IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adversary Proceeding
v.	
ELEVATION MIDSTREAM, LLC,	Adv. Proc. No. 20-50839 (CSS)
Defendant.	**Re: Docket Nos. 25 and 32**

NOTICE OF FILING OF PROPOSED REDACTED VERSIONS OF PLAINTIFF'S RESPONSE ON OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, on September 28, 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 Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment* [Docket No. 32] (the "Motion to Seal"),[2] seeking, *inter alia*, authority to file the *Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment* under seal.

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

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

PLEASE TAKE FURTHER NOTICE, that, consistent with the relief requested in the Motion to Seal, and pursuant to rule 9018-1(d)(ii) of the Local Rules of Bankruptcy Practice and Procedures of the United States Bankruptcy Court for the District of Delaware, the Debtors hereby file the attached proposed redacted version of the *Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment* as **Exhibit A**.

[*Remainder of Page Intentionally Left Blank*]

Dated: September 28, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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

EXHIBIT A

FILED UNDER SEAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Dated: September 23, 2020

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INTRODUCTION

To avoid rejection, Elevation argues the Commercial Agreements[1] cannot be rejected because they create covenants running with the land. However, no matter how much the parties intended, desired, or assumed that certain obligations in the Commercial Agreements ran with Extraction's mineral estates, Colorado does not recognize these obligations as covenants running with the land. Extraction owns mineral estates, allowing Extraction to reduce the minerals and water covered by the Commercial Agreements to chattel. Elevation, however, is a stranger to those mineral estates; it is simply a service provider. Elevation's personal, contractual interests are not covenants that run with the land.

ARGUMENT

The Court should deny Elevation's Cross-Motion for Summary Judgment. Only certain expressly identified covenants were intended to run with the land. The "land" they were intended to run with was Extraction's Dedicated Interests.[2] Thus, the covenants must have been accompanied by a grant to Elevation of a real property interest in the Dedicated Interests sufficient to create privity of estate between the parties to the agreement at the time the covenant was created.

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[1] Extraction is a party to three contracts with Elevation. The first is the Gas Gathering and Compression Agreement dated July 3, 2018 (the "Gas Agreement"). The Gas Agreement was attached as Exhibit A to Extraction's *Brief in Support of Plaintiff's Motion for Summary Judgment* [Dkt. No. 12] ("Extraction Brief in Support") and shall hereinafter be referenced as **Exhibit A**. The second is the Crude Oil Gathering and Stabilization Agreement dated July 3, 2018 (the "Oil Agreement"). The Oil Agreement was attached as Exhibit B to the aforesaid pleading and shall hereinafter be referenced as **Exhibit B**. The third is the Produced Water Gathering Agreement dated July 3, 2018 (the "Water Agreement"). The Water Agreement was attached as Exhibit C to the aforesaid pleading as Exhibit C and shall hereinafter be referenced as **Exhibit C**. Collectively, these instruments shall hereinafter be referred to as the "Commercial Agreements."

[2] The Dedicated Interests are Extraction's "and/or its Affiliates' interests now held in lands, mineral interests, easements, leases, wells and [Crude Oil/Gas/Water] therein and thereunder, including the leases described on Exhibit C in the Dedicated Area, that are not subject to an [sic] Current Existing Dedication as of the Effective Date and operated by [Extraction] or its Affiliates" and Extraction's "and/or its Affiliates interests hereafter acquired during the term of this Agreement in lands, mineral interests, easements, leases, wells and [Crude Oil/Gas/Water] therein and thereunder in the Dedicated Area that are operated by [Extraction] or its Affiliates and not subject to an existing conflicting dedication or commitment as of the date acquired." *See* Ex. A (Ex. A) § I(vv); Ex. B (Ex. A) § I(ss); Ex. C (Ex. A) § I(qq).

The covenants intended to run must also touch and concern the Dedicated Interests. The Commercial Agreements, however, fail to satisfy both privity of estate and touch and concern.

I. THE PARTIES UNAMBIGUOUSLY INTENDED ONLY CERTAIN COVENANTS TO RUN WITH THE LAND.

Extraction does not dispute that the parties intended certain, expressly identified, covenants in the Commercial Agreements to be covenants running with the land. The parties identified the particular covenants to run with the land:

> The Dedication and the Delivery Obligation, the grant of servitude hereinafter provided and other Property Rights and Producer's covenants under Section 2.3, together with all other related commitments in this Agreement and the matters set forth in GTC Section XV(a), GTC Section XV(b) and GTC Section XV(c) are not merely contract rights but are covenants running with (and touching and concerning) all of the Dedicated Interests (including the underlying [Crude Oil/Gas/Water], lands, leases and wells) and, in addition, are binding upon the successors and assigns of Dedicated Interests and/or Producer's [Crude Oil/Gas/Water].

Ex. A § 2.4; Ex. B § 2.4; Ex. C § 2.4. The parties never intended the entirety of the Commercial Agreements to be covenants running with the land. Elevation's arguments to the contrary are wrong. *See Brief in Support of Defendant's Cross-Motion for Summary Judgment* ("Elevation Brief in Support") ¶ 18.

Elevation also incorrectly suggests the Court should assess intent by reaching beyond the Commercial Agreements. *See id.* ¶ 22 (quoting *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 74 (Colo. App. 1993)). Elevation quotes *Lookout Mountain* out of context; the court was discussing "the intent to make [an] assignment," not intent to create a covenant that runs with the land. *See Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74. When the court actually considered covenants that run with the land it said: "Whether a covenant runs with the land ***turns on the construction of relevant documents***." *Id.* (emphasis added) (citing *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435,

437 (Colo. App. 1992)). Indeed, the court reviewed what the contract said and concluded "by express language, this covenant was intended to run with the land." *Id.* at 75.

The Court should assess the Commercial Agreements—and only the Commercial Agreements—concerning the parties' intent. Those instruments unquestionably show that only ***certain*** covenants were intended to run with the Dedicated Interests, the parties did not intend the ***entire*** Gas Agreement, Oil Agreement, and Water Agreement to run with the land.

II. THE PARTIES NEVER SHARED PRIVITY OF ESTATE.

Colorado law requires privity of estate between the parties to the contract to create a covenant that runs with the land, and Elevation fails to identify the conveyance of any real property interest in the land with which the covenant purportedly runs (*i.e.*, Extraction's mineral estates) as part of the Commercial Agreements—nor can it. This failure alone defeats Elevation's argument that it has a covenant running with the land under the Commercial Agreements.

A. Colorado Continues to Require Privity of Estate Between the Parties to the Covenant for a Covenant to Run with the Land.

For over a century, the Colorado Supreme Court has required privity of estate between contracting parties to create a covenant that runs with the land. *See Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954) ("[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.") (emphasis added); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907) ("[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 between the originally covenanting parties was not denied). Elevation claims these "ancient" Colorado Supreme Court cases "reference privity without explicitly stating it is a requirement in covenant running with the land."[3] Elevation is incorrect.

In *Taylor*, an owner of a parcel of land conveyed a portion of platted and subdivided land in a deed binding the grantees (and successors and assigns) to certain restrictions, and also binding the grantor not to build any structure other than residences. *Taylor*, 274 P.2d at 978–79. The deed stated the grantor's "restriction [wa]s a covenant running with the land, and [wa]s binding upon the grantor[,] . . . his successors and assigns forever." *Id.* The defendants contended that the covenants did not run because there was no privity of estate between the parties. *Id.* at 982. The Colorado Supreme Court, however, disagreed and held that privity of estate existed between the parties, "direct[ing] attention to the principle of law stated in volume 3, Tiffany, Real Property (3rd ed.) . . . [that] 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." *Id.* (emphasis added). In other words, the court recognized that privity of estate between the covenanting parties was required and that it was met in that case. *Id.*

Similarly, *Farmers' High Line Canal* analyzed whether the "requisite privity of estate" was present so that "the plaintiff had the right to bring th[e] suit" to enforce a covenant as one that runs with the land. *Farmers' High Line Canal & Reservoir Co.*, 92 P. at 294. Again, the defendant argued there was a lack of privity of estate between the parties. *Id.* In its analysis, the court did not hold that privity of estate between the parties was not required. Instead, it reiterated the rule from "many cases" that "where there is the ***requisite privity of estate***, and the covenant is

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[3] *Elevation Brief in Support* ¶ 57.

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." *Id.* at 293 (emphasis added). The Colorado Supreme Court then distinguished another Colorado case that "[wa]s not in point" because, in part, there was "no privity between" the parties in the other case. Ultimately, the court concluded that "[t]here was, and is, and always will be, privity of estate between the owner or owners of the canal and the owner or owners of the land described in said schedule," and that a suit for the breach of that covenant could be maintained through privity of estate. *Id.*

In holding that a covenant ran with the land, the Colorado Supreme Court in *Hottell* stated "[t]hat privity of estate is present is not denied" in the case before the court and cited "[o]ther authorities in support of [its] conclusion." *See Hottell*, 53 P. at 330. ***First***, the court would not mention that privity of estate was present if it was not required for a covenant to run with the land. ***Second***, each of the cases the court cited in support of its conclusion required privity of estate between the covenanting parties to create a covenant running with the land.[4] It is clear through the Colorado Supreme Court's decisions that privity of estate between the parties is required to create a covenant that runs with the land.

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,

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[4] *Morse v. Aldrich*, 36 Mass. 449, 453 (1837) ("To create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and covenantee."); *Bronson v. Coffin*, 108 Mass. 175, 180 (1871) ("In order to make a covenant run with the land of the covenantor and bind his heirs and assigns, the covenantee must, according to all the authorities, have such an interest in that land as to amount to a privity of estate between the parties to the covenant."); *Easter v. Little Miami R. Co.*, 14 Ohio St. 48, 52–53 (1862) (analyzing whether "sufficient privity of estate" existed "to sustain a covenant, intended to run with the land"); *Norcross v. James*, 2 N.E. 946, 947 (Mass. 1885) (explaining privity of estate as a requirement for covenants that run with the land), overruled by *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243 (Mass. 1979).

1005 (Colo. App. 1893) ("Under these circumstances, there is no privity between him as a grantee from Beecher and the prior grantors subsequent to Parker which entitles him to maintain his suit upon his covenant."). Colorado statutory law also acknowledges the privity requirement.[5]

Real property treatises also note—citing the above Colorado Supreme Court decisions—that Colorado requires privity of estate between the covenanting parties. *See* 3 Tiffany, Real Property § 851 n. 27 (3d ed. 2015) (citing *Taylor* for the proposition that privity of estate at the time of the creation of the covenant is required); *see also* 9 Richard R. Powell, Powell on Real Property § 60.04 n. 123 (citing *Farmers' High Line Canal* for the proposition that either mutual or horizontal privity are required for a covenant to run with the land).

Despite the overwhelming authority to the contrary, Elevation contends that Colorado no longer requires privity of estate between the parties to the agreement for a covenant to run with the land.[6] Elevation, however, does not cite a single Colorado case that held, or even suggested, that Colorado has overturned a century of binding precedent and eliminated the privity of estate requirement. Instead, Elevation relies solely on the Restatement (Third) of Property Servitudes § 2.4 (Am. Law Inst. 2000) and a lack of fulsome discussion of privity of estate in a few cases for support—all of which contradict Elevation's argument.

First, Elevation's dependence on the Third Restatement of Property is misplaced. Given the lack of Colorado law supporting its position, Elevation is left to rely on the Third Restatement of Property for the argument that Colorado courts have dispensed with the requirement of privity of estate between the covenanting parties. This secondary source does not purport to describe

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

6 *Elevation Brief in Support* ¶ 28.

Colorado law, and cannot substitute for Colorado authorities. Instead, the Third Restatement is known for being devoted more to law reform than to a faithful restatement of the law.[7] Despite this, Elevation suggests that because "Colorado courts have followed the Third Restatement when considering other issues concerning real property law" they would follow the Third Restatement's requirements for the creation of real covenants. In doing so, Elevation invites this Court to go where no Colorado court has gone before—a holding that a covenant running with the land can be created in the absence of privity of estate.

Elevation, however, concedes that Colorado has ***not*** adopted the Third Restatement's test for covenants running with the land because Elevation acknowledges that real covenants must "touch and concern the land" under Colorado law.[8] In addition to privity of estate, the Third Restatement removes the touch and concern element and requires only intent for a covenant to run with the land. *See* Restatement (Third) of Property Servitudes § 4.1 (Am. Law Inst. 2000). Likely for this reason, courts have largely ignored the Third Restatement's novel test.[9] Colorado courts certainly have not adopted the Third Restatement's covenant running with the land test and Elevation cannot point to any authority indicating otherwise.

Second, the fact that some "Colorado cases do not articulate a privity of estate requirement"[10] when the element is not at issue does not overturn binding Colorado Supreme Court

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7 *See, e.g.,* Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 Brook. L. Rev. 681, 681-82, 692-95 (2014) ("The ratio of reform to restatement has increased over time, to the point where significant portions of the *Third Restatement* consist of repudiating what was done in the *First* and *Second Restatements* . . . ."); *id.* at 681 n.1 ("[T]he Third Restatement repudiates the First Restatement's version of servitudes . . . ."); *id.* at 693-94 ("To date, the courts have largely ignored the reforms urged by the *Restatements (Third) of Servitudes* and have instead continued to apply the 'outmoded' common law in determining when servitudes run with the land.").

8 *See Elevation Brief in Support* ¶ 2.

9 *See, e.g.*, Merrill & Smith, *Why Restate the Bundle?*, 79 Brook. L. Rev. at 693-94 ("To date, the courts have largely ignored the reforms urged by the *Restatement (Third) of Servitudes* and have instead continued to apply the 'outmoded' common law in determining when servitudes run with the land."); *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 Harv. L. Rev. 938, 938 (2009) ("As of this writing, only one line of cases has used the ALI's new test [for covenants running with the land].").

10 *Elevation Brief in Support* ¶ 57.

precedent requiring privity of estate between the parties. Indeed, privity of estate was clearly satisfied in every case cited by Elevation.[11] For example, in *Lookout Mountain*, privity of estate between the covenanting parties was plainly satisfied; the court enforced a homeowners' association's restrictive architectural requirements based on a finding that the covenants ran with the land. 867 P.2d at 75. Although the court did not address privity of estate—because it was not at issue—it is clear that privity existed: the covenants were incorporated into deeds, meaning the land subject to the covenants was conveyed in the same instrument wherein the covenants were created (*i.e.*, the deed). *See id.* at 76.

Elevation also quotes another case that stated: "[P]rivity of contract is not necessary for a real covenant to bind a successor-in-interest." *TBI Exploration v. Belco Energy Corp.*, No. 99-10872, 2000 WL 960047, at *4 (5th Cir. June 14, 2000) (applying Colorado law). Elevation confuses privity of ***contract*** with privity of ***estate***. Extraction agrees that privity of contract is not necessary to bind successors-in-interest to the obligations of a real covenant; that is the entire purpose of privity of estate. For a party to enforce "contractual obligations," "there ***must be either privity of contract or privity of estate*** between the lessor and that successor in title." *See Fed. Deposit Ins. Corp. v. Mars*, 821 P.2d 826, 829 (Colo. App. 1991) (emphasis added). Thus, to create a covenant running with the land, Colorado law requires privity of estate as the legal basis to bind successors-in-title to the land where "there is no independent contractual relationship between an assignee" and the covenantor. *See id.*

[11] *See Reishus v. Bullmasters, LLC*, 409 P.3d 435, 436 (Colo. App. 2016) (covenants at issue contained in ownership agreement between tenants in common); *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 73 (restrictive covenants imposed by homeowners' associations, recorded with transferred plats, and incorporated into deeds); *In re Banning Lewis Ranch Co., LLC*, 532 B.R. 335, 340 (Bankr. D. Colo. 2015) (real covenants contained in annexation agreement for thousands of acres).

B. Extraction and Elevation were Never in Privity of Estate.

For privity of estate to exist between the parties to the contract, the covenants intended to run with the land must be contained within a grant of a real property interest in the purportedly burdened estate in real property. *See Taylor*, 274 P.2d at 982.[12] The covenants at issue all purport to run with Extraction's mineral estates. *See* Ex. A § 2.4 (purporting to run with "all of the Dedicated Interests"); Ex. B § 2.4 (same); Ex. C § 2.4 (same). Thus, the Gas Agreement, Oil Agreement, and Water Agreement must each convey to Elevation a real property interest in Extraction's ***mineral estates*** before covenants contained therein may run with those ***mineral estates***. *See Taylor*, 274 P.2d at 982. Elevation fails to demonstrate that each of the Commercial Agreements meet this requirement.

Elevation cursorily argues that privity of estate is "satisfied" based on purported grants of easements and rights-of-way related to certain surface estates. The Commercial Agreements, however, merely grant rights of access, or easements upon, the ***surface*** estates for limited purposes and to the extent Extraction has the ability to grant such rights.[13] Privity of estate is not satisfied because: (1) the right to access the surface estate is a personal right and not an interest in real property;[14] and (2) neither a ***surface*** easement nor a ***surface*** access right are interests in the ***mineral estate***.[15] The Second Circuit, applying Texas law that similarly requires privity of estate between

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12 *Accord In re Sabine Oil & Gas Corp.*, 734 Fed. App'x 64, 67 (2d Cir. 2018) (holding privity of estate between the covenanting parties was not satisfied, under Texas law, by conveyance of an easement in an estate in real property other than the mineral estates with which the covenant purportedly ran); 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 . . . .").

13 Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d); Ex. C (Ex. A) § XVI(d).

14 *See Smith v. Moore*, 474 P.2d 794 (Colo. 1970) ("Though the privilege to use the surface is recognized at law, this right ***does not create an ownership interest*** in the surface estate . . . but merely a ***right of access***.") (emphasis added).

15 *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997) ("As the owner of property subject to the easement, the surface owner 'continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement.*'") (quoting *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 183 (Colo. 1991));

the covenanting parties, has held that privity of estate cannot be satisfied unless the "contract convey[s] a property interest in [the] subject land (in this case, the mineral estate)." *In re Sabine Oil & Gas Corp.*, 734 Fed. App'x at 67. The plain language of the Commercial Agreements makes clear that Extraction did not grant Elevation any interest in its mineral estates. Thus, the parties were never in privity of estate and a covenant running with the land was not created. For this reason alone, the Court should grant summary judgment in Extraction's favor.

III. NONE OF THE COVENANTS INTENDED TO RUN WITH EXTRACTION'S MINERAL ESTATES (OTHER THAN THE DRILLING COMMITMENT) TOUCH AND CONCERN THE LAND.

A single obligation in the Commercial Agreements touches and concerns the Dedicated Interests: the Drilling Commitment.[16] Although the Drilling Commitment closely relates to the Dedicated Interests; none of the other purported covenants do. Indeed, an examination of why the Drilling Commitment satisfies this element illustrates how the other purported covenants fall short. Elevation's arguments to the contrary are wrong and are not founded on Colorado law.

A. Elevation Misconstrues Colorado's Touch and Concern Analysis.

1. Touch and concern requires a close relationship between the covenant and the purportedly burdened land.

Under Colorado law, "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or its enjoyment.'" *Reishus*, 409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440); *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74 ("[A covenant running with the land] must closely relate to the land, its use, or its enjoyment.") (citing *Cloud*, 857 P.2d at 440). If a covenant's benefits or burdens are "personal" to the parties or "speculative," the covenant does

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cf. In re Sabine Oil & Gas Corp., 734 Fed. App'x at 67 (applying Texas law) (holding privity of estate is not satisfied by an easement in property separate from the property purportedly creating the covenant).

[16] To be clear, Extraction does not concede that the Drilling Commitment is a covenant running with the land. Extraction concedes only that the Drilling Commitment touches and concerns the land and was intended to run with the land. Elevation must still establish privity of estate.

not touch and concern the land. *See 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) (citing *Rittmaster v. Brisbane*, 35 P. 736 (Colo. 1894)).

Colorado's touch and concern test is derived from the common law test that traces back to *Spencer's Case*. *See* 3 Tiffany, Real Property § 854 (3d ed. 2015) ("An important test for distinguishing a real or running covenant from a merely personal or collateral one, is whether or not the covenant so closely relates to the land or estate granted . . . that it may be said to 'touch and concern' it."). The common law, in turn, largely adopted the test created by Dean Harry Bigelow.[17] Like Colorado's close relationship test, Dean Bigelow's test asks if a covenant materially and directly affects a promisor's legal relationship to the land. *See* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914). Finally, touch and concern is an objective[18] test that prevents collateral and indirect obligations from obtaining binding effect on non-party subsequent landowners.[19]

An example of something that satisfies touch and concern is the Drilling Commitment. The Drilling Commitment is the '[redacted] to the Commercial Agreements, [redacted] Ex. A (Ex. A) § I(aaa); Ex. B

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17 *See* Extraction's *Brief in Support,* incorporated herein by reference.

18 *See Cloud*, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow,* 833 P.2d 764); 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) ("[Touch and concern] is the only essential requirement for the running of covenants which focuses on an objective analysis of the contents of the covenant itself rather than the intentions of and relationships between the parties").

19 A. James, Editor Casner. American Law of Property: A Treatise on the Law of Property in the United States (1952) at 341–42 ("The most important and basic resolution laid down by *Spencer's Case* was the requirement that a covenant in a lease could not run "if the thing to be done be merely collateral to the land and doth not touch or concern the thing demised in any sort." This means that the concept of a running covenant must be limited to those covenants which have some connection with the leased land ***over and above*** the fact that they have been placed in the lease. Thus, ***the law will not permit a purely collateral covenant to run with the land irrespective of how clearly the parties express their intention that it shall***.") (emphasis added) (footnote omitted).

(Ex. A) § I(xx); Ex. C (Ex. A) § I(vv). This covenant limits Extraction's right to develop and is "closely tied with the use, possession and enjoyment of" Extraction's mineral estates. *Reishus*, 409 P.3d at 441 (citing *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74–75). The Drilling Commitment contrasts with other purported real covenants, none of which closely relate to the mineral estates: (1) they do not lessen Extraction's right to develop; (2) they do not allow Elevation to take action respecting unproduced oil, gas, or water; and (3) they do not directly affect Extraction as ***landowner*** instead of Extraction as ***owner of chattel***.

2. *Alta Mesa* and *Badlands* do not apply Colorado's test for touch and concern. *Sabine* is a better guide to the touch and concern analysis.

Elevation mainly relies on two cases to support its argument that the covenants in the Commercial Agreements touch and concern Extraction's mineral estates.[20] Neither *In re Alta Mesa Res., Inc.*,[21] nor *In re Badlands Energy, Inc.*,[22] however, serve as useful guidance concerning Colorado's touch and concern test. ***First***, the touch and concern test applied in *Alta Mesa* is not the same as the traditional common law test applied under Colorado law. Under *Alta Mesa*'s application of Oklahoma law, the "touchstone necessary for a covenant to touch and concern real property is that there must be '***a logical connection*** between the benefit to be derived from enforcement of the covenant and the property.'" *In re Alta Mesa Res., Inc.*, 613 B.R. at 102 (emphasis added) (quoting *Beattie v. State ex rel. Grand River Dam Auth.*, 41 P.3d 377, 388 (Okla. 2002) (Opala, J., concurring)). The "close relationship" test, however, is a more rigorous standard than the "logical connection" test cited in Justice Opala's concurring opinion and originally applied

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[20] Although Elevation pays lip service to Colorado's test, it primarily relies on authorities applying a looser conception of touch and concern under the law of different states. *See Elevation Brief in Support* ¶¶ 26, 39, 40, 45, 48, 55, 56.

[21] *In re Alta Mesa Res., Inc.*, 613 B.R. 90, 96 (Bankr. S.D. Tex. 2019).

[22] *In re Badlands Energy, Inc.*, 608 B.R. 854, 866 (Bankr. D. Colo. 2019).

by Indiana appellate courts.[23] ***Second***, *Badlands* also diverges from Colorado law. "[T]he Utah Supreme Court recognized a ***broad*** test for touch-and-concern that does not require a physical effect upon the land but rather, requires a court to evaluate whether a covenant 'enhances the land's value [on the benefit side], and for the burden side, whether it diminishes the land's value.'" *In re Badlands Energy, Inc.*, 608 B.R. at 868 (quoting *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 624 (Utah 1989)).

One case—affirmed by the Second Circuit—applied traditional notions of touch and concern[24] to a similar contract, and held that the contracts did not create covenants that run with the land. *See In re Sabine Oil & Gas Corp.*, 547 B.R. at 74. The covenants at issue were: "(i) the Debtors' dedication to HPIP of the HPIP Products and certain leases to the performance of the HPIP Agreements; (ii) the Debtors' dedication to Nordheim of the Nordheim Products to the performance of the Nordheim Agreements; and (iii) the Debtors' covenant to pay Nordheim a gathering fee." *Id.* The court held that these covenants concerned services related to produced minerals, which are not real property; thus, the covenants "[did] not impact the value of the land 'independent of collateral circumstances' and [did] not affect any interest in the real property of, or its use by, the owner. Rather, [the] covenants constitute[d] an undertaking personal to the producer . . . and the midstream service providers . . . ." *Id.* at 77. The same is true here.

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23 *See* 9 Richard R. Powell, Powell on Real Property § 60.04 n. 31 (listing the logical connection test as a different test than the traditionally version of touch and concern).

24 *Sabine* applied Texas's two traditional tests for touch and concern. *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 77 (Bankr. S.D.N.Y. 2016), aff'd, 567 B.R. 869 (S.D.N.Y. 2017), aff'd, 734 Fed. Appx. 64 (2d Cir. 2018). The first test asks whether a covenant affects "the nature, quality or value of the thing demised, independently of collateral circumstances, or if it affected the mode of enjoying it." *Id.* (quoting *In re El Paso Refinery, LP*, 302 F.3d 343, 356 (5th Cir. 2002)). The second test asks whether "the promisor's legal relations in respect of the land are lessened . . . [or] if the promisee's legal relations to the land are increased . . . ." *Id.* (quoting *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982). Both are strongly rooted in the common law. *See* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639–40 (1914)).

3. Touch and concern is a covenant-by-covenant analysis.

Determining whether contractual obligations run with the land is a covenant-by-covenant analysis. Elevation incorrectly claims entire contracts run with the land so long as one promise therein satisfies the elements of a covenant running with the land. *See Elevation Brief in Support* ¶ 3 (arguing the Drilling Commitment's satisfaction of touch and concern "is sufficient by itself to establish that the [Commercial] Agreements touch and concern the land"). Courts, however, do not conduct all-or-nothing inquiries when evaluating whether covenants run with the land. This makes sense because Colorado does not favor the creation of covenants that run with the land and resolves all doubt in favor of the free use of property.[25]

For example, a federal court in Colorado, applying Colorado law, individually assessed whether covenants run with the land. *See MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *1 (D. Colo. June 24, 2013). In that case, one party claimed "that Section 2.1 of [a] Deed [was] a real covenant that [ran] with the property at issue and therefore [bound] the owner." *Id.* at *2. The counterparty argued certain obligations ran with the land, but section 2.1 did not. *Id.* at *5. Notwithstanding ***fourteen*** covenants running with the land, the Court held "that the Deed is unambiguous that the Grantees' Covenant contained in Section 2.1 is merely a personal covenant and does not run with the land." *Id.* at *6–7.

Moreover, Elevation misreads its chosen cases. *Cloud* did not involve separate covenants piggy-backing one upon the other; the court considered one covenant. *See Cloud*, 857 P.2d at 440 ("The covenant in question in this case states as follows . . . ."). The covenant required "ten (1)

[25] *Nelson v. Farr*, 354 P.2d 163, 166 (Colo. 1960) ("[A]s a fundamental principle of law of real property, restrictions on the alienation and use of land are not favored, and all doubt should be resolved in favor of the free use of property. 'Restrictions on the use of property, being in derogation of the fee conveyed, will not be extended by implication to include anything not clearly expressed.") (citation omitted).

per cent of the gross rent receipts from [certain] rooms [to] be paid to the Declarant." *Id.* The Court noted the "10% reservation of receipts standing alone would be personal, because the payment would not be a benefit or burden to the land." *Id.* at 440–41. The court concluded, obviously enough, that the "10% reservation to the declarant is coupled with a 90% reservation to the Association." *Id.* at 441. The latter reservation, ***part and parcel of the same covenant***, touched and concerned the land and the court would not "cut and paste the covenant before [it]." *Id.* The court never said an entire contract tags along with a single real covenant.

Meanwhile, the contract in *Reishus* said each of the "provisions of this Agreement shall run with the Ranch . . . ." *Reishus*, 409 P.3d at 441. Thus, the parties intended the entire contract to run with the land; consistent with that express intent, the court assessed whether the whole contract touched and concerned the land. *Id.* Here, as discussed, the parties did not express an intent that the entire contract to run with the land, but individual covenants within the contract.

Finally, Elevation's last case again involves a party arguing that part of a covenant should be separated from the remainder. *See Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 75 ("Viewpoint, ***focusing only on that portion of the covenant granting approval rights to PHI***, further contends that this authority runs with the land and passed to Viewpoint by deed upon conveyance of the real property from PHI."). The court ultimately engaged in an ordinary covenant-by-covenant analysis. *See id.* ("***This particular covenant*** . . . requires that owners submit for PHI's approval plans for any buildings or other improvements which they want to place on the land. We have no trouble concluding ***that this covenant*** relates to the land . . . and thus, touches and concerns the land.") (emphasis added) (citations omitted). None of Elevation's cases holds that when one covenant in a contract runs with the land, all covenants in that contract also run.

B. The Dedication Does Not Touch and Concern Extraction's Mineral Estates.

The Commercial Agreements' dedications do not touch and concern Extraction's mineral estates. In relevant part, the dedications state:

> Subject to the terms of this Agreement, and except as provided in Section 2.2, Producer, on its behalf and on behalf of its Affiliates, hereby commits and dedicates the Dedicated Interests . . . and the exclusive right to receive from Producer and its Affiliates at the Delivery Points all [Crude Oil/Gas/Water] therein and thereunder and as may be produced therefrom to the performance of this Agreement (collectively, the "Dedication")[.]

Ex. A § 2.1; Ex. B § 2.1; Ex. C § 2.1. Such dedications do not closely relate to the Dedicated Interests. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875–76 (holding a dedication did not touch and concern the land under Texas law). Indeed, these provisions have no legal or direct effect upon the Dedicated Interests.

Instead, the dedications simply identify ***what*** minerals, from ***which*** property, are the subject of the services contracts. In the private real property context, a "dedication" is not a conveyance or grant of anything; Colorado recognizes the difference between dedications and conveyances. *See Stagecoach Prop. Owners Ass'n v. Young's Ranch*, 658 P.2d 1378, 1381 (Colo. App. 1982) ("This regulation clearly contemplates a 'conveyance' and not a 'dedication' which terms are not synonymous.") (citation omitted). Furthermore, the legal definition of the word "dedication" is "[t]he donation of land or creation of an easement for public use." Dedication, *Black's Law Dictionary* (11th ed. 2019); *accord Stagecoach Prop. Owners Ass'n*, 658 P.2d at 1381 ("[A] dedication has been defined as an appropriation of land by the owner of the fee to some public use and the adoption thereof by the public.") (citing *Hand v. Rhodes*, 245 P.2d 292 (Colo. 1952)). The parties did not intend to set apart or donate the Dedicated Interests for public use.

Instead, the Court must construe the Commercial Agreements' language "in harmony with the plain and generally accepted meaning of the words employed." *Ad Two, Inc. 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)). The plain meaning of "dedicate" is "to set apart to a definite use." *Dedicate*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003). The plain meaning of "commit" is "to pledge . . . to some particular course or use." *Commit*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003). Extraction merely pledged and set apart its gas, oil, and water in a particular area to the performance of the Commercial Agreements' contractual obligations. Indeed, the Dedicated Interests term is used in the Commercial Agreements to identify ***what*** minerals ***from which area*** are subject to the contracts' obligations.[26] This is consistent with how legal commentators in the oil and gas industry understand dedications.[27]

The dedications do not closely relate to the Dedicated Interests: Elevation may not compel production and may not explore or develop Extraction's mineral estates. *See re Sabine Oil & Gas Corp.*, 567 B.R. at 877 (concluding the covenants in two midstream services agreements did not touch and concern the land because they did "not reduce [the party's] ability to make use of or alienate its real property interests").

The addition of the words "therein and thereunder" to refer to the "commitment" of oil and gas in place to the performance of the services agreement does not change this result. Touch and

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[26] *See, e.g.*, Ex. A § 2.2(a) (reserving to Extraction "the right to pool, communitize or unitize all or part of the Dedicated Interests with other lands, leases and properties in the field in which the Dedicated Interests are located:); Ex. B § 2.2(a) (same); Ex. C § 2.2(a) (same); Ex. A § 2.3 (containing Extraction's agreement "that any sale, assignment or pledge of all or any portion of the Dedicated Interests will be made expressly subject to this Agreement" but noting Extraction "may enter into any agreement pursuant to which any of the Dedicated Interests may be conveyed from [Extraction] to a third party as part of an acreage swap"); Ex. B § 2.3 (same); Ex. C § 2.3 (same); Ex. A § 2.6(b) (noting "Elevation will permanently release from this Agreement that portion of the Dedicated Interests, Other Interests and Producer's Gas that is adversely affected by the Curtailment"); Ex. B § 2.6(b) (similar); Ex. C § 2.6(b) (similar).

[27] *See, e.g.*, Latham & Watkins LLP, The Book of Jargon, Oil & Gas, The Latham & Watkins Glossary to Oil and Gas Terminology (1st ed. 2016) at 24 (defining a dedication as "a promise or commitment of a certain amount of Production from a Dedicated Area . . . to the services provider in a Midstream service agreement").

concern is an objective test. *See* 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a). Accordingly, "[e]ven 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." *Cloud*, 857 P.2d at 440 (citing *Bigelow*, 833 P.2d 764). Recitation of "therein and thereunder" is not a magic formula for the creation of covenants running with the land. If the rule were otherwise, parties could end-run the objective analysis via contractual formulae. Instead, the Court must assess the legal effect of the covenant and whether it ***actually*** closely relates to the land.

Consider an exclusive transportation agreement for the shipment of oil produced from lands in Colorado by boat from a Houston port to a Chinese port. Such a covenant does not closely relate to land; the shipper's only interest is in produced oil that was severed from the mineral estate and became personal property long before it reached the shipper. This is true even though the contract price for shipping incidentally affects the profitability of the producer's oil or the value of the unproduced reserves. *See Bigelow*, 833 P.2d at 767 (noting "personal" covenants do not touch and concern the land) (citing *Rittmaster*, 35 P. at 736). This result does not change if the parties dedicate and commit oil "in and under" the ground to that transportation agreement. The objective effect of the covenants to which the hydrocarbons are "committed" remains the same.

Nevertheless, Elevation repeatedly cites such contractual formulae to end-run the objective analysis that the dedications cannot otherwise satisfy. None of Elevation's arguments show a close relationship between the dedications and Extraction's mineral estates or render the Commercial Agreements something more than service contracts pertaining to Extraction's goods.

First, Elevation cites contract language stating the covenants touch and concern the land. *See Elevation Brief in Support* ¶ 37. These words show intent, but cannot satisfy touch and concern. *Cloud*, 857 P.2d at 440 (citing *Bigelow*, 833 P.2d 764) ("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.").

Second, Elevation suggests the Ratification Agreement satisfies touch and concern. *See Elevation Brief in Support* ¶ 36. Elevation, however, concedes the Ratification Agreement simply confirms the Commercial Agreements' dedications. *See id.* As discussed, the dedications do not touch and concern the land; oft-repeating one's intent to create a real covenant via the Ratification Agreement does not change that outcome.

Third, Elevation resorts to "therein and thereunder" language. *Id.* ¶ 39. Again, magic words do not satisfy touch and concern. This Court should reject the contrary holding in *Badlands* as wrongly decided or unpersuasive; instead, the Court should follow *Sabine*, which assessed a dedication's ***objective*** impact. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875 ("[T]he appellants have not purchased the minerals underlying the Dedicated Areas but, again, have merely agreed to provide services to the minerals' owner. The logical extension of Nordheim's argument—that any agreement relating to minerals in the ground constitutes the conveyance of a real property interest—is not supported by the cited caselaw."). Extraction has interests in unproduced minerals, but the dedication does not affect those interests. The dedication merely identifies ***what*** oil, gas, or water, from ***which*** property, is the subject of the contractual obligations. The contractual obligations, in turn, relate solely to services to Extraction's personal property in exchange for a fee, not the physical use or enjoyment of Extraction's land.

Finally, Elevation argues Extraction's compliance with the Commercial Agreements shows that the contracts touch and concern the land. Specifically, Elevation argues it would have been unnecessary for Extraction to seek Elevation's approval before releasing certain Dedicated Interests from the dedication if there was no covenant running with the land. *See Elevation Brief*

in Support ¶ 38. That is not true; Extraction would have breached the contracts if it had not done so. *See* Ex. A § 2.3; Ex. B § 2.3; Ex. C § 2.3. Indeed, Elevation concedes Extraction was acting pursuant to the contracts. *See Elevation Brief in Support* ¶ 38 ("Extraction sought GSO's approval pursuant to Section 2.3 of the [Commercial] Agreements . . . ."). Extraction's compliance with its contractual promises relating to freeing acreage from contractual obligations offers no insight on whether the dedication touches and concerns Extraction's mineral estates.

In sum, Elevation fails to satisfy its burden of showing that the dedications closely relate to Extraction's mineral estates. Indeed, Elevation could never satisfy that burden. Subject to the Drilling Commitment, Extraction reserved [redacted] this included the right, '[redacted] Ex. A § 2.2(d) (emphasis added); *see also* Ex. B § 2.2(b) (same); Ex. C § 2.2(b) (same). Extraction may unilaterally refuse to produce or may abandon its leases without Elevation's input, confirming that the dedications do not closely relate to Extraction's land, or affect its right to the use or enjoyment of that land. The Commercial Agreements do not obligate Extraction to take—or refrain from taking—any action relating to Extraction's rights in the use or enjoyment of its mineral estates. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875–76 (holding two exclusive midstream gathering agreements did not touch and concern land, notwithstanding a dedication).

C. The Delivery Obligation Does Not Touch and Concern Extraction's Mineral Estates.

The Delivery Obligation does not touch and concern the Dedicated Interests. The Delivery Obligation is an agreement for Extraction:

> [T]o connect all of [Extraction's] wells within the Dedicated Area to the [respective Gathering, Compression, or Stabilization] System and to deliver to Elevation at the Delivery Points one hundred percent (100%) of the [Crude Oil/Gas/Water] produced from the Dedicated Interests and from the Other Interests . . . (collectively, the "Delivery Obligation").

Ex. A § 2.1; Ex. B § 2.1; Ex. C § 2.1. Even on its face, the Delivery Obligation concerns only the delivery of produced oil, gas, or water. These resources are personal property, not real property. *Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608–09 (Colo. App. 1985) ("[A]t some point after they are severed from the land, minerals lose their character as realty and 'become' personalty.") (citing 2 Tiffany, Real Property § 587 (3d ed. 1939)); *W. End Irr. Co. v. Garvey*, 184 P.2d 476, 479 (Colo. 1947) ("Water in possession is personal property."). Indeed, Extraction does not even own unproduced water, rendering it impossible to touch and concern a real property interest therein. *See Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc.*, 386 P.3d 452, 461 (Colo. 2016) (noting "[o]ne does not 'own' water, but owns the right to use water within the limitations of this doctrine") (citing *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011), as modified on denial of reh'g (June 20, 2011)).

To reinforce this conclusion, the Delivery Points are [redacted] as identified on Exhibit B to the Commercial Agreements. Ex. A § 4.1; Ex. B § 4.1; Ex. C § 4.1. Thus, by the time Extraction has an obligation to deliver its produced oil, gas, or water to Elevation for the provision of services, the resources have been severed and converted into personal property.

Finally, the Delivery Obligation's incorporation of the Other Interests dispels any argument that the Delivery Obligation affects the use or enjoyment of Extraction's mineral interests. Other Interests are "all interests of parties ***other than*** [Extraction] and its Affiliates in the Dedicated Area, when such other-party interests are represented and controlled by [Extraction] or in respect of which it has the right to market or otherwise deal with their" oil, water, or gas, but excluding

"any interests for which a party has exercised its take-in-kind rights under its agreement with [Extraction]." Ex. A (Ex. A) § I(zzzz) (emphasis added); Ex. B (Ex. A) § I(uuuu); Ex. C (Ex. A) § I(rrrr). Extraction may not burden a third party's real property. It is acceptable, however, for Extraction to contract for services for personal property that it controls. Thus, the Other Interests clarify that only personal property is encompassed by the Delivery Obligation. Indeed, this is doubly clear because Other Interests excludes minerals governed by third parties' take-in-kind rights. *See* Ex. A (Ex. A) § I(zzzz); Ex. B (Ex. A) § I(uuuu); Ex. C (Ex. A) § I(rrrr). The reason why is obvious: Extraction cannot deliver produced oil, gas, or water for the provision of services that a third-party has already opted to take-in-kind.

The Delivery Obligation concerns only personal property, and it cannot touch and concern the land—real property. *See Bigelow*, 833 P.2d at 767 (noting "personal" covenants do not touch and concern the land) (citing *Rittmaster*, 35 P. 736); *In re Sabine Oil & Gas Corp.*, 567 B.R. at 876 (holding that agreements concerning produced minerals did not touch and concern the land).

D. The Easements, Rights-of-Way, and "Other Rights" Do Not Touch and Concern Extraction's Mineral Estates.

The easements and rights-of-way are not covenants that are intended or alleged to run with Extraction's mineral estates, and, as a result, whether they touch and concern any land is irrelevant. Regardless, the easements, rights-of-way, and "other rights"[28] do not touch and concern Extraction's mineral estates. The easements and rights-of-way, by definition, concern the use and enjoyment of surface estates and are as separate from Extraction's mineral estates as they would be if they were located in a different township.

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[28] Elevation fails to carry its burden of identifying what these "other rights" are supposed to be. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875.

As a threshold matter, Elevation conflates easements and a mineral estate owner's right of access. *See Elevation Brief in Support* ¶ 46. The former is a real property interest. The latter is a right. Concerning the latter, "a severed mineral owner has the right to use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." *Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995) (citing *Rocky Mountain Fuel Co. v. Heflin*, 366 P.2d 577, 580 (Colo. 1961)). However, "[t]hough the privilege to use the surface is recognized at law, this right ***does not create an ownership interest*** in the surface estate . . . but merely a ***right of access***." *Id.* (citing *Smith v. Moore*, 474 P.2d 794 (Colo. 1970) (emphasis added)). An easement, however, is widely acknowledged as "[a]n interest in land . . . ." Easement, *Black's Law Dictionary* (11th ed. 2019). In fact, it is nonsensical to suggest that easements need to "touch and concern" land to "run" with the land because easements, standing alone, are real property interests in the land burdened.

Regardless, neither the easements nor rights-of-way touch and concern, or affect the use or enjoyment of, Extraction's mineral estates. They relate to the use of completely separate land:

> Producer hereby grants to Elevation, without warranty of title, either express or implied, to the extent that it may lawfully and is contractually permitted to do so without the incurrence of additional expense, a non-exclusive easement and right of way upon all lands covered by the Dedicated Area for the purpose of constructing, operating, repairing, replacing, maintaining, and removing measurement facilities for the Delivery Points . . . .

Ex. A (Ex. A) § XVI(d)(i); Ex. B (Ex. A) § XVI(d)(i); Ex. C (Ex. A) § XVI(d)(i). Easements and rights-of-way across the surface estate do not closely relate to Extraction's mineral estates.

Colorado has "long recognized that a conveyance which severs a mineral interest from the surface estate creates ***a separate and distinct estate***." *Notch Mountain Corp.*, 898 P.2d at 556 (citing *Radke v. Union Pac. R. Co.*, 334 P.2d 1077 (Colo. 1959)). Extraction's possession of its mineral estates via mineral leases caused such severances. Thus, easements or rights-of-way

across separate estates in real property (*i.e.*, the surface estates) burden land that is distinct from Extraction's mineral estates; indeed, "[a]s the owner of property ***subject to the easement***, the ***surface owner*** 'continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement.*'" *Gerrity Oil & Gas Corp.*, 946 P.2d at 927 (bold emphasis added) (quoting *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 183 (Colo. 1991)). The Second Circuit similarly drew a distinction between a surface easement and an interest in the mineral estate in a similar context. *See In re Sabine Oil & Gas Corp.*, 734 Fed. App'x at 67 (concluding a contract that granted a surface easement did not convey "a property interest in subject land (in this case, the mineral estate").

To avoid this outcome, Elevation relies on *Alta Mesa*,[29] but that case is inapposite because it was decided based on a quirk of Oklahoma law. *See In re Alta Mesa Res., Inc.*, 613 B.R. at 104 ("Alta Mesa's leases grant it easements to develop hydrocarbons. The gathering agreements ***carve out a portion of Alta Mesa's lease easements and grant those portions to Kingfisher***. This reduces Alta Mesa's real property interest under the leases.") (emphasis added). Indeed, Elevation's other supporting cases also turn on this aspect of Oklahoma law. *Sw. Pipe Line Co. v. Empire Nat. Gas Co.*, 33 F.2d 248, 252 (8th Cir. 1929) (concluding, because of Oklahoma statutory law, that an easement was an interest in the leasehold); *Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61, 70 (10th Cir. 1957) (similar). This quirk does not exist under Colorado law.

Instead, Extraction's ability to access the surface resembles "an implied easement appurtenant, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals . . . ." *Gerrity Oil & Gas Corp.*, 946 P.2d at 927 (citing Restatement (First) of

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[29] Elevation also cites *Badlands*. *See Elevation Brief in Support* ¶ 45 (citing *In re Badlands*, 608 B.R. at 874). However, the cited portion of *Badlands* was discussing privity of estate, not touch and concern. Moreover, *Badlands* is inapposite for the same reasons discussed above concerning *Alta Mesa*.

Property § 450 (Am. Law Inst. 1944)). An easement appurtenant, however, "***is incapable of existence separate and apart from the particular land to which it is annexed***." *Lewitz v. Porath Family Tr.*, 36 P.3d 120, 122 (Colo. App. 2001), *as modified on denial of reh'g* (Apr. 26, 2001) (emphasis added) (citing 7 Thompson on Real Property § 60.06(f)(1)). Extraction lacked the power to carve out and grant to Elevation portions of Extraction's surface access rights. *See id.* Regardless, none of Elevation's cases are on-point because, again, the easements and rights-of-way do not relate to Extraction's mineral estate; they are interests in surface estates. Moreover, Extraction's conveyance of a non-exclusive surface access right would not affect Extraction's use or enjoyment of its mineral estates, as it retains—incidental to ownership of the mineral estates—its right of ingress and egress, which is not lessened.[30]

Elevation also incorrectly argues that the surface easements and rights-of-way are linked to the mineral estates because development of Extraction's assets is supposedly impossible in their absence, especially because of the Broomfield Operating Agreement. *See Elevation Brief in Support* ¶ 44. Touch and concern is not a "but for" inquiry; collateral or personal covenants are not closely related to the land. *See* 3 Tiffany, Real Property § 854 (3d ed. 2015). Elevation's arguments about surface rights and the Broomfield Operating Agreement run afoul of those bedrock principles of touch and concern. ***First***, even if the Commercial Agreements make Extraction's satisfaction of the Broomfield Operating Agreement easier, this benefit is collateral because it is separate from the effect the Commercial Agreements ***themselves*** have upon the Dedicated Interests or Extraction's right to the use and enjoyment of those interests. ***Second***, the

[30] *Rocky Mountain Fuel Co. v. Heflin*, 366 P.2d 577, 580 (Colo. 1961) ("The owner of a mineral estate has rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of his interest.") (citation omitted).

benefit flows principally to Extraction as owner of personal property—produced oil, gas, or water—and not as landowner.

Finally, Elevation again retreats to contractual language stating a particular aspect of the Commercial Agreements touches and concerns the land. *See Elevation Brief in Support* ¶ 47. Again, while the parties may have desired that the purported servitude touched and concerned the land, they could not simply say it did and make it so. ***Surface*** rights do not closely relate to, or affect the use or enjoyment of, the ***mineral*** estates.

E. The Assignment Provisions Do Not Touch and Concern Extraction's Mineral Estates.

The Commercial Agreements' assignment provisions are purely contractual and do not closely relate to or affect the use or enjoyment of Extraction's mineral estates. If the covenants at issue run with the land, these provisions are unnecessary because such covenants ***automatically*** bind successive landowners through privity of estate, and not through privity of contract. *See Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74 ("[R]eal covenants 'run with the land' and burden or benefit successors in interest.") (citation omitted).

The first assignment provision to which Elevation points states: "Except for transfers and assignments to a Party's Contracting Party Affiliate . . ., this Agreement (including the Drilling Commitment) may not be transferred or assigned, in whole or in part, by either Party without the prior written consent of the other Party." Ex. A (Ex. A) § XII; Ex. B (Ex. A) § XII; Ex. C (Ex. A) § XII. On its face, the provision refers to contractual assigns, not assignments of the Dedicated Interests. This is a standard contractual assignment provision of the sort found in a wide variety of contracts. *See* General Contract Clauses: Assignment and Delegation, Practical Law Standard Clauses 8-508-2992, attached hereto as **Exhibit 1**. It in no way affects Extraction's ability to convey its land. *See* Ex. A (Ex. A) § XII ("Except for transfers and assignments to a Party's

Contracting Party Affiliate . . . this Agreement . . . may not be transferred or assigned . . . without the prior written consent of the other Party . . . ."); Ex. B (Ex. A) § XII (same); Ex. C (Ex. A) § XII (same). Indeed, subject to the Drilling Commitment, Extraction could walk away from its land entirely and there is nothing Elevation could do about it. *See* Ex. A § 2.2(d); Ex. B § 2.2(b) (same); Ex. C § 2.2(b) (same).

Colorado courts have specifically rejected Elevation's interpretation of this type of provision. *See Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 167 (Colo. App. 1994). In *Villa Sierra*, a joint venture entered a "Time Delay Agreement" which allowed it to delay a construction project. *Id.* at 163. The agreement said it was "binding upon the signatory parties, 'their heirs, successors, assigns, and/or personal representatives.'" *Id.* The court held "[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 second provision Elevation relies on states: "[A]ny sale, assignment or pledge of all or any portion of the Dedicated Interests will be made expressly subject to this Agreement and will be sold, assigned, or pledged in accordance with GTC Section XII." Ex. A § 2.3; Ex. B § 2.3; Ex. C § 2.3. Again, this provision does not restrict Extraction's ability to assign or convey the Dedicated Interests. Instead, Extraction simply commits to assign the contracts pursuant to the previously discussed contractual assignment provision to a successor-in-title to the Dedicated Interests. In *Sabine*, the Court considered a similar provision and held that it did not touch and concern the land, distinguishing the very authority relied upon by Elevation:

> [T]he [*Energytec*] requirement that Newco consent to any assignment of the use of the pipeline provides a restraint on the owner's right of alienation that is not present in the Agreements here. While the HPIP Agreements provide that any subsequent purchaser of Sabine's interests in the leases covering the HPIP Dedicated Area must

> assume Sabine's obligations under those agreements, such a provision merely equates to another statement that the agreements are enforceable against Sabine's successors.

In re Sabine Oil & Gas Corp., 567 B.R. at 876 (distinguishing *In re Energytec, Inc.*, 739 F.3d 215 (5th Cir. 2013)). The same thing is true here.

Finally, once again, Elevation points to contractual language showing intent. *See Elevation Brief in Support* ¶ 51. Statements about successors, claims that a servitude was created, or recitations that obligations touch and concern the land are not "evidence that these agreements touch and concern the land." *Id.* They are evidence that the parties ***intended*** that result. Indeed, such language is routinely assessed as an indicia of intent, not touch and concern.[31]

F. The Midstream Facilities Do Not Touch and Concern Extraction's Mineral Estates.

In a non sequitur, Elevation claims its personal obligation to construct the Midstream Facilities affects the use and enjoyment of Extraction's mineral estates. *See Elevation Brief in Support* ¶ 52. It does not.

The Commercial Agreements require Elevation to build Midstream Facilities. Ex. A § 3.1; Ex. B § 3.1; Ex. C § 3.1. The Midstream Facilities benefit Extraction as the owner of personal property by facilitating Elevation's provision of services under the Commercial Agreements. Without Elevation's contractual commitment to provide these services, however, these facilities

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[31] *See, e.g.*, *Cloud*, 857 P.2d at 440 ("Here, that intent is present since the declaration specifically states: 'The following . . . covenants . . . shall be deemed to run with the land, shall be a benefit and a burden to Declarant, its successors and assigns and any person acquiring or owning an interest in the real property and improvements, their grantees, successors, heirs, administrators, devises or assigns."); *Reishus*, 409 P.3d at 441 ("First, it explicitly states that '[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 as provided in this Agreement.' Accordingly, the parties clearly intended the 2007 Amended Agreement to run with the land.") (citing *Cloud*, 857 P.2d at 440).

are of no benefit to Extraction, as it does not own or have the right to the use of these facilities. Only Elevation has that right.

Consider an owner of an apple orchard that enters into an Apple Gathering and Processing Agreement with a service provider. Therein, the owner harvests its apples and places them on the ground at an agreed location (the Delivery Point), the service provider gathers the apples, cleans them, and processes them into applesauce for marketing. These services do not benefit or affect the use or enjoyment of the orchard or the unpicked apples; the landowner can pick or not pick its apples as it pleases. The facility the service provider may build to clean and process the apples similarly does not closely affect the landowner's use or enjoyment of its orchard. Instead, the services benefit the seller of severed apples by making the personal property more marketable. This is true even though apples (like oil, gas, or water) are real property before severance and receipt at the Delivery Points. *Compare Wood v. Wood*, 183 P.2d 889, 89-91 (Colo. 1947) (discussing crops) *with El Paso Gold Mines, Inc.*, 720 P.2d at 609 (discussing minerals).

Similarly, Elevation makes much of its role as Extraction's "exclusive" service provider. *See Elevation Brief in Support* ¶ 35. Elevation's exclusivity simply does not matter; all that this contractual commitment affects is Extraction's ability to contract with other service providers, not the use and enjoyment of its mineral estates. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875 ("[T]he Court concludes that the Agreements . . . granted [appellants] the ***merely contractual right to be the exclusive providers of certain services*** for gas and condensate produced in certain areas.") (emphasis added); *cf. Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 388 (Tex. 1977) ("Enforcement of the exclusive service provision would not have restricted NCL in the use of its real property . . . . At most NCL's promise limited NCL's freedom to contract

with other suppliers of water and sewer service. Such a limitation affects the use of land only collaterally . . . .").

G. The Fixed Fee Provisions Do Not Touch and Concern Extraction's Mineral Estates.

Finally, the fixed fee requirement does not closely relate to Extraction's mineral estates. Extraction must "pay Elevation a Monthly fee for the services provided under" the Commercial Agreements. *See* Ex. A § 4.3; Ex. B § 4.3; Ex. C § 4.3. As described above, these services are provided by Elevation to personal property for a fee. Thus, the fees concern the parties' personal obligations and are "personal" covenants that do not touch and concern the land, or affect Extraction's use or enjoyment of land. *See Bigelow*, 833 P.2d at 767 (citing *Rittmaster*, 35 P. 736). Moreover, Elevation concedes the fees could be either benefits or burdens. *Elevation Brief in Support* ¶ 55. Thus, the fees' effect is too "speculative" to touch and concern the land. *See Bigelow*, 833 P.2d at 767 (citing *Rittmaster*, 35 P. 736). Indeed, *Sabine* rejected similar arguments. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 877 (applying the touch and concern aspect of the equitable servitude test and stating "the Agreements benefit only appellants, not their land.").

CONCLUSION

Elevation's motion for summary judgment should be denied as a matter of law because the Commercial Agreements do not create covenants running with the land. Elevation is a stranger to Extraction's mineral estates, and the Commercial Agreements merely provide Elevation with personal, contractual rights concerning Extraction's produced gas and oil, and the water produced during production of these hydrocarbons. The parties never shared privity of estate and the covenants in the Commercial Agreements do not touch and concern the land (excepting the Drilling Commitment).

Dated: September 23, 2020
Wilmington, Delaware

/s/ Richard W. Rilley

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EXHIBIT 1

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General Contract Clauses: Assignment and Delegation

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A Standard Clause, also known as an anti-assignment clause, that provides for a contractual limitation on the assignability of contractual rights and the delegation of contractual duties. This Standard Clause has integrated notes with important explanations and drafting tips.

Note: *Read This Before Using Document*

1. Assignment[and Delegation]. [Neither party shall]/[[Seller/Buyer] shall not] assign any of its rights [or delegate any of its obligations] hereunder without the prior written consent of the other party[, which consent shall not be unreasonably withheld, conditioned or delayed] [; provided, however, that [either party/Seller/Buyer] may assign its rights [or delegate its obligations], in whole [only/or in part], without such consent and upon [NUMBER] days prior written notice to the other party, to (a) one [or more] of its [wholly owned][Subsidiaries/Affiliates], or (b) an entity that acquires all or substantially all of the business or assets of such party to which this Agreement pertains, whether by merger, reorganization, acquisition, sale, or otherwise]. [Any purported assignment [or delegation] in violation of this Section shall be null and void.] [No assignment [or delegation] shall relieve the assigning [or delegating] party of any of its obligations hereunder unless the non-assigning [or non-delegating] party enters into a novation releasing the assigning [or delegating] party of its obligation under the Agreement.]

Note: *Assignment and Delegation*

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CERTIFICATE OF SERVICE

I, Richard W. Riley, do hereby certify that on September 23, 2020, I caused a copy of the foregoing document to be served on the parties listed on the attached service list by CM/ECF notification and electronic mail.

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