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,	)	
v.	)	Adv. Proc. No. 20-50816 (CSS)
	)	**Re: Docket Nos. 22 & 28**
GRAND MESA PIPELINE, LLC,	)	
Defendant.	)	

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 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 Debtors' Reply in Support of Plaintiff's Motion for Summary Judgment* [Docket No. 28] (the "Motion to Seal"),[2] seeking, *inter alia*, authority to file *Reply in Support of Plaintiff's 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 *Reply in Support of Plaintiff's Motion for Summary Judgment*.

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Dated: October 5, 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 1

Reply

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.	)	Case No. 20-50816 (CSS)
GRAND MESA PIPELINE, LLC,	)	
Defendant.	)	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Dated: September 23, 2020

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INTRODUCTION

No matter how much the parties intended, desired, or assumed that the Transportation Agreement's[1] dedication to transport oil or pay a fee ran with Extraction's mineral estates, Colorado does not recognize these obligations as covenants running with the land. Grand Mesa incorrectly claims "the parties' intent was that the agreement, including the dedication and commitment, created a covenant running with the land . . . ." *See Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment* [Dkt. 20] at 5 (hereinafter Grand Mesa's *Answering Brief*). The Transportation Agreement, however, says: "***The dedication*** by Shipper described in the preceding paragraph for the performance of this Agreement ***shall be a covenant running with the land*** . . . ." Ex. A § 1.2 (emphasis added). The dedication is the sole covenant intended to run with Extraction's mineral estates. Moreover, Grand Mesa does not even attempt to argue that privity of estate is satisfied by the Transportation Agreement's conveyance of some real property interest in those mineral estates. Grand Mesa also failed to show that the dedication touches and concerns the mineral estates. Accordingly, no covenant running with the land exists. In its response, Grand Mesa raised no genuine issue of material fact. The Court should, therefore, grant summary judgment as a matter of law under Federal Rule of Civil Procedure 56(a), made applicable to this action under Federal Rule of Bankruptcy Procedure 7056, and declare that Grand Mesa's personal, contractual interests are not covenants running with the land.

I. PRIVITY OF ESTATE IS REQUIRED AND GRAND MESA DOES NOT EVEN ATTEMPT TO SUGGEST IT IS IN PRIVITY OF ESTATE WITH EXTRACTION.

Colorado law requires privity of estate between the contracting parties to create a covenant running with the land and Grand Mesa failed to identify any real property interest in the land with

[1] Capitalized terms not otherwise defined herein shall have the meanings set forth in the *Brief in Support of Plaintiff's Motion for Summary Judgment* [Dkt. 5] (hereinafter Extraction's *Brief in Support*).

which the covenant purportedly runs (*i.e.*, Extraction's mineral estates) that was conveyed as part of the Transportation Agreement—nor can it. This failure alone defeats Grand Mesa's argument that it has a covenant running with the land under the Transportation Agreement.

A. Colorado Law Requires Privity of Estate Between the Parties to the Covenant.

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.[2] Despite this authority, Grand Mesa argues privity of estate is not required under Colorado law because "the relevant Colorado authorities []neither use the phrase 'horizontal privity,' nor stand for the theory [Extraction] invites this Court to adopt." Grand Mesa's *Answering Brief* at 14 (citations omitted). Grand Mesa is wrong. Extraction is not asking this Court to adopt a "theory" on the requirement of privity of estate for a covenant to run with the land. To the contrary, Extraction asks the Court to apply long-held precedent requiring privity of estate in Colorado. It is Grand Mesa, with scant support, who invites the Court to go where no Colorado court has gone before—overturning Colorado Supreme Court precedent and eliminating the requirement of privity of estate for a covenant to run with the land. The Court should decline the invitation.

Grand Mesa cites *Taylor* and *Farmers*—without analysis or explanation—for the claim that privity of estate is not required. Both of these cases, however, directly contradict Grand Mesa's argument. 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,

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[2] *See Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) ("[T]he ***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.") (citation omitted); *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 original covenanting parties was not denied).

and also binding the grantor not to build any structure other than residences, among other restrictions. *Taylor*, 274 P.2d at 978–79. The deed stated that 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 argued 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 and "direct[ed] 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 "requisite" for subsequent interest owners to be burdened with a covenant running with the land, and that it was met in that case. *See id.*

Similarly, in *Farmers*, the Colorado Supreme Court 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 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 (citation omitted). The Colorado Supreme Court then distinguished the case before it from another case relied on by the defendant that "[wa]s not in point" because, in part, there was "no privity between" the parties in the other case. *Id.* Ultimately, the court concluded "[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," or the parties to the agreement, and that a suit for the breach of that covenant could be maintained through that privity of estate. *See id.*

Indeed, real property treatises continue to cite these same cases for the proposition that privity of estate between the parties to the contract is required under Colorado law. *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* for the proposition that either mutual or horizontal privity are required for a covenant to run with the land).

These decisions are also consistent with even earlier precedent from the Colorado Supreme Court. *See Hottell*, 53 P. at 330. In holding that a covenant ran with the land, the Colorado Supreme Court stated "[t]hat privity of estate is present is not denied" in the case before it and cited "[o]ther authorities in support of [its] conclusion." *Id.* (collecting cases). ***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.[3] The Colorado Supreme Court's decisions make clear that privity of estate between the parties is required to create covenants running with the land. Reading these cases any other way requires willful blindness as to the requirements of Colorado law.

[3] *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) (holding that the covenant did not run with the land because "sufficient privity of estate" did not exist "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).

Moreover, Colorado statutory law acknowledges this same privity of estate requirement. Colorado, by statute, identifies several covenants that necessarily run with the land, but each one of those covenants must nevertheless satisfy privity of estate between the covenanting parties. 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). Grand Mesa takes issue with recitation of this statute, arguing "[Extraction] fails to inform this Court" that the "Colorado Statute also defines 'conveyance'" as "every instrument in writing, except a last will and testament, whatever may be its form and by whatever name it may be known in law, by which any estate or interest in land is created, aliened, assigned, or surrendered."[4] However, Colorado's statutory definition of "conveyance" means, unsurprisingly, that title to a real property interest or estate may be transferred via a written instrument. It is not readily apparent to Extraction why Grand Mesa believes this statutory definition contradicts Extraction's arguments on privity of estate; Extraction's arguments are entirely consistent with this definition.[5] If anything, the definition bolsters Extraction's argument (discussed further below) that Grand Mesa must point to an "estate or interest in land" that was conveyed within the Transportation Agreement to create privity of estate between the parties—something Grand Mesa failed to do in its response.

Despite the overwhelming case law, statutory, and persuasive authority to the contrary, Grand Mesa contends that Colorado law no longer requires privity of estate between the parties to the agreement to establish the existence of a covenant running with the land.[6] In doing so,

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4 Grand Mesa's *Answering Brief* at 19 (quoting Colo. Rev. Stat. § 38-10-123) (emphasis omitted).
5 *See, e.g.*, Extraction's *Brief in Support* at 12–13.
6 Grand Mesa's *Answering Brief* at 14.

however, Grand Mesa does not cite a single Colorado case (Supreme Court or appellate) that holds, or even suggests, that Colorado has overturned over 100 years of binding precedent and removed the privity of estate requirement for creation of a covenant running with the land. Instead, it relies solely on the Restatement (Third) of Property Servitudes § 2.4 (Am. Law Inst. 2000) for support.

However, Grand Mesa's dependence on the Third Restatement of Property is misplaced. Given the lack of Colorado law supporting its position, Grand Mesa resorts to reliance on section 2.4 of the Third Restatement of Property to imply that Colorado courts have dispensed with the requirement of privity of estate.[7] But this secondary source does not purport to describe Colorado law, and cannot substitute for Colorado authorities. Moreover, the Third Restatement is known for being devoted more to law reform than to faithful restatement of the law and has largely been ignored by courts.[8] Indeed, courts have been particularly reticent to adopt the novel test put forward by the Third Restatement to govern the creation of covenants that run with the land. *See, e.g.*, *Id.* at 693–94; *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 Harv. L. Rev. 938 (2009) ("As of this writing, only one line of cases has used the ALI's new test [for covenants running with the land].").

Grand Mesa provides no support for the implication that the Colorado Supreme Court has adopted, or will adopt, this test. Further, Grand Mesa concedes Colorado has ***not*** adopted the Third Restatement's test for covenants running with the land because Grand Mesa acknowledges that real covenants must "touch and concern the land" under Colorado law.[9] In contrast, the Third

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7 *See* Grand Mesa's *Answering Brief* at 15.

8 *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.").

9 *See* Grand Mesa's *Answering Brief* at 7.

Restatement dispenses with the touch and concern element, requiring only intent for a covenant to run with the land. *See* Restatement (Third) of Property Servitudes §§ 2.4 and 4.1 (Am. Law Inst. 2000). Thus, Colorado has not adopted the Third Restatement's covenant running with the land test, and Grand Mesa cannot point to ***any*** Colorado authority, let alone authority from the Colorado Supreme Court, indicating it has overturned its precedent on this subject.

Grand Mesa also implies privity of estate is no longer required in Colorado by citing two federal cases applying Colorado law where privity of estate was not at issue, and, therefore, not analyzed by the court.[10] But, of course, the lack of discussion concerning privity of estate—especially where the element is not at issue—does not overturn precedent requiring it. None of the cases cited by Grand Mesa hold or even suggest that Colorado does not require privity of estate. Instead, in each case, the element was clearly met or the court did not reach it because another element was dispositive. *See TBI Exploration v. Belco Energy Corp.*, 220 F.3d 586 (5th Cir. 2000) (applying Colorado law) (holding the covenant did not run with the land based on lack of intent alone); *In re Banning Lewis Ranch Co., LLC*, 532 B.R. 335, 340 (Bankr. D. Colo. 2015) (not discussing privity that was clearly met because the real covenants were contained in an annexation agreement for the conveyance of thousands of acres).

B. Grand Mesa Failed to Show that the Transportation Agreement Conveyed a Real Property Interest in Extraction's Mineral Estate—Because It Did Not.

It is no accident that Grand Mesa seeks to avoid Colorado's privity requirement—it cannot remotely satisfy it. Extraction did not convey to Grand Mesa any interest in the real property allegedly burdened by the Transportation Agreement—*i.e.*, Extraction's mineral estates. Grand Mesa also does not point to any recognized property interest conveyed by Extraction to which the

[10] *See* Grand Mesa's *Answering Brief* at 15–17.

purported covenants would attach—nor can it. Accordingly, no privity of estate exists between the parties, and no covenant within the Transportation Agreement runs with Extraction's mineral estates as a matter of Colorado law.

The dedication is the only contractual covenant intended to run with the land, and it is intended to run with Extraction's oil and gas interests in the Dedicated Area. *See* Ex. A § 1.2. To satisfy the requirements of privity of estate, the Transportation Agreement must grant or convey a real property interest in Extraction's mineral estate at the time of the creation of the covenant.[11] However, neither the dedication nor any other provision in the Transportation Agreement did so.

Further, Grand Mesa does not identify its purported real property interest in Extraction's mineral estate other than to claim it has some "interest in the Dedicated Interests." This is because Grand Mesa cannot identify any real property interest; no such interest was conveyed. Grand Mesa does not have the right to drill or otherwise develop Extraction's mineral estates; the right to lease or assign the estates to another; or the right to receive any bonus, delay, or royalty payments. Accordingly, the Transportation Agreement does not create any covenants running with the land because there was no privity of estate between the parties.

II. THE PURPORTED REAL COVENANT DOES NOT TOUCH AND CONCERN EXTRACTION'S MINERAL ESTATES.

A. Contracting Parties Cannot Create Real Covenants by Agreement Alone.

Grand Mesa argues that covenants running with the land can be created by mere party agreement,[12] but real covenants cannot be created by the parties' intent alone. Contracting parties may say whatever they like, but covenants must still touch and concern the land before they may

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[11] *See* 3 Tiffany Real Property § 851 (3d ed. 2015) (describing "privity of estate between the covenantor and the covenantee at the time the covenant was created"); *accord In re Sabine Oil & Gas Corp.*, 734 Fed. Appx. 64, 67 (2d Cir. 2018) (holding privity of estate between covenanting parties was not satisfied, under Texas law, by conveyance of an easement in an agreement separate from the one purportedly creating the covenant).

[12] *See* Grand Mesa's *Answering Brief* at 15.

run with it.[13] There is no colorable argument to the contrary: "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." *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) (citing *Bigelow v. Nottingham*, 833 P.2d 764 (Colo. App. 1991); *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 74 (Colo. App. 1993) ("In order for a covenant to run with the land, not only must the parties to the covenant intend that it do so . . . but the covenant must 'touch and concern' the land.") (citations omitted). Indeed, the objective[14] touch and concern test is vital because it stops collateral or indirect obligations from unfairly binding subsequent landowners.[15]

None of the cases relied on by Grand Mesa allowed parties to create real covenants by mere agreement. The first case held that a real covenant existed because the contract closely related to land, not because the parties agreed it existed. *See In re Banning Lewis Ranch Co., LLC*, 532 B.R. at 345 n. 11. The next case held that intent, touch and concern, and privity of estate were satisfied and said, "[u]nder Utah law, not every covenant that purports to run with the land binds subsequent owners or users; the 'effect of the touch-and-concern requirement is to restrict the types of duties and liabilities that can burden future ownership of interests in the land . . . .'" *In re Badlands Energy, Inc.*, 608 B.R. 854, 867 (Bankr. D. Colo. 2019). The last case held no real covenant was created. *TBI Expl.*, 220 F.3d at 586.

Extraction agrees that covenants ***within contracts*** can be made by agreement, but covenants cannot bind land or parties ***outside privity of contract*** without meeting the elements

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13 As discussed above, privity of estate at the time of the real covenant's creation is also required.

14 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.").

15 *See* A. James, Editor Casner. American Law of Property: A Treatise on the Law of Property in the United States (1952) at 341–42.

required under Colorado law. The entire point of real covenant law is to ***prevent*** contracting parties from perpetually binding land—and the land's successive owners, who did ***not*** sign the contract—without the restraints of intent, privity of estate, and touch and concern.

B. The Transportation Agreement Does not Touch and Concern the Land.

1. The Transportation Agreement purely concerns produced minerals that are personal property.

The Transportation Agreement concerns transportation of personal property in exchange for a fee, and it does not closely relate to Extraction's real property. Under Colorado law, "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or its enjoyment.'" *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (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 is "personal" or "speculative" it does not touch and concern the land. *See Bigelow*, 833 P.2d at 767 (citing *Rittmaster v. Brisbane*, 35 P. 736 (Colo. 1894)).

Even under Grand Mesa's characterization of the Transportation Agreement, the only thing touched and concerned is personal property. Grand Mesa claims the "stated purposes of the [Transportation Agreement] are to: gain access to the Pipeline System, with sufficient expanded volume capacity ***to ship Plaintiff's crude produced from the Dedicated Interests*** . . ., establish a tariff rate ***for the cost of shipment*** . . ., and obtain ***priority service*** on the Pipeline System . . . ." Grand Mesa's *Answering Brief* at 18 (emphasis added). By its very terms, the contract purely concerns services for personal property because produced petroleum is personal property. *Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608, 609 (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 § 587 (3d ed. 1939)).

Indeed, Grand Mesa has no answer to the Transportation Agreement's unambiguous language that reserved from the dedication's scope Extraction's right to use and enjoy its real property without interference:



Ex. A § 2. Grand Mesa also has no answer to Extraction's ability to perform without implicating even ***produced*** minerals. Extraction may satisfy its obligations by paying Grand Mesa the remaining Total Financial Commitment. *Id.* at § 4.1. The payment of monies is a personal commitment burdening and benefitting the parties, not Extraction's land. *See 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).

2. Incidental effects on the mineral estate's value are insufficient to satisfy touch and concern.

The critical point of touch and concern is that a covenant runs with the land only when it is ***so closely related*** to the land that it essentially becomes part of the land. *See Reishus*, 409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440). Colorado's test is derived from the ordinary common law test. *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, adopted Dean Harry Bigelow's test.[16] Like the close relationship test, Dean Bigelow asks if a covenant materially 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).

The claim that there is a close relationship between the Transportation Agreement's provision of shipping services for produced oil and the Dedicated Interests runs afoul of Dean Bigelow's[17] "fundamental" and "easy" example of something that does not touch and concern the land. *See* Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. at 652. Dean Bigelow 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.* This is 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.*

If the example provided by the individual credited with creating the modern test for touch and concern is insufficient, there are others. For example, another esteemed commentator on real property noted: "No covenant will run which is personal merely, and can be performed without the obligor owning the land, or which can benefit one not owning the particular land to be benefited." Henry Upson Sims, A Treatise on Covenants Which Run with Land Other than Covenants for Title (1901) at 27. This example was given:

> Thus if A sells a piece of his land to B and covenants to cut B's hay for him yearly, this covenant will not bind A's vendee of the remainder of the land; for anybody can cut B's hay without regard to his proximity to B. And the same would be the case if B, in consideration of A's selling him a piece of his land, should covenant to cut A's hay. These are merely personal covenants, and would not run beyond the agreeing parties.

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16 *See* Extraction's *Brief in Support* at 17.

17 Grand Mesa attempts to avoid Dean Bigelow's example by arguing that his article deals with covenants in leases. ***First***, there is nothing special about covenants in leases. ***Second***, as Extraction already explained, Dean Bigelow's touch and concern test was widely adopted, irrespective of instrument.

Id. Colorado's Supreme Court approvingly quotes this very treatise. *Farmers' High Line Canal & Reservoir Co.*, 92 P. at 294 ("A covenant which runs with the land is a promise, the effect of which is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefited land.") (quoting Henry Upson Sims, A Treatise on Covenants Which Run with Land Other than Covenants for Title (1901) at 23).

The covenants in the Transportation Agreement are even further removed from real property than contracts to sell grain or cut hay. Grand Mesa takes the crude petroleum long after it has been severed from the land in order to transport it across state lines. Indeed, Extraction could satisfy its obligations by purchasing and giving to Grand Mesa ***someone else's*** personal property. *See* Ex. A § 4.1 [redacted] (emphasis added); *id.* at § 2 [redacted] (emphasis added); *id.* [redacted] (emphasis added). In other words, and to extend Dean Bigelow's metaphor, Extraction could satisfy its obligations by purchasing severed grain from a third-party farmer's cooperative and tendering it to Grand Mesa for transportation.

Finally, Grand Mesa's value argument proves too much. Assuming, *arguendo*, the Transportation Agreement indirectly benefits mineral reserves by providing for transportation services once the minerals are produced, this cannot be sufficient. If the rule were otherwise, any beneficial (or burdensome) service in the chain of title could run with the land because it affected the profitability of the hydrocarbons sold. This is nonsensical. A hypothetical shipping company who receives produced oil in barrels at a port in Houston cannot have a covenant running with land in Colorado by virtue of "valuable" transportation of produced oil.

C. The Dedication Does Not Affect Real Property. It Simply Identifies *What* Minerals, from *Which* Property, are Subject to the Contract.

Grand Mesa's argument concerning the dedication is a bald assertion that everybody uses dedications, so they must be important. Grand Mesa does not favor the Court with an explanation and claims dedications need "no definition." Grand Mesa's *Answering Brief* at 20. Grand Mesa does not provide an alternative definition for the dedication language.[18] Instead, Grand Mesa inventories non-binding authority that supports what Extraction has said all along: dedications in oil and gas agreements identify ***what*** minerals within ***which*** geographic area are subject to the parties' contractual promises once produced.

Pointedly, one case already abridged Grand Mesa's treatise: "In this contract the lessee 'dedicated' all the reserves under the Miller lease to the pipeline company which in essence ***means that the company was given exclusive rights to purchase the reserves under the premises when and if produced***." *Nordan-Lawton Oil & Gas Corp. of Tex. v. Miller*, 272 F. Supp. 125, 129 (W.D. La. 1967), aff'd, 403 F.2d 946 (5th Cir. 1968) (emphasis added) (citing Williams and Meyers, Oil and Gas Terms (1957) at 54). The "Book of Jargon" also defines 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."[19] Grand Mesa's cases only reinforce this conclusion.[20]

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[18] Grand Mesa claims Extraction's "resort to the 'real property context'" is "disingenuous," but fails to explain why real property law should not be considered when dealing with the creation of an alleged real property interest or assessing a dedication's legal effect concerning the creation of a real property interest. *See* Grand Mesa's *Answering Brief* at 20.

[19] Latham & Watkins LLP, The Book of Jargon, Oil & Gas, The Latham & Watkins Glossary to Oil and Gas Terminology (1st ed. 2016) at 24.

[20] *See Holloway v. Atl. Richfield Co.*, 970 S.W.2d 641, 642 (Tex. App.—Tyler 1998, no pet.) ("The two entities entered into a contract wherein HCP dedicated its gas to B & A at the maximum lawful price per MMbtu . . . . The next day, B & A entered into a ten-year contract with Ensearch . . . in which B & A dedicated its gas to Ensearch to be purchased at an agreed price."); *Johnston v. Am. Cometra, Inc.*, 837 S.W.2d 711, 713 (Tex. App.—Austin 1992, writ denied) ("Blanks entered into a gas purchase contract dedicating all of the gas reserves from the Mertz # 1 to Lone Star Gas Company for a period of fifteen years."); *Atl. Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 442 (Tex. App.—Texarkana 1993, writ denied), on reh'g (June 15, 1993) ("[The parties] entered into a contract whereby HCP dedicated its gas to B & A at the applicable maximum lawful price per MMBTU . . . . On May 11, 1982, B & A entered into a ten-year contract with Lone Star Gas

The dedication is not a grant, conveyance, or interest in unproduced minerals. Instead, dedications simply describe what the contract governs. *See In re Sabine Oil & Gas Corp.*, 550 B.R. 59, 81 (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] 'dedication' [is not] a burdening of the Debtors' property interests, but rather an identification of what property and products are the subject of the Agreement and will be made available . . . in furtherance of the purposes of the Agreements.").

CONCLUSION

Grand Mesa is a stranger to Extraction's mineral estates, and the Transportation Agreement merely provides Grand Mesa with personal and purely contractual rights concerning produced crude petroleum or contractual fees. The Transportation Agreement failed to create a covenant running with the land, and the Court should enter judgment in Extraction's favor.

in which B & A dedicated its gas to Lone Star, to be purchased at the price that B & A had agreed to pay HCP."); *Thornberry Oil Field Servs. v. Gulf Coast Pipeline Partners, L.P.*, No. H-03-1458, 2004 U.S. Dist. LEXIS 8237, at *7 (S.D. Tex. 2004) ("[Under the] Gas Purchase Agreement Danex agreed to sell gas produced from its 'Dedicated Reserves,' which included Thornberry's gas in the Dyersdale Field, to HPLR."); *Estate of H.A. True v. Commissioner*, No. 10940-97; No. 3408-98; No. 3409-98, 2001 Tax. Ct. Memo LEXIS 199, at *73 (T.C. 2001) (discussing the absence of a dedication); *Dominion Midwest Energy v. Mich. Psc*, No. 280391, 2009 Mich. App. LEXIS 2271, at *13 (Ct. App. 2009) (holding that a contract stated a real property interest was conveyed, not that dedications are *per se* real property interests).

Dated: September 23, 2020
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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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