IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)
EXTRACTION OIL & GAS, INC., Plaintiff,	)	
v.	)	Adv. Pro. No. 20-50816 (CSS)
GRAND MESA PIPELINE, LLC, Defendant.	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRAND MESA PIPELINE, LLC'S MOTION FOR ABSTENTION

WHEREAS on June 14, 2020 (the "**Petition Date**"), the above-captioned debtors and debtors-in-possession (the "**Debtors**"), including Plaintiff Extraction Oil & Gas, Inc. ("**Plaintiff**" or the "**Debtor**") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "**Court**").

WHEREAS on August 19, 2020, Plaintiff initiated this adversary proceeding by filing a *Complaint for Declaratory Judgment* (D.I. 1) (the "**Complaint**"), which seeks a declaration that certain covenants contained in the Bayswater TSA do not "run with the land."

WHEREAS on August 19, 2020, Plaintiff also filed its *Motion for Summary Judgment* (A. D.I. 4) and *Brief in Support of Plaintiff's Motion for Summary Judgment* (A D.I. 5) (together, the "**Extraction MSJ**").

WHEREAS on September 17, 2020, Grand Mesa Pipeline, LLC ("**Grand Mesa**" or

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"**Defendant**") filed its *Motion for Permissive Abstention* (A. D.I. 19) (the "**Abstention Motion**"), as well as its *Brief in Support of Defendant's Motion for Abstention and Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment*, seeking to have a Colorado Court adjudicate the issue of whether certain covenants in the Bayswater TSA run with the land. (A. D.I. 20) (the "**GMP Brief**").

WHEREAS on September 23, 2020, Plaintiff filed its *Reply in Support of Plaintiff's Motion for Summary Judgment* (A. D.I. 22) and its *Response in Opposition to Defendant's Motion for Abstention.* (A. D.I. 23) (the "**Extraction Reply**").

WHEREAS the Court held a hearing on the Extraction MSJ on September 30, 2020.

NOW, THEREFORE, based upon the Bankruptcy Court's consideration of: (i) the Extraction MSJ, (ii) the GMP Abstention Motion, (iii) the GMP Brief, and (iv) the Extraction Reply; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND AND DETERMINED AS FOLLOWS:[1]

Findings of Fact

A. Findings of Fact with Respect to Grand Mesa's Abstention Motion

1. The Adversary Proceeding concerns real property located in Colorado. See Complaint (Adv. D.I. 1) at ¶ 20.

2. The Adversary Proceeding seeks to resolve only state-law property rights. See Complaint (Adv. D.I. 1) at ¶ 3.

3. The Adversary Proceeding does not require any consideration of any bankruptcy law. See generally Complaint (Adv. D.I. 1).

[1] The findings and conclusions set forth herein constitute the Bankruptcy Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable herein by Bankruptcy Rule 7052. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

4. The Adversary Proceeding does not seek approval of the proposed rejection of the Bayswater TSA. See generally Complaint (Adv. D.I. 1); Id. at ¶ 3 ("this adversary proceeding seeks a declaration that certain covenants contained in the agreements between Grand Mesa and certain of the Debtors do not "run with the land.").

5. Based on the record of the hearings before this Court to date, there is a significant dispute among the parties, both in this Adversary Proceeding, as well as Adv. Proc. Nos. 20-50833 and 20-50839, as to the applicable standard under Colorado law regarding whether a covenant runs with the land. See generally Transcript of September 30, 2020 hearing.

6. Although there is no presently pending related proceeding in state court, Grand Mesa has prepared a draft complaint (the "**Proposed Colorado Complaint**") to be filed in the appropriate Colorado state court, which Grand Mesa has represented can be filed and prosecuted without delay. GMP Brief (Adv. D.I. 20) at p. 7 and 11; Exh. B.

7. As a result of, *inter alia*, the COVID-19 pandemic and resulting economic fallout, this Court's docket is extremely heavily burdened.

8. There is no right to a jury trial under the Bayswater TSA. See Bayswater TSA (Adv. D.I. 5-1), Exh A. at § 15.14.

9. Plaintiff and (non-debtor) Grand Mesa are the only parties involved in this Adversary Proceeding. See Complaint (Adv. D.I. 1) at p.1.

B. Findings of Fact with Respect to Plaintiff's Summary Judgment Motion

The Bayswater TSA

10. Grand Mesa is a party to that certain Amended and Restated Transportation

Services Agreement with Plaintiff, dated June 21, 2016 (A. D.I. 5-1) (the "**Bayswater TSA**").[2]

11. The Bayswater TSA sets forth the terms and conditions governing the respective rights of Grand Mesa and Plaintiff (referred to in the TSA as "Shipper") relating to the transportation by Plaintiff of certain volumes of crude petroleum through Grand Mesa's pipeline system originating at stations in Weld County, Colorado.

12. The Bayswater TSA expressly states the parties' intent in entering into the agreement:

> WHEREAS, Shipper and Grand Mesa desire to amend the Original Transportation Services Agreement as set forth herein with respect to Shipper's committed volume, the term and the tariff rate and to provide for Shipper's dedication of certain oil, gas and mineral leases and wells located in Weld County, Colorado owned or controlled by Shipper, along with all Crude Petroleum produced therefrom and associated reserves (collectively, the **"Dedicated Interests"** as further defined below) as further consideration of the amendments herein.

Bayswater TSA (A. D.I. 5-1) at p. 1.

13. In turn, Section 1.1 of the Bayswater TSA defines "Dedicated Interests" and states as follows:

> 1.1 As assurance for Shipper's performance under this Agreement, and subject to the terms and conditions of this Agreement and Shipper's Reservations, Shipper hereby dedicates and commits to the performance of this Agreement, all of Shipper's right, title and interest in and to: (i) the Subject Leases; (ii) the Wells; (iii) the Dedicated Reserves; and (iv) Shipper's Crude Petroleum all to the extent located within, or produced from the Dedication Area (collectively, the **"Dedicated Interests"**), for and during the Term of this Agreement, for the purpose of exclusively dedicating and committing the Dedicated Interests to Grand Mesa for the performance of this Agreement.

Id. at § 1.1.

14. Section 2 of the Bayswater TSA defines the terms found in Section 1.1, as follows:

[2] The original Shipper in the Bayswater TSA was Baywater Exploration & Production, LLC ("**Bayswater**"). Extraction Oil & Gas, LLC is the successor-in-interest to Bayswater, and Plaintiff is the successor-in-interest to Extraction Oil & Gas, LLC.

"Dedication Area" means the following described lands located within Weld County, Colorado:

Township 5 North, Range 65 West, 6th P.M.

Section 4: W/2NW/4, NE/4NW/4, SW/4
Section 9: W/2NW/4, S/2
Section 10: S/2
Section 15: N/2
Section 16: NE/4, E/2NW/4

Township 6 North, Range 65 West, 6th P.M.

Section 29: All

"Dedicated Interests" has the meaning set forth in Section 1.1.

"Dedicated Reserves" means all of the right, title and interest of Shipper in and to all Crude Petroleum reserves in and under the Subject Leases and the Wells Owned or Controlled by Shipper, whether now owned or hereafter acquired by Shipper.

"Shipper's Crude Petroleum" means all Crude Petroleum Owned or Controlled by Shipper, including, without limitation, Crude Petroleum produced from the Subject Leases and the Wells, whether now owned or hereafter acquired by Shipper. For the purposes hereof, Crude Petroleum is **"Owned or Controlled"** by Shipper if Shipper has title to such Crude Petroleum, whether by virtue of its ownership of a Subject Lease or otherwise, or, if Shipper does not have title to such Crude Petroleum, Shipper has the right, under any joint operating agreement, unit operating agreement, or other contractual arrangement or arising by operation of Applicable Laws, to commit and dedicate such Crude Petroleum to the performance of this Agreement.

"Subject Leases" means the oil, gas, and mineral leases (including any extensions or renewals of such leases and any new leases taken in replacement thereof prior to or within six (6) months after the expiration of any such lease), deeds, conveyances, and other instruments described in Exhibit D, as such exhibit may be amended from time to time, but only to the extent that such leases are located within the Dedication Area.

"Wells" means a horizontal well for the production of hydrocarbons located on the Subject Leases or on lands otherwise pooled, communitized or unitized therewith, in which Shipper owns an interest, that is either producing or intended to produce Dedicated Reserves, but expressly excluding vertical wells and further expressly excluding the wells described on Exhibit F.

Id. at § 2.

15. The Court finds that Plaintiff dedicated and committed to the performance of the

Bayswater TSA, "all of its right, title and interest in and to: (i) the Subject Leases; (ii) the Wells; (iii) the Dedicated Reserves; and (iv) Shipper's Crude Petroleum," with respect of the entirety of the described "Dedication Area" located in Weld County, Colorado. Id. at § 1.1

16. The Dedicated Interests were exclusively dedicated to Grand Mesa. Id.

17. The Court further finds that, in agreeing to the Bayswater TSA, the parties' intent was that the agreement, including the dedication and commitment, created a covenant running with the land, such that the agreement would be binding upon any successors and assigns. Id. at § 15.9.

18. The Bayswater TSA cannot be assigned or transferred in whole or in part by either party except upon the prior written consent of the other party. Id.

19. The Bayswater TSA expressly states that Defendant's obligations will run with the land:

> 1.2 **The dedication by Shipper described in the preceding paragraph for the performance of this Agreement shall be a covenant running with the land (and for clarity, shall also apply to any Dedicated Interests acquired by Shipper subsequent to the Effective Date), shall be deemed to touch and concern all of Shipper's oil and gas leasehold interests in the lands within the Dedication Area, and shall be binding upon all of Shipper's permitted successors and assigns. To that end, counterparts of a recording memorandum for this Agreement, in the form attached hereto as Exhibit E, shall be filed of record in all counties in which any of the Dedicated Interests are located.**

Id. at § 1.2.

20. To further confirm the nature of the agreement—and as required by the Bayswater TSA—a memorandum was recorded in the Weld County real property records, as was that certain Amended and Supplemental Memorandum of Amended and Restated Transportation Services Agreement, effective as of January 5, 2017, and publicly recorded in the real property records of Weld County at Reception No. 4270731. GMP Brief (A. D.I. 20), at Exh. A.

Conclusions of Law

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

I. The Court Elects to Permissively Abstain.

21. The Complaint is a non-core, state law predicated action, which requires a determination of a real property law issue arising in Colorado, governed by Colorado law, and related to property located in Colorado. It involves a determination of an unsettled issue under Colorado law, with implications that go beyond solely the Plaintiff's property rights in this case.

22. Abstention is most appropriate where, as here, novel or unsettled issues of state law are involved. Principles of federalism and comity weigh in favor of allowing state courts to decide issues of state law when possible. See, e.g., Stoe v. Flaherty, 436 F.3d 209, 214 (3d Cir. 2006) ("Section 1334(c)(2) is based on comity and, on its face, reflects a congressional judgment that a party who wishes to litigate a state claim in a state court, but finds himself in a federal court solely because the controversy is related to a bankruptcy, should be able to insist upon a state adjudication if that will not adversely affect the bankruptcy proceedings.").

23. A Colorado state court should decide the standard applicable to a determination of whether a covenant runs with the land under Colorado law, and the yet undecided issue of whether certain covenants in the Bayswater TSA touch and concern, and therefore run with the land.

24. 28 U.S.C. § 1334(c)(1) provides this Court with the discretion to abstain from hearing a case and provides:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
> 28 U.S.C. § 1334(c)(1).

25. In considering permissive abstention under section 1334(c)(1), courts look to and

evaluate a list of twelve factors: (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the court's docket; (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. In re Maxus Energy Corp., 506 B.R. 111, 124-25 (Bankr. D. Del. 2016)

26. While the court need not engage in a mathematical analysis of these factors, consideration of the factors overall weighs in favor of the Court's abstention from the Adversary Proceeding and permitting Grand Mesa's complaint to be filed, heard, and decided in Colorado. The Court addresses each permissive abstention factor in turn:

Factors 1 and 6: Limited Effect on the Efficient Administration of the Debtor's Estate.

27. The adjudication of the single, non-bankruptcy, state law, and two-party issue presented by this Adversary Proceeding in Colorado will have a limited effect on the administration of the Debtor's estate. Although resolution of the Adversary Proceeding may impact the Court's decision on the Rejection Motion, once the Colorado court resolves the underlying, unsettled, and important state law issue, this Court can turn to resolution of the Rejection Motion and the application of the Colorado court's decision, and guidance contained

therein, as may be necessary to decide the Rejection Motion.

28. These factors weigh in favor of abstention.

Factor 2: State law Issues Predominate Over Bankruptcy Issues.

29. State law issues are the only issues presented in the Adversary Proceeding. No bankruptcy claim, cause of action, or issue is presented. See In re Mobile Tool Int'l, 320 B.R. 552, 557 (Bankr. D. Del. 2005) (holding that where the adversary proceeding required only an application of state contract law and no bankruptcy issues were present, this factor weighed in favor of abstention); Fruit of the Loom, 407 B.R. at 600 (finding factor 2 favored abstention because contract at issue was governed by state law and no provision of Bankruptcy Code was implicated).

30. Factor 2 weighs in favor of abstention.

Factor 3: The Status of Colorado Law is Disputed by Extraction.

31. The dispute over the application of Colorado law to this Adversary Proceeding weights in favor of abstention. Grand Mesa maintains that horizontal privity is not required for a covenant to touch and concern the land under Colorado law. See ¶ 44, *infra*. This is especially true where, as Extraction's position suggests here, the issue is a matter of first impression for this Court. See also In re Sabine Oil & Gas Corp., 547 B.R. 66, 74 (Bankr. S.D.N.Y. 2016) (citation omitted) (holding that "[i]n U.S. property law, no rules are more arcane and anachronistic than those governing real covenants…").

32. Factor 3 weighs in favor of abstention.

Factor 4: The Presence of a Related Proceeding.

33. Although there is no presently pending state court action, Grand Mesa has represented and demonstrated that it is prepared to file its complaint in Colorado state court and

proceed without delay. This factor, therefore, does not weigh heavily in favor of this Court keeping the case. See Integrated Health Services, Inc., 291 B.R. 615, 621 (Bankr. D. Del. 2003) (granting permissive abstention motion and holding that while the existence of a pending state court action is a dispositive factor in mandatory abstention, it is not dispositive, and only one factor in considering permissive abstention).

Factors 5 and 7: There is No Jurisdictional Basis Other Than 28 U.S.C. § 1334; The Adversary Proceeding is Non-Core.

34. This is not a core proceeding and there is no independent basis for federal jurisdiction. A core proceeding raises rights that the Bankruptcy Code enumerates or which by their very nature would only arise in a bankruptcy case. In re Venoco, LLC, 596 B.R. 480, 488 (Bankr. D. Del. 2019. The Court must consult section 157(b) of title 28 which provides an "illustrative list of proceedings that may be considered 'core." In re DHP Holdings II Corp., 435 B.R. 220, 228 (Bankr. D. Del. 2010). Second, the court must apply the Third Circuit's test to determine whether it is core: "a proceeding is core if (1) it invokes a substantive right provided by title 11 or (2) if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case." Id. Plaintiff's claim is not among those enumerated within section 157(b), nor could it arise only in the context of a bankruptcy case.

35. The Complaint relates solely to a Colorado state law claim regarding real property interests in Colorado. In addition, there is no complete diversity as both the Debtor and Grand Mesa are Delaware entities. See In re LaRoche Indus., Inc., 312 B.R. 249, 254 (Bankr. D. Del. 2004) (finding that where there was no federal question jurisdiction and no complete diversity between the parties, that this factor weighed in favor of abstention).

36. Factors 5 and 7 weigh in favor of abstention.

Factor 8: There are No State Law Claims to Sever from Core Bankruptcy Matters.

37. There are no core bankruptcy matters presented in this Adversary Proceeding, and therefore none to sever. Factor 8 is either neutral or weighs in favor of abstention.

Factor 9: This Court's Docket is Heavily Burdened.

38. As a result of, *inter alia*, the COVID-19 pandemic and resulting economic fallout, there is no dispute that this Court's docket is extremely heavily burdened.

39. Factor 9 weighs in favor of abstention.

Factors 10 (The likelihood of forum shopping), 11 (The existence of a right to a jury trial), and 12 (The presence of non-debtor parties).

40. The tenth, eleventh and twelfth factors, i.e. the likelihood of forum shopping, the right to a jury trial, and whether the proceeding involves non-debtor parties are largely inapplicable to and/or neutral in respect of this Adversary Proceeding. First, there is no evidence of forum shopping by either party. Second, there is no right to a jury trial under the Bayswater TSA. See Bayswater TSA at 15.14 ("Each party hereby irrevocably waives trial by jury in any action or proceeding with respect to this Agreement."). Lastly, the Plaintiff and (non-debtor) Grand Mesa are the only parties involved in this Adversary Proceeding.

41. Factors 10, 11, and 12 are either inapplicable or neutral.

42. Accordingly, based on its consideration of the foregoing factors, the Court will permissively abstain from this Adversary Proceeding and permit Grand Mesa to file its Proposed Colorado Complaint.

II. Plaintiff Has Not Met its Burden; the Court Concludes that the Bayswater TSA Creates Covenants Running with the Land Under Colorado Law.

1. Plaintiff has the burden to prove as a matter of law that the Bayswater TSA did not create a covenant running with the land. In re FBI Wind Down, Inc., 581 B.R. 387, 398 (Bankr. D. Del. 2018). Plaintiff has not met its burden. The Court is further persuaded that the covenants

in the Bayswater TSA run with the land under Colorado law for at least two reasons.

2. ***First,*** Colorado law approves the creation of a covenant running with the land by agreement. See Restatement (Third) of Property: Servitudes § 2.4, "No privity relationship between the parties is necessary to create a servitude;" see also id., cmt. b., "As a matter of common law, horizontal privity between the covenanting parties is no longer required to create a servitude obligation." In Colorado real property law, a servitude is a "covenant that 'runs with the land.'" City of Steamboat Springs v. Johnson, 353 P.2d 1142, 1147 (Colo. App. 2009), quoting Restatement (Third) of Property: Servitudes § 1.3(1)). Colorado courts, including the Supreme Court of Colorado, have adopted and consistently applied the Restatement (Third) of Property. See e.g., Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229 (Colo. 2001); City of Boulder v. Farmer's Reservoir & Irrigation Co., 214 P.3d 563 (Colo. App. 2009); Johnson, 353 P.2d 1142 (Colo. App. 2010). The Restatements further explains that: "A servitude is created[:] (1) if the owner of the property to be burdened [,] (a) enters into a contract or makes a conveyance intended to create a servitude that complies with § 2.7 (Statute of Frauds) or § 2.9 (Exception to the Statute of Frauds). Restatement (Third) of Property: Servitudes § 2.1.(1)(a); cited by Precious Offerings Mineral Exch., Inc. v. McLain, 194 P.3d 455, 458 (Colo. App. 2008). No conveyance is required, a contract will suffice.

3. Applying Colorado law to this case, the Bayswater TSA states that the Dedicated Interests acquired "shall be [ ] covenant[s] running with the land" and "shall be deemed to touch and concern all of [Extraction's] oil and gas leasehold interests in the lands within the Dedication Area, and shall be binding upon all of [Extraction's] permitted successors and assigns." Bayswater TSA, §1.2. The Parties to the Bayswater TSA intended and expressed in uncertain terms that it is a covenant that "runs with the land." TBI Exploration, Inc. v. Bellco Energy Corp., No. 99-10872,

200 U.S. App. LEXIS 39999 at *12-*13 (5th Cir. June 14, 2000) (citing Lookout Mountain Paradise Homeowners' Ass'n, v, Viewpoint Estates, 867 P.2d 70, 74 (Colo. App. 1993)); Cloud v. Association of Owners, Satellite Apartment Building, 857 P.2d 435, 440 (Colo. App. 1992); Brown v. McDavid, 676 P.d 714 (Colo. App. 1983).

4. The Court concludes that under Colorado law, language of the Bayswater TSA alone is sufficient to create a covenant running with the land, and it is undisputed that a memorandum of the Bayswater TSA was recorded. See In re: The Banning Lewis Ranch Company, LLC v. City of Colorado Springs, 532 B.R. 335, 345-346 (Bankr. D. Colo. 2015) (the agreements were "of the type that run with the land and are properly recorded," making the contracts "not only valid and enforceable among the non-debtor parties, . . . but they are also binding on the Debtor's successors in interest."). Therefore, consistent with the bankruptcy court's ruling in Banning, the Bayswater TSA creates real property interests that run with the land and are binding on the Debtor's successors in interest.

5. Colorado Revised Statute § 72-112-101(1)(b) authorizes a corporation to dedicate or otherwise encumber any or all of its property. The dedication of hydrocarbon reserves are routinely negotiated between oil and gas producers pipeline operators, whereby a producer burdens its reserves with a servitude to benefit the construction of a facility. See 8 Williams & Meyers, Oil and Gas Terms, definition of "Dedication of reserves," and Cristopher J. Castillo, et al., 'Anatomy of a Commercial Gathering Project: Midstream Oil & Gas from the Upstream Perspective," 3-2 Rocky Mountain Min. L. Found (2018). This is exactly what happened in connection with the Grand Mesa pipeline and under the Bayswater TSA. The Bayswater TSA provides for the "Dedicated Reserves" covered by the "Subject Leases" – Extraction burdening its reserves with a servitude in favor of Grand Mesa.

6. The TSA and the servitude it created is part of the "bundle of sticks" that Plaintiff acquired when obtained the Dedicated Interests, including the Dedicated Reserves and the Subject Leases. Monarch Midstream, LLC v. Badlands Production Co. (In re Badlands Energy, Inc.), 608 B.R. 854, 874 (Bankr. D. Colo. 2019). As further explained by the bankruptcy court in Banning, the fact that "the servitude limits the market for property by limiting its use or reducing its value . . . is irrelevant in determining its validity, so long as there is some rational justification for creation of the servitude." Banning, 532 B.R. at 348 (quoting CBS Outdoor, Inc. v. 800 Lincoln, LLC, Case No. 11-cv-02233-WYD-MJW, 2012 WL 4356241, at *20, n.13 (D. Colo. Sept. 24, 2012) (quoting Restatement (Third) of Property: Servitudes, § 3.5, cmt. a)). An "otherwise valid servitude is valid even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property, or by otherwise reducing the value of the property." Restatement (Third) of Property: Servitudes § 3.5(1). Under Colorado real property law, the Bayswater TSA is a valid restraint on alienation of which Plaintiff was well aware when it purchased the Dedicated Interests, even if the servitude might reduce the value realizable on the sale of Plaintiff's leases and wells composing the Dedicated Interests.

7. ***Second***, the Bayswater TSA and its covenants also touch and concern the land. In Colorado, a "covenant touches and concerns the land if it is "closely tied with the use, possession and enjoyment" of the land. Reishus v. Bullmasters, LLC, 409 P.3d 435 (Colo. App. 2016) (citing Lookout Mountain, 867 P.2d at 74-75). The stated purposes of the Bayswater TSA are to: gain access to the Grand Mesa pipeline system, with sufficient expanded volume capacity to ship Plaintiff's crude produced from the Dedicated Interests (Bayswater TSA 3rd and 4th Recitals and § 10), establish a tariff rate for the cost of shipment (Bayswater TSA § 7), and obtain priority

service on the Grand Mesa pipeline system (Bayswater TSA § 10.2).

8. Being able to ship the oil it produces from the Dedicated Interests at stable volumetric rates, for a predictable fee with priority service undoubtedly adds to the enjoyment of Plaintiff's use and possession of its dedicated leases and wells. In fact, to further secure these benefits to the Dedicated Interests, the "Original Transportation Services Agreement" was renegotiated and amended (see Bayswater TSA 3rd and 4th Recitals and § 7.1.5), and replaced by the Bayswater TSA.

9. The Dedicated Interests set forth in the Bayswater TSA satisfy the "touch and concern" element under Colorado law as they are directly related to the use and enjoyment of the land in the Dedication Area. The Bayswater TSA, therefore, contains covenants that run with the land – real property interests under Colorado law.

10. For the foregoing reasons, the Extraction MSJ is denied.