IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	) Chapter 11
	) Bankruptcy Case No. 20-11548 (CSS)
EXTRACTION OIL & GAS, INC., *et al.*,[1]	) Jointly Administered
Debtors.	)
GRAND MESA PIPELINE, LLC,	)
	)
Appellant,	)
v.	)
	) Civil Action No. 20-cv-01411
EXTRACTION OIL & GAS, INC.	) Civil Action No. 20-cv-01521
	) Civil Action No. 20-cv-01458
Appellee.	)
	) Civil Action No. 20-cv-01412
FEDERAL ENERGY REGULATORY	) Civil Action No. 20-cv-01506
COMMISSION,	) Civil Action No. 20-cv-01564
	)
Appellant,	) Civil Action No. 20-cv-01457
	) Civil Action No. 20-cv-01532
v.	)
	) Bankruptcy Case No. 20-11548 (CSS)
EXTRACTION OIL & GAS, INC.,	) Bankruptcy BAP No. 20-43
	) Bankruptcy BAP No. 20-44
Appellee.	) Bankruptcy BAP No. 20-48
	) Bankruptcy BAP No. 20-49
PLATTE RIVER MIDSTREAM, LLC, *et al.*,	) Bankruptcy BAP No. 20-52
	) Bankruptcy BAP No. 20-53
Appellant,	) Bankruptcy BAP No. 20-54
	) Bankruptcy BAP No. 20-56
v.	)
	)
EXTRACTION OIL & GAS, INC.	)
Appellee.	)

APPELLEE EXTRACTION OIL & GAS, INC.'S (1) RESPONSE TO JOINT MOTION TO CONSOLIDATE BANKRUPTCY APPEALS AND CONFORM BRIEFING SCHEDULES AND (2) CROSS-MOTION FOR CONSOLIDATION OF BANKRUPTCY APPEALS

[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.



Pursuant to Local Rule 7.1.2(c) and Federal Rules of Bankruptcy Procedure 8003(b) and 8013, Appellee Extraction Oil & Gas, Inc. (Extraction) respectfully submits this combined (1) response to the *Joint Motion to Consolidate Bankruptcy Appeals and Conform Briefing Schedules* (Consolidation Motion) filed by Appellants Grand Mesa Pipeline, LLC (Grand Mesa) and the Federal Energy Regulatory Commission (FERC) and (2) cross-motion regarding consolidation. As set forth below, although Extraction agrees that the Court should consolidate the five appeals discussed in the Consolidation Motion, there are three other appeals arising from Extraction's bankruptcy case that present the same ultimate issue—including another appeal filed by Grand Mesa, which the Consolidation Motion neglects to mention. In the interest of judicial economy and efficiency, and to eliminate unnecessary burdens on the parties, this Court should consolidate all eight appeals—not merely a subset of them, as Grand Mesa and FERC have unilaterally requested.[2] Upon entering an order consolidating those eight appeals, the Court can then instruct

[2] On November 19, 2020, Chief Magistrate Judge Thynge held a mediation-related teleconference with counsel for Extraction and Grand Mesa in one of Grand Mesa's appeals. *See* No. 20-cv-01411. Recognizing that all eight of the appeals arising from Extraction's bankruptcy involved overlapping issues, Chief Magistrate Judge Thynge directed Extraction and Grand Mesa to confer with the parties in the other appeals (including FERC) and to develop an omnibus proposal regarding the consolidation of and briefing in the appeals; the parties were to submit a proposal by December 7. Consistent with that directive, Extraction coordinated consolidation-related discussions among the parties, but the parties could not reach an agreement. Accordingly, on December 7, after obtaining input from the parties to all eight appeals, Extraction emailed a letter to Chief Judge Magistrate Thynge (attached here as Exhibit A) that provided each party's respective position. Remarkably, however, literally minutes after Extraction sent that letter to Chief Magistrate Judge Thynge—and without providing *any* notice to Extraction—Grand Mesa and FERC forged ahead with filing the Consolidation Motion, thereby short-circuiting Chief Magistrate Judge Thynge's efforts to develop a negotiated solution. As a result, although Extraction had expected to engage in further consolidation-related discussions with Chief Magistrate Judge Thynge and the other parties, it is now compelled to file this response and cross-motion.

the parties to propose a single briefing schedule. In support of this response and cross-motion, Extraction states as follows:

1. Extraction is an independent exploration-and-production company that is focused on the acquisition, development, and production of oil, natural gas, and natural gas liquids reserves in the Rocky Mountain region. *See* D.I.1023 at 5. In recent years, Extraction faced significant challenges from volatility in the commodities markets—volatility that the COVID-19 pandemic and tensions between OPEC and Russia only exacerbated in 2020. *See id.* Accordingly, on June 14, 2020, Extraction voluntarily filed for Chapter 11 bankruptcy. *See* D.I.1.

2. Pursuant to 11 U.S.C. §365, Extraction thereafter moved to "reject" certain executory contracts—*i.e.*, contracts under which "performance" remains "due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). As relevant here, on June 15, Extraction moved to reject two "transportation service agreements" (TSAs) between it and Grand Mesa, which addressed the shipment of crude petroleum on Grand Mesa's pipelines. *See* D.I.14. Likewise, on August 11, Extraction moved to reject two similar TSAs involving two other parties: Platte River Midstream, LLC and DJ South Gathering, LLC (Platte River/DJ South). *See* D.I.412.

3. Grand Mesa, Platte River/DJ South, and FERC opposed these rejection efforts. In particular, Grand Mesa filed a motion (which FERC and Platte River/DJ South supported) arguing that, before rejection could proceed, Extraction first had

to obtain approval from FERC. That motion contended that Chapter 11's automatic-stay provision, *see* 11 U.S.C. §362, did not prohibit proceedings before FERC and that, regardless, good cause existed to lift the automatic stay. *See* D.I.364; *see also* D.I.644; D.I.653.

4. In addition to that lift-stay motion, Grand Mesa and Platte River/DJ South also filed separate objections to Extraction's rejection motions (and Platte River/DJ South also filed a joinder to Grand Mesa's objection). *See* D.I.363; D.I.482; D.I.655. In those filings, Grand Mesa and Platte River/DJ South asserted, among other things, that Extraction could not lawfully reject the TSAs because those contracts contained covenants running with the land under Colorado law—an issue, they insisted, that required adversary proceedings in the Bankruptcy Court to resolve. *See, e.g.*, D.I.363 at 5-6, 31-38; D.I.482 at 2; D.I.655 at 2-3, 20-21. Consistent with those demands, Extraction initiated adversary proceedings and sought summary judgment on the claim that the TSAs did not contain covenants running with the land under Colorado law. *See Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC*, Adv. Pro. No. 20-50816; *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC*, Adv. Pro. No. 20-50833.

5. The Bankruptcy Court ruled in Extraction's favor on all of these rejection-related issues. First, the court denied the lift-stay motion, explaining, among other things, that "[i]t would be a violation of [the bankruptcy courts'] exclusive jurisdiction over the rejection of executory contracts for FERC to purport

to decide the [rejection] issue." D.I.770 at 2. Next, the court granted summary judgment to Extraction in the adversary proceedings, concluding—in two substantially similar decisions—that neither the Grand Mesa nor the Platte River/DJ South TSAs contained covenants running with the land that impeded rejection. *See* Adv. Pro. No. 20-50816 D.I.45; Adv. Pro. No. 20-50833 D.I.54. Finally, the court authorized Extraction to reject the Grand Mesa and Platte River/DJ South TSAs, reasoning, among other things, that §365 of the Bankruptcy Code compelled that result "even if the TSAs contain covenants running with the land, which they do not," and also concluding that Extraction had satisfied the necessary standards for rejecting the TSAs. D.I.942 at 19.

6. In eight separate notices of appeal, the parties appealed from these rejection-related rulings.[3] First, Grand Mesa and FERC appealed from the Bankruptcy Court's lift-stay rulings, *see* D.I.864; D.I. 866, giving rise to Case Nos. 20-cv-01411 and 20-cv-01412 in this Court. Second, Grand Mesa and Platte River/DJ South appealed from the adversary-proceeding rulings, *see* Adv. Pro. No. 20-50816 D.I.53; Adv. Pro. No. 20-50833 D.I.64, giving rise to Case Nos. 20-cv-01458 and 20-cv-01457 in this Court. Finally, Grand Mesa, Platte River/DJ South, and FERC appealed from the contract-rejection rulings, *see* D.I.1016; D.I.1048;

[3] There is also a ninth appeal filed by Elevation Midstream, LLC, which also arises from an adversary proceeding. *See* No. 20-cv-01456. Extraction, however, is in the midst of reaching a settlement agreement that would result in the dismissal of that appeal; accordingly, that appeal is not discussed here.

D.I.1084; D.I.1138, giving rise to Case Nos. 20-cv-01521, 20-cv-01532, 20-cv-01506, and 20-cv-01564 in this Court.

7. On December 7, Grand Mesa and FERC—without providing any advance notice to Extraction, despite a tailor-made opportunity to do so, *see* n.2, *supra*—filed the Consolidation Motion. In that motion, Grand Mesa and FERC ask this Court to consolidate five appeals—namely, Grand Mesa's and FERC's respective appeals of the lift-stay rulings (20-cv-01411 and 20-cv-01412) and their three appeals (one by Grand Mesa, and two by FERC) of the contract-rejection rulings (20-cv-01506, 20-cv-01521, and 20-cv-01564). Grand Mesa and FERC argue that consolidation of these appeals is justified because of the "overlapping factual and legal issues" and to "preserve the resources of both the Court and the parties." Consolidation.Mot.2. The motion adds that "the burden on the parties and judicial resources would be greatly lessened by consolidation of the Appeals." Consolidation.Mot.4.

8. The Consolidation Motion does not, however, ask this Court to consolidate the three remaining appeals—namely, the adversary-proceeding appeals filed by Grand Mesa (20-cv-01458) and Platte River/DJ South (20-cv-01457), respectively, and the contract-rejection appeal filed by Platte River/DJ South (20-cv-01532). Indeed, the Consolidation Motion never even acknowledges the existence of those three appeals.

9. Although Extraction would have expected and appreciated notice of the Consolidation Motion beforehand, it does not oppose the consolidation of the five appeals discussed in that motion. As the foregoing discussion makes clear, those five appeals all concern the same ultimate issue: whether the Bankruptcy Court properly authorized the rejection of the TSAs in dispute.

10. That said, that same ultimate issue is *also* the subject of the three other appeals, as further explained below. Thus, to "preserve the resources of both the Court and the parties," Consolidation.Mot.4, the Court should consolidate all eight appeals arising from Extraction's bankruptcy that are currently pending before this Court.

11. Taking Grand Mesa's adversary-proceeding appeal first, it cannot seriously be contested that it "overlap[s]" with the five rejection-related appeals addressed in the Consolidation Motion. Consolidation.Mot.4. The issue in that appeal is whether the TSAs between Grand Mesa and Extraction—the *same* TSAs addressed in Grand Mesa's other appeals—contain covenants running with the land that preclude Extraction from rejecting those TSAs in bankruptcy. In other words, the adversary proceeding and appeal merely concern another argument by Grand Mesa as to *why* Extraction is precluded from rejecting the TSAs in bankruptcy—just like Grand Mesa's other appeals. That is, all three of Grand Mesa's appeals concern reasons *why* the Bankruptcy Court improperly authorized rejection of the TSAs: because Grand Mesa should have been permitted to commence a FERC proceeding

prior to the Bankruptcy Court's determination (20-cv-01411), because the TSAs contain covenants running with the land (20-cv-01458), or because rejection is unwarranted under business-judgment considerations or public-policy concerns (20-cv-01521). At the end of the day, all of these arguments are directed to the same ultimate issue: whether the Bankruptcy Court properly authorized rejection of the TSAs.

12. The Bankruptcy Court recognized as much. In its ruling authorizing rejection of Grand Mesa's TSAs, the court repeatedly cross-referenced its ruling from the Grand Mesa adversary proceeding to support its conclusion that Extraction may proceed with rejection. *See, e.g.*, D.I.942 at 12 ("The Rejection Counterparties contend that the TSAs contain 'covenants that run with the land' and, thus, cannot be rejected. The Court has previously held on summary judgment in two adversary proceedings brought by [Extraction] against the Rejection Counterparties (at their insistence) that the TSA's do not contain covenants that run with the land." (footnote omitted)); *see also* D.I.942 at 12 n.32, 18 n.57. As Grand Mesa and FERC emphasized in the Consolidation Motion, such cross-references leave no doubt that consolidation is warranted. *See* Consolidation.Mot.4 ("Indeed, in its bench ruling granting Extraction's rejection motion, the bankruptcy court cross-referenced the letter clarifying its bench ruling denying Grand Mesa's lift-stay motion. (D.I. 942 at 20 & n.63). Against this backdrop, the burden on the parties and judicial resources would be greatly lessened by consolidation of the Appeals."). Put differently, if the

Bankruptcy Court's "cross-reference[]" to its earlier letter clarifying its bench ruling denying the lift-stay motion supports consolidation of the lift-stay appeal with the contract-rejection appeal, as Grand Mesa and FERC (correctly) argued in the Consolidation Motion, the Bankruptcy Court's *numerous* cross-references to its earlier adversary-proceeding decision addressing covenants likewise supports consolidation of the adversary-proceeding appeal with the contract-rejection appeal.

13. Nor is that all. The Bankruptcy Court's contract-rejection decision does not just cross-reference its earlier adversary-proceeding decision on purported covenants in the TSAs; it then devotes over *seven pages* to explaining that, *even if* the TSAs contained the covenants, such covenants would not preclude Extraction from rejecting them. *See* D.I.942 at 13-19. In turn, Grand Mesa's "Statement of Issues" for its contract-rejection appeal identifies *not only* the FERC issues that it raises in the Consolidation Motion *but also* the covenant issues. *See* D.I.1173 at 3-4.

14. All told, there can be no serious question that all three of Grand Mesa's appeals—to use Grand Mesa's own words—involve "common factual and legal issues," such that consolidation of all three appeals "would avoid significant repetitive briefing and argument involving overlapping factual and legal issues, and preserve the resources of both the Court and the parties." Consolidation.Mot.2.[4]

[4] For the Court's convenience, Extraction has attached the three Bankruptcy Court decisions giving rise to Grand Mesa's three appeals. *See* Ex.B (lift-stay decision), Ex.C (adversary-proceeding decision), Ex.D (contract-rejection decision). Extraction has also attached Grand Mesa's submitted statements of issues for each of those appeals. *See*

15. Notwithstanding this undeniable overlap, the Consolidation Motion pretends as though Grand Mesa never filed its adversary-proceeding appeal. The only hint that Grand Mesa provides about its plan for that appeal comes from the letter that the parties submitted on December 7 to Chief Magistrate Judge Thynge. In that letter, Grand Mesa suggested that it would seek to certify questions regarding the covenants-running-with-the-land issue addressed in the adversary proceeding to the Colorado Supreme Court and "to have briefing abated pending" the resolution of that request. Ex.A at 3.

16. Grand Mesa's apparent strategy for its adversary-proceeding appeal provides no basis for declining to consolidate it. *First*, the proper way to seek certification is to present such a request in a merits brief—not in a standalone motion at the outset of an appeal that "abate[s]" briefing—so that a court can consider it in full context and in light of all competing arguments.[5] The procedurally correct approach here, therefore, is to consolidate all of Grand Mesa's appeals and have Grand Mesa file its opening brief. That opening brief would raise all of the arguments as to why the Bankruptcy Court's decision to authorize contract rejection

Ex.E (lift-stay appeal statement), Ex.F (adversary-proceeding appeal statement), Ex.G (contract-rejection appeal statement).

[5] The Third Circuit's certification rule is consistent with this understanding. *See* 3d Cir. L.A.R. Misc. 110.1 ("When the procedures of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the procedures of that court, and will stay the case in this court to await the state court's decision whether to accept the question certified. *The certification will be made after the briefs are filed in this court. A motion for certification must be included in the moving party's brief.*" (emphasis added)).

was erroneous (as noted above), and in that brief, Grand Mesa could request certification of the covenants issue. Under Grand Mesa's approach, by contrast, there would be two separate sets of Grand Mesa appeals before this Court, each with its own briefing, which is the opposite of "sav[ing] … time and expense" and "avoid[ing]" duplicative filings. Consolidation.Mot.4.

17. *Second*, Grand Mesa could not satisfy the relevant certification criteria in any event. The Colorado Supreme Court addresses a question certified from a federal court only when "there is no controlling precedent in the decisions of the [Colorado Supreme Court]" on the relevant question and when that question "may be determinative of the cause then pending in the certifying court." Colo. R. App. P. 21.1(a). As the Bankruptcy Court's adversary-proceeding ruling here illustrates, however, the Colorado Supreme Court has already issued multiple decisions that answer the covenants-running-with-the-land question. *See, e.g.*, Adv. Pro. No. 20-50816 D.I.45 at 15-16 (discussing *Nelson v. Farr*, 354 P.2d 163 (Colo. 1960); *Reishus v. Bullmasters, LLC*, 409 P.3d 435 (Colo. 2016); *Taylor v. Melton*, 274 P.2d 977 (Colo. 1954); *Farmers' High Line Canal & Reservoir Co. v. N. H. Real Estate Co.*, 92 P. 290 (Colo. 1907); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327 (Colo. 1898)). More important, the certified question would not be "determinative" of Grand Mesa's adversary-proceeding appeal: as the Bankruptcy Court correctly recognized, *even if* the TSAs contain covenants as a matter of Colorado law, Extraction may *still* reject them. *See* D.I.942 at 19 (explaining that the TSAs may

"be rejected pursuant to Section 365 of the Bankruptcy Code even if they contain covenants running with the land, which they do not").

18. Simply put, Grand Mesa's certification strategy contains procedural problems, and certifying state-law questions to the Colorado Supreme Court will have no impact on the dispositive federal-law questions here. It follows that this Court should consolidate Grand Mesa's adversary-proceeding appeal, which is fundamentally about the propriety of contract rejection, with the five appeals addressed in the Consolidation Motion, which are also fundamentally about the propriety of contract rejection.

19. The two appeals filed by Platte River/DJ South—an adversary-proceeding appeal (20-cv-01457) and a contract-rejection appeal (20-cv-01532)—merit the same treatment, too. At the outset, it bears emphasizing that even Platte River/DJ South recognizes that the Court should consolidate its adversary-proceeding appeal and its contract-rejection appeal, *see* Ex.A at 3, further underscoring the infirmity of Grand Mesa's plan to treat its adversary-proceeding appeal different from its contract-rejection appeal. In any event, given that the two appeals filed by Platte River/DJ South both pertain to the same ultimate issue raised in the six appeals filed by Grand Mesa and FERC—*i.e.*, whether the Bankruptcy Court erred in authorizing the rejection of the TSAs—and indeed involve many of the same arguments, it makes no sense for this Court to keep those appeals separate, with briefing and adjudication taking place on a track different from the Grand

Mesa/FERC appeals. *See, e.g.*, D.I.942 at 12 n.32, 18 n.57 (Bankruptcy Court cross-referencing its ruling from the Platte River/DJ South adversary proceeding in its contract-rejection ruling).[6]

20. In sum, interests in judicial and party efficiency and economy plainly favor the consolidation of all eight appeals arising from Extraction's bankruptcy case currently pending before this Court. The Court should therefore consolidate all eight of them—not just five of them. Upon the entry of such a consolidation order, the Court can instruct the parties to propose a single briefing schedule.[7] In the alternative, the Court can establish the briefing schedule that Extraction proposed to Chief Magistrate Judge Thynge, *see* Ex.A at 2, which is reproduced below:

[6] Extraction has attached the Bankruptcy Court's decision giving rise to Platte River/DJ South's adversary-proceeding appeal. *See* Ex.H. As noted, Platte River/DJ South's contract-rejection appeal arises from the same decision giving rise to Grand Mesa's contract-rejection appeal. *See* Ex.D.

[7] Grand Mesa and FERC ask this Court to "conform" the briefing schedule in the consolidated appeals to the schedule in Grand Mesa's lift-stay appeal (20-cv-01411). *See* Consolidation.Mot.4-5. It is not clear what that request means. To the extent that Grand Mesa and FERC wish to align the briefing for all consolidated appeals in a single briefing schedule, Extraction agrees—at least so long as all eight appeals discussed here are consolidated.

Brief	Length (Pages)	Due Date
Grand Mesa opening brief	40	40 days from order entering schedule
Platte River/DJ South opening brief	40	40 days from order entering schedule
FERC opening brief	30	40 days from order entering schedule
Extraction response brief	80	60 days from filing of last opening brief
Grand Mesa reply brief	20	21 days from filing of response brief
Platte River/DJ South reply brief	20	21 days from filing of response brief
FERC reply brief	15	21 days from filing of response brief

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS

Pursuant to the *Standing Order Regarding Briefing In All Cases*, this response and cross-motion does not exceed 5,000 words, excluding the caption/coverage page, this certificate of compliance, and the signature block. The text of this response and cross-motion is also in 14-point Time Roman typeface.

WHEREFORE, Extraction respectfully requests that this Court enter an order consolidating the appeals in Nos. 20-cv-01411, 20-cv-01412, 20-cv-01457, 20-cv-01458, 20-cv-01506, 20-cv-01521, 20-cv-01532, and 20-cv-01564 and instructing the parties to propose a single briefing schedule.

Dated: December 11, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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

Certificate of Service

I hereby certify that on December 11, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

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EXHIBIT A

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December 7, 2020

VIA EMAIL
The Honorable Mary Pat Thynge
Chief Magistrate Judge
United States District Court
for the District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801-357

Re: *In re Extraction Oil & Gas, Inc.*

Dear Chief Magistrate Judge Thynge:

On November 19, 2020, the Court held a teleconference with counsel for Extraction Oil & Gas, Inc. (Debtor) and Grand Mesa Pipeline, LLC (Grand Mesa) regarding an appeal arising out of Debtor's bankruptcy. *See* 20-cv-1411. During that teleconference, the Court requested that Debtor and Grand Mesa confer with the parties in several other pending appeals that also arise out of Debtor's bankruptcy. *See* 20-cv-1412, 20-cv-1457, 20-cv-1458, 20-cv-1506, 20-cv-1521, 20-cv-1532, and 20-cv-1564. Those other parties are Platte River Midstream, LLC and DJ South Gathering, LLC (Platte River/DJ South) and the Federal Energy Regulatory Commission (FERC).[1] In particular, the Court requested that, in light of the overlapping issues in the appeals, the parties submit by December 7, 2020 a proposal regarding the consolidation and briefing of the appeals.

This letter responds to that request. Although the parties have conferred after the November 19 teleconference in accordance with the Court's request, they could not agree on a path forward for these appeals. Each party's respective position is set forth below.

[1] The appeal in 20-cv-1564 was filed after the November 19 teleconference (by FERC) but similarly relates to the other appeals. In addition, there is another related appeal, 20-cv-1456, but the appellant there, Elevation Midstream, LLC (Elevation) and Debtor are in the midst of reaching a settlement that would result in the dismissal of Elevation's appeal. Accordingly, the parties did not confer with Elevation.

**Whiteford, Taylor & Preston LLC is a limited liability company. Our offices outside of Delaware operate under a separate Maryland limited liability partnership, Whiteford, Taylor & Preston L.L.P.*

Debtor's Position

In Debtor's view, all eight of these appeals are related to the same ultimate issue of whether the bankruptcy court properly authorized the rejection of the contracts in dispute. Although appellants raise different arguments in their various appeals as to *why* rejection was improper—for example, a party should have been able to commence a proceeding with FERC notwithstanding the automatic stay; the contracts contain covenants running with the land; rejection was inappropriate under the business-judgment rule; rejection was inappropriate under a heightened standard; and so forth—all of those arguments are directed to the same overarching claim that contract rejection was erroneous.

Accordingly, Debtor believes that it would be most efficient to consolidate all of the pending appeals into a single case for purposes of briefing and argument. Each of the three appellants—(1) Grand Mesa, (2) Platte River/DJ South, and (3) FERC—would be entitled to file its own opening brief. Debtor would file a single response brief addressing all three opening briefs. And each of the three appellants would be entitled to file its own reply brief.

Because of the number of issues in the appeals and the fact-intensive nature of some of the private appellants' issues, Debtor would not be opposed to an increase in the length of each private appellant's opening and reply briefs. Because Debtor would be responding to three opening briefs, however, there would also be an increase in the length of Debtor's response brief. In addition, given the number of issues and sizes of briefs, Debtor would also propose an extended briefing schedule.

Accordingly, Debtor would propose the following schedule:

Brief	Length (Pages)	Due Date
Grand Mesa opening brief	40	40 days from order entering schedule
Platte River/DJ South opening brief	40	40 days from order entering schedule
FERC opening brief	30	40 days from order entering schedule
Debtor response brief	80	60 days from filing of last opening brief
Grand Mesa reply brief	20	21 days from filing of response brief
Platte River/DJ South reply brief	20	21 days from filing of response brief
FERC reply brief	15	21 days from filing of response brief

Each party would reserve the right to request additional pages or an extension of time, which any other party could oppose.

Debtor believes that this approach is the most efficient and fair for all parties and the Court. Debtor opposes the divergent positions of the parties below as not only inefficient and confusing but prejudicial to Debtor.

Grand Mesa's Position

In Grand Mesa's view, its appeals in 20-cv-1411 and 20-cv-1521 are closely intertwined and, for the sake of efficiency and sensible case management, should be consolidated for purposes of briefing and argument. Grand Mesa also favors consolidation of these two appeals with FERC's appeals in 20-cv-1412, 20-cv-1506, and 20-cv-1564. As described below, FERC agrees with Grand Mesa's request for consolidation of Grand Mesa's appeals with FERC's appeals. Grand Mesa does not believe that the summary judgment appeal, 20-cv-1458, should be consolidated with the stay relief and rejection appeals. Rather, Grand Mesa intends to move to have the state law legal issues in the summary judgment appeal certified to the Colorado Supreme Court and to have briefing abated pending determination from the District Court (and Colorado Supreme Court).

To further facilitate efficiency and economy, Grand Mesa also plans to seek certification of its appeals in 20-cv-1411 and 20-cv-1521 for direct review to the Third Circuit. Grand Mesa believes that these appeals satisfy the criteria for certification, as there is no Third Circuit or Supreme Court precedent regarding rejection of FERC-jurisdictional contracts in bankruptcy; the matters are of public importance; and that certification will serve Debtor's interests and best conserve its resources, as well as facilitate a more expeditious ultimate resolution. It is Grand Mesa's understanding that Debtor opposes certification. Although Grand Mesa asks that Debtor support certification, Grand Mesa nonetheless intends to make the appropriate certification motions if Debtor does not support certification.

Grand Mesa believes that it is premature to address a briefing schedule and page limits until there is a determination regarding consolidation and certification.

Platte River/DJ South's Position

In Platte River/DJ South's view, its two appeals (20-cv-1457 and 20-cv-1532) should be consolidated for both briefing and decision. But it does not agree that its appeals should be consolidated with the Grand Mesa and FERC appeals, because unlike Grand Mesa and FERC, Platte River/DJ South have not appealed the bankruptcy court's ruling on the stay-relief motions concerning FERC's concurrent jurisdiction, and although certain issues may overlap, there are sufficient differences to warrant keeping the parties' appeals separate.

As for the briefing schedule, Platte River/DJ South proposes 42 days for principal briefs and 21 days for a reply brief. The time for Platte River/DJ South's principal brief would begin to run when the court enters an order approving the briefing schedule. As for length, Platte River/DJ South proposes that the parties follow the default rules under the Federal Rules of Appellate Procedure: 13,000 words for principal briefs and 6,500 for its reply brief. The parties would reserve their rights to request extensions of time and increased word limits and to oppose any such requests.

FERC's Position

The Commission agrees that consolidation of its three appeals (Nos. 20-cv-1412, 20-cv-1506, and 20-cv-1564) is appropriate and does not oppose consolidation with the other appellants' appeals provided that the Commission has an independent brief. The Commission would prefer to bypass the district court and appeal directly to the Third Circuit as swiftly as possible, ideally joined with other parties, but alone or in a smaller group, if necessary.

Respectfully submitted,

[Signature Pages on Following Pages]

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cc: Cathleen Kennedy, Judicial Administrator for Judge Thynge (via email)

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

CHRISTOPHER S. SONTCHI
CHIEF JUDGE

824 N. MARKET STREET
WILMINGTON, DELAWARE
(302) 252-2888

October 4, 2020

VIA CM/ECF

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RE: **Extraction Oil & Gas, Inc., *et al.*, Case No.: 20-11548 (CSS)**

Dear Counsel,

I am writing to clarify a portion of my bench ruling of October 2, 2020, denying the Motion of Grand Mesa Pipeline, LLC for Order Confirming that the Automatic Stay Does Not

Apply or, in the Alternative, for Relief from the Automatic Stay [Docket No. 364] and various joinders thereto. More specifically, I wish to clarify and to restate that portion of my bench ruling denying Grand Mesa's alternative request for entry of an order granting relief from the automatic stay to allow Grand Mesa to petition for an order from the Federal Energy Regulatory Commission ("FERC") as to whether rejection of the TSA's during this bankruptcy proceeding is consistent with the public interest and the Interstate Commerce Act, 49 U.S.C. §1 ("ICA"). This letter supplants and replaces the ruling on this issue. All other portions of the bench ruling remain extant and controlling.

Grand Mesa argues that relief from the automatic stay is appropriate "for cause" under section 362(d)(1) of the Bankruptcy Code; that a determination of cause requires a consideration of a totality of the circumstances—including the consideration of "concurrent jurisdiction" over the rejection of contracts shared by FERC and this Court. Grand Mesa argues that the filed rate obligations are subject to the *Mobile-Sierra* doctrine meaning that they "may not unilaterally abrogate or modify their [filed rate obligations] . . . ." *NextEra Energy, Inc. and NextEra Energy Partners, L.P. v. Pacific Gas and Electric Co.; Exelon Corp. v. Pacific Gas and Electric Co.*, 167 FERC ¶ 61,096 at P 23 (quoting *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 534 (2008).

As a preliminary matter and as discussed in the Court's bench ruling, Grand Mesa's request for stay relief to obtain FERC's position as to whether rejection of the TSA's during this bankruptcy proceeding is consistent with the public interest and the ICA is based on a false premise. FERC's recent statement in *ETC Tiger Pipeline, LLC* that the "[r]ejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate" is incorrect. It does no such thing. The Supreme Court recently confirmed in *Mission Product Holdings* that "[a]ccording to Section 365(g), 'the rejection of an executory contract[ ] constitutes a breach of such contract . . . .'" *Mission Product Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1659 (2019). The effect of a debtor's rejection of a contract under section 365 is that "[i]t gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract." *Id.*, 139 S. Ct. at 1661.

Thus, Grand Mesa's request for stay relief seeks to institute a proceeding that is completely irrelevant to the issues before this Court. This Court and FERC do not exercise concurrent jurisdiction, rather they exercise parallel exclusive jurisdiction. It would be a violation of this Court's exclusive jurisdiction over the rejection of executory contracts for FERC to purport to decide the issue Grand Mesa wishes to present; just as it would be a violation of FERC's exclusive jurisdiction for this Court to consider or to decide whether abrogation or modification of the filed rate obligations is consistent with the public interest and the ICA. They are two separate issues for two separate decision makers, each of which is exercising its exclusive jurisdiction. Moreover, Grand Mesa and its supporters have not provided any evidence of an independent reason for allowing a proceeding involving the Debtors to proceed

before FERC. Thus, as granting relief from the automatic stay would involve the pursuit of irrelevant litigation in front of FERC and would violate this Court's exclusive jurisdiction over the rejection of executory contracts Grand Mesas has not and cannot demonstrate cause for relief from the automatic stay.

In the alternative, the Court will consider the elements for relief from the automatic stay to pursue litigation. This is a somewhat awkward fit to the facts before the Court as Grand Mesa is not seeking to commence or to continue civil litigation against the Debtors. Rather, Grand Mesa seeks to commence an administrative proceeding before FERC. However, as that administrative proceeding will directly impact the Debtors it is appropriate to apply the traditional factors.

The Bankruptcy Code authorizes bankruptcy courts to grant relief from the automatic stay for "cause." Courts are to determine "cause" based on the totality of the circumstances in each particular case. The factors courts generally use in determining whether cause exists are: (1) whether any great prejudice to either the bankrupt estate or the debtor will result from a lifting of the automatic stay; (2) whether the hardship to the non-bankrupt party by maintenance of the automatic stay considerably outweighs the hardship to the debtor; and (3) the probability of the creditor prevailing on the merits. *In re Samson Res. Corp.*, 559 B.R. 360, 370 (Bankr. D. Del. 2016) (citations and footnotes omitted).

The first element is whether any great prejudice to either the bankrupt estate or the debtor will result from a lifting of the automatic stay. The Debtors presented evidence on this issue based on the time delay and expense associated with being required to participate in a FERC proceeding. The delay is significant. While there was evidence that FERC would complete its proceeding in five weeks even that delay is significant given the Debtors ongoing efforts to complete its Chapter 11 case. Moreover, FERC's timeline ignores that the parties have a right to appeal to the D.C. Circuit. Such an appeal could take up to a year or more. Lifting the stay would greatly prejudice the Debtors and their estates.

The second element is whether the hardship to the non-bankrupt party by maintenance of the automatic stay considerably outweighs the hardship to the debtor. Grand Mesa did not present any evidence that it would be harmed by maintenance of the automatic stay. Obviously, the harm to the Debtors identified above outweighs the absence of any harm shown by Grand Mesa.

The third element is the probability of the movant prevailing on the merits. There are two possible disputes to consider – the Debtors' motion to reject the TSA's; and the desired FERC proceeding. Grand Mesa did not present any evidence whatsoever as to whether in either case there is even a possibility of success on the merits let alone a probability.

Thus, as each of the applicable factors favor maintenance of the automatic stay, Grand Mesa has not met its evidentiary burden and the request for relief from the automatic stay will be denied.

Debtors' counsel is directed to consult with the parties and submit an agreed order under certification of counsel.

Sincerely,



Christopher S. Sontchi
Chief United States Bankruptcy Judge

CSS/cas

EXHIBIT C

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)
	:	(Jointly Administered)
Debtor.	:	
EXTRACTION OIL & GAS, INC., *et al.*,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adv. Proc. No.: 20-50816 (CSS)
	:	
GRAND MESA PIPELINE, LLC,	:	
	:	
Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT, GRAND MESA PIPELINE, LLC; AND DEFENDANT'S MOTION FOR PERMISSIVE ABSTENTION[1]

INTRODUCTION

This adversary proceeding is one of several arising from the Chapter 11 case of Extraction and its affiliates.[2] The Debtors are in the "upstream" business of extracting hydrocarbons from land in the State of Colorado. In the Chapter 11 case, the Debtors have sought to reject several of what are commonly known as Transportation Services Agreements or TSA's. Broadly speaking, the counterparties to these TSA's are

[1] The Court hereby makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. Pro. 52, as made applicable herein by Fed. R. Bank. P. 7052, which is applicable to this matter by virtue of Fed. R. Bankr. P. 9014. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions or law constitute findings of fact, they are adopted as such.

[2] Undefined terms used in this Introduction have the meaning set forth below.

"midstream" pipelines, which transport the Debtors' hydrocarbons to larger "downstream" pipelines or directly to the depot in Cushing, Oklahoma.

In response to the motion to reject, many of the counterparties, including this defendant, have argued that the TSA's cannot be rejected because they include covenants that run with the land. Moreover, they argue that a determination of whether there are covenants that run with the land requires an adversary proceeding. Hence, the Debtors have filed several adversary proceedings in which they have sought a declaratory judgment that the TSA's do not create covenants that run with the land. Currently, before the Court is the Debtor's motion for summary judgment to that effect.[3]

As set forth in detail below, the Court will grant the Debtors' motion for summary judgment. Under Colorado law, to create a covenant running with the land, the parties must intend to create a covenant running with the land and the covenant must touch and concern the land with which it runs. In addition, there must also be privity of estate between the original covenanting parties at the time of the covenant's creation. Under the unambiguous terms of the Transportation Agreement, the parties intended that the dedication and commitment under section 1.1 of the Transportation Agreement to be a covenant that runs with the land. Nonetheless, the dedication and commitment covenant does not touch or concern the land, and there is no privity of the estate. Thus, as not all the required elements are present, no covenant runs with the land.

[3] The motions to reject are pending in the Chapter 11 case. As of this writing, the motion to reject the Transportation Agreement with Grand Mesa is in the midst of an evidentiary hearing.

Finally, while there are several issues discussed below, the central issue before the Court is whether the dedicated and committed interests in the Transportation Agreement referenced above touch and concern the land. They do not. The dedications and commitments concern only personal property and do not affect the physical use of real property or closely relate to real property. Throughout the Transportation Agreement, the dedicated and committed interests are used to identify the particular minerals that are subject to, set apart for, pledged or committed to the parties' contractual obligations. They do not convey any interests in real property. Thus, they cannot serve to satisfy the touch and concern the land element of the test to establish a covenant that runs with the land.

Also, before the Court is Defendant's motion requesting this Court to abstain from hearing this adversary proceeding. As the overwhelming number of the applicable factors weigh against abstention, the Court will deny the motion to abstain.

THE TRANSPORTATION AGREEMENT.

On June 21, 2016, Extraction Oil & Gas, Inc. ("Extraction"), Grand Mesa Pipeline, LLC ("Grand Mesa") and Bayswater Exploration & Production, LLC ("Bayswater") entered into the Amended and Restated Transportation Services Agreement (the "Transportation Agreement"). *Brief in Support of Plaintiff's Motion for Summary Judgment* (A. D.I. 5-1) ("*Extraction MSJ*"), Ex. A at p. 1.

PROCEDURAL BACKGROUND.

On June 14, 2020, Extraction and its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

On June 15, 2020, Extraction filed a motion in the underlying chapter 11 case seeking the Court's authorization of its rejection of the Transportation Agreement. *Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* (D.I. 14) ("*Motion to Reject*") at p. 1.

On August 4, 2020, Grand Mesa filed its objection to the *Motion to Reject*. *Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* (D.I. 363) ("*Grand Mesa Objection*") at p. 1.

As relevant to this adversary proceeding, Grand Mesa's objection argued that the Transportation Agreement created covenants running with the land, and, therefore, the Court could not authorize Extraction's rejection of the Transportation Agreement. *Id*. at p. 6.

Grand Mesa's objection also argued that the Court's resolution of whether the Transportation Agreement created covenants running with the land could only be properly decided in an adversary proceeding. *Id*.

On August 19, 2020, Extraction instituted the instant adversary proceeding by filing the Complaint for Declaratory Judgment. *Complaint for Declaratory Judgment* (A. D.I. 2) ("*Extraction Complaint*") at p. 1.

In the Extraction Complaint, Extraction requested a declaratory judgment declaring that the Transportation Agreement did not create any covenants running with the land. *Id*. at p. 2.

On August 19, 2020, Extraction filed a motion for summary judgment and brief in support of the motion for summary judgment, and requested that the Court rule in Extraction's favor on its declaratory judgment claim as a matter of law. *Plaintiff's Motion for Summary Judgment* (A. D.I. 4) at p. 1–7; *Brief in Support of Plaintiff's Motion for Summary Judgment* (A. D.I. 5) ("*Extraction MSJ*") at p. 7–9.

On September 17, 2020, Grand Mesa filed a motion to allow its motion for permissive abstention. *Motion to Allow Defendant's Motion for Permissive Abstention* (A. D.I. 19) at p. 1.

On September 17, 2020, Grand Mesa also filed its response to Extraction's summary judgment briefing and a brief in support of Grand Mesa's permissive abstention motion. *Brief in Support of Defendant's Motion for Abstention and Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment* (A. D.I. 20) ("*Grand Mesa Response*") at p. 1.

On September 25, 2020, Extraction filed a notice informing the Court that briefing on the motion for summary judgment in the adversary proceeding was complete. *Notice of Completion of Briefing* (A. D.I. 25) at p. 1.

On September 30, 2020, Grand Mesa and Extraction participated in oral argument on Extraction's motion for summary judgment in the adversary proceeding.

On October 1, 2020, Grand Mesa filed a notice informing the Court that briefing on its permissive abstention motion in the adversary proceeding was complete. *Notice of Completion of Briefing* (A. D.I. 33) at p. 1. The Court informed the parties that oral argument was not necessary.

On October 8, 2020, the parties submitted proposed findings of fact and conclusions of law.

CONTRACTUAL INTERPRETATION

The first recital of the Transportation Agreement states:

> WHEREAS, Grand Mesa is planning to construct, own, operate and maintain an interstate crude oil pipeline and certain associated appurtenant facilities as described in Exhibit A to this Agreement (said pipeline and all associated appurtenances and facilities, the **"Pipeline System"**) that will originate at a station to be constructed near Lucerne, Weld County, Colorado with an injection station near Kersey (Riverside Reservoir), Colorado (collectively, the **"Colorado Stations"**) and terminate at NGL Energy Partners LP's terminal in Cushing, Oklahoma (the **"Cushing Terminal"**)[.]

Extraction MSJ (A. D.I. 5-1), Ex. A at First Recital.

The second recital of the Transportation Agreement states:

> WHEREAS, in consideration and support of Grand Mesa's commitment to construct the Pipeline System, Shipper and Grand Mesa mutually desire to enter into this Agreement pursuant to which Shipper will commit to ship, and will ship after the Pipeline System becomes operational, specified volumes of Crude Petroleum through the Pipeline System from the Colorado stations to the Cushing Terminal and to pay a minimum payment each month in addition to

> a fee applicable to any incremental volumes shipped through the Pipeline System, subject to the terms and conditions set forth below[.]

Id. Ex. A at Second Recital.

The primary purpose of the Transportation Agreement was to govern Grand Mesa's transportation of produced crude petroleum from Lucerne, Colorado to Cushing, Oklahoma via Grand Mesa's pipelines in exchange for a fee from Extraction. *Id*. at First and Second Recitals.

Section 1.1 of the Transportation Agreement states:

> 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.

Extraction's dedication and commitment was "to the performance of th[e] [Transportation] Agreement" and the dedication and commitment was done "for the purpose of exclusively dedicating and committing the Dedicated Interests to Grand Mesa for the performance of this Agreement." *Id*.

Section 1.2 of the Transportation Agreement states:

> 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.

The dedication is the only covenant that was specifically stating that it was intended to run with the land. *Id.* ("The dedication by Shipper described in the preceding paragraph for the performance of this Agreement shall be a covenant running with the land . . . .").

Section 2 ("Committed Volume") of the Transportation Agreement states:

> **"Committed Volume"** means the first fourteen million six hundred six thousand (14,606,000) Barrels of Shipper's Crude Petroleum over the initial seven (7) year term of this Agreement and the first nine million one hundred five thirty thousand (9,135,000) Barrels of Shipper's Crude Petroleum over the additional five (5) year term of this Agreement if extended pursuant to Section 6.1.

Id. at § 2.

Section 2 ("Dedication Area") of the Transportation Agreement states:

> **"Dedication Area"** means the following described lands located within Weld County, Colorado . . . .

Id.

Section 2 ("Dedicated Reserves") of the Transportation Agreement states:

> **"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.

Id.

Section 2 ("Shipper's Crude Petroleum") of the Transportation Agreement states:

> **"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 the Applicable Laws, to commit and dedicate such Crude Petroleum to the performance of this Agreement.

Id.

Section 2 ("Shipper's Reservations") of the Transportation Agreement states, in relevant part:

> **"Shipper's Reservations"** means the following rights reserved to Shipper with respect to the Dedicated Interests: (i) to operate (or cause to be operated) the Wells in its sole discretion, including the right (but not the obligation) to drill new Wells, to repair and rework old Wells, temporarily shut in Wells, renew or extend, in whole or in part, any of the Subject Leases, and to cease production from or abandon any Well or surrender any such Subject Lease, in whole or in part, when no longer deemed by Shipper to be capable of producing Crude Petroleum or other hydrocarbons in paying quantities under normal methods of operation[.]

Id.

Section 2 ("Subject Leases") of the Transportation Agreement states:

> **"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.

Id.

Section 2 ("Total Financial Commitment") of the Transportation Agreement states:

> **"Total Financial Commitment"** means the aggregate of the Fixed Monthly Payment Volumes set out in Schedule A, multiplied by the per-barrel rate set out in Schedule B that is applicable to Committed Shippers at the time the calculation is made, for all months remaining in the Term.

Id.

Section 2 ("Wells") of the Transportation Agreement states:

> **"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.

Section 4.1 of the Transportation Agreement states:

> Commencing as of the Commencement Date and continuing thereafter during the Term of this Agreement, Shipper agrees to tender to Grand Mesa for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff. For the avoidance of doubt, Shipper's obligation to ship or pay its Committed Volume under this Agreement is satisfied in full upon the earlier of (a) Shipper's shipment of (i) fourteen million six hundred six thousand (14,606,000) Barrels under the terms of this Agreement during the initial seven (7) year term of this Agreement and (ii) nine million one hundred thirty five thousand (9,135,000) Barrels under the terms of this Agreement during the additional five (5) year term of this Agreement if extended pursuant to Section 6.1 or (b) by satisfaction of Shipper's Total Financial Commitment. This Agreement shall terminate upon satisfaction of Shipper's obligations under this Section 4.1.

Id. at § 4.1.

The Transportation Agreement's purpose was the facilitation of Grand Mesa's transportation of crude petroleum from Colorado to Oklahoma in exchange for a contractual fee. *Id.* (noting Extraction agreed to "tender to Grand Mesa for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff").

Extraction can satisfy its obligations under the Transportation Agreement by either (1) shipping certain amounts of crude petroleum or (2) payment of the Total Financial Commitment. *Id*. ("For the avoidance of doubt, Shipper's obligation to ship or pay its Committed Volume under this Agreement is satisfied in full upon the earlier of" shipment of a certain volume of crude petroleum or payment of the Total Financial Commitment).

Section 8.2 of the Transportation Agreement states:

> Unless this Agreement is terminated by Shipper due to an Event of Default by Grand Mesa (as more fully described in Section 13.3.1) or due to failure by Grand Mesa to provide Service by the Completion Due Date, as extended pursuant to Section 3.1, upon termination of this Agreement if, for any reason, Shipper has not paid to Grand Mesa the Total Financial Commitment, Shipper will pay to Grand Mesa the amount due within thirty (30) days following receipt of an invoice from Grand Mesa for such amount due. For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by Shipper of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at Shipper's option, any payment made by Shipper to accelerate the satisfaction of that obligation. At the end of each Contract Year, Grand Mesa will provide Shipper a statement of dollars accumulated towards the Total Financial Commitment, as well as Barrels shipped to date.

Id. at § 8.2.

The Total Financial commitment is "satisfied by payment by [Extraction] of the aggregate of the Fixed Monthly Payments," and Extraction has the option "to accelerate the satisfaction of that obligation." *Id*.

Section 8.5 of the Transportation Agreement states, in relevant part:

> Shipper will be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the Pipeline System and after redelivery of such Crude

> Petroleum to Shipper or its designee at the Cushing Terminal. Grand Mesa shall be in control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof into the Pipeline System and prior to redelivery thereof to Shipper or its designee at the Cushing Terminal.

Id. at § 8.5.

Extraction retained exclusive control and possession of all crude petroleum until its severance from the ground and delivery into Grand Mesa's pipeline system. *Id*. ("Shipper will be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the Pipeline System and after redelivery of such Crude Petroleum to Shipper or its designee at the Cushing Terminal.").

Extraction retained title to the crude petroleum throughout transportation, and Grand Mesa never obtained title to the crude petroleum at any point. *Id*. ("Grand Mesa shall be in control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof into the Pipeline System . . . .").

The real property implicated under the Transportation Agreement is located in Colorado. *Id*. at § 2 (defining the Dedication Area).

CONCLUSIONS OF LAW

JURISDICTION

The Court has jurisdiction over this matter. 28 U.S.C. §§ 157 and 1334.

Neither Extraction nor Grand Mesa has challenged the Court's jurisdiction. *Extraction Complaint* (A. D.I. 2) at p. 2; *Grand Mesa Response* (A. D.I. 20) at p. 1–6.

DECLARATORY JUDGMENT

Declaratory judgment is appropriate because there is an actual controversy between the parties: Extraction and Grand Mesa dispute whether the Transportation Agreement creates covenants running with the land in the context of Extraction's rejection of the Transportation Agreement. 28 U.S.C § 2201(a) ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.").

In its objection to the Rejection Motion, Grand Mesa argued that Extraction's attempt to reject the Transportation Agreement was improper because the contract created a covenant running with the land. *Grand Mesa Objection* (D.I. 363) at p. 5–6.

Grand Mesa argues that the Transportation Agreement created a covenant running with the land in the adversary proceeding and that this insulates the contract from rejection. *Grand Mesa Response* (A. D.I. 20) at p. 1–2.

Extraction argues the Transportation Agreement did not create a covenant running with the land. *Extraction Complaint* (A. D.I. 2) at p. 7.

There is a justiciable controversy because the parties dispute the nature of their rights and obligations under the Transportation Agreement. 28 U.S.C § 2201(a).

CHOICE OF LAW

Colorado law governs the substantive real property questions in this case. *Wolf v. Burke*, 32 P. 427, 429 (Colo. 1893) ("[T]he rights and titles to real property are governed by the law of the situs . . . ."); *United States v. Novotny*, 184 F. Supp. 2d 1071, 1087 (D. Colo. 2001) ("Colorado law applies to issues relating to the conveyance and ownership of real property located within Colorado.") (citation simplified).

SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of material fact. Fed. R. Civ. P. 56(a) (noting the "[C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact."); *Tamarind Resort Associates v. Gov't of Virgin Islands*, 138 F.3d 107, 110 (3d Cir. 1998) ("[I]t is a fundamental principle of contract law that 'disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law, and are, therefore, appropriate cases for summary judgment.'").

Grand Mesa has not raised any genuine issue of material fact concerning whether the Transportation Agreement creates a covenant running with the land. *Grand Mesa Response* (A. D.I. 20) at p. 14–21.

Any ambiguity concerning whether the terms of the Transportation Agreement created a covenant running with the land would be resolved in favor of the unrestricted use of the land. *B.B. & C. P'ship v. Edelweiss Condo. Ass'n*, 218 P.3d 310, 315 (Colo. 2009) ("When the covenant is unclear, courts resolve all doubts against the restriction and in favor of free and unrestricted use of property.").

The Transportation Agreement's terms are unambiguous. *Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 120 (Colo. 2016) ("A contractual term is ambiguous 'if it is susceptible on its face to more than one reasonable interpretation.'").

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

COVENANTS RUNNING WITH THE LAND.

The Transportation Agreement's terms unambiguously do not create covenants running with the land. *Extraction MSJ* (A. D.I. 5-1), Ex. A.

Colorado law disfavors the creation of covenants running with the land as a derogation of the common law's preference for the free alienability of land. *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.'").

To create a covenant running with the land, the parties must intend to create a covenant running with the land and the covenant must touch and concern the land with which it runs. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (concerning intent and touch and concern).

In addition, to create a covenant running with the land, there must be privity of estate between the original covenanting parties at the time of the covenant's creation. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (requiring privity of estate between the covenanting parties); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907) (same); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (same).

Failure to satisfy any one of the elements needed to create a covenant running with the land means a covenant cannot run with the land as a matter of law. *See Cloud v. Ass'n of Owners, Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) ("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.").

Contracting parties cannot create covenants running with the land by agreement alone; party intent is necessary for a covenant to run with the land, but such intent is not sufficient. *Id.* ("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."); *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.").

The Transportation Agreement does not create covenants that run with the land because these covenants fail to touch and concern Extraction's mineral estates and the original parties were not in privity of estate at the time of the creation of the covenants.

I. Intent.

To create covenants running with the land, parties must express an intent to create covenants running with the land in clear and unambiguous terms. *TBI Expl. v. Belco Energy Corp.*, No. 99-10872, 2000 WL 960047, at *4 (5th Cir. June 14, 2000) (applying Colorado law and stating "[I]n the cases that have recognized a covenant running with the land, the covenants were in express terms."); *MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *3 (D. Colo. June 24, 2013) (applying Colorado law and noting that if a covenant is ambiguous, the Court must "resolve all doubts against the restriction and in favor of free and unrestricted use of property.").

The only covenant in the Transportation Agreement that the parties clearly intended to run with the land is the dedication for the performance of the Transportation Agreement in Section 1.1. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 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 . . . .").

The parties intended the dedication to run with Extraction's mineral estates. *Id.* ("The dedication by Shipper described in the preceding paragraph for the performance of this Agreement . . . 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.").

The parties did not clearly express an intent for other covenants in the Transportation Agreement to run with the land. *Id.* ("The dedication by Shipper described in the preceding paragraph for the performance of this Agreement shall be a covenant running with the land . . . .").

II. Touch and Concern.

To satisfy touch and concern, the covenant intended to run with the land—the dedication—must closely relate to land with which it is intended to run (here, Extraction's mineral estates), its use, or enjoyment. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (noting "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or enjoyment.'").

"The 'touch and concern' requirement is fulfilled when the covenant operates to benefit the physical use of the land . . . ." *Bigelow v. Nottingham*, 833 P.2d 764, 767 (Colo. App. 1991), *rev'd in part sub nom. on other grounds Haberl v. Bigelow*, 855 P.2d 1368 (Colo. 1993) (noting 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").

Colorado generally follows the common law approach to the touch and concern element. 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.").

Touch and concern is an objective analysis of a covenant's effect upon land and the element does not turn on party intent or word choice. *Cloud v. Ass'n of Owners,* 857 P.2d 435, 440 (Colo. App. 1992) ("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."); *In re Sabine Oil & Gas Corp.*, 567 B.R. 869, 875 (S.D.N.Y. 2017), *aff'd*, 734 Fed. Appx. 64 (2d Cir. 2018) ("[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."); 21 C.J.S. Covenants § 34 ("[T]he intent of the parties is not dispositive, insofar as obligations arising from restrictive covenants that are inherently personal cannot be made appurtenant to the land[.]"); 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) ("The touch and concern requirement 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.").

Grand Mesa argues that the Transportation Agreement and its covenants also touch and concern the land. In support, Grand Mesa cites to Colorado law, which provides that 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 Transportation Agreement 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 (Transportation Agreement 3rd and 4th Recitals and § 10), establish a tariff rate for the cost of shipment (*Id*. at § 7), and obtain priority service on the Grand Mesa pipeline system (*Id*. at § 10.2).

Grand Mesa argues that being able to ship the oil Extraction produces from the Dedicated Interests at stable volumetric rates, for a predictable fee with priority service undoubtedly adds to the enjoyment of Extraction's use and possession of its dedicated leases and wells. In fact, Grand Mesa argues, to further secure these benefits to the Dedicated Interests, the "Original Transportation Services Agreement" was renegotiated and amended (see *Id*. at 3rd and 4th Recitals and § 7.1.5), and replaced by the Transportation Agreement. *Id*. at § 10.2.

The Court disagrees that the Dedicated Interests set forth in the Transportation Agreement satisfy the "touch and concern" element under Colorado law.

A. The Dedication to the performance of the agreement.

The dedication and commitment in Section 1.1 was "to the performance of th[e] [Transportation] Agreement" and the provision was included "for the purpose of exclusively dedicating and committing the Dedicated Interests to Grand Mesa for the performance of this Agreement." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1.

Under the Transportation Agreement, Grand Mesa committed to transport a certain volume of Extraction's crude petroleum from Lucerne, Weld County, Colorado to Cushing, Oklahoma in exchange for a contractual fee. *Id*. at § 4.1 (noting Extraction agreed to "tender to Grand Mesa for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff"); *Id*. at First Recital (discussing the contract in general).

B. The dedication and commitment effects personal, and not real, property.

The dedication and commitment in Section 1.1 does not change the nature of the covenants contained in the Transportation Agreement; it simply identifies the produced minerals subject to the parties' contractual obligations. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1; *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (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) (holding a similar contract merely "identif[ies] and delineat[es] the [parties'] contractual rights and obligations").

The dedication does not touch and concern Extraction's mineral estates because it concerns only personal property and does not affect the physical use of real property or closely relate to real property. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1.

Neither party argues that the Transportation Agreement employed the conventional legal definition of a dedication, which would have meant that the parties intended the donation of Extraction's real property to the public use. *Stagecoach Prop. Owners Ass'n v. Young's Ranch*, 658 P.2d 1378, 1381 (Colo. App. 1982) ("[A] dedication has been defined as an appropriation of land by the owner of the fee to some public use and the adoption thereof by the public."); Dedication, *Black's Law Dictionary* (11th ed. 2019) (defining "dedication" as "[t]he donation of land or creation of an easement for public use").

The plain and ordinary meaning of the word "dedicate" is "to set apart to a definite use." *Dedicate*, *Id*.

The plain and ordinary meaning of "commit" is "to pledge . . . to some particular course or use." *Commit*, *id*.

In accordance with this plain language, the dedication in Section 1.1 identifies the particular produced crude petroleum that is subject to, set apart for, pledged or committed to the parties' contractual obligations under the contract for transportation services. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 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.").

Throughout the Transportation Agreement, terms making up the Dedicated Interests—the Subject Leases, the Wells, the Dedicated Reserves, and Shipper's Crude Petroleum—are used to identify the particular produced crude petroleum that is subject to, set apart for, pledged or committed to the parties' contractual obligations. *Id.* (describing the Subject Leases as "the oil, gas, and mineral leases . . ., deeds, conveyances, and other instruments described in Exhibit D . . . but only to the extent such leases are located within the Dedication Area."); *Id.* (describing the Wells as "a horizontal well for the production of hydrocarbons located on the Subject Leases or on lands otherwise pooled . . . in which [Extraction] 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.* (describing the Dedicated Reserves as "all of the right, title and interest of [Extraction] in and to all Crude Petroleum reserves in and under the Subject Leases and the Wells Owned or Controlled by [Extraction] . . . ."); *Id.* (describing Shipper's Crude Petroleum as "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").

Dedications, generally, only identify the particular produced minerals subject to, set apart for, pledged or committed to the parties' contractual obligations under midstream agreements. *Cf. 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."); *Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1170 (10th Cir. 1999) (noting that dedication contracts are contracts "wherein the producer 'contracts to furnish the purchaser all the gas produced from specified reserves, thus dedicating those reserves to the customer'"); *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) ("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."); 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").

Produced minerals, such as crude petroleum, are personal property and are not real 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.").

The dedication does not limit Extraction's rights to the use of its mineral estates. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2 (reserving to Extraction the right to operates its Wells in its sole discretion, including the ability to cease production).

Extraction retained exclusive control and possession of all crude petroleum until its severance from the ground and delivery into Grand Mesa's pipeline system. *Id.* at § 8.5 ("Shipper will be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the Pipeline System and after redelivery of such Crude Petroleum to Shipper or its designee at the Cushing Terminal.").

Extraction retained title to the crude petroleum throughout the entire transportation process, and Grand Mesa never obtained title to the crude petroleum at any point. *Id*. ("Grand Mesa shall be in control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof into the Pipeline System . . . .").

Extraction retained the right "to operate (or cause to be operated) the Wells in its sole discretion" and this included the rights "to drill new Wells, to repair and rework old Wells, temporarily shut in Wells . . . and to cease production from or abandon any Well or surrender any such Subject Leases . . . ." *Id*. at § 2.

Also, the contractual obligations—the performance of which this dedication was made—require the delivery of a certain volume of produced crude petroleum to Grand Mesa for the provision of transportation services from Colorado to Oklahoma in exchange for a fee, or the payment of a certain amount of money. *Id*. at First Recital; *Id*. at Second Recital; *Id*. at § 4.1.

The provision of such services does not affect the use or enjoyment of crude petroleum in place, or the use of the mineral estate, but crude petroleum that has been severed from the mineral estate and now constitutes the personal property of Extraction, as a merchant in this commodity. As a result, the covenants in the Transportation Agreement do not benefit Extraction in its capacity as a landowner, but benefit and affect Extraction's use of its personal property (*i.e.*, its produced crude petroleum). *Cf.* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914).

Even assuming that the Transportation Agreement has an indirect effect upon Extraction's mineral estates, such as an incidental increase in value, this effect is not closely related to the mineral estates and, therefore, cannot satisfy touch and concern, as its primary effect is on the use and enjoyment of personal property, and not real property. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (noting "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or enjoyment'"); *cf.* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914) (explaining that indirect effects are insufficient).

The "dedication" and "commitment" of real property interests to the performance of contractual obligations and services that closely relate to and affect only the use and enjoyment of personal property does not change this result. To hold otherwise would render the objective "touch and concern" element beholden to the subjective intent of the parties, and allow parties to convert covenants that do not closely relate to real property into covenants that bind successors and assigns simply by recitation of a set phrase.

Extraction's tender options confirm that the Transportation Agreement does not closely relate to Extraction's mineral estates. Extraction may fully perform without providing crude petroleum produced from its own mineral estates and may instead provide crude petroleum produced from the land of third parties. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 4.1 (reciting Extraction's agreement to "tender to Grand Mesa for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff"); *Id*. at § 2 (noting the "Committed Volume" is a set amount of crude petroleum that must be delivered within certain timeframes).

Extraction's payment option also confirms that the Transportation Agreement's covenants do not closely relate to Extraction's mineral estates. *Id*. at §§ 4.1 and 8.2.

Extraction could satisfy its obligations under the Transportation Agreement by either (1) shipping certain amounts of crude petroleum or (2) payment of the Total Financial Commitment. *Id*. at § 4.1 ("For the avoidance of doubt, Shipper's obligation to ship or pay its Committed Volume under this Agreement is satisfied in full upon the earlier of" shipment of a certain volume of crude petroleum or payment of the Total Financial Commitment).

Payment of the Total Financial Commitment is purely the payment of a specified amount of money set forth in the Transportation Agreement. *Id*. ("For the avoidance of doubt, Shipper's obligation to ship or pay its Committed Volume under this Agreement is satisfied in full upon the earlier of (a) [shipment of certain amounts of Crude Petroleum within certain timeframes] or (b) by satisfaction of Shipper's Total Financial

Commitment. This Agreement shall terminate upon satisfaction of Shipper's obligations under this Section 4.1.").

Moreover, Extraction can accelerate payment of the Total Financial Commitment and relieve itself of any obligation to provide crude petroleum. *Id*. at § 8.2 ("For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by Shipper of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at Shipper's option, any payment made by Shipper to accelerate the satisfaction of that obligation.").

The payment of money is a personal commitment that does not touch and concern Extraction's mineral estates. *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) (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").

Grand Mesa's own arguments reveal that the Transportation Agreement only touches and concerns personal property. *Grand Mesa Response* (A. D.I. 20) at p. 18 (arguing 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 . . . .").

The dedication contained in the Transportation Agreement does not closely relate to, or affect the use or enjoyment of Extraction's mineral estates. As a result, it does not

touch and concern Extraction's mineral estates, and the Transportation Agreement does not create covenants that run with the land.

III. Privity of Estate.

The Court is bound to apply Colorado law as declared by the Colorado Supreme Court until the Colorado Supreme Court overrules its prior holdings. *Erie County v. Am. States Ins. Co.*, 573 F. Supp. 479, 486 (W.D. Pa. 1983) ("While plaintiff questions the continuing vitality of *Gordon,* we are bound to consider the [Pennsylvania] Supreme Court's undisturbed holding in *Gordon* as good law on this point."), *aff'd*, 745 F.2d 45 (3d Cir. 1984) *and aff'd sub nom. Am. States Ins. Co. v. Santafemia*, 745 F.2d 45 (3d Cir. 1984); *cf. Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

The Colorado Supreme Court requires privity of estate between the covenanting parties at the time of the covenant's creation before the covenant may run with the land. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (noting "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"); *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."); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (concluding a

covenant running with the land was created, in part, because privity of estate was not denied).

Colorado appellate courts confirm that Colorado law requires privity of estate. *Fed. Deposit Ins. Corp. v. Mars*, 821 P.2d 826, 829 (Colo. App. 1991) ("For contractual obligations between a lessor and lessee to pass to a successor in title of the lessee, there must be either privity of contract or privity of estate between the lessor and that successor in title."); *Fisk v. Cathcart*, 33 P. 1004, 1005 (Colo. App. 1893) ("Under these 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 identifies several covenants that necessarily run with the land, provided that those covenants satisfy privity of estate between the covenanting parties. Colo. Rev. Stat. § 38-30-121 ("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.").

Real property treatises continue to cite Colorado Supreme Court cases for the proposition that privity of estate between the covenanting parties is required. 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* for the proposition that either mutual or horizontal privity are required for a covenant to run with the land).

Grand Mesa has not identified a single Colorado case from the Colorado Supreme Court holding that Colorado law no longer requires the privity of estate between the covenanting parties. *Grand Mesa Response* (A. D.I. 20) at p. 14–21.

The Restatement (Third) of Property does not restate Colorado law regarding covenants that run with the land, and Colorado has not adopted the reforms suggested therein. *See* Restatement (Third) of Property Servitudes § 3.2 (Am. Law Inst. 2000) (dispensing with the required touch and concern element and stating "[n]either the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude.").

Privity of estate requires that any covenant that allegedly runs with the land be accompanied by a contemporaneous conveyance of some interest in the land with which the covenant runs. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (noting "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"); 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 . . . ."); 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").

The conveyance contemplated by privity of estate cannot be satisfied by the purported covenant running with the land itself; there must be a conveyance of some independent real property interest. *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.").

The Transportation Agreement did not convey to Grand Mesa any real property interest in Extraction's mineral estate. *Extraction MSJ* (A. D.I. 5-1), Ex. A.

Grand Mesa failed to identify any real property interest in Extraction's mineral estate that was purportedly conveyed contemporaneously with the alleged covenant running with the land. *Grand Mesa Response* (A. D.I. 20) at p. 14–21.

The dedication is not a conveyance of a real property interest in Extraction's mineral estates capable of satisfying privity of estate. *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.").

As discussed above, the dedication simply identifies the particular produced crude petroleum that is subject to the parties' contractual obligations. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1; *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (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 Transportation Agreement's dedication was not intended to convey any real property interest implicated thereunder; Extraction still owns real property interests that

it dedicated to the performance of the Transportation Agreement. *Id*. at §1.1 (dedicating and committing to the performance of the 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").

Extraction retains its rights, title, and interest in its leases. *Id*. at § 2 (reserving to Extraction the right to "renew or extend, in whole or in part, any of the Subject Leases, and to cease production from or abandon any Well or surrender any such Subject Lease, in whole or in part, when no longer deemed by Shipper to be capable of producing Crude Petroleum or other hydrocarbons in paying quantities under normal methods of operation").

Extraction retains its rights, title, and interest in its wells. *Id*. at §1.1 (reserving to Extraction the right "to operate (or cause to be operated) the Wells in its sole discretion, including the right (but not the obligation) to drill new Wells, to repair and rework old Wells, temporarily shut in Wells, renew or extend, in whole or in part, any of the Subject Leases, and to cease production from or abandon any Well or surrender any such Subject Lease . . . .").

Extraction retains its rights, title and interest in its dedicated reserves and unproduced crude petroleum. *Id*. (reserving to Extraction the right "to operate (or cause to be operated) the Wells in its sole discretion, including the right (but not the obligation) to drill new Wells, to repair and rework old Wells, temporarily shut in Wells, renew or extend, in whole or in part, any of the Subject Leases, and to cease production from or abandon any Well or surrender any such Subject Lease . . . ."); *Id*. at § 8.5 ("Shipper will

be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the Pipeline System and after redelivery of such Crude Petroleum to Shipper or its designee at the Cushing Terminal."); *Id.* ("Grand Mesa shall be in control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof into the Pipeline System . . . .").

As a result, the original covenanting parties to the Transportation Agreement were not in privity of estate at the time of the creation of the covenants therein, and the Transportation Agreement contains no covenants that run with the land. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (requiring privity of estate between the covenanting parties).

PERMISSIVE ABSTENTION

Grand Mesa argues that 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. Grand Mesa further argues that the Complaint involves a determination of an unsettled issue under Colorado law, with implications that go beyond solely the Plaintiff's property rights in this case. Thus, it concludes that this Court should exercise its discretion to permissively abstain.

The Court disagrees. Permissive abstention is not warranted. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

Generally, abstention is an extraordinary exception to the Court's responsibility to rule on the matters before it. *In re Venoco, LLC*, 596 B.R. 480, 492 (Bankr. D. Del. 2019) (citation simplified) ("The Court recognizes that abstention is an extraordinary exception to its responsibility to rule on matters before it. The Court is therefore generally reluctant to abstain from a case properly before it.").

The Third Circuit has identified twelve factors for consideration when assessing whether permissive abstention is appropriate. *In re Cubic Energy, Inc.*, 603 B.R. 743, 755 (Bankr. D. Del. 2019) ("The Third Circuit has identified twelve factors when considering whether permissive abstention is appropriate. These factors include the: (1) effect or lack thereof on the efficient administration of the estate, (2) extent to which state law issues predominate over bankruptcy issues, (3) difficulty or unsettled nature of the applicable state law, (4) presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) jurisdictional basis, if any, other than 28 U.S.C. § 1334(c)(1), (6) degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) substance rather than form of an asserted 'core' proceeding, (8) 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) burden of the court's docket, (10) likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) existence of a right to a jury trial, and (12) presence in, the proceeding of non-debtor parties.).

"The Court's analysis of the relevant factors 'is not a mathematical formula.' And this list is not exhaustive." *In re Cubic Energy, Inc.*, 603 B.R. at 755.

Permissive abstention involves an equitable consideration of the circumstances and is not formulaic. *In re Maxus Energy Corp.*, 597 B.R. 235, 247 (Bankr. D. Del. 2019), *leave to appeal denied*, 611 B.R. 532 (D. Del. 2019) ("Permissive abstention is not formulaic and involves an equitable consideration of the circumstances and weighing of the factors.").

Grand Mesa's (1) argument concerning the necessity and propriety of an adversary proceeding; and (2) agreement to respond to the motion for summary judgment warrant denial of Grand Mesa's request for permissive abstention. *Id*. ("Permissive abstention is not formulaic and involves an equitable consideration of the circumstances and weighing of the factors.").

A vast majority of the Third Circuit's twelve factors also favor the Court's exercise of its jurisdiction and refusal of Grand Mesa's request for permissive abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

I. Permissive Abstention - First Factor.

The first factor concerning the "effect or lack thereof on the efficient administration of the estate" strongly weighs against abstention. *Id*.

The Court has an obligation to exercise its jurisdiction because resolution of the issues in the adversary proceeding affects the claims resolution process; Grand Mesa requested this adversary proceeding to be filed because it sought to avoid rejection based on the presence of an alleged covenant running with the land. *In re Welded Constr., L.P.*, 609 B.R. 101, 113 (Bankr. D. Del. 2019) (noting the "bankruptcy court has an inherent responsibility to exercise its jurisdiction to effectuate one of the core features of the bankruptcy process itself—the claims resolution process").

Abstaining from deciding the matters in this adversary proceeding would be an inefficient use of resources. Briefing on the motion for summary judgment is complete, and Grand Mesa raises no genuine issues of material fact. The parties have participated in oral argument on the motion for summary judgment, and the issue has been submitted to the Court for adjudication. Other adversary proceedings currently pending before this Court also involve application of this same area of Colorado law in the context of the rejection of oil and gas midstream agreements, and will be decided regardless of the Court's abstention in this adversary proceeding. Permissively abstaining from resolution of these issues while they are relitigated in Colorado state court to a non-appealable judgment could potentially delay resolution of the adjudication of the Debtors' rejection of the contract at issue for several months, if not over a year. *In re Maxus Energy Corp.*, 597 B.R. at 247 ("Granting [the] [m]otion would require two separate courts to consider a similar set of operative facts [and legal issues] concerning related defendants and with respect to similar issues. This would neither conserve judicial resources nor avoid . . . inconsistent rulings—traditional arguments for abstention.").

II. Permissive Abstention - Second Factor.

The second factor concerning whether "state law issues predominate" likely weighs in favor of abstention, but is of lesser significance. *In re Venoco, LLC*, 596 B.R. 480, 493 (Bankr. D. Del. 2019), aff'd, 610 B.R. 239 (D. Del. 2020) ("Clearly, state law issues predominate, which favors the Defendants. The Court is, however, very accustomed to deciding state law issues which somewhat reduces the significance of this factor.").

III. Permissive Abstention - Third Factor.

The third factor concerning the "difficulty or unsettled nature of the applicable state law" weighs against abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

The law is settled; Colorado has consistently applied the traditional common law elements for covenants that run with the land to decide similar cases since before it was a state. *See Hayes v. New York Gold Min. Co.*, 2 Colo. 273, 279 (1874) (concluding a promise affected "the quality and value of the premises demised, and [was] therefore within the definition of real covenants which run with the land").

Bankruptcy courts are competent to resolve these issues. *In re Sabine Oil & Gas Corp.*, 550 B.R. 59, 61 (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).

IV. Permissive Abstention - Fourth Factor.

The fourth factor concerning the "presence of a related proceeding commenced in state court or other non-bankruptcy court" weighs against abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

Grand Mesa concedes there is no pending non-bankruptcy case. *Grand Mesa Response* (A. D.I. 20) at p. 11.

V. Permissive Abstention - Fifth Factor.

The fifth factor concerning the jurisdictional basis, if any, other than section 1334 weighs against abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

This proceeding arises from the chapter 11 case and seeks a declaratory judgment that the Transportation Agreement does not create covenants running with the land in

order to support Extraction's motion to reject the contract (and in response to Grand Mesa's objection). *Extraction Complaint* (A. D.I. 2) at 7.

First, the adversary proceeding is a core proceeding because Extraction's ability to reject the Transportation Agreement under the Bankruptcy Code is at issue, which directly implicates the administration of the estate. *In re DBSI, Inc.*, 409 B.R. 720, 727 (Bankr. D. Del. 2009) ("In short, a 'core' proceeding 'must have as its foundation the creation, recognition, or adjudication of rights which would not exist independent of a bankruptcy environment although of necessity there may be peripheral state law involvement.'"); 28 U.S.C. § 157(b)(2)(A) (stating that core proceedings include "matters concerning the administration of the estate").

Second, the adversary proceeding is a core proceeding because Grand Mesa asserts that the Transportation Agreement creates covenants running with the land in objection to Extraction's ability to reject the Transportation Agreement. *In re DBSI, Inc.*, 409 B.R. at 728 ("Moreover, even if the instant proceeding does not fall within one of § 157(b)(2)'s enumerated categories, I find that it is a 'core' proceeding. Republic challenges the effect of orders that sought to reject certain leases and assume and assign certain subleases pursuant to § 365. The rejection and assumption and assignment of leases and executory contracts are fundamental issues of bankruptcy law unique to the Bankruptcy Code.").

Moreover, the relationship between the resolution of the adversary proceeding and rejection is such that this factor favors Extraction. *In re Venoco, LLC*, 596 B.R. 480, 493 (Bankr. D. Del. 2019) (citation simplified) ("[E]ven if the adversary proceeding is non-

core, the relationship to the Chapter 11 case is [of] such strength that the advantage remains with Debtors.").

VI. Permissive Abstention - Sixth Factor.

The sixth factor concerning the "degree of relatedness or remoteness of the proceeding to the main bankruptcy case" strongly weighs against abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

This adversary proceeding was filed in response to Grand Mesa's objection raising the purported creation of a covenant running with the land and to facilitate the Court's resolution of Grand Mesa's objection to the rejection of its executory contract. *Grand Mesa Objection* (D.I. 363) at p. 6.

VII. Permissive Abstention - Seventh Factor.

The seventh factor concerning the "substance rather than form of an asserted 'core' proceeding" likely weighs in favor of abstention because of the adversary proceeding's state law focus. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

VIII. Permissive Abstention - Eighth Factor.

The eighth factor concerning 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" either weighs against abstention or is neutral. *Id.*

It is not efficient to sever this proceeding from the motion to reject. *See In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 73 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 Fed. Appx. 64 (2d Cir. 2018) ("[B]ifurcating the motion to reject and further proceedings to finally resolve the underlying property law dispute is an inefficient use of

judicial and private resources; it would have been far preferable for the Court to hear the two together.").

IX. Permissive Abstention - Ninth Factor.

The ninth factor concerning the "burden of the court's docket" is neutral. *In re Cubic Energy, Inc.*, 603 B.R. at 755 ("The question of docket burden is neutral, as the burden would eventually fall on *some* court and [the] Court can not ascertain the degree of burden the [other] court would suffer would this Court abstain.").

X. Permissive Abstention - Tenth Factor.

The tenth factor concerning the "likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties" weighs in favor of abstention. *Id*.

Extraction is not forum-shopping; the adversary proceeding was filed at Grand Mesa's insistence in response to Grand Mesa's objection to Extraction's motion to reject. *Grand Mesa Objection* (D.I. 363) at p. 6.

XI. Permissive Abstention - Eleventh Factor.

The eleventh factor concerning the "existence of a right to a jury trial" weighs against abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

Grand Mesa concedes it has no right to a jury trial. *Grand Mesa Response* (A. D.I. 20) at p. 14.

XII. Permissive Abstention - Twelfth Factor.

The twelfth factor concerning the "presence in, the proceeding of non-debtor parties" weighs against abstention. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

Grand Mesa concedes there are no non-debtor parties whose presence would support permissive abstention. *Grand Mesa Response* (A. D.I. 20) at p. 14.

CONCLUSION

As set forth above, the Transportation Agreement is unambiguous and the question of whether the Transportation Agreement contains any covenants that run with the land is a legal one. There is no genuine issue of material fact. Extraction has met its burden for entry of summary judgment against Grand Mesa based on the plain meaning of the Transportation Agreement. The parties intended the dedication and commitment in section 1.1 of the Transportation Agreement to be a covenant that runs with the land (the parties did not intend that any other provision of the contract to create a covenant that runs with the land); the Transportation Agreement does not touch and concern the land; and there was no privity among the parties. Thus, as not all the required elements are present, no covenant runs with the land and the Court will enter summary judgment in favor of Extraction on the sole count of the complaint. In addition, as the overwhelming number of the applicable factors weight against abstention, the Court will

deny the motion to abstain. An Order and Judgment will be entered.

By the Court:

Christopher S. Sontchi
Chief United States Bankruptcy Judge

Date: October 14, 2020

EXHIBIT D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	Case No. 20-11548 (CSS)
EXTRACTION OIL & GAS, *et al.*	)	
	)	
	)	Related Docket Nos.: 14, 363, 377,
Debtors.	)	412, 482, 655, 681, 801, and 803
	)	

BENCH RULING

Before the Court is a series of motions and notices to reject unexpired leases of nonresidential real property and executory contracts (*see* D.I. 14, 377 and 412, collectively, the "Motions") as well as objections from Grand Mesa Pipeline, LLC (D.I. 363 and 803, referred to as "Grand Mesa"); and Platte River Midstream, LLC, DJ South Gathering, LLC, and Platte River Holdings, LLC (D.I. 482, 655 and 801, collectively referred to as "Platte River" and with Grand Mesa, the "Rejection Counterparties") and the contracts the Debtors seek to reject, collectively, the "Transportation Services Agreements" or "TSAs").[1] The Court held evidentiary hearings on the rejection motions on October 7, 20, 26, and 27, and, on October 28, the Court heard closing arguments.[2]

[1] The TSAs at issue in the Motions are: (i) **Grand Mesa TSAs:** (a) Amended and Restated Transportation Agreement dated June 21, 2016 (the "Bayswater Contract"), Debtors' Ex. 32; (b) Amended and Restated Transportation Services Agreement dated February 19, 2016 (the "Grand Mesa Contract" and together with the Bayswater Contract, the "Grand Mesa TSAs"), Debtors' Ex. 33; and (ii) **Platte River TSAs:** (a) First Amended and Restated Transportation Services Agreement dated April 14, 2017 (the "Platte River Contract"), Debtors' Ex. 24; (b) Transportation Services Agreement dated May 16, 2018 (the "DJ South Contract" and together with the Platte River Contracts, the "Platte River TSAs"), Debtors' Ex. 26.

[2] The Transcripts are docketed as D.I. 812, 877, 926, and 933. Citations to the hearing transcripts will be noted as Date Hr'g Tr. page:line.

JURISIDICTION

The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter, pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper, pursuant to 28 U.S.C. §§ 1408 and 1409. The bases for the relief requested are sections 105(a), 363(b), and 365(a) of the Bankruptcy Code, Bankruptcy Rules 6004, 6006, and 6007, and Bankruptcy Local Rule 9013-1.

BACKGROUND

Extraction Oil & Gas and certain of its affiliates (the "Debtors") filed their petitions under Chapter 11 of the Bankruptcy Code on June 14, 2020. The Debtors cases are jointly administered for procedural purposes.[3] The Debtors operate primarily in the "upstream" oil and gas sector, including the exploration and production of oil and gas. The oil and gas industry can be broken up into three segments: (i) upstream, (ii) midstream, and (iii) downstream. Upstream activities are mainly "Exploration and Production" or E&P activities that focus on locating and extracting hydrocarbons from beneath the surface. Common upstream assets include mineral leases, producing wells, and associated production equipment. The midstream sector includes the activities involved in gathering, transporting, processing, and storing hydrocarbons. Common midstream assets include gathering pipelines, separation facilities, and tankage. The downstream sector is focused on the marketing and distribution of the products derived from the

[3] D.I. 79.

extracted hydrocarbons to the ultimate end users. Common downstream assets include refineries and retail sites.

The majority of the Debtors' assets are in the upstream sector, but the Debtors also have limited ownership in midstream assets. Prior to bankruptcy, the Debtors contracted with midstream counterparties, including the Rejection Counterparties, to transport their oil and gas from the production points to downstream providers. These TSAs are not only agreed to between and among the parties, but the rates are approved by the Federal Energy Regulatory Commission ("FERC"). The Debtors filed the Motions seeking authorization to reject these TSAs, which are contested by the Rejection Counterparties. This is the Court's ruling on the rejection of the TSAs.

ANALYSIS

A. Rejection of Leases and Executory Contracts

Section 365(a) of the Bankruptcy Code provides that a debtor in possession "may assume or reject any executory contract or unexpired lease of the debtor" subject to the court's approval. Courts generally authorize debtors to assume or to reject executory contracts and unexpired leases where the debtors appropriately exercise their "business judgment."[4] "An executory contract is a contract under which the obligation of both the

[4] *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39–40 (3d Cir. 1989); *In re Fed. Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *Robertson v. Pierce (In re Chi-Feng Huang)*, 23 B.R. 798, 800 (B.A.P. 9th Cir. 1982); *Lubrizol Enters. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1047 (4th Cir. 1985) (holding that absent bad faith or abuse of discretion, deference is given to debtor's business judgment); *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 849 (Bankr. W.D. Pa. 1987); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994).

bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[5]

Importantly, "although Congress knew how to craft exceptions to rejection, Congress declined to except FERC approved contracts."[6] There is no prohibition on or limitation against rejecting a FERC approved contract. Therefore, the Court was tasked with determining whether (i) the Debtors' decision to reject was a proper exercise of business judgment, (ii) public policy prohibits the rejection of such contracts; and (iii) the matter should be referred to FERC.

B. Business Judgment

The "business judgment" test requires a showing that rejection of the executory contract or unexpired lease will benefit the debtor's estate.[7] Courts generally will not second-guess a debtor's business judgment concerning the rejection of an executory contract or unexpired lease.[8] The "business judgment" test merely requires a showing that rejection will benefit the debtor's estate. "A debtor's decision to reject an executory

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[5] *In re Exide Techs.*, 607 F.3d 957, 967 (3d Cir. 2010), as amended (June 24, 2010) (*quoting In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 239 (3d Cir. 1995)). *See also Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1667 (2019) (Section 365 "enables a debtor to 'reject any executory contract'—meaning a contract that neither party has finished performing.").

[6] *In re Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240, at *6 (Bankr. S.D. Tex. Aug. 21, 2020). *See, e.g.*, 11 U.S.C. §§ 365(n)(intellectual property rights), 365(h)&(i) (real property leases and time share interests).

[7] *In re Trans World Airlines*, 261 B.R. 103, 121 (Bankr. D. Del. 2003). ("A debtor's decision to reject an executory contract must be summarily affirmed unless it is the product of 'bad faith, or whim or caprice'") (*quoting In re Wheeling-Pittsburgh Steel Corp.*, 72 B.R. at 849–50); *In re Trans World Airlines, Inc.*, No. 01-0056, 2001 Bankr. LEXIS 722, at *7–8 (Bankr. D. Del. Mar. 16, 2001) (noting that 5 the standard under section 365 requires consideration of the benefit of the rejection to the debtor's estate).

[8] *See Trans World Airlines*, 261 B.R. at 121.

contract must be summarily affirmed unless it is the product of '**bad faith, or whim or caprice**.'"[9] Importantly, the Court cannot substitute its judgment for the Debtors' judgment[10] and absent a heightened standard such as bad faith or abuse of discretion the Debtors' business judgment will be not altered.[11]

The Debtors assert that the TSAs are neither compatible with the Debtors' ongoing business needs nor a source of potential value for the Debtors' future operations, creditors, or other parties in interest. Absent rejection, the TSAs impose ongoing obligations on the Debtors and their estates that constitute an unnecessary drain on the Debtors' resources. Here, the Debtors presented evidence of the following: (i) Debtors' estate will benefit from rejection of the TSAs because the Grand Mesa, Bayswater, and Platte River Contracts charge rates significantly above market rates, the estate will save millions of dollars annually if allowed to reject these contracts; and (ii) Rejecting the DJ South Contract is in the Debtors' interest because the Debtors would be able to use an alternative service provider that, unlike DJ South, will take their crude oil to Platteville, a location where the Debtors can sell their crude oil for a significantly higher price.

The Rejecting Counterparties presented evidence but did not rebut the Debtors' business judgment. In fact, testimony reflected that the Debtors may also use a "walk-

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[9] *Id.* (emphasis added).

[10] *In re Prime Motor Inns*, 124 B.R. 378, 381 (Bankr. S.D. Fla. 1991).

[11] *In re Old Carco LLC*, 406 B.R. 180, 188 (Bankr. S.D.NY. 2009) ("Moreover, the business judgment standard . . . requires that the decision be accepted by courts unless it is shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankruptcy retained business discretion."). *See also Federal Mogul Global, Inc.*, 293 B.R. at 126 ("The business judgment test dictates that a court should approve a debtor's decision to reject a contract unless that decision is the product of bad faith or a gross abuse of discretion.").

up" rate with some of the midstream pipeline providers.[12] Additionally, the Debtors presented evidence of ability to use trucks as alternatives to using the pipelines. Furthermore, the Debtors can shut-in wells (or partially shut-in wells) until alternative shipment methods become available.

The Debtors presented evidence that the alternative transportation would cost less and that a new midstream pipeline may transport the oil to a more favorable location in some instances. With the current contract rates at higher-than-market value for transporting the Debtors' oil, it is within the Debtors' business judgment to reject these contracts and to seek alternative providers, whether by walk-up rates, trucking, or new pipeline contracts.

More specifically, the Debtors presented the testimony of its Chief Executive Officer Matthew Owens. Mr. Owens, despite his youth, is one of the most competent, well informed, measured, and persuasive executives that has ever testified before me. He made a solid case in favor of the Debtors' business judgment. Mr. Owens testified that rejection enables the Debtors to access the pipeline providers at a more competitive Platteville terminal[13] and that such access will save the company tens of millions of dollars per year.[14] Mr. Owens continued that without the onerous rates and deficiency

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[12] The Court finds the statements of certain of the Rejecting Counterparties that, in a fit of pique, they will not accept the Debtors as a walk-up shipper not to be credible.

[13] Oct. 7, 2020 Hr'g Tr. 79:10-15 (Access to the Platteville terminal "is extremely important for the company because the three other pipelines that perform the same service as Grand Mesa are located in Platteville; therefore, for the company to access a competitive market, we need to have access to Platteville. Instead, we're stuck in Lucerne and stuck with one person who can set the price.").

[14] Oct. 7, 2020 Hr'g Tr. 80:22-24 ("[I]f we were to access Platteville . . . we estimate that the company could increase its margins in 2021 by anywhere from $25 to $32 million dollars [if it could access Platteville].").

claims, rejection of the DJ South Contract would save the Debtors between $4.5 and $5.5 million in 2021.[15] Furthermore, Mr. Owens testified that, as to Platte River, reasonable alternatives could be up-and-running within 90 days[16] because the alternative infrastructure was already within a mile of the well (versus constructing a whole new pipeline that was 90-miles from the well).[17] Rogan McGillis, ARB Midstream's Chief Financial Officer, who was a competent and well-prepared witness but whose testimony was self-serving and, ultimately, unpersuasive, could not rebut the timing or feasibility of the Debtors' alternatives to the Platte River gathering system.

Mr. Owens also testified about the DJ South pipeline. He stated that alternative pipeline providers will be able to install the short connections between their existing infrastructure and the collection points in the DJ South dedication area in a matter of months – again, the testimony reflects that the alternative pipeline providers are relatively close to the Debtors' wells.[18] Again, Mr. McGillis could not rebut the timing or feasibility of the Debtors' alternatives to the DJ South gathering systems.

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[15] *Compare* Debtors Ex. 42 to Debtors Ex. 57.

[16] Oct. 7, 2020 Hr'g Tr. 87:11-24 ("[The timeline for alternative pipeline companies] varies pad by pad. . . . [W]e had some pads that are already connected to oil gathering companies. . . . We have other pads where . . . it would only require building a couple hundred feet of flow line connections and we think that would be done in a month timeframe or less. And then a few of the other pads that are further away, they gave us a schedule of . . . three to six months to obtain the necessary rights-of-way. . . . In most cases, for the alternate pad that they would be connecting, it's anywhere from a half mile to a mile and a half connection, so not very long.").

[17] Oct. 7, 2020 Hr'g Tr. 88:3-13 ("[F]or Platte River to construct its entire gathering system it took . . . eighteen months or so because they were building around ninety miles of pipe . . . [T]he third-party company we received a proposal from . . . has already constructed the backbone of their pipeline systems. And all they need to do are build small connectors to connect us into the backbone of that system.").

[18] Oct. 7, 2020 Hr'g Tr. 102:8-18 ("[T]he alternatives [to DJ South] are very close to the Badger central gathering facility . . . they only need to connect to one point. They only need to connect to that central gathering facility. They do not need to connect to multiple well pads like the alternative to Platte River

As to Platte River and DJ South, Mr. Owens also testified about the economic benefit of rejection[19] of the TSAs and the realistic alternatives.[20] Mr. Owens provided details about the cost of alternatives[21] and the timeframe to alternative transition.[22] Mr. Owens continued regarding the Debtors' analysis of the regulatory requirements to

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would have to do. So the fact that they only need to build out to one point that is roughly . . . one to one and a half miles away, we believe in our talks with them that it could be as little as ninety days to as much as 180 days to finish that connection."); Oct. 7, 2020 Hr'g Tr. 102:21-103:4 ("You can't really compare [the time to construct the DJ South system to the time to construct an alternative] because for DJ South they were building a large system which I believe is probably 50 miles or so in length, so it took them a long time to do that, where these companies that have submitted bids to us have already built out their pipeline systems to Platteville, so all they need to do is connect into their existing infrastructure which, as I mentioned, is very close to the Badger central gathering facility.").

[19] Oct. 7, 2020 Hr'g Tr. 80:22-24 (Platte River Contract: "[W]e estimate that the company could increase its margins in 2021 by anywhere from $25 to $32 million dollars" if it had access to the Platteville terminal); Oct. 7, 2020 Hr'g Tr. 102:1-3 (DJ South Contract: "[T]he total savings based on the bids that we have received would be anywhere from $4.5 to $5.5 million dollars in calendar year 2021.").

[20] Oct. 7, 2020 Hr'g Tr. 86:6-13 (Platte River Contract: "[W]e reached out to multiple trucking companies to solicit bids, as well as alternate oil gathering companies that perform the same services as Platte River. And we solicited bids from them, as well as timing for when they thought they could transport the crude from the pads that we laid out, and that is how we used or that is how we came up with the timing of this oil being pivoted off of the Platte River system."); Oct. 7, 2020 Hr'g Tr. 100:21-101:2 (DJ South Contract: "[Extraction] have gone out to multiple other oil gathering companies who have pipeline very close within about a mile to a mile and a half or so of the Badger central gathering facility. And we have received bids from them to connect their oil pipeline to the Badger central gathering facility and transport the oil from the Badger central gathering facility to the Platteville Terminal.").

[21] Oct. 7, 2020 Hr'g Tr. 80:7-15 (Platte River Contract: "[Extraction] have gone out and done marketing analysis and received proposals from companies who could ship our oil from Platteville . . . the cost that we have received from the pipelines in Platteville to transport our oils to the same place in Cushing, Oklahoma is $1.60 to $2.20 per barrel."); Oct. 7, 2020 Hr'g Tr. 101:22-102:1 (DJ South Contract: "The alternatives that we received are . . . at sixty cents to $1.00 per barrel and we would anticipate the gross spend associated with these contracts that we've been offered to be $1.5 to $2.5 million dollars.").

[22] Oct. 7, 2020 Hr'g Tr. 87:11-24. (Platte River Contract: "[The timeline for alternative pipeline companies] varies pad by pad. . . . [W]e had some pads that are already connected to oil gathering companies. . . . We have other pads where . . . it would only require building a couple hundred feet of flow line connections and we think that would be done in a month timeframe or less. And then a few of the other pads that are further away, they gave us a schedule of . . . three to six months to obtain the necessary rights-of-way. . . . In most cases, for the alternate pad that they would be connecting, it's anywhere from a half mile to a mile and a half connection, so not very long."); Oct. 7, 2020 Hr'g Tr. 102:16-18 (DJ South Contract: "[W]e believe in our talks with [alternative providers] that it could be as little as ninety days to as much as 180 days to finish that connection [to the Badger central gathering facility].").

transition to another pipeline provider,[23] including interim options, such as shutting-in, trucking, and/or walk-up shipping.[24] Mr. Owens described the best and worst-case scenarios for making the transition to new pipeline suppliers.[25]

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[23] Oct. 7, 2020 Hr'g Tr. 88:18-25 ("[The alternative providers' need to obtain permits and rights-of-way] was submitted to us in their bid, so we gave them the location of our pads and they looked at the distance from their current infrastructure to the pads that we would like to have connected, and they analyzed quickly the routes that they would probably most likely take to get there. And in their bid, they provided what they thought the timing would be, so that was assumed in that three to six-month timeframe that we've talked about with the alternative providers.").

[24] Oct. 7, 2020 Hr'g Tr. 89:15-90:3 (Platte River Contract: "[T]he majority of our pads we would be able to start trucking in very short order so those would not have any significant down times. But we have spent a lot of time thinking about what we would do during that several month period for the few pads that would currently require a new pipeline in order to continue producing. Our alternative there would be set those pads up for trucking, get a modification temporarily for permits to allow trucking or we could continue to ship on the Platte River system as a walk-up shipper. But, in the worst case, we would shut in those wells for a short period of time until the new company is connected, and then we would quickly make up that deferred oil production that was not produced during the short shut in period.); Oct. 7, 2020 Hr'g Tr. 103:9-23 (DJ South Contract: "We are unable to truck any oil from the central gathering facility, so we would have to shut-in the wells, at least two of the three pads that produce to the central gathering facility, while we wait for a third-party line to be built or we have the option to produce temporarily as a walk-up shipper under the DJ South tariff filed with FERC. […] We believe [walk up shipping is] a viable alternative because it's explicitly allowed under the FERC tariff and I don't believe can be turned away. But also, Extraction is one of the largest shippers on the DJ South system, and I don't believe that they would willingly forego a large amount of revenue for several months just to prevent us from walk-up shipping."); Oct. 7, 2020 Hr'g Tr. 94:7-16 (Shutting in wells: "The oil isn't necessarily lost during the shut-in period. What happens with wells when you shut them in is they build pressure during their shut-in time. And then when you turn them back online, they're producing at much higher volume then they were when you shut-in, and that incremental volume we call flush production, and that flush production usually makes up the amount of oil that was not produced during the shut-in period in fairly short order. So it's more like the production is being deferred temporarily rather than permanently lost or foregone."); Oct. 7, 2020 Hr'g Tr. 104:20-105:5 ("We would shut in, at least, two of the pads that are producing to the central gathering facility. They would be shut-in for those few months while we waited for a third-party to connect into the central gathering facility. And, at that point in time, we would turn all of those wells back on at significantly higher production rates then they were making at the time of shut-in. And we should be able to quickly recoup any deferred revenue that was lost during the shut-in period, given the flush production and the better contracts that we would have in place when that new production came online.").

[25] Oct. 7, 2020 Hr'g Tr. 89:24-90:3 (Platte River Contract: "[I]n the worst case, we would shut in those wells for a short period of time until the new company is connected, and then we would quickly make up that deferred oil production that was not produced during the short shut in period."); Oct. 7, 2020 Hr'g Tr. 105:10-15 (DJ South Contract: Shutting in wells for the time period it takes to install an alternative provider is better than assuming the contracts because "[t]he [DJ South Contract] . . . is charging us about three times the rate that their competitors are willing to charge. And shutting in for a few months is vastly outweighed by the economic benefit that the company's reserves in the area would receive for the next twenty to thirty years.").

Mr. Owens testified about the Grand Mesa TSAs. Mr. Owens testified that these contracts are projected to cost the Debtors approximately $100 million in annual spending.[26] Mr. Owens elaborated on the three possible alternatives to the Grand Mesa TSAs, which would result in millions of dollars in savings.[27]

Grand Mesa presented the testimony of Matthew O'Laughlin, a Principal of The Brattle Group, an economics and financial consulting firm.[28] Mr. O'Laughlin was a well-prepared and competent witness; however, he could not refute Mr. Owens' testimony. Mr. O'Laughlin opined that alternatives pose a "reasonable risk" of prorationing[29] but did not cite and was not aware of any prior instances of prorationing in the DJ Basin. Further, Mr. O'Laughlin did not model or provide the probability of prorationing by

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[26] Oct. 7, 2020 Hr'g Tr. 107:19-107:21 ("So far 2021, for example, we estimate a total spend with [Grand Mesa's] TSA to be $94 million."); Oct. 7, 2020 Hr'g Tr. 108:1-108:2 ("We anticipate a 2021 gross spend with [Bayswater] TSA to be $7.4 million."); Oct. 7, 2020 Hr'g Tr. 107:16-19 ("[T]he volume commitment is 58,000 barrels per day . . . [t]he term goes through October 2026 and the current rate we are charged is $4.40 per barrel."); Oct. 7, 2020 Hr'g Tr. 107:2-3 ("That escalates, I believe, at 2 percent per year through the end of the contract in 2026.").

[27] Oct. 7, 2020 Hr'g Tr. 108:5-10 ("We have seeked [sic] proposals from three companies that also provide transportation services through their pipelines from the Wattenberg Field in Platteville to Cushing, Oklahoma. The rates that we have received from those parties have been anywhere from $1.60 to $2.20."); Oct. 7, 2020 Hr'g Tr. 108:11-14 ("We anticipate that if we had one of those contracts our annual spend would be $25 to $35 million dollars which would equate to savings over our current contract or current Grand Mesa contract of $59 to $68 million dollars in 2021."). *Also compare* Debtors Ex. 37 to Debtors Ex. 57 (reflecting a savings of $59.2-$68.7 million in 2021 by using alternatives to the Grand Mesa TSA; and saving $7.4 million in 2021 by using alternatives to the Bayswater TSA").

[28] *See also* D.I. 892 (Declaration of Matthew O'Loughlin).

[29] Proration orders limit output from oil and gas wells in a field, for example, limiting the production of oil to the amount of the reasonable daily market demand and to require ratable production by all taking from the common source. *Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 229, 52 S. Ct. 559, 563, 76 L. Ed. 1062 (1932). The Grand TSA at § 3.1 (stating that "Grand Mesa shall provide Services for all volumes up to the Fixed Monthly Payment Volume"), and at § 10.1 (stating that Extraction's capacity "shall not be reduced due to prorationing resulting from Pipeline System oversubscription due to shipper nominations exceeding Pipeline System capacity in any given Month."). The Bayswater TSA contains similar terms. In other words, the TSAs state that the Debtors' oil production would not be prorated (or slowed down), where if the TSAs are rejected, the Debtors' oil supply could be prorationed, or reduced.

alternative suppliers or a timeframe for such. Most troubling was Mr. O'Laughlin's opinion concerning the future price of oil, which is wholly inconsistent with the industry standard.[30]

Nothing about Mr. Owens' testimony leads the Court to believe that the Debtors were acting on a whim or were capricious.[31] In fact, Mr. Owens' testimony contained the cost benefit analysis of various alternatives, a well-reasoned discussion about why alternatives were preferable to continuing under the TSAs, and showed that the Debtors made a proper exercise of business judgment by rejecting the TSAs. Additionally, the rebuttal evidence of the Rejecting Counterparties did not rebut Mr. Owens testimony nor raise any concerns that the Debtors were acting on a whim or capriciously. Business judgment does not mean that the Debtors dotted every "i" and crossed every "t" – it means that the Debtors explored their options, thought through the alternatives, and

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[30] This is not the first time the Court has heard overly optimistic and unpersuasive projections of the price of oil using unorthodox methods.

[31] *See, e.g.*, Oct. 7, 2020 Hr'g Tr. 108:5-10 ("We have seeked[sic] proposals from three companies that also provide transportation services through their pipelines from the Wattenberg Field in Platteville to Cushing, Oklahoma. The rates that we have received from those parties have been anywhere from $1.60 to $2.20."); Oct. 7, 2020 Hr'g Tr. 76:1-6 ("[W]e recognized that for the most part alternative pipeline would not be immediately available to us and we had to understand exactly what our transaction would look like or what a transition plan would look like so that we could accurately model what the cost and effects would be to the company."); Oct. 7, 2020 Hr'g Tr. 88:22-25 ("[I]n their bid, they [alternative providers] provided what they thought the timing would be, so that was assumed in that three to six-month timeframe that we've talked about with the alternative providers."); Oct. 7, 2020 Hr'g Tr. 111:12-16 ("[W]e don't believe there will be any pro rationing or tightening in the near term, and that we should have ample access to markets and other pipeline providers in the event we did need to move any of our volumes on an alternative pipeline."); Oct. 7, 2020 Hr'g Tr. 89:24-90:3 ("[I]n the worst case, we would shut in those wells for a short period of time until the new company is connected, and then we would quickly make up that deferred oil production that was not produced during the short shut in period."); Oct. 7, 2020 Hr'g Tr. 108:11-14 ("We anticipate that if we had one of those [market rate alternative] contracts our annual spend would be $25 to $35 million dollars which would equate to savings over our current contract or current Grand Mesa contract of $59 to $68 million dollars in 2021.").

made a rationale decision based on the information available. Here, the Debtors spent considerable time analyzing whether rejection was in their business interest, they determined rejection provided them significant economic benefits, and they believe that will be able to successfully transition to alternative providers.

As a result, the Court finds that the Debtors' have presented sufficient evidence to support a showing of the proper exercise of their business judgment and the Rejection Counterparties have not rebutted the Debtors' evidence.

C. Covenant Running with the Land

The Rejection Counterparties contend that the TSAs contain "covenants that run with the land" and, thus, cannot be rejected.[32] The Court has previously held on summary judgment in two adversary proceedings brought by the Debtors against the Rejection Counterparties (at their insistence) that the TSA's do not contain covenants that run with the land. Nonetheless, the Court will assume, *arguendo*, for purposes of this section that the TSA's contain covenants that run with the land. This section does not alter or amend the Court's contrary decisions on summary judgment, which stand and are on appeal.

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[32] *See also Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50816, Adv. D.I. 45 at 17 ("The Transportation Agreement does not create covenants that run with the land because these covenants fail to touch and concern Extraction's mineral estates and the original parties were not in privity of estate at the time of the creation of the covenants."); and *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50833, Adv. D.I. 54 at 24 ("The parties did not express an intent to allow any other covenants in the DJ South Contract to run with the land. Because the Platte River Contract does not clearly evince an intent for any covenants contained therein to run with the land and bind successors-to-title to any estate in real property, the Platte River Contract does not create covenants that run with the land as a matter of Colorado law." (citations omitted)).

Consistent with Section 365, when considering whether real covenants or instruments creating real covenants can be rejected, courts have generally considered whether those covenants meet the definition of an executory contract.[33] Most courts[34] that have held covenants running with the land cannot be rejected have found that the covenant was not an executory contract because it lacked material obligations on both sides[35] or did not otherwise constitute a contract.[36]

As cited by the Debtors, the court in *In re Arden & Howes Assocs., Ltd.* expressly rejected the notion that covenants running with the land insulate agreements from rejection.[37] In that case, confirmation of the "plan of reorganization turn[ed] on whether a restrictive use covenant that 'runs with the land' under state law can, after the lease is

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[33] *See, e.g., In re Foothills Texas, Inc.*, 476 B.R. 143, 151–53 (Bankr. D. Del. 2012) (holding that an overriding royalty interest did not meet the definition of an executory contract).

[34] *In In re Alta Mesa Res., Inc.*, the Court stated, without further analysis, that "[c]ontracts forming real property covenants are not executory." *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC (In re Alta Mesa Res, Inc.),* 613 B.R. 90, 99 (Bankr. S.D. Tex. 2019) (*citing In re Badlands Energy, Inc.*, 608 B.R. 854, 874 (Bankr. D. Colo. 2019)). In doing so, the Court cited *In re Badlands Energy, Inc.*, 608 B.R. at 875, which in turn quoted *In re Sabine Oil & Gas Corp.*, 567 B.R. 869, 874 (S.D.N.Y. 2017), *aff'd*, 734 Fed. Appx. 64 (2d Cir. 2018)). In *Sabine*, however, the court simply stated the parties agreed that a covenant that runs with the land creates an unrejectable property interest. *In re Sabine Oil & Gas Corp.*, 567 B.R. at 874. Similarly, in *Alta Mesa*, the matter of whether a contract that creates real covenants can be rejected under Section 365 was neither briefed for nor analyzed by the Court.

[35] *See In re Hayes*, ADV.07-00045-RBK, 2008 WL 8444812, at *11 (B.A.P. 9th Cir. Mar. 31, 2008) (concluding the bankruptcy court did not err because "there were no mutual obligations" remaining); *Gouveia v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994) (concluding the real covenant was not rejectable because it "establishes an ongoing right of present (not merely future) enjoyment" and thus it lacked outstanding future material performance obligations) (emphasis in original)); *In re Foothills Texas, Inc.*, 476 B.R. at 151–53 (holding an overriding royalty interest did not meet the definition of an executory contract because there were not mutual material obligations remaining to be performed); *In re Banning Lewis Ranch Co.*, LLC, 532 B.R. 335, 343 (Bankr. D. Colo. 2015) ("Even if the Annexation Agreement could be considered a contract, the Court cannot find that it meets the Countryman definition of an executory contract.").

[36] *See, e.g., In re Banning Lewis Ranch Co.*, LLC, 532 B.R. at 343 ("[U]pon compliance with the . . . Colorado Municipal Annexation Act, the Annexation Agreement became a legislative act that set the boundaries of the City. At that point, the Annexation Agreement was no longer a contract, much less an executory one.").

[37] *In re Arden & Howe Assocs., Ltd.*, 152 B.R. 971, 975 (Bankr. E.D. Cal. 1993).

rejected, be enforced against one who acquires the shopping center from the trustee pursuant to the plan."[38] In *Arden & Howes*, the restrictive covenant at issue was recognized as running with the land.[39] Thus, the covenant's beneficiary sued to enjoin execution of a new lease to a third party that violated the covenant.[40] The beneficiary also opposed confirmation, arguing the reorganization plan "impermissibly [took] part of its leasehold, to wit, the restrictive use covenant that . . . runs with the land."[41] The court was not persuaded even though a "lease of real property is simultaneously a conveyance and a contract."[42] The court observed:

> Section 365(h) makes no mention of, and imparts no significance to, the concept of running with the land in connection with what constitutes the leasehold. The lessee is entitled to remain 'in possession of the leasehold' estate. The key is possession. What the lessee is entitled to retain consists of the essential elements of a lease— possession, term, and rent. Breaches of restrictive use covenants do not ordinarily work a dispossession.[43]

The court also rejected "the argument that successors who take from the trustee are nonetheless bound by a covenant that runs with the land."[44] Instead, the court held that the beneficiary was entitled to only the same remedy it would otherwise receive under the Bankruptcy Code—in the case of a lessee that remedy was an offset.[45] Thus, the court

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[38] *Id.* at 972.

[39] *Id.* at 975.

[40] *Id.* at 973.

[41] *Id.*

[42] *Id.* at 974.

[43] *Id.* at 975.

[44] *Id.*

[45] *See id.*

(i) placed no importance on the concept of covenants running with the land; (ii) allowed the rejection of a lease containing a covenant running with the land; and (iii) afforded the non-breaching party only the Bankruptcy Code's generally available remedy for the situation and did not allow any other remedy against successors to the burdened land.

The district court reached the same conclusion, noting "[t]he restrictive use covenant requires future performance, and courts have consistently held rejection relieves a trustee from covenants requiring future performance."[46] Section 365(h)(2) does not distinguish between affirmative covenants requiring expenditure of estate resources and the restrictive use covenant – section 365(h)(2) anticipates nonperformance of both types of covenants, since it provides a remedy for a trustee's "nonperformance of ***any obligation of the debtor under such lease***."[47] The court explained that "[r]ejection relieves a trustee from performing covenants requiring future performance, but does not deprive the lessee of its possessory property interest in the leased premises."[48] The same thing is true for the Debtors: rejection relieves the Debtors of their future obligations and only previously conferred rights are not rescinded.[49]

The Rejection Counterparties argue that covenants running with the land are real property in nature and not contractual obligations. The Court disagrees. Real covenants,

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[46] *Matter of Arden & Howe Associates, Ltd.*, 91-2299, 1993 WL 129784, at *4 (E.D. Cal. Mar. 1, 1993).

[47] *Matter of Arden & Howe Assocs., Ltd.*, No. 91-2299, 1993 WL 129784 at *3 (emphasis added).

[48] *Id.* (*citing In re Wood Comm Fund I, Inc.*, 116 B.R. 817, 818 (Bankr. N.D. Okla. 1990)).

[49] *Mission Prod. Holdings*, 139 S. Ct. at 1666 ("[W]e hold that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted.").

or covenants that run with the land, are fundamentally creatures of contract. In *Thornton v. Schobe*,[50] the court considered whether an agreement not to build certain kinds of structures on a piece of property was a contractual agreement or a real property interest. The *Thornton* court held that agreement not to build a certain sort of building on certain land is not a transfer of an estate or interest therein nor a trust or power over it.[51] The *Thornton* court continues that "'Power' is used in the statute, as suggested by its connection with 'trust,' in the technical sense of power to convey or otherwise dispose of the lands as in wills, declarations of trust, trust deeds, and letters of attorney, and does not embrace restrictions of use."[52]

Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.[53] also explains that an easement is a burden on the **land** whereas a contractual obligation is a burden on the **owner** of the land.[54] Thus an easement must be enforced with an injunctive type action and a contractual dispute is an action for money damages.

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[50] 79 Colo. 25, 28, 243 P. 617, 618 (1925).

[51] *Id.*

[52] *Id.*

[53] 40 Colo. 467, 480, 92 P. 290, 294 (1907).

[54] *Farmers' High Line Canal & Reservoir Co.*, 92 P. at 294 ("[I]f Eli Allen had an easement, such an easement was a burden solely upon the land, and not upon the owner. We agree with this, but the covenant running with the easement is personal: '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. According to this the covenant binds the person of the owner of the burdened land, provided he comes by his title legally, and benefits the owner of the benefited land, provided he comes by his title legally.'" (citations omitted)).

If the TSAs are rejected, this simply results in a breach of the contracts, and the covenants therein, and not a termination of those contracts.[55] In other words, rejection allows a debtor to stop performing its obligations, but the non-breaching party's rights remain. Here, the Rejection Counterparties are seeking the Debtors' performance under the midstream contracts. However, the Court concludes that these covenants that run with the land are not rights to the use of land, but contractual obligations on others that may be enforced against parties not bound by privity of contract but, rather, through privity of estate. Rejection will relieve the Debtors of all future performance obligations to deliver its oil to the Rejection Counterparties for transportation services (or pay any fee), and the Debtors may enter new transportation agreements with new counterparties or find alternatives to transporting its products.[56]

However, *even if* the TSAs contain covenants running with the land, which they do not, the question then becomes what effect the covenants have on the Debtors' property post rejection. The answer is simple: any covenant running with the land still exists (as the contract still exists), but it is unenforceable against the Debtors and their assigns after the Rejection Counterparties' claims are satisfied as part of the reorganization process. Upon rejection, the Rejection Counterparties' claims under the

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[55] *See* 11 U.S.C. § 365(h) ("Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . .").

[56] The Court was troubled by the testimony of Mr. McGillis, which was also discussed during closing argument, that Platte River had obtained an *ex parte* TRO in Colorado State Court against one of the Debtors' alternative trucking companies based on the terms of the Platte River TSA's. Notwithstanding that the action may have been a violation of the automatic stay, it is based on a theory that does not hold water post-rejection as Platte River will have a rejection claim, and, thus, an adequate remedy at law.

TSAs will be compensated, rendering the claims fully satisfied and incapable of subsequent enforcement against the Debtors and its assigns through either privity of contract or privity of estate.[57] Importantly, the Rejection Counterparties cannot seek duplicative recovery for the breached covenants by using privity of estate as justification for suing successors to the Debtors' real property interests for a breach of the fully satisfied covenants.[58]

Like the covenant to pay rent in leases—covenants running with the leasehold estate—the TSAs explicitly provide for a specific amount of monetary damages to remedy a breach of the alleged real covenants. Consequently, the Rejection Counterparties will be fully compensated for the deemed prepetition breach of their contracts with an unsecured claim for money damages, pursuant to section 365.

Specifically, as to Platte River**,** Platte River expressly granted the Debtors the unilateral right to "terminate" the agreement upon satisfaction of its contractual obligations via payment of the Total Financial Commitment. As evidenced in the Platte River Contract and the DJ South Contract, the Total Financial Commitment means "the

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[57] *See also Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50816, Adv. D.I. 45 at 2 (holding that "the dedication and commitment covenant does not touch or concern the land, and there is no privity of the estate.."); and *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50833, Adv. D.I. 54 at 2 ("Under the unambiguous terms of the Platte River Contract, none of the required elements are met—the parties did not intend to create a covenant that runs with the land, the covenant does not touch or concern the land, and there is no privity of the estate.").

[58] *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121, 1134 (10th Cir. 2011) (applying Colorado law) ("In a breach of contract action, the objective is to place the injured party in the same position it would have been in but for the breach. A double or duplicative recovery for a single injury, however, is invalid. Under Colorado law, a plaintiff may not receive a double recovery for the same injuries or losses arising from the same conduct." (citations omitted)).

aggregate of the Fixed Monthly Payment due under this Agreement for all Months of the Term remaining at such time." "Upon satisfaction of either of such obligations, (i) the Committed Volume shall immediately be reduced to zero and (ii) [the Debtors] may elect to terminate [the] Agreement upon written notice to [the counter party]."[59] Indeed, the Debtors may even opt to accelerate satisfaction of the Total Volume Commitment, and all of its obligations under these contracts, through payment. Thus, as to Platte River, it is made clear in their contracts and proofs of claims, monetary damages are easily calculable and specific performance is both unavailable and inappropriate.

The same thing is true for the Grand Mesa TSAs. Again, the Debtors' commitments can be satisfied in full by either: (i) shipping certain amounts of crude petroleum within certain timeframes or (ii) "by satisfaction of [the Debtors'] Total Financial Commitment." Again, at the Debtors' option, they may accelerate the satisfaction of the Total Financial Commitment, and their obligations under the Grand Mesa TSA, through payment.[60] Again, monetary damages are easily calculable.

As a result, all the TSAs provide for money damages, which further supports that the covenants running with the land are contractual in nature; thus allowing these contracts to be rejected pursuant to Section 365 of the Bankruptcy Code even if they contain covenants running with the land, which they do not.

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[59] Platte River Contract, at §3.1; and DJ South Contract at § 4.1.

[60] Bayswater Contract at § 8.2 ("For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by [the Debtors] of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at [the Debtors'] option, any payment made by [the Debtors] to accelerate the satisfaction of that obligation."); Grand Mesa Contract at § 8.2 (same).

D. FERC Inquiry

Platte River and Grand Mesa have asserted that FERC should hold a proceeding on whether the Court should approve rejection of the contracts.

FERC has held that "the Commission neither presumes to sit in judgment of rejection motions nor seeks to abrogate the role of adjudicating bankruptcy proceedings. The Commission recognizes that rendering a determination on rejection motions is solely within the province of the bankruptcy court."[61] Similarly, the Court recently described the Court and FERC – having a "parallel exclusive jurisdiction" - a debtor seeking to reject a FERC jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract but a debtor may go before FERC to abrogate or modify the filed rate in that contract. They are two separate matters. Here, the Debtors are seeking to reject the contracts and not to abrogate or to modify the rates therein.[62] Moreover, as the Court recently held in this case, an order authorizing rejection does not abrogate or modify a filed rate.[63] Congress provided FERC limited regulatory jurisdiction over interstate oil pipeline transportation services (just as it provided this

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[61] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, at 62,828 (June 22, 2020) (*quoting NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 (2019) (Exelon), order on reh'g, NextEra, Inc. v. Pac. Gas & Elec. Co., 167 FERC ¶ 61,096 (2019)).

[62] "FERC's jurisdiction concerning rate setting is unaltered by rejection." *Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240 at *12.

[63] D.I. 770, Letter Clarifying Oral Ruling on October 2, 2020 (entered 10/4/2020) ("FERC's recent statement in *ETC Tiger Pipeline, LLC* that the [r]ejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate is incorrect. It does no such thing. The Supreme Court recently confirmed in *Mission Product Holdings* that "[a]ccording to Section 365(g), 'the rejection of an executory contract[ ] constitutes a breach of such contract . . . .'" *Mission Product Holdings*, 139 S. Ct. at 1659. The effect of a debtor's rejection of a contract under section 365 is that "[i]t gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract." *Id.*, 139 S. Ct. at 1661.)

Court with limited jurisdiction), and this limited regulatory jurisdiction is not a legitimate basis to usurp this Court's authority to rule on Debtors' motion to reject in this proceeding.

Interestingly, FERC argued that because rejection claims would be paid in "plan dollars" or "claim dollars" rather than dollar-for-dollar, that rejection of the TSAs would necessarily be abrogating the rates. First, and not to be flippant, that is how bankruptcy works – bankruptcy is about consolidating assets and equitable distribution of available funds. Congress established the bankruptcy waterfall of distribution, much like it created FERC, and nothing in the Bankruptcy Code nor the FERC regulation excepts or prioritizes either of the statutes.

Second, nothing in this Court's ruling changes the rates, including for the time from the petition date to today. Such rate claims will be claims against the estate and will be paid by the Debtors, pursuant to a plan and subject to the Bankruptcy Code's waterfall. As a result, the *only* possible "claim dollar" payout would be for unpaid usage of the pipelines, as well as rejection damages. And to be clear, nothing is affecting the rate charged – the Rejection Counterparties have and will file claims at the rates approved by FERC and this Court is doing nothing to abrogate those approved rates.[64] How and when those claims will be paid-out is an issue for the plan and confirmation process.

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[64] *In re Mirant Corp.*, 378 F.3d 511, 520 (5th Cir. 2004) ("Mirant's rejection of the Back–to–Back Agreement was approved, then PEPCO's unsecured claim against the bankruptcy estate would be based upon the amount of electricity it would have otherwise sold to Mirant under that agreement at the filed rate. Thus, the damages calculation from the rejection of a contract is analogous to the damages calculation we previously approved in Gulf States because the award calculation is based upon the filed rate." (citation omitted); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471 (5th Cir.), *amended*, 831 F.2d 557

As a result, the Court rejects the argument that payment of claims through the plan and confirmation process is an abrogation of FERC approved rates.

E. Public Interest

Platte River and Grand Mesa claim that rejection would not be in the public interest because (i) certain alternatives would require trucking of crude oil, which they contend is more risky and not as environmentally sound, (ii) rejection would require the shutting-in of wells, which may lead to decreased production, (iii) rejection would harm the community-at-large due to the significant impact on the Rejection Counterparties (i.e. would the Rejection Counterparties continue to operate? Would they be forced to shutter their businesses, fire their employees, and have the pipelines fall into disrepair?); and (iv) rejection would impact the oil markets in general. The Rejection Counterparties assert that the three-prong test articulated in *Mirant* should apply here. *Mirant* set forth a more rigorous standard for rejecting a contract for the purchase of electricity,[65] which was adopted, in part, in *Ultra Petroleum* relating to the rejection of a natural gas contract.[66] The three prongs are: (i) determining if the executory contract was excepted from rejection under section 365; (ii) scrutinizing "the impact of rejection on the public interest and on the supply of natural gas to consumers;" and (iii) after determining the public

(5th Cir. 1987) (damages from breach claims challenging the quantity purchased are not preempted but they must be calculated using the filed rate).

[65] *In re Mirant Corp.*, 378 F.3d at 525 (upon remand "the courts should carefully scrutinize the impact of rejection upon the public interest and should, *inter alia*, ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.").

[66] *Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240 at *8.

interest and supply concerns, the Court must "weigh those concerns against the [a]greement's burden on [the] reorganization."[67]

No court has applied the *Mirant* test to oil contracts that are at issue in the TSAs. This is not surprising as FERC has a more limited jurisdiction over oil pipelines than of gas and power contracts (which were at issue in *Mirant* and *Ultra*).[68] The Interstate Commerce Act ("ICA") is applicable to oil pipelines. It is important to note that the ICA was enacted to address monopoly power.[69] Furthermore, the ICA applies a different "public interest" test than other federal statutes (interestingly, the ICA never uses the words "public interest"). In the ICA, the "public interest" encompasses "just and reasonable pipeline rates and terms" and "an efficient petroleum market."[70] By contrast, for purposes of the Natural Gas Act (the "NGA"), the "public interest" encompasses "plentiful and uninterrupted supplies of fuel to the public."[71] That the ICA and NGA would provide different standards for assessing the public interest is not surprising; these standards arise from the "different economic context[s]" in which Congress passed the statutes, and manifest themselves through FERC's corresponding and distinct regulatory approaches.

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[67] *Id.*

[68] Oct. 20, 2020 Hr'g, Tr. 11:5-12 ("Q: And are there any significant differences between the tools that FERC was given to regulate oil pipelines as compared with gas pipelines? A [Dr. Makholm] Yes. As the regulations for gas was grounded in a regulatory function, the FERC was given duties over regulated entry and exit, and over regulated accounting. So, either it was not given -- it was handed to the regulator under the original Interstate Commerce Act for oil pipelines.").

[69] Oct. 20, 2020 Hr'g Tr. 10:4-11:12.

[70] *See* Makholm Decl. (attached as Ex. 19 to the Debtors' reply, D.I. 681) at 5.

[71] *Id.* at 4.

With that background in mind, the Court must start its analysis with Section 365. Section 365 of the Bankruptcy Code does not mandate that the Court consider public policy or public interest. It is irrelevant for Section 365's purposes. This is not a proceeding before FERC to modify or to abrogate a filed rate. In fact, allowing rejection in order for companies in bankruptcy to reorganize *is in the public interest*.[72] The Supreme Court has held that "the authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization."[73]

The Court does not believe that a heightened scrutiny, including consideration of the public interest, is warranted. However, assuming *arguendo* that it is, the Court finds that the balance tips in favor of the Debtors. And, as this is a Court of equity, the Court will consider and evaluate the balance of equities to each of the parties and the impact on the public at large.[74]

Moreover, like the *Ultra Petroleum* court considered, the consideration of the macroeconomic effects on future use of oil pipelines is unfounded – that is a policy determination for Congress and not for this Court.[75] However, the Court, in its balance

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[72] *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 527-28, 104 S. Ct. 1188, 1197, 79 L. Ed. 2d 482 (1984) ("The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. . . . The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." (citing H.R.Rep. No. 95-595, p. 220 (1977)).

[73] *Bildisco*, 465 U.S. at 528.

[74] *Bildisco*, 465 U.S. at 527 ("The Bankruptcy Court is a court of equity, and in making [the determination to reject a collectively bargaining agreement] is in a very real sense balancing the equities . . .").

[75] *Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240 at *9.

of equities consideration, will look at whether the rejection of the TSAs "threatens the public health, safety or welfare."[76]

At trial, the Debtors presented the testimony of Dr. Jeff Makholm. Dr. Makholm was clearly intelligent, articulate, and a bit too sure of himself, but well qualified and persuasive. Dr. Makholm testified that (i) any consideration of public interest must account for the FERC's lighter regulation of oil pipelines contracts versus gas or power;[77] (ii) the ICA was enacted to address monopoly power;[78] (iii) the *Mobile-Sierra* doctrine has not been extended to the oil pipeline context;[79] and (iv) rejection will not discernibly affect the relevant market.[80] Dr. Makholm's testimony concluded that rejection of the TSAs would be in the public interest because it would promote competitive oil markets.[81]

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[76] *Id.*

[77] Oct. 20, 2020 Hr'g Tr. 10:4-11:12.

[78] Oct. 20, 2020 Hr'g Tr. 10:9-16.

[79] Oct. 20 Hr'g Tr 19:15-20:6. The *Mobile-Sierra* doctrine, which originated from two Supreme Court decisions issued in 1956, prohibits FERC from modifying or abrogating existing contracts under the Federal Power Act ("FPA") and NGA unless required to protect the public interest (*not* the ICA). *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 344 (1956) ("*Mobile*"); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) ("*Sierra*"). Mobile and Sierra were decided under the "substantially identical" ratemaking provisions of the NGA and the FPA, which is why the judicial decisions interpreting the *Mobile-Sierra* doctrine interchangeably cite cases decided under the NGA and FPA. *See, e.g., Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted).

[80] Oct. 20, 2020 Hr'g Tr. 13:20-14:5.

[81] Oct. 20, 2020 Hr'g Tr. 19:15-20:11. Dr. Makholm's testimony is as follows:

> Q Dr. Makholm, you understand that the counterparties in this case have raised concerns more generally about the public interest such as potential impacts from trucking oil; is that right?
>
> A That's what I understand, yes.
>
> Q And do you believe that those are appropriate public interest considerations under the ICA?
>
> A No, not for the FERC. The local trucking --
>
> Q And why is that?

In response, Grand Mesa submitted the testimony of Commissioner Branko Terzic.[82] Commissioner Terzic stated that, although the ICA does not define "public policy," he believed that the *Mobile-Sierra* doctrine is instructive guidance.[83] The *Mobile-Sierra* doctrine provides that a party seeking to avoid its contractual obligations may do so only after it meets the burden of demonstrating "'unequivocal public necessity' or 'extraordinary circumstances'" where "the public interest will be severely harmed" by continued compliance.[84] Commissioner Terzic continued that "[g]iven the breadth of the meaning of public interest in relation to energy regulation, [he] groups the multitude of factors relating to [the Debtors'] proposed noncompliance with the TSAs into five general buckets: (a) Financing concerns; (b) Economic concerns; (c) Environmental concerns; (d) Safety concerns; and (e) Other issues of public importance, including regulatory

> A Trucking pipeline safety, other issues associated with those aspects of the public interest while looming important for local communities, don't fall under the egis of the Interstate Congress Act as an item for the FERC to oversee.
>
> Q So, in conclusion, do you believe that there will be any harm to the public interest if the Bankruptcy Court grants Extraction's motion to reject?
>
> A No.
>
> Q And why is that?
>
> A Because the competitive market for fuel, which was the impetus, and the practice of applying the Interstate Commerce Act to oil pipelines both by the Interstate Commerce Commission and by the FERC is unaffected by rejection.

Id.

[82] D.I. 891 (the "Terzic Decl.").

[83] Terzic Decl. at ¶ 9.

[84] *Id.*

procedure and labor impacts."[85] Commissioner Terzic testified that the Debtors' rejection of the TSAs would have a huge impact on Grand Mesa and its other customers, it would impact labor and trucking (the alternative to using the pipeline) and it would also have safety and environmental implications.[86] Commissioner Terzic also testified that *but for* the Debtors, Grand Mesa would not have built the pipeline or even been approved by FERC. The Court finds that Commissioner Terzic was a forceful, honest, and confident witness. The Court believes he was an outstanding Commissioner in Wisconsin and on FERC. Nonetheless, his testimony on the public interest was circular and not enlightening. Moreover, it provided no specifics relevant to the Debtors. The Court gives little weight to his testimony.

Furthermore, Mr. David Haag, the President and Chief Executive Officer of Brown Williams Moorhead & Quinn, Inc., an energy consulting firm, testified on behalf of Platte River.[87] Mr. Haag opined that trucking may not be available to the Debtors and that alternative pipelines may take years to complete and, as a result, it would be against public policy to reject the TSAs. Mr. Haag mentioned four alternatives available to the Debtors: (i) shut-in the wells, which Mr. Haag states will affect public interest by decreasing supply, which will have an impact as these wells are already drilled. However, the Debtors' do not plan to shut-in a majority of their wells – of course it is an

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[85] *Id.* at ¶ 11.

[86] *Id.* at ¶¶ 13-25. *But see* Oct. 20, 2020 Hr'g Tr. (Makholm) 18:4-19:14 (disagreeing with Mr. Terzic's conclusions).

[87] Expert Report of David J. Haag, attached to Platte River's objection to the Motions (D.I. 655 and 656) at Ex. D.

option for the Debtors, but the Debtors have not made that determination; (ii) alternative modes of transporting the oil (for example: (a) an alternative pipeline, (b) marine vessel, (c) rail, and (d) trucks); however, FERC does not regulate trucking of oil, nor has Mr. Haag analyzed the impact of public interest by additional traffic caused by trucks or whether the alternatives could be in the best interests of the Debtors. Furthermore, Mr. Haag commented that new pipelines could take years to build and be very expensive – but, yet again did not study the impact of such alternative; (iii) impact on the Rejection Counterparties – Mr. Haag testified that rejection of the TSAs could cause the midstream providers to become insolvent and may potentially cause the pipelines to fall into disrepair. However, Mr. Haag did not analyze whether the pipelines could be sold or whether they could renegotiate new rates and contracts – in other words, Mr. Haag's testimony was hypothetical and contingent rather than presenting quantifiable evidence. Furthermore, although rejection would have a great deal of impact on the Rejection Counterparties – this is not the same as "public interest;" and (iv) Mr. Haag testified that downstream producers would be impacted by duplicate pipelines and delay in receipt of the oil – again, the testimony of Mr. Owens who testified that alternative pipelines were within a mile or so of the Debtors' wells and Dr. Makholm's testimony concerning the impact on the oil markets refute Mr. Haag's generalized claims.

Mr. Haag's credentials are unimpressive; he was an evasive and overly verbose witness. Several times he appeared to either not understand or simply to ignore the

questions. Furthermore, Mr. Haag spoke with a lack of clarity. The court gives zero weight to his testimony.

Furthermore, when balancing the equities, the Court must consider whether the threat to the public was imminent or calculable. Might it slow down oil production or potentially be more expensive to the consumer – no, based on Dr. Makholm's testimony. In hindsight, could the Debtors' business judgment in rejecting these contracts be a business misstep? Potentially. But the Court must look at the evidence before it and not speculate.

The Court is sympathetic to all the Rejection Counterparties and their broken expectation of doing business with the Debtors in the long-term. For example, the relationship with the Debtors plays into the counterparties' own financial projections and was a basis for the financing of their construction of the pipelines. Clearly, the Rejection Counterparties relied on the TSAs and the Debtors' oil and gas is a large percentage of their respective businesses. Nonetheless, similar situations arise in bankruptcy contexts all the time – landlords build out floors or entire buildings for their tenants; factories are built based on business expectations. Here, pipelines were constructed, and permits obtained. The reality is that the Debtors cannot continue to perform under these contracts.[88] The Debtors filed for bankruptcy to relieve themselves of some of their

[88] Oct. 7, 2020 Hr'g Tr. 73:7-14 (Mr. Owens: "Rather than really providing a benefit to the company since oil prices collapsed almost immediately after they entered into the first agreement, these contracts have been a very large burden on the company. With the lower commodity prices, we've had to slow our development plan which made it extremely difficult for us to comply with the minimum volume commitments or minimal financial commitments that are associated with the majority of these contracts."). Mr. Owens continued:

obligations and are restructuring their debt, including rejecting these TSAs. Furthermore, although there is testimony that trucking may cause additional environmental harm from accidents and weather-related delays, it is not enough to force the Debtors to perform under the TSAs at an extreme financial hardship.

Thus, although the Rejection Counterparties may be commercially harmed by these rejections, the Court finds that the public, as a whole, will not be harmed by the rejection; and any harm is not an imminent threat to the health, safety or welfare of the public-at-large. The rejection will not affect the ability of pipelines to offer reasonable rates and terms, nor affect the petroleum market more broadly.[89] On balance, the public will benefit from the Debtors' continued production, their workers remaining employed, and potentially additional jobs and contracts from the Debtors having to re-route its oil. Overall, the Debtors' creditors and the public-at-large will be in a better position after the rejection of these TSAs. Furthermore, the Rejection Counterparties will be entitled to file proofs of claim based on their respective rejection damages.

> Q And what form of analysis were prepared by Alvarez & Marsal or the debtors to assist in making the rejection for assumption decision?
>
> A We looked at several things. First, we had to understand what continued performance under each contract would cost the company, and how that would affect the company's liquidity in the short term. Second, we performed a market check to see what current rates were being offered from competitors of our Midstream companies in light of the dramatic drop in crude prices and the historic drop in rigs running into basin to an all-time low. We also needed to understand the alternatives to each contract in the short term and the long term. And, finally, I'd say we decided whether rejection was a better outcome for the business going forward or not.

Oct. 7, 2020 Hr'g Tr. 75:1-15.

[89] Makholm Decl. at 2-3.

F. *Nunc Pro Tunc* Rejection of the TSAs

The Rejection Counterparties argue that the Court should not grant relief *nunc pro tunc* to the Petition Date, arguing that the equities weigh against such a ruling on the ground that Debtors have continued to ship on their pipelines. "[C]ourts have held that bankruptcy courts may exercise their equitable powers in granting such a retroactive order when doing so promotes the purposes of Section 365(a). Courts have further held that the retroactive rejection of executory contracts and unexpired leases may be approved 'after balancing the equities' of a case and concluding that such equities weigh in favor of the debtor."[90]

Here, the Debtors presented evidence analyzing their costs and benefits, and determining that the TSAs are no longer beneficial to their estates. The Debtors have sought the relief requested as soon as they determined that the rejection of the TSAs was in the best interests of their estates. Without a retroactive date of rejection, the Debtors could be forced to incur unnecessary administrative charges and contractual obligations in connection with the TSAs that do not provide an equivalent benefit to the Debtors' estates (such as minimum volumes and deficiency payment obligations). Furthermore, each of the Rejection Counterparties has benefited from Debtors continuing to ship on their pipelines, which means that the Debtors have been paying for the services provided while the rejection has been litigated. Lastly, the Rejection Counterparties have done

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[90] *In re Rupari Holding Corp.*, No. 17-10793 (KJC), 2017 WL 5903498, at *6 (Bankr. D. Del. Nov. 28, 2017) (footnotes and citations omitted). "[T]he court's power to grant retroactive relief is derived from the bankruptcy court's equitable powers so long as it promotes the purposes of § 365(a)." *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (*citing In re Thinking Machines Corp.*, 67 F.3d 1021, 1028 (1st Cir. 1995)).

nothing to mitigate their damages, such as filing a motion to terminate the TSAs or petitioning FERC to request waiver to be permitted to re-market the associated capacity.

Thus, the Court will authorize *nunc pro tunc* rejection of the TSAs.

CONCLUSION

For the foregoing reasons, the Court will grant the Motions and enter relief, *nunc pro tunc* to the dates specified in the Motions. The Court requests that the Debtors circulate and submit an agreed proposed order or orders. If the parties cannot agree on a proposed forms of order, submit competing Certificates of Counsel and the Court will decide.

Christopher S. Sontchi, Chief Judge
United States Bankruptcy Court

Dated: November 2, 2020

EXHIBIT E

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)

GRAND MESA PIPELINE, LLC'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF ISSUES

Appellant, Grand Mesa Pipeline, LLC ("Grand Mesa"), pursuant to Rule 8009(a) of the Federal Rules of Bankruptcy Procedure and Local Rule 8009-1, respectfully submits this designation of items to be included in the record on appeal and statement of issues with respect to the appeal docketed in the United States District Court for the District Court of Delaware, C.A. No. 20-CV-1411-CFC.

I. Designation of Record on Appeal.

Grand Mesa designates the following items to be included in the record on appeal. Each designated item shall also include any and all exhibits and documents annexed to and/or referenced within such items.

DATE	DOCKET ENTRY	DESCRIPTION
6/14/2020	1	Voluntary Petition for Non-Individuals Filing for Bankruptcy
6/15/2020	14	Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief

[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.

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DATE	DOCKET ENTRY	DESCRIPTION
8/4/2020	363	Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
8/4/2020	364	Motion of Grand Mesa Pipeline, LLC for Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief from the Automatic Stay
8/18/2020	482	Limited Joinder in and Statement in Support by Platte River Midstream, LLC, DJ South Gathering, LLC, and Platte River Holdings, LLC to Certain Filings of Grand Mesa Pipeline, LLC
8/21/2020	507	Debtors' Objection to Motion of Grand Mesa Pipeline, LLC, for Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief From the Automatic Stay
9/14/2020	625	Letter to the Honorable Christopher S. Sontchi Regarding September 14, 2020 Status Conference Filed by Grand Mesa Pipeline, LLC
9/16/2020	644	Platte River Midstream, LLC, DJ South Gathering, LLC, and Platte River Holdings, LLC's Joinder and Statement in Support of Grand Mesa Pipeline, LLC's Motion for Relief from the Automatic Stay
9/17/2020	652	Reply in Support of Motion of Grand Mesa Pipeline, LLC for Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief from the Automatic Stay
9/17/2020	653	Statement in Support Filed by Federal Energy Regulatory Commission
10/4/2020	770	Letter Clarifying Oral Ruling of October 2, 2020 by Chief Judge Christopher S. Sontchi
10/5/2020	776	Transcript of Hearing Held on October 1, 2020
10/6/2020	781	Transcript of Hearing Held on October 2, 2020
10/13/2020	828	Certification of Counsel Regarding Order Denying Motion of Grand Mesa Pipeline, LLC for an Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief from the Automatic Stay

DATE	DOCKET ENTRY	DESCRIPTION
10/14/2020	831	Order Denying the Motion for Grand Mesa Pipeline, LLC for an Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief from the Automatic Stay
10/21/2020	864	Notice of Appeal of Grand Mesa Pipeline, LLC

II. Statement of Issues.

1. Whether the bankruptcy court erred in finding that the declaratory petition Grand Mesa sought to file with the Federal Energy Regulatory Commission ("FERC") was subject to the automatic stay set forth in 11 U.S.C. § 362.

2. Whether the bankruptcy court erred in finding that the police and regulatory power exception to the automatic stay set forth in 11 U.S.C. § 362(b)(4) did not apply to the declaratory petition Grand Mesa sought to file with FERC regarding the impact of the Debtors' proposed rejection of the parties' transportation service agreements ("TSAs") and, specifically, whether such rejection is consistent with, and necessitated by, the public interest as required under the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq*.

3. Whether the bankruptcy court erred in determining that "cause" did not exist for the bankruptcy court to lift the automatic stay in respect of the declaratory petition Grand Mesa sought to file with FERC.

4. Whether the bankruptcy court erred by precluding FERC from exercising its statutory mandate in respect of the impact of the Debtors' proposed rejection of the TSAs on the public interest consistent with the Sixth Circuit Court of Appeals in *In re FirstEnergy Solutions Corp. v. FERC* 945 F.3d 431 (6th Cir. 2019).

Grand Mesa reserves the right to supplement or amend the statement of issues to be presented on appeal and to designate additional items for inclusion in the record in the appeal.

Dated: November 4, 2020

Respectfully submitted,

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

/s/ Dennis A. Meloro
Dennis A. Meloro (DE Bar No. 4435)

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Claims Agent Kurtzman Carson Consultants LLC	Albert Kass Kurtzman Carson Consultants, LLC 222 N Pacific Coast Highway Suite 300 El Segundo, CA 90245 Email: ECFpleadings@kccllc.com
Interested Party Official Committee of Unsecured Creditors	G. David Dean Cole Schotz P.C. 500 Delaware Avenue, Suite 1410 Wilmington, DE 19801 Email: ddean@coleschotz.com Erez Gilad Stroock & Stroock & Lavan LLP 180 Maiden Lane New York, NY 10038 Email: egilad@stroock.com

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EXHIBIT F

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.	)	

GRAND MESA PIPELINE, LLC'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF ISSUES

Appellant, Grand Mesa Pipeline, LLC ("Grand Mesa"), pursuant to Rule 8009(a) of the Federal Rules of Bankruptcy Procedure and Local Rule 8009-1, respectfully submits this designation of items to be included in the record on appeal and statement of issues with respect to the appeal docketed in the United States District Court for the District Court of Delaware No. 20-CV-1458.

I. Designation of Record on Appeal.

Grand Mesa designates the following items to be included in the record on appeal. Each designated item shall also include any and all exhibits and documents annexed to and/or referenced within such items.

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Items from *In re Extraction Oil & Gas, Inc., et al.*, Case No. 20-11548 (CSS):

DATE	DOCKET ENTRY	DESCRIPTION
6/15/2020	14	Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
8/4/2020	363	Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
9/24/2020	681	[Sealed] Debtors' Combined Reply in Support of (1) Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Date Specified Herein and (II) Granting Related Relief; (2) Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases; and (3) Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
10/5/2020	766	Transcript of Hearing Held on September 30, 2020
10/5/2020	779	Notice of Filing of Proposed Redacted Version of Debtors' Combined Reply in Support of: (1) Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Date Specified Herein and (II) Granting Related Relief; (2) Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases; and (3) Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
10/6/2020	778	Amended Notice of Filing of Proposed Redacted Version of Debtors' Combined Reply in Support of: (1) Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Date Specified Herein and (II) Granting Related Relief; (2) Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases; and (3) Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
10/8/2020	803	Supplemental Brief of Grand Mesa Pipeline, LLC in Support of Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion

DATE	DOCKET ENTRY	DESCRIPTION
		for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Therein and (II) Granting Related Relief
10/9/2020	812	Transcript Regarding Hearing Held October 7, 2020 re: Motion to Reject
10/30/2020	933	Transcript for Hearing Held on October 28, 2020 re: Leases and Contracts Motions
11/2/2020	942	Bench Ruling
11/4/2020	973	Transcript Regarding Hearing Held November 2, 2020 re: Leases Motion Ruling and Stay Relief Motion

Items from *Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC*, Adversary Case No. 20-50816 (CSS):

DATE	DOCKET ENTRY	DESCRIPTION
8/19/2020	Adv. 1	Complaint for Declaratory Judgment by Extraction Oil & Gas, Inc. Against Grand Mesa Pipeline, LLC
8/19/2020	Adv. 2	[Sealed] Complaint for Declaratory Judgment by Extraction Oil & Gas, Inc. Against Grand Mesa Pipeline, LLC
8/19/2020	Adv. 4	Plaintiff's Motion for Summary Judgment
8/19/2020	Adv. 5	[Sealed] Brief in Support of Plaintiff's Motion for Summary Judgment
8/21/2020	Adv. 7	Plaintiff's Motion for Entry of an Order Authorizing Plaintiff to File Under Seal Debtors' Complaint and Brief in Support of Plaintiff's Motion for Summary Judgment
8/21/2020	Adv. 8	Notice of Filing of Proposed Redacted Versions of Plaintiff's Complaint and Brief in Support of Motion for Summary Judgment
9/14/2020	Adv. 14	Letter to the Court by Richard W. Riley re: Status Conference Held on September 14, 2020
9/14/2020	Adv. 15	Letter to the Court by Hal S. Shaftel re: Status Conference Held on September 14, 2020
9/16/2020	Adv. 18	Transcript for Hearing Held on September 14, 2020 re: Status Conference
9/17/2020	Adv. 19	Defendant's Motion for Permissive Abstention
9/17/2020	Adv. 20	[Sealed] Brief in Support of Defendant's Motion for Abstention and Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment
9/23/2020	Adv. 22	[Sealed] Reply in Support of Plaintiff's Motion for Summary Judgment
9/23/2020	Adv. 23	Response in Opposition to Defendant's Motion for Abstention Document

DATE	DOCKET ENTRY	DESCRIPTION
9/28/2020	Adv. 28	Plaintiff's Motion for Entry of an Order Authorizing Plaintiff to File Under Seal Reply in Support of Plaintiff's Motion for Summary Judgment
9/29/2020	Adv. 29	Transcript Regarding Hearing Held on September 25, 2020 re: Status
10/2/2020	Adv. 38	Transcript Regarding Hearing Held September 30, 2020 re: Omnibus Hearings
10/5/2020	Adv. 40	Notice of Filing of Proposed Redacted Versions of Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment
10/8/2020	Adv. 42	[Sealed] Proposed Findings of Fact and Conclusions of Law
10/8/2020	Adv. 43	Exhibit(s) Proposed Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion for Summary Judgment and Grand Mesa Pipeline, LLC's Motion for Abstention
10/9/2020	Adv. 44	Transcript regarding Hearing Held 10/07/20 RE: Motion to Reject.
10/14/2020	Adv. 45	Findings of Fact and Conclusions of Law on Plaintiff's Motion for Summary Judgment Against Defendant, Grand Mesa Pipeline, LLC; and Defendant's Motion for Permissive Abstention
10/14/2020	Adv. 46	Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Permissive Abstention
10/14/2020	Adv. 47	Judgment for Findings of Fact and Conclusions of Law on Plaintiff's Motion for Summary Judgment Against Defendant, Grand Mesa Pipeline, LLC; and Defendant's Motion for Permissive Abstention
10/20/2020	Adv. 51	Order Authorizing the Debtors to File Under Seal Debtors' Complaint and Brief in Support of Plaintiff's Motion for Summary Judgment
10/20/2020	Adv. 52	Order Authorizing the Debtors to File Under Seal Reply in Support of Plaintiff's Motion for Summary Judgment
10/27/2020	Adv. 53	Notice of Appeal of Grand Mesa Pipeline, LLC
10/30/2020	Adv. 59	Transcript for Hearing Held on October 28, 2020 re: Leases and Contracts Motions

II. Statement of Issues.

1. Whether the bankruptcy court erred in holding that the Amended and Restated Transportation Services Agreements dated June 21, 2016 between Grand Mesa Pipeline, LLC and Extraction Oil & Gas, Inc.[1] (the "Bayswater TSA"), which includes dedications of lands and reserves and commitments in favor of Grand Mesa, does not establish a real covenant running with the land under Colorado law.

2. Whether the bankruptcy court erred in holding that Colorado law requires privity of estate between covenanting parties in order to establish a real covenant running with the land.

3. Whether the bankruptcy court erred in holding that the Bayswater TSA did not create an equitable servitude that runs with the land under Colorado law.

Grand Mesa reserves the right to supplement or amend the statement of issues to be presented on appeal and to designate additional items for inclusion in the record in the appeal.

[1] Assigned by Bayswater Exploration & Production, LLC to Extraction Oil & Gas, Inc. pursuant to an Assignment, Bill of Sale and Conveyance dated October 3, 2016 effective July 1, 2016.

Dated: November 10, 2020

Respectfully submitted,

GREENBERG TRAURIG, LLP

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Counsel for Grand Mesa Pipeline, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

/s/ Dennis A. Meloro
Dennis A. Meloro (DE Bar No. 4435)

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Interested Party Official Committee of Unsecured Creditors	G. David Dean Cole Schotz P.C. 500 Delaware Avenue, Suite 1410 Wilmington, DE 19801 Telephone: 302-652-3131 Email: ddean@coleschotz.com Erez Gilad Stroock & Stroock & Lavan LLP 180 Maiden Lane New York, NY 10038 Telephone: 212-806-5400 Email: egilad@stroock.com Kristopher M. Hansen Stroock & Stroock & Lavan LLP 180 Maiden Lane New York, NY 10038 Telephone: 212-806-5400 Email: khansen@stroock.com Frank A. Merola Stroock & Stroock & Lavan LLP 2029 Century Park East Los Angeles, CA 90067 Telephone: 310-556-5802 Email: fmerola@stroock.com Kenneth Pasquale Stroock & Stroock & Lavan LLP 180 Maiden Lane New York, NY 10038 Telephone: 212-806-5400 Email: kpasquale@stroock.com Jason M. Pierce Stroock & Scroock & Lavan LLP 180 Maiden Lane New York, NY 10038-4982 Telephone: 212-806-5400 Email: jpierce@stroock.com Andrew John Roth-Moore Cole Schotz P.C. 500 Delaware Avenue, Suite 1410 Wilmington, DE 19801

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EXHIBIT G

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)

GRAND MESA PIPELINE, LLC'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF ISSUES

Appellant, Grand Mesa Pipeline, LLC ("Grand Mesa"), pursuant to Rule 8009(a) of the Federal Rules of Bankruptcy Procedure and Local Rule 8009-1, respectfully submits this designation of items to be included in the record on appeal and statement of issues with respect to the appeal docketed in the United States District Court for the District Court of Delaware, C.A. No. 1:20-cv-01521-UNA.

I. Designation of Record on Appeal.

Grand Mesa designates the following items to be included in the record on appeal. Each designated item shall also include any and all exhibits and documents annexed to and/or referenced within such items.

DATE	DOCKET ENTRY	DESCRIPTION
6/14/2020	1	Voluntary Petition for Non-Individuals Filing for Bankruptcy
6/15/2020	14	Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief

[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.

DATE	DOCKET ENTRY	DESCRIPTION
8/4/2020	363	Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
8/18/2020	482	Limited Joinder in and Statement in Support by Platte River Midstream, LLC, DJ South Gathering, LLC, and Platte River Holdings, LLC to Certain Filings of Grand Mesa Pipeline, LLC
9/8/2020	599	Transcript of Hearing Held on September 3, 2020
9/14/2020	625	Letter to the Honorable Christopher S. Sontchi Regarding September 14, 2020 Status Conference Filed by Grand Mesa Pipeline, LLC
9/24/2020	681	Debtors' Combined Reply in Support of (1) Debtors' Omnibus Motion for Entry of an Order(I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Date Specific Herein and (II) Granting Related Relief; (2) Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases; and (3) Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
10/2/2020	766	Transcript of Hearing Held on September 30, 2020
10/5/2020	776	Transcript of Hearing Held on October 1, 2020
10/6/2020	781	Transcript of Hearing Held on October 2, 2020
10/8/2020	803	Supplemental Brief of Grand Mesa Pipeline, LLC in Support of Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief
10/9/2020	811	Transcript of Hearing Held on October 6, 2020
10/9/2020	812	Transcript of Hearing Held on October 7, 2020
10/22/2020	877	Transcript of Hearing Held on October 20, 2020

DATE	DOCKET ENTRY	DESCRIPTION
10/26/2020	891	Declaration of Branko Terzic
10/26/2020	892	[SEALED] Declaration of Matthew O'Loughlin
10/29/2020	926	Transcript of Hearing Held on October 27, 2020
10/30/2020	933	Transcript of Hearing Held on October 28, 2020
11/2/2020	942	Bench Ruling
11/4/2020	973	Transcript of Hearing Held on November 2, 2020
11/10/2020	1038	Order Granting Motions to Reject Certain Executory Contracts
11/11/2020	1048	Notice of Appeal

II. Statement of Issues.

1. Whether the bankruptcy court applied the incorrect standard in deciding the motion to reject:

a. Whether the bankruptcy court erred by applying the business judgment standard in granting the motion to reject.

b. Whether the bankruptcy court erred in determining the "heightened scrutiny," public interest standard announced in *Mirant* and its progeny is not "warranted" in this case.

c. Whether the bankruptcy court erred by failing to allow FERC to conduct a hearing, in accordance with its normal procedures, to evaluate the public interest impact by the proposed rejection of the TSAs, consistent with the ruling of the U.S. Court of Appeals for the Sixth Circuit in *FirstEnergy*.

2. Whether the bankruptcy court erred in finding that rejection of the TSAs and payment of damages claims arising therefrom through the plan and confirmation process is not an abrogation or modification of FERC-approved filed rates.

3. Whether the bankruptcy court erred in ruling that even if the Bayswater TSA contained a valid and enforceable covenant running with the land under Colorado law, such covenant is contractual in nature and may be rejected under 11 U.S.C. § 365.

4. Whether the bankruptcy court erred in authorizing rejection of the TSAs *nunc pro tunc* to June 14, 2020.

Grand Mesa reserves the right to supplement or amend the statement of issues to be presented on appeal and to designate additional items for inclusion in the record in the appeal.

Dated: November 25, 2020

Respectfully submitted,

GREENBERG TRAURIG, LLP

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Counsel for Grand Mesa Pipeline, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 25, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

/s/ Dennis A. Meloro
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EXHIBIT H

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)
	:	(Jointly Administered)
Debtor.	:	
EXTRACTION OIL & GAS, INC., *et al.*,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adv. Proc. No.: 20-50833 (CSS)
	:	
PLATTE RIVER MIDSTREAM, LLC, and DJ SOUTH GATHERING, LLC,	:	
	:	
Defendants.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC[1]

INTRODUCTION

This adversary proceeding is one of several arising from the Chapter 11 case of Extraction and its affiliates.[2] The Debtors are in the "upstream" business of extracting hydrocarbons from land in the State of Colorado. In the Chapter 11 case, the Debtors have sought to reject several of what are commonly known as Transportation Services Agreements or TSA's. Broadly speaking, the counterparties to these TSA's are

[1] The Court hereby makes the following findings of fact and conclusions of law pursuant to Fed. R. Bank. P. 7052, which is applicable to this matter by virtue of Fed. R. Bankr. P. 9014. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions or law constitute findings of fact, they are adopted as such.

[2] Undefined terms used in this Introduction have the meaning set forth below.

"midstream" pipelines, which transport the Debtors' hydrocarbons to larger "downstream" pipelines or directly to the depot in Cushing, Oklahoma.

In response to the motion to reject, many of the counterparties, including these defendants, have argued that the TSA's cannot be rejected because they include covenants that run with the land. Moreover, they argue that a determination of whether there are covenants that run with the land requires an adversary proceeding. Hence, the Debtors have filed several adversary proceedings in which they have sought a declaratory judgment that the TSA's do not create covenants that run with the land. Currently, before the Court is the Debtor's motion for summary judgment to that effect.[3]

As set forth in detail below, the Court will grant the Debtors' motion for summary judgment. Under Colorado law, to create a covenant running with the land, the parties must intend to create a covenant running with the land and the covenant must touch and concern the land with which it runs. In addition, there must also be privity of estate between the original covenanting parties at the time of the covenant's creation. Under the unambiguous terms of the Platte River Contract, none of the required elements are met—the parties did not intend to create a covenant that runs with the land, the covenant does not touch or concern the land, and there is no privity of the estate. Similarly, under the unambiguous terms of the DJ South Contract, while the parties did intend the dedication and commitment to run with the land, it nonetheless does not touch or concern

[3] The motions to reject are pending in the Chapter 11 case. As of this writing, the motion to reject the Transportation Agreements with Platte River and DJ South are in the midst of an evidentiary hearing.

the land and there is no privity of the estate. Thus, as not all the required elements are present in connection with either contract, no covenant runs with the land.

Finally, while there are several issues discussed below, the central issue before the Court is whether the dedicated and committed interests in the Transportation Agreements touch and concern the land. They do not. The dedications and commitments concern only personal property and do not affect the physical use of real property or closely relate to real property. Throughout the Transportation Agreements, the dedicated and committed interests are used to identify the particular minerals that are subject to, set apart for, pledged or committed to the parties' contractual obligations. They do not convey any interests in real property. Thus, they cannot serve to satisfy the touch and concern the land element of the test to establish a covenant that runs with the land.

THE TRANSPORTATION AGREEMENTS.

This proceeding concerns two agreements for the transportation of crude oil from wells owned and operated by Extraction Oil & Gas, Inc. ("Extraction") north of Denver, Colorado. *Brief in Support of Plaintiff's Motion for Summary Judgment* ("*Extraction MSJ*") (A. D.I. 4) at p. 1-2. Extraction owns leasehold interests in the crude oil and related hydrocarbons, and has contracted with Platte River Midstream, LLC ("Platte River") and DJ South Gathering, LLC ("DJ South" and, collectively with Platte River, the "Defendants") to transport the oil downstream for eventual sale. *Extraction MSJ* (A. D.I. 5-1), Ex. A; (A. D.I. 5-2), Ex. B. The issue presented by *Extraction MSJ* is whether these agreements create covenants running with the land under Colorado law. *Extraction MSJ* (A. D.I. 4) at p. 1.

Extraction and Platte River entered into the First Amended and Restated Transportation Services Agreement (the "Platte River Contract") on April 14, 2017. *Extraction MSJ* Ex. A at p. 1.

On the same day, Extraction and Platte River entered into the April 14, 2017 Storage Tank Lease Option Agreement—a side letter agreement that the parties stated was "intended to be a covenant that runs with the land . . . ." *Reply in Support of the Motion for Summary Judgment* (A. D.I. 23) Ex. 2 at § 7.

Extraction and DJ South entered into the Transportation Services Agreement (the "DJ South Contract," together with the Platte River Contract, the "Transportation Agreements") on May 16, 2018. *Extraction MSJ* (A. D.I. 5-2), Ex. B at p. 1.

The Transportation Agreements are construed in accordance with, and are governed by, Colorado law, without regard to Colorado's conflict of laws provisions. *Extraction MSJ* (A. D.I. 5), Ex. A at § 13.14; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 14.14. The real property implicated by the Transportation Agreements is located within Colorado. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1(t); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 1.1(u).

Extraction did not grant any easement or rights-of-way to the Defendants contemporaneously with the Transportation Agreements. *Defendants' Response in Opposition to the Motion for Summary Judgment* (A. D.I. 21) (the "*Platte River Response*"), Ex. G (A. D.I. 21-7) (Extraction not a party to the contract); Ex. H (A. D.I. 21-8) (same); Ex. N (A. D.I. 21-14) (same); Ex. S (A. D.I. 21-19) (same); Ex. L (A. D.I. 21-12) (right-of-way granted to Platte River on July 17, 2019).

PROCEDURAL BACKGROUND

On June 14, 2020, Extraction and its affiliates filed voluntary petitions under Chapter 11 of the Bankruptcy Code.

On August 11, 2020, the Debtors filed the *Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* (D.I. 412) (the "*Motion to Reject*").

In connection with the Debtors' chapter 11 cases, Extraction instituted this adversary proceeding by filing its *Complaint for Declaratory Judgment* (A. D.I. 2) against Platte River and DJ South on August 25 (the "*Extraction Complaint*"). The parties dispute whether the Transportation Agreement creates any covenants running with the land. *Extraction Complaint* (A. D.I. 2) at p. 8 and 10.

On the same day, Extraction filed its *Motion for Summary Judgment* (A. D.I. 3).

On September 18, Platte River and DJ South filed their *Response in Opposition to the Motion for Summary Judgment* (A. D.I. 21).

On September 23, Extraction filed its *Reply in Support of the Motion for Summary Judgment* (A. D.I. 23).

On September 30, 2020, the parties argued the motion for summary judgment before this Court.

On October 8, 2020, the parties submitted proposed findings of fact and conclusions of law under the direction of this Court.

CONTRACTUAL TERMS

The Platte River Contract's term ends on "October 31, 2026 unless earlier terminated pursuant to the terms of this Agreement or extended" under the contract's terms. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 4.1.

The DJ South Contract's term ends ten years following the Commencement Date. *Extraction MSJ* (A. D.I. 5-2), Ex. B at §§ 1.1(o) and 5.1.

Section 1.1(o) of the Platte River Contract states: "'Committed Volume' means, subject to Section 3.1, the number of Barrels of Crude Petroleum per day Shipper commits to ship on the Pipeline System as set forth on Schedule A." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1(o).

Section 1.1(p) of the DJ South Contract states: "'Committed Volume' means, subject to Section 4.1, the number of Barrels of Crude Petroleum per day Shipper commits to ship on the Pipeline System as set forth on Schedule A." *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 1.1(p).

Section 1.1(s) of the Platte River Contract states: "'Crude Petroleum' has the meaning set forth in the Tariff." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1(s).

Section 1.1(t) of the DJ South Contract also states: "'Crude Petroleum' has the meaning set forth in the Tariff." *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 1.1(t).

The Tariff attached to the Platte River Contract defines "Crude Petroleum" as "the direct liquid product of oil wells, or the indirect liquid petroleum products of oil or gas wells, or a mixture of such products." *Extraction MSJ* (A. D.I. 5-1), Ex. A, (Ex. C) at Item 5.

Section 1.1(bb) of the Platte River Contract states:

> "Interests" means all interests that Shipper (or any of its Affiliates) now or hereinafter owns, controls, acquires or has the right to market (as such marketing rights may change from time to time) in Crude Petroleum of all formations in, under or attributable to the Dedication Area, together with any pool, communitized area or unit, and all interests in any wells, whether now existing or drilled hereafter, on or completed within the Dedication Area, or within any such pool, communitized area or unit, even though such interests may be incorrectly or incompletely stated, all as the same shall be enlarged by the discharge of any burdens or by the removal of any charges or encumbrances to which any of same may be subject as of the Execution Date, and any and all replacements, renewals and extensions or amendments of any of the same; provided, however, that "Interests" shall not include any interest of Shipper or any of its Affiliates that must be offered to a working interest partner pursuant to any applicable agreement with such partner in effect on the Execution Date.

Extraction MSJ (A. D.I. 5-1), Ex. A at § 1.1(bb).

Section 1.1(dd) of the DJ South Contract states:

> "Interests" means all interests that Shipper (or any of its Affiliates) now or hereinafter owns, controls, acquires or has the right to market (as such marketing rights may change from time to time) in Crude Petroleum of all formations in, under or attributable to the Dedication Area, and all interests in any wells, whether now existing or drilled hereafter, on or completed within the Dedication Area, all as the same shall be enlarged by the discharge of any burdens or by the removal of any charges or encumbrances to which any of same may be subject as of the Execution Date, and any and all replacements, renewals and extensions or amendments of any of the same; provided, however, that "Interests" shall not include (i) any interest of Shipper or any of its Affiliates that must be offered to a working interest partner pursuant to any applicable agreement with such partner in effect on the Execution Date or (ii) any interest that Shipper (or any of its Affiliates) now or hereinafter owns, controls, acquires or has the right to market (as such marketing rights may change from time to time) in gas, natural gas liquids or any other gaseous hydrocarbons.

Extraction MSJ (A. D.I. 5-2), Ex. B at § 1.1(dd).

Section 1.1(rr) of the Platte River Contract states: "'Services' means transportation on the Pipeline System of Crude Petroleum for Shipper's account from the origination points set forth on Exhibit A to Lucerne Station and redelivering such Crude Petroleum for Shipper's account into the Grand Mesa Pipeline, any other third party pipeline that connects to the Lucerne Station or any storage tank owned or controlled by Shipper at the Lucerne Station." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1(rr).

Section 1.1(aaa) of the DJ South Contract states: "'Services' means transportation on the Pipeline System of Crude Petroleum for Shipper's account from the Receipt Points and redelivery of such Crude Petroleum for Shipper's account at the Delivery Points." *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 1.1(aaa).

Section 1.1(ccc) of the Platte River Contract states: "'Total Financial Commitment' means, at a given time, the aggregate of the Fixed Monthly Payments due under this Agreement for all Months of the Term remaining at such time." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1(ccc).

Section 1.1(kkk) of the DJ South Contract states: "Total Financial Commitment" means, at a given time, the aggregate of the Fixed Monthly Payments due under this Agreement for all Months of the Term remaining at such time." *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 1.1(kkk).

Extraction is required to pay DJ South and Platte River a monthly tariff approved by FERC for the volumes Extraction delivers into the Transportation Systems. Extraction MSJ (A. D.I. 5-1, 5-2), Ex. A at § 5.1 and Ex. B at § 6.1.

Extraction is obligated to make a fixed monthly payment to DJ South and Platte River, regardless of the volumes Extraction delivers. *Id.* at § 6.1 and Ex. B at § 7.1. The fixed monthly payment sets a minimum that Platte River and DJ South will be paid, although it is offset, and usually exceeded, by tariff payments. *Id*.

Section 2.1 of the Platte River Contract states: "Dedication. Subject to Section 2.2, Shipper hereby dedicates and commits to the Services to be provided by Platte River hereunder all of the Interests." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2.1.

Section 2.1 of the DJ South Contract states: "Dedication. Subject to Sections 2.2, 2.5 and 2.6, Shipper hereby dedicates and commits to the Services to be provided by Transporter hereunder all of the Interests. Notwithstanding the foregoing, Transporter temporarily releases all of the Interests from the dedication hereunder until (a) with respect to the Interests served by the Badger CGF, the Badger Commencement Date, and (b) with respect to the Interests served by Matador CGF, the Matador Commencement Date." *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.1.

Section 2.5 of the DJ South Contract states:

> **Covenant.** Subject to Section 2.6, the dedication and commitment by Shipper under this Article II shall be deemed an interest that runs with the land in the Dedication Area, and the Parties agree that the dedications and commitments with regard to any Interest existing as of the Effective Date shall be deemed fully vested, and, subject to Section 2.2(b), further agree that the dedications and commitments with regard to future interests in the Interests shall vest upon Shipper's acquiring ownership, control or right to market such Interest(s). Shipper agrees to execute and deliver a memorandum substantially in the form attached hereto as Exhibit C for each of Adams County, Arapahoe County, Weld County, Boulder County, and the City and County of Broomfield to Transporter for recording in the real property records of

each such county in which any portion of the Dedication Area is located in order to evidence the dedication provision of this Article II.

Id. at § 2.5.

There is no provision resembling section 2.5 of the DJ South Contract in the Platte River Contract.

Section 3.1 of the Platte River Contract states:

> **Volume Commitment; Ship or Pay Obligations.** Commencing as of the Commencement Date and continuing thereafter during the Term of this Agreement, Shipper agrees to tender to Platte River for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff and the terms of this Agreement; provided, that Shipper's obligation to ship or pay its Committed Volume under this Agreement shall be satisfied in full upon the earlier to occur of (a) Shipper's shipment of eighty five million (85,000,000) Barrels under the terms of this Agreement or (b) by satisfaction of Shipper's Total Financial Commitment. Upon satisfaction of either of such obligations, (i) the Committed Volume shall immediately be reduced to zero and (ii) Shipper may elect to terminate this Agreement upon written notice to Platte River.

Extraction MSJ (A. D.I. 5-1), Ex. A at § 3.1.

Section 4.1 of the DJ South Contract states:

> **Volume Commitment; Ship or Pay Obligations.** Commencing as of the Commencement Date and continuing thereafter during the Term of this Agreement, Shipper agrees to tender to Transporter for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff and the terms of this Agreement; provided, that Shipper's obligation to ship or pay its Committed Volume under this Agreement shall be satisfied in full and Shipper's Total Financial Commitment will be zero (0) upon the earlier to occur of (a) Shipper's shipment of one hundred sixteen million, seventy thousand (116,070,000) Barrels under the terms of this Agreement or (b) by satisfaction of Shipper's Total Financial Commitment. Upon satisfaction of either of such obligations, (i) the Committed Volume shall immediately be reduced to zero and (ii) Shipper may elect to terminate this Agreement upon written notice to Transporter.

Extraction MSJ (A. D.I. 5-2), Ex. B at § 4.1.

Section 6.2 of the Platte River Contract states:

> **Total Financial Commitment.** Unless this Agreement is terminated by Shipper due to an Event of Default by Platte River (as more fully described in Section 11.3), or under Section 13.2, upon termination of this Agreement, if, for any reason, Shipper has not paid to Platte River the Total Financial Commitment, Shipper will pay to Platte River the amount due within thirty (30) days following receipt of an invoice from Platte River for such amount due. For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by Shipper of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at Shipper's option, any payment made by Shipper to accelerate the satisfaction of that obligation. At the end of each Contract Year, Platte River will provide Shipper a statement of dollars accumulated towards the Total Financial Commitment, as well as Barrels shipped to date.

Extraction MSJ (A. D.I. 5-1), Ex. A at § 6.2.

Section 7.2 of the DJ South Contract states:

> **Total Financial Commitment.** Unless this Agreement is terminated by Shipper due to an Event of Default by Transporter (as more fully described in Section 12.3), or under Section 14.2, upon termination of this Agreement, if, for any reason, Shipper has not paid to Transporter the Total Financial Commitment, Shipper will pay to Transporter the amount due within thirty (30) days following receipt of an invoice from Transporter for such amount due; provided, however, that if Shipper's failure to pay the Total Financial Commitment is due to Transporter's failure to accept volumes nominated by Shipper, Shipper shall have the option to extend the Term of this Agreement for such period of time as required to pay the Total Financial Commitment at the same Volume Commitment level as in effect on the date Shipper exercises such extension option. For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by Shipper of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at Shipper's option, any payment made by Shipper to accelerate the satisfaction of that obligation. At the end of each Contract Year, Transporter will provide Shipper a statement of dollars accumulated towards the Total Financial Commitment, as well as Barrels shipped to date.

Extraction MSJ (A. D.I. 5-2), Ex. B at § 7.2.

Section 6.6 of the Platte River Contract states:

> **Title.** Shipper warrants that it possesses either title to, or the right to deliver to Platte River for transportation hereunder, all of the Crude Petroleum delivered or caused to be delivered by Shipper to the Pipeline System for shipment under this Agreement. Shipper warrants that all Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement is free from all liens, security interests, and adverse claims of every kind and agrees to release, indemnify, defend and hold Platte River and its affiliate and subsidiary companies and their respective shareholders, members, partners, directors, managers, officers, employees, agents and representatives harmless from all suits, actions, claims, judgments, debts, accounts, damages, costs, liabilities, losses, and expenses arising from or out of adverse claims of any or all persons, including Governmental Authorities, as to title to, or otherwise claiming an interest in or right to payment on account of, such Crude Petroleum including, but not limited to, royalties and other charges payable with respect thereto. Platte River will have the right to reject any Crude Petroleum that, when tendered for transportation on the Pipeline System, is the subject of litigation or that is encumbered by any lien, security interest, or other form of burden, and Platte River may require Shipper to provide satisfactory evidence of unencumbered title prior to accepting deliveries of Crude Petroleum from Shipper.

Extraction MSJ (A. D.I. 5-1), Ex. A at § 6.6.

Section 7.6 of the DJ South Contract states:

> **Title.** Shipper warrants that it possesses either title to, or the right to deliver to Transporter for transportation hereunder, all of the Crude Petroleum delivered or caused to be delivered by Shipper to the Pipeline System for shipment under this Agreement. Shipper warrants that all Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement will be delivered to Shipper free of all liens, security interests, and adverse claims of every kind (other than statutory liens and liens in favor of Persons who have provided debt financing to Shipper) and agrees to release, indemnify, defend and hold Transporter and its affiliate and subsidiary companies and their respective shareholders, members, partners, directors, managers, officers, employees, agents and representatives harmless from all suits, actions, claims, judgments, debts, accounts, damages, costs, liabilities, losses, and expenses arising from or out of adverse claims of any or all persons, including Governmental Authorities, as to

> title to, or otherwise claiming an interest in or right to payment on account of, such Crude Petroleum including, but not limited to, royalties and other charges payable with respect thereto. Transporter will have the right to reject any Crude Petroleum that, when tendered for transportation on the Pipeline System, is the subject of litigation or that is encumbered by any lien, security interest, or other form of burden, and Transporter may require Shipper to provide satisfactory evidence of unencumbered title prior to accepting deliveries of Crude Petroleum from Shipper.

Extraction MSJ (A. D.I. 5-2), Ex. B at § 7.6.

Section 6.7 of the Platte River Contract states:

> **Custody.** Shipper will be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the inlet flange of LACT units provided by Platte River for delivery into the Pipeline System, and after redelivery of such Crude Petroleum to Shipper or its designee at the Lucerne Station. Platte River shall be in exclusive control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof into the Pipeline System and prior to redelivery thereof to Shipper or its designee at the Lucerne Station. The Party that is in exclusive control and possession of the Crude Petroleum will be responsible for all injury, damage, pollution, or contamination, or violation of or the need to comply with Applicable Law caused thereby, except (a) to the extent attributable to the gross negligence or willful misconduct of the other Party and (b) to the extent caused by the failure of the Crude Petroleum to meet the quality specifications described in the Tariff. Further, the Party having responsibility for Crude Petroleum under the preceding sentences (except with respect to Platte River to the extent such Crude Petroleum does not meet the specification set forth in Item No. 30 of the Tariff), will release, defend, indemnify, and hold the other Party, its Affiliates, and its and their officers, employees, and agents harmless from and against any and all Claims arising from (i) personal injury, death, damage, pollution or contamination, or violation of or the need to comply with any Applicable Law, caused by Crude Petroleum deliverable under the Tariff while such Crude Petroleum was in the exclusive control and possession of the Party as set forth in this Section 6.7; or (ii) personal injury, death, damage, pollution or contamination, or violation of or the

need to comply with any Applicable Law, arising out of the Party's facilities or operations WITHOUT REGARD TO WHETHER THE ACT, OCCURRENCE, OR CIRCUMSTANCE GIVING RISE TO THE INDEMNIFICATION OBLIGATION IS THE RESULT OF THE SOLE, ACTIVE, PASSIVE, CONCURRENT, OR COMPARATIVE NEGLIGENCE, STRICT LIABILITY, BREACH OF DUTY (STATUTORY OR OTHERWISE), OR OTHER FAULT OF OR VIOLATION OF ANY APPLICABLE LAW BY THE INDEMNIFIED PERSON, PROVIDED THAT NO INDEMNIFICATION WILL BE APPLICABLE TO THE EXTENT OF ANY GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INDEMNIFIED PERSON.

Extraction MSJ (A. D.I. 5-1), Ex. A at § 6.7.

Section 7.7 of the DJ South Contract states:

Custody. Shipper will be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the inlet flange of LACT units provided by Shipper for delivery into the Pipeline System, and after redelivery of such Crude Petroleum to Shipper or its designee at the Delivery Points. Transporter shall be in exclusive control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof at the Receipt Point and prior to redelivery thereof to Shipper or its designee at the Delivery Points. The Party that is in exclusive control and possession of the Crude Petroleum will be responsible for all injury, damage, pollution, or contamination, or violation of or the need to comply with Applicable Law caused thereby, except (a) to the extent attributable to the gross negligence or willful misconduct of the other Party and (b) to the extent caused by the failure of the Crude Petroleum to meet the quality specifications described in the Tariff. Further, the Party having responsibility for Crude Petroleum under the preceding sentences (except with respect to Transporter to the extent (1) such Crude Petroleum does not meet the specification set forth in Item No. 30 of the Tariff, (2) Transporter did not knowingly accept such off-specification Crude Petroleum, and (3) the injury or other loss was caused by such Crude Petroleum failing to meet the specifications), will release, defend, indemnify, and hold the other Party, its Affiliates, and its and their officers, employees, and agents harmless from and against any and all Claims arising from (i) personal injury, death, damage, pollution or contamination, or violation of or the

need to comply with any Applicable Law, caused by Crude Petroleum deliverable under the Tariff while such Crude Petroleum was in the exclusive control and possession of the Party as set forth in this Section 7.7; or (ii) personal injury, death, damage, pollution or contamination, or violation of or the need to comply with any Applicable Law, arising out of the Party's facilities or operations WITHOUT REGARD TO WHETHER THE ACT, OCCURRENCE, OR CIRCUMSTANCE GIVING RISE TO THE INDEMNIFICATION OBLIGATION IS THE RESULT OF THE SOLE, ACTIVE, PASSIVE, CONCURRENT, OR COMPARATIVE NEGLIGENCE, STRICT LIABILITY, BREACH OF DUTY (STATUTORY OR OTHERWISE), OR OTHER FAULT OF OR VIOLATION OF ANY APPLICABLE LAW BY THE INDEMNIFIED PERSON, PROVIDED THAT NO INDEMNIFICATION WILL BE APPLICABLE TO THE EXTENT OF ANY GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INDEMNIFIED PERSON.

Extraction MSJ (A. D.I. 5-2), Ex. B at § 7.7.

Section 13.9 of the Platte River Contract states:

Successors and Assignability. This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective permitted successors and assigns. This Agreement shall not be assigned or transferred in whole or in part by either Party except upon the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, either Party may make a Permitted Transfer of this Agreement at any time, without the other Party's consent. In the event of any assignment made by Shipper as a Permitted Transfer, Shipper shall remain obligated for all obligations under this Agreement jointly and severally with its assignee unless such assignee demonstrates sufficient financial viability and creditworthiness equivalent or better than Shipper or otherwise sufficient to fulfill the obligations of Shipper under this Agreement to the reasonable satisfaction of Platte River. With respect to all other assignments to which Platte River has consented pursuant to this Section 13.9, Shipper shall not remain obligated for all obligations under this Agreement jointly and severally with its assignee.

Extraction MSJ (A. D.I. 5-1), Ex. A at § 13.9.

Section 14.9 of the DJ South Contract states:

Successors and Assignability. This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective

> permitted successors and assigns. This Agreement shall not be assigned or transferred in whole or in part by either Party except upon the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, either Party may make a Permitted Transfer of this Agreement at any time, without the other Party's consent. In the event of any assignment made by Shipper as a Permitted Transfer, Shipper shall remain obligated for all obligations under this Agreement jointly and severally with its assignee unless such assignee demonstrates, consistent with the Tariff, sufficient financial viability and creditworthiness equivalent or better than Shipper or otherwise sufficient to fulfill the obligations of Shipper under this Agreement to the reasonable satisfaction of Transporter. With respect to all other assignments to which Transporter has consented pursuant to this Section 14.9, Shipper shall not remain obligated for all obligations under this Agreement jointly and severally with its assignee.

Extraction MSJ (A. D.I. 5-2), Ex. B at § 14.9.

CONCLUSIONS OF LAW

JURISDICTION AND VENUE

The Court has jurisdiction over this matter. 28 U.S.C. §§ 157 and 1334.

No party has challenged the Court's jurisdiction. *Extraction Complaint* (A. D.I. 2); *Platte River Response* (A. D.I. 21). Extraction consents to entry of a final order or judgment by this Court in this proceeding; however, pursuant to Local Rule 7012-1, Platte River and DJ South do not consent to the entry of a final order or judgment by this Court.

DECLARATORY JUDGMENT

Declaratory judgment is appropriate because the parties dispute whether the Transportation Agreements create any covenants running with the land in connection with the Debtors' *Motion to Reject* the Transportation Agreements. 28 U.S.C § 2201 (a) ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal

relations of any interested party seeking such declaration, whether or not further relief is or could be sought.").

LEGAL STANDARD

To succeed on summary judgment, the movant must show that "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *In re Maxus Energy Corp.*, 615 B.R. 62, 68 (Bankr. D. Del. 2020) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The movant "bears the burden of proving that no genuine issue of material fact exists." *In re Quintas Corp.*, 397 B.R. 710, 714 (Bankr. D. Del. 2008) (citation omitted).

In determining whether summary judgment is appropriate, the court accepts all evidence presented by the non-movant as true and draws all inferences in the non-movants' favor and against summary judgment. *See In re LTC Holdings, Inc.*, 597 B.R. 554, 559 (Bankr. D. Del. 2019) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

"[W[here the record could leave reasonable minds to draw conflicting inferences, summary judgment is improper and the action must proceed to trial." *In re Maxus Energy Corp.*, 615 B.R. at 69 (citations and internal quotations omitted).

GOVERNING LAW

Colorado law governs the substantive real property questions in this case. *Wolf v. Burke*, 32 P. 427, 429 (Colo. 1893) ("[T]he rights and titles to real property are governed by the law of the situs . . . ."); *United States v. Novotny*, 184 F. Supp. 2d 1071, 1087 (D. Colo.

2001) ("Colorado law applies to issues relating to the conveyance and ownership of real property located within Colorado.") (citation simplified).

SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of material fact. Fed. R. Civ. P. 56(a) (noting the "[C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact."); *Tamarind Resort Assocs. v. Gov't of Virgin Islands*, 138 F.3d 107, 110 (3d Cir. 1998) ("[I]t is a fundamental principle of contract law that 'disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law, and are, therefore, appropriate cases for summary judgment.'").

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

The Defendants have not raised any genuine issue of material fact concerning whether the Transportation Agreements create covenants running with the land. *Platte River Response* (A. D.I. 21).

Any ambiguity concerning whether the terms of the Transportation Agreements created covenants running with the land would be resolved in favor of the unrestricted use of the land. *B.B. & C. P'ship v. Edelweiss Condo. Ass'n*, 218 P.3d 310, 315 (Colo. 2009) ("When the covenant is unclear, courts resolve all doubts against the restriction and in favor of free and unrestricted use of property.").

The Transportation Agreements' terms are unambiguous. *Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 120 (Colo. 2016) ("A contractual term is ambiguous 'if it is susceptible on its face to more than one reasonable interpretation.'").

COVENANTS RUNNING WITH THE LAND

The unambiguous terms of the Transportation Agreements do not create any covenants running with the land. *Extraction MSJ* (A. D.I. 4), Ex. A; *Extraction MSJ* (A. D.I. 5-2), B.

Under Colorado law, "[u]nlike personal covenants, which operate like a general contract provision and bind only the actual parties to the covenant, real covenants "run with the land" and burden or benefit successors in interests." *Cloud v. Ass'n of Owners*, 857 P.2d 435, 440 (Colo. App. 1992).

A real covenant, or covenant running with the land, creates "an equitable property interest in the burdened land." 9 Powell, Powell on Real Property § 60.01; *see also* Restatement (Third) of Property (Servitudes) § 7.9 (2000) (servitudes, such as covenants running with the land, are not a lien or executory contract but rather, "an interest in land"); *id.* at § 1.4 (abolishing distinction between the terms "real covenant" and "equitable servitude" as they both "describe servitudes encompassed within the term

'covenant that runs with the land'"). Colorado courts long have recognized that a covenant running with the land is a burden on real property. *See Farmers' High Line Canal & Reservoir Co. v. N.H. Real Estate Co.*, 92 P. 290, 294 (Colo. 1907) ("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. According to this the covenant binds the person of the owner of the burdened land, provided he comes by his title legally, and benefits the owner of the benefited land, provided he comes by his title legally.") (citation and internal quotations omitted); *see also In re Lonesome Pine Holdings, LLC*, 2011 Bankr. LEXIS 5775, at *9 (Bankr. D. Colo. Sept. 1, 2011) ("restrictions that run with the land create equitable interests") (citation and internal quotations omitted).

Colorado law disfavors the creation of covenants running with the land as a derogation of the common law's preference for the free alienability of land. *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.'").

In addition, to create a covenant running with the land, the parties must intend to create a covenant running with the land and the covenant must touch and concern the land with which it runs. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (concerning intent and touch and concern).

Finally, to create a covenant running with the land, there must also be privity of estate between the original covenanting parties. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (requiring privity of estate between the covenanting parties); *Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293 (same); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (same).

Failure to satisfy any of the three elements needed to create a covenant running with the land means that a covenant cannot run with the land as a matter of law. *See Cloud v. Ass'n of Owners,* 857 P.2d 435, 440 (Colo. App. 1992) ("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.").

Contracting parties cannot create covenants running with the land by agreement alone; intent of the parties is necessary for a covenant to run with the land, but not sufficient. *Id.* ("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."); *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.").

I. Intent.

The parties dispute whether the Platte River Contract was intended to create a covenant running with the land. Extraction argues that the absence of express language in the Platte River Contract evidences the parties' lack of intent. *See Extraction MSJ* (A.

D.I. 4) at p. 11-12. Platte River and DJ South argue that although there is no express language, the contract as a whole, as well as the underlying purpose of the Transportation Agreements, demonstrate an intent to create a covenant running with the land and bind successors in interest. *See Platte River Response* (A. D.I. 21), at p. 16-22.

Platte River further argues that the absence of language in the Platte River Contract expressly stating that it creates a covenant running with the land is not dispositive under Colorado law, as a covenant running with the land need not "be expressed in specific or magical terms." *TBI Expl. v. Belco Energy Corp.*, No. 99-10872, 2000 WL 960047, at *4 (5th Cir. June 14, 2000) (conducting a survey of Colorado case law). Rather, Colorado courts look at agreements "as a whole…, giving effect to all provisions contained therein." *Lookout Mtn.*, 867 P.2d at 75 (citation omitted).

To create covenants running with the land, the parties must express their intent to create a covenant running with the land in clear and unambiguous terms. *TBI Explr.*, 2000 WL 960047, at *4 (applying Colorado law and stating "[I]n the cases that have recognized a covenant running with the land, the covenants were in express terms."); *MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *3 (D. Colo. June 24, 2013) (applying Colorado law and noting that if a covenant is ambiguous, the Court must "resolve all doubts against the restriction and in favor of free and unrestricted use of property.").

The Platte River Contract was not intended to create a covenant running with the land. The Platte River Contract does not contain any language evincing a clear intent to create a covenant running with the land. *See, e.g., Lookout Mountain* 867 P.2d at 75; *TBI*

Explr., 2000 WL 960047, at *4 (applying Colorado law and stating "[I]n the cases that have recognized a covenant running with the land, the covenants were in express terms."). Defendants' attempts to manufacture a genuine issue of material fact are based on inappropriate extrinsic evidence and, in any event, are unavailing.

Reference to successors and assigns in Section 13.9 of the Platte River Contract is insufficient to demonstrate an intent to create a covenant that runs with the land because the language does not purport to bind successors-to-title to any identified real property, but simply relates to contractual successors and assigns to the Platte River Contract. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 13.9; *see Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 167 (Colo. App. 1994).

The DJ South Contract contains this same provision despite also containing covenant running with the land language. *See Extraction MSJ* (A. D.I. 5-2), Ex. B at § 14.9 ("This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective permitted successors and assigns.") *and* § 2.5 ("[T]he dedication and commitment . . . shall be ***deemed an interest that runs with the land*** . . . .") (emphasis added).

In contrast to the Platte River Contract, the DJ South Contract similarly contains the requisite language to show intent to create a covenant running with the land. *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.5 ("[T]he dedication and commitment . . . shall be ***deemed an interest that runs with the land*** . . . .") (emphasis added).

The only covenant in the DJ South Contract that the parties clearly expressed an intent to run with the land is the dedication and commitment for the performance of the

transportation services obligations. *Id*. ("[T]he dedication and commitment by [Extraction] under this Article II shall be deemed an interest that runs with the land in the Dedication Area . . . .").

The parties intended the dedication and commitment in the DJ South Contract to run with Extraction's mineral estates. *Extraction MSJ* (A. D.I. 5-2), Ex. B at §§ 1.1(dd) ("'Interests' means all interests that Shipper (or any of its Affiliates) now or hereinafter owns, controls, acquires or has the right to market (as such marketing rights may change from time to time) in Crude Petroleum of all formations in, under or attributable to the Dedication Area, and all interests in any wells, whether now existing or drilled hereafter, on or completed within the Dedication Area . . . .") and § 2.1 ("Shipper hereby dedicates and commits to the Services to be provided by Transporter hereunder all of the Interests.").

The parties did not express an intent to allow any other covenants in the DJ South Contract to run with the land. *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.5.

Because the Platte River Contract does not clearly evince an intent for any covenants contained therein to run with the land and bind successors-to-title to any estate in real property, the Platte River Contract does not create covenants that run with the land as a matter of Colorado law. *TBI Explr. v. Belco Energy Corp.*, No. 99-10872, 2000 WL960047, at *4 (5th Cir. June 14, 2000) (applying Colorado law and stating "[I]n the cases that have recognized a covenant running with the land, the covenants were in express terms.").

II. Touch and Concern.

The parties dispute whether the Transportation Agreements touch and concern the land. Extraction argues that the Transportation Agreements do not touch and concern the land because the dedications only identify crude petroleum from particular lands that are subject to the agreements and because they affect only personal property. *Extraction MSJ* (A. D.I. 4), at p. 24. Defendants argue the Transportation Agreements touch and concern the land because they both benefit and burden Extraction's real property interests. *Platte River Response* (A. D.I. 21), at p. 22-24.

To satisfy touch and concern, the covenant intended to run with the land—here, the dedication and commitment—must closely relate to the estate in real property with which it is intended to run (here, Extraction's mineral estate), its use, or enjoyment. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (noting "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or enjoyment.'").

"The 'touch and concern' requirement is fulfilled when the covenant operates to benefit the physical use of the land . . . ." *Bigelow v. Nottingham*, 833 P.2d 764, 767 (Colo. App. 1991), *rev'd in part sub nom. on other grounds Haberl v. Bigelow*, 855 P.2d 1368 (Colo. 1993) (noting 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").

Colorado generally follows the traditional common law approach to the touch and concern element. 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.").

Touch and concern is an objective analysis of a covenant's effect upon land and the element does not turn on party intent or word choice. *Cloud v. Ass'n of Owners,* 857 P.2d 435, 440 (Colo. App. 1992) ("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."); *In re Sabine Oil & Gas Corp.*, 567 B.R. 869, 875 (S.D.N.Y. 2017), *aff'd,* 734 Fed. Appx. 64 (2d Cir. 2018) ("[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."); 21 C.J.S. Covenants § 34 ("[T]he intent of the parties is not dispositive, insofar as obligations arising from restrictive covenants that are inherently personal cannot be made appurtenant to the land[.]"); 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) ("The touch and concern requirement 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.").

The dedications and commitments in Sections 2.1 were "to the Services to be provided" by Platte River and DJ South under the Transportation Agreements (*i.e.*, the transportation of certain produced crude petroleum from Receipt Points to Delivery

Points, or to Lucerne Station). *Extraction MSJ* (A. D.I. 5-1), Ex. A at §§ 1.1(rr) and 2.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at §§ 1.1(aaa) and 2.1.

Under the Transportation Agreements, Platte River and DJ South committed to transport a certain volume of Extraction's crude petroleum in exchange for a contractual fee. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 3.1 ("Commencing as of the Commencement Date and continuing thereafter during the Term of this Agreement, Shipper agrees to tender to Platte River for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff and the terms of this Agreement); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 4.1 (same but respecting DJ South).

The dedications in Section 2.1 of both Transportation Agreements do not change the nature of the covenants contained in the Transportation Agreements; they simply identify the produced minerals subject to the parties' contractual obligations. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.1; *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (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) (holding a similar contract merely "identif[ies] and delineat[es] the [parties'] contractual rights and obligations").

In the Transportation Agreements, Defendants dedicated and committed "to the Services to be provided" under the Transportation Agreements "all of the Interests." *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.1.

Defendants argue that, although Extraction claims the dedication relates only to personal property in the form of produced crude oil, the Transportation Agreements

clearly dedicate more than Extraction's current production. Rather, they dedicate all of Extraction's "interests" "in, under, or attributable to" the Dedication Areas. *Id.*

In support of this argument, Defendants cite to the recent decision by the Colorado Bankruptcy Court that a production dedication with similar language touched and concerned the land under Utah law. *See In re Badlands Energy, Inc.*, 608 B.R. 854, 869 (Bankr. D. Colo. 2019). The court explained because the "dedicated reserves" under the gathering agreement were defined broadly to include "the interest of Producer in all Gas reserves in and under" the dedicated area, the gathering agreement encompassed real property. *Id.* (emphasis in original). As in Utah, "real property" under Colorado law includes non-extracted minerals. *See Bill Barrett Corp.*, 2018 WL 4225030, at *5 (citation omitted).

Nonetheless, the dedications do not touch and concern Extraction's mineral estates because they concern only personal property and do not affect the physical use of real property or closely relate to real property. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2.1, Ex. C ("Form of Tariff") at Item 5 (defining "Crude Petroleum" as "the direct liquid product of oil wells, or the indirect liquid petroleum products of oil or gas wells, or a mixture of such products"); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.1.

No party argues that the Transportation Agreements employed the conventional legal definition of a dedication, which would have meant that the parties intended the donation of Extraction's real property to the public use. *Stagecoach Prop. Owners Ass'n v. Young's Ranch*, 658 P.2d 1378, 1381 (Colo. App. 1982) ("[A] dedication has been defined as an appropriation of land by the owner of the fee to some public use and the adoption

thereof by the public."); Dedication, *Black's Law Dictionary* (11th ed. 2019) (defining "dedication" as "[t]he donation of land or creation of an easement for public use").

The plain and ordinary meaning of the word "dedicate" is "to set apart to a definite use." *Dedicate*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003).

The plain and ordinary meaning of "commit" is "to pledge . . . to some particular course or use." *Commit*, *id.*

Throughout the Transportation Agreements, the Interests are used to identify the particular minerals that are subject to, set apart for, pledged or committed to the parties' contractual obligations. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 1.1.(bb) (defining "Interests" as "all interests that [Extraction] . . . now or hereinafter owns, controls, acquires or has the right to market . . . in Crude Petroleum of all formations in, under or attributable to the Dedication Area . . . and all interests in any wells . . . on or completed within the Dedication Area"); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 1.1(dd) (defining "Interests" as all interests that [Extraction] . . . now or hereinafter owns, controls, acquires or has the right to market . . . in Crude Petroleum of all formations in, under or attributable to the Dedication Area, and all interests in any wells . . . on or completed within the Dedication Area"); *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2.2(a) (reserving from the dedication "[a]ny Interest which is, at any time during the Term . . . operated by an operator other than Shipper"); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.2(a) (reserving from the dedication "[a]ny Interest which is, at any time during the Term . . . operated by an operator other than Shipper or . . . owned by a non-operator in a property operated by Shipper"); *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 2.2(b) (reserving from the dedication any

interest subject to a prior dedication); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.2(b) (reserving from the dedication any interest subject to a prior dedication).

Dedications, generally, only identify the particular produced minerals that are subject to, set apart for, pledged or committed to the parties' contractual obligations under the contracts for transportation services. *Cf. 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."); *Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1170 (10th Cir. 1999) (noting that dedication contracts are contracts "wherein the producer 'contracts to furnish the purchaser all the gas produced from specified reserves, thus dedicating those reserves to the customer'"); *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) ("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."); 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").

Produced minerals, such as crude petroleum, are personal property and not real 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.").

The dedications do not limit Extraction's rights to the use or enjoyment of its mineral estates. *Extraction MSJ* (A. D.I. 5-1), Ex. A at §2.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.1. And the dedications do not increase the Defendants' rights (or convey to Defendants rights) respecting Extraction's mineral estates. *Extraction MSJ* (A. D.I. 5-1), Ex. A at §2.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 2.1.

Extraction retains exclusive control and possession of all minerals from severance from the ground through delivery into the pipeline systems. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 6.7 ("Shipper will be deemed to be in exclusive control and possession of the Crude Petroleum delivered by or for Shipper to the Pipeline System under this Agreement prior to and until such Crude Petroleum is delivered into the inlet flange of LACT units provided by Platte River for delivery into the Pipeline System . . . ."); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 7.7 (similar but respecting DJ South).

Extraction retains title to the crude petroleum throughout the entire transportation process, and the Defendants never obtain title to the crude petroleum at any point. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 6.7 ("Platte River shall be in control and possession of (although title will remain in Shipper or other person for whom Shipper has the right to transport Crude Petroleum) Crude Petroleum delivered by or for Shipper to the Pipeline System for shipment under this Agreement after delivery thereof into the Pipeline System . . . ."); *Extraction MSJ* (A. D.I. 5-2), Ex. B at §7.7 (similar but respecting DJ South).

Additionally, the contractual obligations and Services—the performance of which by Defendants this dedication and commitment was made—require the delivery of a certain volume of produced crude petroleum to the Defendants for the provision of transportation services from in exchange for a fee, or the payment of a certain amount of money. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 3.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 4.1.

The provision of such services does not affect the use or enjoyment of oil in place, or the use of the mineral estate, but crude petroleum that has been severed from the mineral estate and now constitutes the personal property of Extraction, as a merchant tin this commodity. As a result, the covenants contained in the Transportation Agreements do not benefit Extraction in its capacity as a landowner, but benefits and affects Extraction's use of its personal property (*i.e.*, its produced crude oil). *Cf.* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914).

Even assuming that the Transportation Agreements' dedications have an indirect effect upon Extraction's mineral estates, such as an incidental increase in value, this effect is not closely related to the land and, therefore, cannot satisfy touch and concern, as its primary affect is on the use and enjoyment of personal property, and not real property. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (noting "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or enjoyment.'"); *cf.* Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914) (explaining that indirect effects are insufficient).

The "dedication" and "commitment" of real property interests to the performance of contractual obligations and services that closely relate to and affect only the use and enjoyment of personal property does not change this result. To hold otherwise would render the objective "touch and concern" element beholden to the subjective intent of the parties, and allow parties to convert covenants that do not closely relate to real property into covenants that bind successors and assigns simply by recitation of a set phrase.

Extraction's tender options confirm that the Transportation Agreements do not closely relate to Extraction's mineral estates. Extraction may fully perform under the Transportation Agreements without providing crude petroleum produced from its own mineral estates and may instead provide crude petroleum produced from the land of third parties. *Extraction MSJ* (A. D.I. 5-1), Ex. A § 3.1 (reciting Extraction's agreement to tender "for transportation, or otherwise to pay for the transportation of, the Committed Volume in accordance with the tender procedures set forth in the Tariff and the terms of this Agreement . . . .") ; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 4.1 (same).

Extraction's payment options similarly confirm that the Transportation Agreements' covenants do not closely relate to Extraction's real property. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 3.1; *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 4.1.

Extraction could satisfy its obligations under the Transportation Agreements by either (1) shipping certain amounts of crude petroleum or (2) payment of the Total Financial Commitment. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 3.1 ("Shipper's obligation to ship or pay its Committed Volume under this Agreement shall be satisfied in full upon

the earlier" of shipment of a certain volume of crude petroleum or payment of the Total Financial Commitment); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 4.1 (same).

Payment of the Total Financial Commitment is purely the payment of a specified amount of money set forth in the Transportation Agreements. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 6.2 ("For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by Shipper of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at Shipper's option, any payment made by Shipper to accelerate the satisfaction of that obligation."); *Extraction MSJ* (A. D.I. 5-2), Ex. B at § 7.2 (same).

Moreover, Extraction may accelerate the satisfaction of the Total Financial Commitment, and its obligations under the Transportation Agreement, through payment. *Extraction MSJ* (A. D.I. 5-1), Ex. A at § 6.2 ("For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by [Extraction] of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at [Extraction's] option, any payment made by [Extraction] to accelerate the satisfaction of that obligation."); Ex. B at § 7.2 (same).

The payment of money is a personal commitment that does not touch and concern Extraction's mineral estates. *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) (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").

The dedications contained in the Transportation Agreements do not closely relate to, or affect, the use or enjoyment of Extraction's mineral estates. As a result, they do not touch and concern Extraction's mineral estates, and do not create covenants that run with the land.

III. Privity of Estate.

The Court is bound to apply Colorado law as declared by the Colorado Supreme Court until the Colorado Supreme Court disturbs its prior holdings. *Erie County v. Am. States Ins. Co.*, 573 F. Supp. 479, 486 (W.D. Pa. 1983) ("While plaintiff questions the continuing vitality of *Gordon,* we are bound to consider the [Pennsylvania] Supreme Court's undisturbed holding in *Gordon* as good law on this point."), *aff'd*, 745 F.2d 45 (3d Cir. 1984*) and aff'd sub nom. Am. States Ins. Co. v. Santafemia*, 745 F.2d 45 (3d Cir. 1984); *cf. Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

The Colorado Supreme Court requires privity of estate between the covenanting parties at the time of the covenant's creation before the covenant may run with the land. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (noting "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"); *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."); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (concluding a covenant running with the land was created, in part, because privity of estate was not denied).

Colorado appellate courts confirm that Colorado law requires this privity of estate. *Fed. Deposit Ins. Corp. v. Mars*, 821 P.2d 826, 829 (Colo. App. 1991) ("For contractual obligations between a lessor and lessee to pass to a successor in title of the lessee, there must be either privity of contract or privity of estate between the lessor and that successor in title."); *Fisk v. Cathcart*, 33 P. 1004, 1005 (Colo. App. 1893) ("Under these 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 identifies several covenants that necessarily run with the land, provided that those covenants satisfy privity of estate between the covenanting parties. Colo. Rev. Stat. § 38-30-121 ("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.").

Real property treatises continue to cite Colorado Supreme Court cases for the proposition that privity of estate between the covenanting parties is required. 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* for the proposition that either mutual or horizontal privity are required for a covenant to run with the land).

Defendants argue that no Colorado court has referenced the concept of privity of estate or horizontal privity since 1954. Indeed, they argue, the year after *Taylor* was decided, the Colorado Supreme Court held a restrictive covenant ran with the land, even though it was never in the defendant's chain of title, and that it could be enforced even between parties that had no direct contractual relations. *See Pagel v. Gisi*, 286 P.2d 636, 638-39 (Colo. 1955). Privity was unnecessary to create the covenant then, and it is unnecessary now. *See id*.

Defendants further argue that every subsequent Colorado decision regarding covenants running with the land—including the cases cited by Extraction—has expressly stated the only requirements to create a real covenant are (1) the parties' intent, and (2) the covenant touches and concerns the land. *See*, *e.g.*, *Reishus v. Bullmaters, LLC*, 409 P.3d 435, 440 (Colo. App. 2106) (containing no reference to horizontal privity requirement); *DeJean v. Grosz*, 412 P.3d 733, 739 (Colo. App. 2015) (same); *In re Banning Lewis Ranch Co.*, 532 B.R. 335, 345 n.11 (Bankr. D. Co. 2015) (same); *MidCities Metro. Dist. No. 1. v. U.S. Bank Nat'l Ass'n*, Civil No. 12-cv-03322, 2013 WL 3200088, at *3 (D. Colo. June 24, 2013) (same); *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 74 Col. App. 1993) (same); *Cloud v. Association of Owners*, 857 P.2d 435, 440 (Colo. App. 1992) (same); *Bigelow v. Nottingham*, 833 P.2d 764, 767-68 (Colo. App. 1991), *rev'd in part sub nom. on other grounds Haberl v. Bigelow*, 855, P.2d 1368 (Colo. 1993)(same). The Fifth Circuit reached the same conclusion after conducting a "survey of Colorado case law." *TBI Expl.*,

No. 99-10872, 2000 WL 960047, at *4 (5th Cir. June 14, 2000) (only elements required under Colorado law are "intent by the parties to the covenant that the covenant runs with the land" and "the covenant must 'touch and concern' the land.") (collecting cases).

Nonetheless, the Defendants have not identified a single case from the *Colorado Supreme Court holding that Colorado law no longer requires privity of estate* between the original covenanting parties to create a covenant running with the land. *Platte River Response* (A. D.I. 21).

The Restatement (Third) of Property does not restate Colorado law regarding covenants that run with the land, and Colorado has not adopted the reforms suggested therein. *See* Restatement (Third) of Property Servitudes § 3.2 (Am. Law Inst. 2000) (dispensing with the acknowledged touch and concern requirement and stating "[n]either the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude.")

Privity of estate requires that the covenants that allegedly run with the land be accompanied by a contemporaneous conveyance of some interest in the land with which the covenant runs. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (noting "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"); 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 . . . ."); 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").

The Transportation Agreements do not convey to the Defendants any real property interest in Extraction's mineral estate. *Extraction MSJ* (A. D.I. 5-1), Ex. A; *Extraction MSJ* (A. D.I. 5-2), Ex. B.

The Defendants failed to identify any real property interest in Extraction's mineral estate that was purportedly conveyed contemporaneously with the alleged covenant running with the land, choosing instead to argue that privity of estate was not required. *Platte River Response* (A. D.I. 21).

The surface estate and mineral estate, once severed, are separate and distinct estates in real property. *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995) ("[Colorado has] long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate."); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997), *as modified on denial of reh'g* (Oct. 20, 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*.'").

The Defendants point to the following as interests sufficient to satisfy Colorado's privity of estate requirement: (1) an above-ground pipeline transportation system conveyed by XTR Midstream, a non-party to the Transportation Agreements; (2) equity interests through an LLC agreement acquired by non-parties to the Transportation Agreements; (3) purported easements or rights-of-way on Extraction's surface estate; and

(4) the Transportation Agreements' dedications. *Platte River Response* (A. D.I. 21) at ¶¶ 95 and 98. As a matter of law, these alleged interests cannot satisfy Colorado's privity of estate requirement to create a covenant running with the land.

First, an equity interest in the pipeline transportation system is not a real property interest in Extraction's mineral estate. To satisfy Colorado law's requirement for privity of estate between the covenanting parties, the interest must be conveyed between the covenanting parties and it must be an interest in the mineral estate (the estate in real property with which the covenant is intended to run). *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (requiring privity of estate between the covenanting parties).

The conveyance here was with a non-party to the relevant covenant and not Extraction. *Platte River Response* (A. D.I. 21-6), Ex. F (Extraction not a party to the contract).

An equity interest in the pipeline is not an interest in Extraction's oil in place.

Further, the pipeline is not an interest in the mineral estate. *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995) ("[Colorado has] long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate.")

Second, the sale of a subsidiary is not a sale of an interest in the mineral estate. Nor is an equity interest in a company an interest in real property. *See* Property, *Black's Law Dictionary* (11th ed. 2019) (defining "real property" as "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land").

Third, any purported easements or rights-of-way on Extraction's surface estate fail to satisfy privity of estate for several reasons. As an initial matter, all of the easements or rights-of-way at issue here are either between parties that are not the covenanting parties or they were conveyed long after the dedication was executed. *Platte River Response* (A. D.I. 21), Ex. G (A. D.I. 21-7) (Extraction not a party to the contract); Ex. H (A. D.I. 21-8) (same); Ex. N (A. D.I. 21-14) (same); Ex. S (A. D.I. 21-19) (same); Ex. L (A. D.I. 21-12) (right-of-way granted to Platte River on July 17, 2019).

The conveyance needed to satisfy privity of estate must be made between the covenanting parties and contemporaneously with the creation of the covenant running with the land. 3 Tiffany Real Property § 851 (3d ed. 2015) (cited approvingly by the Colorado Supreme Court to describe the requirements of privity of estate in *Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954). A stranger to the covenant cannot grant or receive a real property interest that establishes privity of estate between the contracting parties. *Id*. at 982–83 (requiring privity of estate between the covenanting parties); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907) (same).

The single conveyance of rights-of-way from Extraction to Platte River occurred on July 17, 2019. *Platte River Response* (A. D.I. 21-12), Ex. L at p. 1. The parties, however, entered the Platte River Contract two years prior, on May 14, 2017. Consequently, the right-of-way grant cannot satisfy privity of estate, which requires the grant of a real property interest ***contemporaneous*** with the creation of the covenant intended to run. 3

Tiffany Real Property § 851 (3d ed. 2015) (cited approvingly by the Colorado Supreme Court to describe the requirements of privity of estate in *Taylor*, 274 P.2d at 982.

Next, an interest in the surface estate cannot qualify as a conveyance as an interest in Extraction's mineral estate as a matter of Colorado law. Conveyances of easements or rights-of-way across the surface estate are interests in the surface estate that cannot satisfy privity of estate respecting a mineral estate. *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995) (noting Colorado has "long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate").

Because easements in gross are personal rights in the use of (and interests in) the surface estate, they are not interests in a severed mineral estate. *Lobato v. Taylor*, 71 P.3d 938, 945 (Colo. 2002) ("An easement in gross does not belong to an individual by virtue of her ownership of land, but rather is a personal right to use another's property."). As a result, the conveyance of an easement in gross in a surface estate cannot satisfy privity of estate respecting a mineral estate.

The Defendants also implied that Extraction conveyed easements or rights-of-way associated with the mineral estate. *Elevation Response* (A. D.I. 21) at ¶ 96.

However, Extraction expressly cannot convey any property interest it lacked the ability to convey.

Extraction lacked the ability to convey any easement appurtenant separate and apart from the land the easement is annexed to (here, Extraction's mineral estates). *Lewitz v. Porath Family Tr.*, 36 P.3d 120, 122 (Colo. App. 2001), as modified on denial of reh'g (Apr. 26, 2001) ("[A]n easement appurtenant is an 'incorporeal right' attached to

and belonging with some other parcel of land. It runs with that land and is incapable of existence separate and apart from the particular land to which it is annexed.").

Extraction also lacked the ability to convey its rights of ingress and egress upon the surface estates, which are incidental (and appurtenant) to ownership of Extraction's mineral estates. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997), as modified on denial of reh'g (Oct. 20, 1997) ("In this sense, the right of access to the mineral estate is in the nature of an implied easement, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals."); *Chase v. Colorado Oil & Gas Conservation Comm'n*, 284 P.3d 161, 171 n. 17 (Colo. App. 2012), as modified on denial of reh'g (July 19, 2012) ("Mineral estate owners have an implied easement, which burdens the surface interest and empowers mineral owners to make reasonable use of the surface in order to access the minerals below."); *Entek GRB, LLC v. Stull Ranches, LLC*, 885 F. Supp. 2d 1082, 1088 (D. Colo. 2012) ("Because the mineral estate is considered the dominant estate, it impliedly carries with it a right to use as much of the surface as may be reasonably necessary for operations relating to the mineral estate.").

Rights of ingress and egress are not real property interests capable of satisfying privity of estate; they are incidental rights. *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.").

Fourth, and finally, the dedication itself is not a conveyance in real property. The dedication cannot be both the real covenant and the element that satisfies privity of estate to create a real covenant. Dedications are not conveyances of real property interests

capable of satisfying privity of estate. *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.").

Dedications only identify the particular produced crude petroleum within a particular area that is subject to the parties' contractual obligations. *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (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).

Accordingly, the original covenanting parties to the Transportation Agreements were not in privity of estate at the time of the creation of the covenants therein, and the Transportation Agreements contain no covenants that run with the land. *Taylor v. Melton*, 274 P.2d 977, 988–89 (Colo. 1954) (requiring privity of estate between the covenanting parties).

CONCLUSION

As set forth above, the Transportation Agreements are unambiguous and the question of whether the Transportation Agreements contain any covenants that run with the land is a legal one. There is no genuine issue of material fact. Extraction has met its burden for entry of summary judgment against Defendants based on the plain meaning of the Transportation Agreements. As to Platte River, there was no intent by the parties to create a covenant that runs with the land; the Platte River Contract does not touch and concern the land; and there is no privity among the parties. As to DJ South, the parties intended the dedication and commitment in section 2.5 of the DJ South Contract to be a covenant that runs with the land (the parties did not intend that any other provision of

the contract to create a covenant that runs with the land); the DJ South Contract does not touch and concern the land; and there was no privity among the parties. Thus, as not all the required elements are present in either contract, the Court will enter summary judgment in favor of Extraction. An Order and Judgment will be entered.

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By the Court:

Christopher S. Sontchi
Chief United States Bankruptcy Judge

Date: October 14, 2020