IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adversary Proceeding
v.	
	Adv. Proc. No. 20-50840 (CSS)
ROCKY MOUNTAIN MIDSTREAM LLC,	
	Re: Docket No. 40
Defendant.	

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

PLEASE TAKE NOTICE that, on December 9, 2020, the above-captioned debtors and debtors-in-possession (the "Debtors") filed the *Plaintiff's Motion for Entry of an Order Authorizing Plaintiff to File Under Seal Reply in Support of Plaintiff's Motion for Summary Judgment* [Docket No. 40] (the "Motion to Seal"),[2] seeking, *inter alia*, authority to file the *Reply in Support of Plaintiff's Motion for Summary* (the "Reply") under seal.

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

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

PLEASE TAKE FURTHER NOTICE, that, consistent with the relief requested in the Motion to Seal, and pursuant to rule 9018-1(d)(ii) of the Local Rules of Bankruptcy Practice and Procedures of the United States Bankruptcy Court for the District of Delaware, the Debtors hereby file the attached proposed redacted versions of the Reply as **Exhibit 1**.

[*Remainder of Page Intentionally Left Blank*]

Dated: December 9, 2020
Wilmington, Delaware

/s/ *Stephen B. Gerald*

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

Exhibit 1

Reply

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	)	
Plaintiff,	)	Adversary Proceeding
v.	)	Adv. Proc. No. 20-50840 (CSS)
ROCKY MOUNTAIN MIDSTREAM LLC,	)	
Defendant.	)	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Dated: December 4, 2020

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ARGUMENT[2]

RMM concedes that, in the Gathering Agreements,[3] "Extraction promised to use RMM's gathering services—and pay the associated fees—for all of the natural gas produced from its wells in the relevant areas of interest." *Defendant's Resp.* at ¶ 16. These are contracts for the provision of exclusive services to Extraction's personal property in exchange for money. Such covenants—by their very nature—are personal, and do not affect the use or enjoyment of Extraction's mineral estates. This is highlighted by the fact that a party's sole remedy for non-performance of these obligations is contractual.[4] Moreover, RMM is a stranger to Extraction's estates in real property, owning no interest therein. As a result, Colorado law does not allow these covenants to be enforced against successors-in-title to Extraction's estates in real property where those parties have not contractually agreed to be so bound. The Court, therefore, should grant the motion for summary judgment, declaring that the covenants in the Gathering Agreements do not run with the land.

I. THE GATHERING AGREEMENTS EXPRESS THE PARTIES' INTENT THAT ONLY CERTAIN COVENANTS RUN WITH THE LAND.

Extraction agrees "[i]t is hard to be clearer"[5] concerning what the parties intended to run with the land: "[redacted]"

[redacted]

[redacted]

[2] RMM purports to incorporate by reference voluminous briefing by unrelated parties, likely in the hope it will preserve an argument for appeal that it has not properly presented to the Court. *See Rocky Mountain Midstream LLC's Response to Plaintiff's Motion for Summary Judgment* [A.D.I. 33] ¶ 2 n.3 (hereinafter "Defendant's Resp."). The Court should limit RMM to only those arguments it actually bothered to raise.

[3] This term has the meaning given in Extraction's *Brief in Support of Plaintiff's Motion for Summary Judgment* [D.I. 4]. The East Greeley Agreement shall hereinafter be referenced as **Exhibit A**. The Broomfield Agreement shall hereinafter be referenced as **Exhibit B.**

[4] *See* Ex. A (Ex. A) § XII(d) (stating the sole remedy shall be in contract); Ex. B (Ex. A) § XII(d) (same).

[5] *Defendant's Resp.* at ¶ 27.

[redacted]" Ex. A § 2.4; *accord* Ex. B § 2.4 (adding "[redacted]").

RMM ignores this when it claims "the parties intended for the ***entirety*** of the Gathering Agreements to run with the land."[6] It is RMM—not the Court—who "fail[s] to give effect to all the words the parties chose"[7] by reading the parties' express limits out of the contracts.[8]

Additionally, a covenant-by-covenant analysis is required under Colorado law. For example, leases are the archetypal real-covenant-creating contracts,[9] and courts routinely hold that ***leases*** do not run with the leaseholds, but only certain ***covenants***. *See, e.g.*, *Shaffer v. George*, 171 P. 881, 882 (Colo. 1917) ("The assignee [of a lease] is in privity of estate, but not in privity of contract with the lessor, and ***is only liable on covenants which run with the land***, such as covenants for rent, to pay taxes, and to yield up premises in good repair.") (emphasis added).[10] Courts routinely conduct a covenant-by-covenant analysis,[11] and this Court was right when it did so under similar contracts. *See Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC*, No. 20-

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6 *Id.* ¶ 29 (emphasis in original).

7 *Id.*

8 Indeed, courts have called into doubt whether even express recitations are sufficient. Sometimes—like here—contractual context reveals such clauses are only "an ill-conceived attempt to portray [a midstream agreement] as a horse of a different color." *In re Chesapeake Energy Corp.*, No. 20-33233, 2020 WL 6325535, at *5 (S.D. Tex. Oct. 28, 2020) at 7 (holding intent was not met ***despite*** "express language that the parties intended for the obligation to sell certain quantities of gas to run with the land").

9 *See* 7 Thompson on Real Property, Thomas Editions § 61.03 n. 32 (noting modern real covenant theory derives from *Spencer's Case*, a 16th century English case dealing with a lease).

10 RMM criticizes *Shaffer* for its age. *See generally Defendant's Resp.* But, more recent cases say the same. *See, e.g.*, *Primock v. Jew*, 680 P.2d 1347, 1348 (Colo. App. 1984) (holding that lease "[c]ovenants to repair and to surrender in good condition run with the land. The right to enforce any such covenant not yet breached passes to the grantee with the conveyance of the ownership of the property.") (citation omitted); *accord* 52 C.J.S. Landlord & Tenant § 458 ("A covenant in a lease runs with the land only where the act covenanted to be done or omitted concerns the land or the estate conveyed as where it affects the use, condition, value, and enjoyment of the premises.").

11 *See, e.g.*, *In re Southland Royalty Co. LLC*, No. 20-10158 (KBO), 2020 WL 6685502, at *9 (Bankr. D. Del. Nov. 13, 2020) (rejecting, under Wyoming law, the argument that an entire contract ran with the land and concluding that only dedications were intended to run with the land); *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 78 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 F. App'x 64 (2d Cir. 2018) (assessing whether dedications, not midstream contracts, ran with the land under Texas law); *MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *6–7 (D. Colo. June 24, 2013) (concluding, under Colorado law, that—notwithstanding ***fourteen*** covenants running with the land—"the Deed is unambiguous that the Grantees' Covenant contained in Section 2.1 is merely a personal covenant and does not run with the land").

50839 (CSS), 2020 Bankr. LEXIS 2855, at *44 (Bankr. D. Del. Oct. 14, 2020) (concluding that a covenant-by-covenant analysis is proper).

RMM misreads the cases it cites to support its assertion to the contrary. In the first case, a party argued ***part*** of a covenant should be separated from the rest. *See Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) ("Viewpoint, focusing only on that portion of the covenant granting approval rights to PHI, further contends that this authority runs with the land and passed to Viewpoint by deed upon conveyance of the real property from PHI."). The court ultimately engaged in a covenant-by-covenant analysis. *See id.* ("***This particular covenant*** . . . requires that owners submit for PHI's approval plans for any buildings or other improvements which they want to place on the land. We have no trouble concluding ***that this covenant*** relates to the land . . . and thus, touches and concerns the land.") (emphasis added) (citations omitted).

In the second case, the contract said each of the "provisions of this Agreement shall run with the Ranch . . . ." *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 441 (Colo. App. 2016). The parties expressly intended the entire contract to run with the land, and—consistent with that intent—the court assessed whether the whole contract ran with the land. *Id.*

In the third case, the court again considered a single covenant. *See Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) ("The covenant in question in this case states as follows . . . ."). The covenant required "ten (1) per cent of the gross rent receipts from [certain] rooms [to] be paid to the Declarant." *Id.* The Court noted the "10% reservation of receipts standing alone would be personal, because the payment would not be a benefit or burden to the land." *Id.* at 440–41. The court concluded, obviously enough, the "10% reservation to the declarant is coupled with a 90% reservation to the Association." *Id.* at 441. The

latter reservation, ***part of the same covenant***, ran with the land and the court would not "cut and paste the covenant before [it]." *Id.* The court never said that entire contracts run with the land.

RMM's argument that the entire contract was meant to run with the land directly contradicts express terms of the Gathering Agreements and settled Colorado law.

II. THE PARTIES NEVER SHARED PRIVITY OF ESTATE RESPECTING EXTRACTION'S MINERAL ESTATES.

For a covenant to run with the land under Colorado law, privity of estate must exist between the covenanting parties at the time of the covenant's creation. Privity of estate is satisfied when the covenant is contained in a conveyance of an interest in the estate with which the covenant is to run: in this case, Extraction's mineral estates. RMM failed to satisfy privity of estate.

A. Colorado Law Requires Privity of Estate to Create a Real Covenant.

For over a century, the Colorado Supreme Court has required privity of estate between contracting parties to create a covenant that runs with the land.[12] Despite this authority, RMM argues privity of estate between the covenanting parties is not required. RMM, however, identifies ***no*** Colorado case holding that privity of estate is no longer required for a covenant to run with the land. Instead, RMM relies on: (1) a few cases where privity of estate was not at issue and (2) the Restatement (Third) of Property Servitudes § 2.4 (Am. Law Inst. 2000).

First, RMM incorrectly claims that silence concerning privity of estate in a few cases implicitly overruled Colorado Supreme Court precedent. The lack of discussion concerning privity of estate—especially when not at issue—does not overturn precedent requiring it. RMM

[12] *See Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954) ("[The ***requisite privity*** exists in the case of a covenant ***by a grantor*** to do or not to do something on land retained by him, adjoining that conveyed, so that one to whom the former is subsequently conveyed by him may be bound by the covenant.") (emphasis added) (citation omitted); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907) ("[W]here there is the requisite privity of estate, and the covenant is connected with or concerns the land or estate conveyed, then a covenant imposing a burden will run with the land as readily as one conferring a benefit.") (citation omitted); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (stating privity not denied and citing cases requiring it).

fails to cite any cases that hold, or even suggest, that Colorado does not require privity of estate. Instead, RMM cites only cases where the element was clearly met[13] or the court did not reach it because another element was dispositive.[14] Indeed, one such case reinforces privity of estate's necessity.[15] The Court must require privity of estate until the Colorado Supreme Court explicitly holds otherwise.[16]

Second, Colorado courts have not adopted the Third Restatement as law: "[T]he 'adoption' of, or quoting from, one or more sections of the Restatement (Third) is not the 'adoption' of the entire Restatement (Third)." *Trask v. Nozisko*, 134 P.3d 544, 553 (Colo. App. 2006). RMM essentially concedes that Colorado has ***not*** adopted the Restatement (Third)'s test because RMM acknowledges real covenants must touch and concern the land. *Compare Defendant's Resp.* at ¶ 24 *with* Restatement (Third) of Property Servitudes § 3.2 (Am. Law Inst. 2000) ("Neither 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.").

RMM also muddies the waters by manufacturing distinctions in Colorado's conception of privity of estate, suggesting (without support) that Colorado requires only what modern scholars

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[13] *See Pagel v. Gisi*, 286 P.2d 636, 637 (Colo. 1955) (not discussing privity that was clearly met because the restrictions at issue were contained in "deeds of conveyance"); *Reishus*, 409 P.3d at 437 (privity of estate not at issue because original "owner of Adams Ranch conveyed it to eleven individuals as tenants in common"); *In re Banning Lewis Ranch Co., LLC*, 532 B.R. 335, 340 (Bankr. D. Colo. 2015) (not discussing privity that was clearly met because the real covenants were contained in an annexation agreement for the conveyance of thousands of acres); *MidCities Metro. Dist. No. 1*, 2013 WL 3200088, at *1 (privity of estate not at issue because covenant contained in deed between original grantor and grantee); *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 72–73 (same); *Cloud*, 857 P.2d at 440 (same).

[14] *See TBI Expl. v. Belco Energy Corp.*, 220 F.3d 586 (5th Cir. 2000) (applying Colorado law and holding the covenant did not run with the land based on lack of intent alone).

[15] *See 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.").

[16] *See 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).

have labelled as vertical privity. *See Defendant's Resp.* at ¶¶ 59–60. RMM is wrong. *See Taylor*, 274 P.2d at 988–89 (Colo. 1954) ("[T]he requisite privity exists in the case of a covenant ***by a grantor*** to do or not to do something on land retained by him, adjoining that conveyed . . . .") (emphasis added). If privity of estate must be artificially compartmentalized, Colorado requires both horizontal privity ***and*** vertical privity. *Compare id. with* 9 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."). Other jurisdictions following the majority approach in requiring privity of estate agree.[17]

Colorado requires privity of estate for the creation and enforcement of covenants running with the land. RMM has not cited any binding authority (or even any persuasive authority) that suggests privity of estate is no longer required.

B. Extraction and RMM Were Never in Privity of Estate.

RMM incorrectly argues privity of estate is satisfied because "Extraction conveyed property interests to RMM out of its leasehold estates" in two ways: (1) "Extraction conveyed easements and rights of way out of its surface-use rights" and (2) Extraction conveyed "[d]edications that burden its rights to develop and market." *Defendant's Resp.* at ¶ 65.

[17] *See, e.g., Federated Retail Holdings, Inc. v. County of Ramsey*, 820 N.W.2d 553, 560 (Minn. 2012) ("Three legal factors must exist to create a property interest that runs with the land. First, the parties must be in privity of estate when the covenant is made concerning the land or estate. Privity of estate describes the legal relationship created between the parties to the subject property; for example, the legal relationship could be a grantor and grantee, a landlord and tenant, etc.") (citations omitted); *Runyon v. Paley*, 416 S.E.2d 177, 184 (N.C. 1992) ("For the enforcement at law of a covenant running with the land, most states require two types of privity: (1) privity of estate between the covenantor and covenantee at the time the covenant was created ('horizontal privity'), and (2) privity of estate between the covenanting parties and their successors in interest ('vertical privity'). The majority of jurisdictions have held that horizontal privity exists when the original covenanting parties make their covenant in connection with the conveyance of an estate in land from one of the parties to the other.") (internal quotations omitted); *Beeren & Barry Investments, LLC v. Equity Tr., LLC*, 73 Va. Cir. 375 (Va. Cir. 2007) ("[H]orizontal privity is established by showing the covenant was made in connection with the conveyance of an estate in land from one of the parties to the other. This is satisfied when the transaction includes a transfer of interest either in the land benefited by or in the land burdened by the performance of the promise.") (internal quotations omitted).

1. RMM cannot share Extraction's incidental rights of ingress and egress.

Extraction, as the owner of a mineral estate, "has rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of [its] interest." *Rocky Mountain Fuel Co. v. Heflin*, 366 P.2d 577, 580 (Colo. 1961) (citation omitted). Extraction's "right of access to the mineral estate is in the nature of an implied easement . . . ." *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997), *as modified on denial of reh'g* (Oct. 20, 1997) (citing Restatement of Property § 450 (Am. Law Inst. 1944)). Extraction's rights are incidental to its ownership of the mineral estate, which is dominant to the servient surface estate. *See 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.") (citing *Gerrity Oil & Gas Corp.*, 946 P.2d at 927).

First, Extraction's surface access rights are not real property interests sufficient to satisfy privity of estate; they are merely incidental rights. *See Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995) ("Though the privilege to use the surface is recognized at law, this right does not create an ownership interest in the surface estate, or the right to destroy the surface, but ***merely a right of access***.") (emphasis added) (citing *Smith v. Moore*, 474 P.2d 794 (Colo. 1970)).

Second, Extraction lacks the ability to convey portions of its incidental surface access rights separate from ownership of the mineral estates. Again, Extraction possesses these rights as owner of a dominant estate. *See Entek GRB, LLC*, 885 F. Supp. at 1088. Thus, the rights are ***like*** implied easements appurtenant.[18] Consequently, the surface access right is "incapable of existence

[18] *Compare Gerrity Oil & Gas Corp.*, 946 P.2d at 927 (noting the rights resemble implied easements because they arise by virtue of ownership of a dominant estate) *with Lewitz v. Porath Family Tr.*, 36 P.3d 120, 122 (Colo. App. 2001), *as modified on denial of reh'g* (Apr. 26, 2001) ("The property burdened by an easement appurtenant is known

separate and apart from the particular land to which it is annexed." *Id.* (citing 7 Thompson on Real Property § 60.06(f)(1)). In other words, RMM cannot tear a metaphorical chunk of Extraction's servient estate access rights away from their source in the possession of the dominant estate. *See id.* The cases RMM cites do not support or suggest that Extraction could convey to RMM its incidental rights; each case concerns different interests in different contexts.[19]

The points that RMM fails to grasp are threefold: (1) surface access rights are not property interests in the surface estate, but mere incidental rights;[20] (2) surface access rights resemble implied easements insofar as they cannot be conveyed separately from the dominant estate;[21] and (3) ordinary surface easements are distinct from the incidental right of access given to the owner of a dominant mineral estate.[22] RMM has failed to satisfy privity of estate.

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as the servient estate, and the property benefited by the easement is the dominant estate.") (citing *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1231 (Colo. 1998), *as modified on denial of reh'g* (Oct. 19, 1998)).

[19] One case involved a true easement appurtenant allowing the owners of farmlands to access another parcel of land for grazing animals, firewood, and timber. *See Lobato v. Taylor*, 71 P.3d 938, 945 (Colo. 2002). The court did not suggest that Colorado generally has a presumption in favor of easements appurtenant, only that "[a]n easement is presumed to be appurtenant, rather than in gross." *Id.* The case also had nothing to do with incidental surface access rights. *See id.* The second case discussed whether a highway department took title to a mineral estate in fee simple absolute or whether the department merely acquired a surface easement. *See Dep't of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127, 133 (Colo. 2010). Again, the incidental surface access right was not discussed. *See id.* The third case held that the change of use in a dominant surface estate did not justify additional burdens upon a servient estate and the change in use of an easement appurtenant was unacceptable. *See Wright v. Horse Creek Ranches*, 697 P.2d 384, 385 (Colo. 1985). Yet again, the incidental surface access right was not discussed. *See id.* The fourth case held that a mineral lessee did ***not*** have a prescriptive easement because the lessee's use of the land was permissive. *See Maralex Res., Inc., v. Chamberlain*, 320 P.3d 399, 403 (Colo. 2014). Once again, the incidental surface access right was not discussed. *See id.* The final case held that a party did not obtain an implied easement by virtue of prior use of a road. *See Precious Offerings Mineral Exch., Inc. v. McLain*, 194 P.3d 455, 457 (Colo. App. 2008). The incidental surface access right and the ability to convey such a right separate from the mineral estate was, again, not at issue. *See id.*

[20] *Notch Mountain Corp.*, 898 P.2d at 556.

[21] *Compare Gerrity Oil & Gas Corp.*, 946 P.2d at 927 *with Lewitz*, 36 P.3d at 12.

[22] *Compare Gerrity Oil & Gas Corp.*, 946 P.2d at 927 *with Lewitz*, 36 P.3d at 12. Indeed, the alleged easements across the surface estate are interests in the surface estate, and, therefore, also cannot satisfy privity of estate respecting a mineral estate. *Notch Mountain Corp.*, 898 P.2d at 556 (noting Colorado has "long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate"). Furthermore, RMM does not point to any particular easement or right-of-way that Extraction actually conveyed to RMM.

2. Dedications do not convey real property interests as a matter of law.

The dedications are not conveyances of interests in Extraction's mineral estates. ***First***, RMM claims the dedications conveyed interests that "burden" Extraction's rights and duties under its leases;[23] the dedications' legal effect on real property is not relevant to privity, but touch and concern. *See* 9 Powell on Real Property § 60.04(3)(c)(iii) (describing "horizontal privity," not as an effect on land, but as a "covenant in connection with the conveyance of an estate in fee from one of the parties to the other"). ***Second***, RMM claims Extraction conveyed to RMM the right to gather and process gas and that this is a leasehold interest. *See Defendant's Resp.* at ¶ 71. RMM cites only the inapposite *Badlands* (which applied Utah law) for support. *See id.* ***Third***, RMM claims the dedications satisfy privity of estate, *see id.*, but the dedications are the very covenants that allegedly run with the land. *See* Ex. A § 2.4; Ex. B § 2.4. The alleged covenant cannot be both the thing that runs with the land and the conveyance sufficient to satisfy privity of estate; this circular logic would moot the privity of estate element. ***Fourth***, RMM's premise is fundamentally wrong; a dedication is not a conveyance. *See Stagecoach Prop. Owners Ass'n v. Young's Ranch*, 658 P.2d 1378, 1381 (Colo. App. 1982) ("This regulation clearly contemplates a 'conveyance' and not a 'dedication' which terms are not synonymous."). As this Court has already held, "[t]he dedications and commitments identify the particular produced minerals and produced water that is subject to, set apart, pledged or committed to the parties' contractual obligations under the services contracts." *Elevation Midstream, LLC*, 2020 Bankr. LEXIS 2855, at *59.

III. THE GATHERING AGREEMENTS' COVENANTS DO NOT TOUCH AND CONCERN EXTRACTION'S MINERAL ESTATES.

The covenants in the Gathering Agreements do not touch and concern Extraction's mineral estates. Under Colorado law, "[a] covenant touches and concerns the land if it 'closely relate[s]

[23] *Defendant's Resp.* at ¶ 71.

to the land, its use, or its enjoyment.'" *Reishus*, 409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440). "[P]ersonal" or "speculative" covenants do not touch and concern the land. *See Bigelow v. Nottingham*, 833 P.2d 764, 767 (Colo. App. 1991), *rev'd in part sub nom. Haberl v. Bigelow*, 855 P.2d 1368 (Colo. 1993) (citing *Rittmaster v. Brisbane*, 35 P. 736 (Colo. 1894)). In other words, a covenant must have a direct—closely relating, non-personal, non-speculative—effect upon the subject land.

RMM believes Colorado's standard is too "strict,"[24] but the point of real covenant law is to ***prevent*** contracting parties from perpetually binding land—and the land's successive owners, who did ***not*** agree to be bound by contract.[25] Touch and concern does not consider party intent; it is an objective test. *See Cloud*, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow*, 833 P.2d 764); 9 Powell on Real Property § 60.04(3)(a) ("[Touch and concern] is the only essential requirement for the running of covenants which focuses on an objective analysis of the contents of the covenant itself rather than the intentions of and relationships between the parties."). Indirect effects are also insufficient. *See Bigelow*, 833 P.2d at 767 (noting indirect covenants do not touch and concern the land even if a landowner derives value therefrom).

A. The Dedications Do Not Touch and Concern Extraction's Mineral Estates.

The [redacted]

[redacted]

[24] *See Defendant's Resp*. at p. 13.

[25] *Compare 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 . . . .") *with* 9 Powell on Real Property § 60.01 ("Since the running of either the benefit or the burden of a covenant was a departure from the early principles of contract, it is not surprising to find that in the early cases, such departures were restricted by many judicially evolved requirements, which had to be met in order for a person aggrieved by a breach of a covenant to recover at law a judgment for damages.").

[redacted] does not closely relate to real property. *See* Ex. A § 2.1; Ex. B § 2.1. Cases discussing dedications clarify that dedications merely identify minerals subject to contractual obligations once produced.[26] The dedications do not relate to the implied duty to market, or the use or enjoyment of Extraction's real property; the covenant to use RMM as an exclusive service provider for its personal property does not affect, restrict, or relate to how Extraction chooses to use or enjoy its real property. Furthermore, the mere facilitation of marketing hydrocarbons once produced is not sufficient to touch and concern the land; for example, a covenant to allow an oil tanker to transport gas produced from Colorado in barrels from a port in Houston to a market in Tokyo facilitates the marketing of oil that has been produced, but does not closely relate to (or touch and concern) the land. *Cf.* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914). Simply "dedicating" real property to the performance of services to personal property (Extraction's produced gas) does not alter the nature of the covenant or cause it to affect the use and enjoyment of the real property dedicated.[27] The dedications simply identify the produced gas subject to Extraction's contractual obligations.[28] As already explained, this is exactly how these dedications

[26] *See, e.g.*, *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.")

[27] *See In re Chesapeake Energy Corp.*, 2020 WL 6325535, at *6 ("Even if the 'underlying and produced from' language contained in the Memorandum governed, the result would be no different. The thing or object of the parties' agreement is gas to be delivered to ETC's entry point if any such gas is produced, up to the agreed quantity. ETC has no right of access to or control over Chesapeake's use of its real property interests. Chesapeake's ability to use and enjoy its property rights is unaffected. Only after gas is produced and becomes personal property does an obligation regarding the disposition of that gas arise.")

[28] *See, e.g.*, *In re Southland Royalty Co. LLC*, 2020 WL 6685502, at *12 (Bankr. D. Del. Nov. 13, 2020) ("[T]o the extent that there are benefits provided to or burdens imposed upon . . . unproduced reserves as a result of the L63 Dedication, including those related to value or use, they are indirect, arising from the provision of . . . services with respect to . . . personal property – the produced gas. The consideration of these indirect effects in the touch and concern analysis could lead to an expansion of the type of covenants that run with the land and improperly serve to restrict alienability of land beyond ways currently contemplated by Wyoming law."); *Elevation Midstream, LLC*, 2020 Bankr. LEXIS 2855, at *71–72 ("The dedications and commitments of Extraction's mineral interests to the

are used. *See Brief in Support of Plaintiff's Motion for Summary Judgment* [D.I. 4] at 15 n. 5. As a result, the dedications and commitments do not touch and concern Extraction's mineral estates as a matter of law.[29]

B. Fixed Fees and the Conveyance of Easements to Build and Maintain Facilities Necessary for RMM to Provide Services to Extraction's Produced Gas Do Not Touch and Concern Extraction's Mineral Estates.

The requirement to pay fixed fees for RMM's services does not closely relate to real property; the mere payment of money is a personal commitment. *See Bigelow*, 833 P.2d at 767 (holding that a subordination agreement did not run with the land because "the parties' entitlement to physical use of the land was not increased, nor was improvement made to the land as a result of subsequent loan proceeds") (citations omitted).

RMM misreads *Cloud,* claiming it "held that an agreement to pay 10% of gross receipts from a condominium complex touched and concerned the land because the agreement as a whole benefitted and burdened the land." *Defendant's Resp*. at ¶ 52. ***First***, *Cloud* noted "[a] covenant granting a 10% reservation of receipts standing alone would be personal . . . ." *Cloud*, 857 P.2d at 440. Thus, fixed fees alone are personal and do not touch and concern the land. ***Second***, *Cloud* did not assess the contract as a whole; instead, the court "read ***the covenant*** as a whole" and held the 10% reservation ran with the land because the rest of the covenant—reservation to an apartment association of 90% of gross receipt proceeds—touched and concerned the relevant real property. *See id.* at 441 (emphasis added). RMM points to no other part of the covenant to pay fixed fees—which was not intended to run with the land—that touches and concerns the land.

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performance of these services do not change the nature of the covenants contained in the Commercial Agreements; they simply identify the produced minerals and produced water subject to the parties' contractual obligations.") (citation omitted); *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.").

[29] *See Brief in Support of Plaintiff's Motion for Summary Judgment* [D.I. 4] at 10–20.

RMM misconstrues the law of covenants by arguing that building facilities or conveying easements meets the test for touch and concern. *See Defendant's Resp*. at ¶ 50–51. ***First***, neither RMM's obligation to build its own facilities nor the conveyance of easements were intended to run with Extraction's mineral estates. ***Second***, the facilities exist on the surface estate, not the mineral estates.[30] *See* Ex. A § 3.1; Ex. B § 3.1. ***Third***, whether the facilities literally touch real property is not the test under Colorado law, but instead whether the covenant affects the use or enjoyment of the land. ***Third***, RMM's easements are standalone real property rights in the surface estate; they are not covenants or obligations that run with the land.[31] ***Fourth***, Extraction's alleged conveyance of easements does not burden its incidental rights of ingress and egress because these rights cannot be conveyed to RMM—in whole or in part—separately from the real property to which they are incidental (*i.e.*, Extraction's mineral estates).[32]

C. To the Extent Any Covenant Is Purely For Extraction's Benefit, Extraction May Unilaterally Release that Covenant.

RMM's value-based argument boils down to the paternalistic claim that its services are so beneficial to the mineral estates that Extraction is powerless to reject them. *See Defendant's Resp*. at ¶ 48. Even assuming that RMM's services were valuable (and that this is relevant to touch and concern),[33] real property law does not compel a landowner to accept a covenant's benefit, or, in

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[30] The term "'surface estate' in this context is somewhat of a misnomer, as it includes all subsoil rights, including strata, except for minerals." *Solid Minerals: Transportation and Storage Issues*, 14 E. Min. L. Found. § 4.02 (available at 1993 WL 771094) (suggesting a better name is the "non-mineral estate"); *accord Murray v. BEJ Minerals, LLC*, 908 F.3d 437, 439 (9th Cir. 2018), certified question answered, 464 P.3d 80 (Mont. 2020) (applying Montana law and stating: "The mineral estate includes any minerals found 'in, on or under' the conveyed land, including minerals found on the surface. The surface estate, in turn, ***includes all of the property other than minerals, including property underneath the surface***.") (emphasis added).

[31] *See generally* Restatement (First) of Property § 450 (Am. Law. Inst. 1944).

[32] *See 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) (discussing the nature of the incidental rights) (citing *Gerrity Oil & Gas Corp.*, 946 P.2d at 926); *Entek GRB, LLC*, 885 F. Supp. 2d at 1088 ("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.") (emphasis added) (citing *Gerrity Oil & Gas Corp.*, 946 P.2d at 926).

[33] They are not, which is why Extraction seeks to reject the Gathering Agreements.

other words, the performance of the obligee. *See Elevation Midstream, LLC*, 2020 Bankr. LEXIS 2855, at *88–89 ("Extraction, the beneficiary of this covenant, is not required to accept the benefit of a purely beneficial covenant.") (citing 9 Powell on Real Property § 60.10(1)).[34] Colorado law agrees that the person entitled to enforce a covenant may extinguish it. *See, e.g.*, *Brown v. McDavid*, 676 P.2d 714, 718 (Colo. App. 1983). To the extent RMM attempts to bind Extraction to a purely beneficial covenant, Extraction would release that covenant through rejection.

D. *Alta Mesa* and *Badlands* Are Inapposite.

RMM frequently relies on two cases to support its arguments. Neither *In re Alta Mesa Res., Inc.*[35] nor *In re Badlands Energy, Inc.*[36] are useful guidance concerning Colorado law. The touch and concern test in *Alta Mesa* is not the same as Colorado's test. Under *Alta Mesa*'s application of Oklahoma law, the "touchstone necessary for a covenant to touch and concern real property is that there must be '***a logical connection*** between the benefit to be derived from enforcement of the covenant and the property.'" *In re Alta Mesa Res., Inc.*, 613 B.R. at 102 (emphasis added) (quoting *Beattie v. State ex rel. Grand River Dam Auth.*, 41 P.3d 377, 388 (Okla. 2002) (Opala, J., concurring)). Colorado's close relationship test, however, is a more rigorous standard than the "logical connection" test cited in Justice Opala's concurring opinion and originally applied by Indiana appellate courts.[37] *Badlands* also diverges from Colorado law. "[T]he Utah Supreme Court recognized a ***broad*** test for touch-and-concern that does not require a physical effect upon the land but rather, requires a court to evaluate whether a covenant 'enhances the land's value [on the benefit side], and for the burden side, whether it diminishes the

[34] *See also* Restatement (First) of Property § 556 (Am. Law. Inst. 1944) ("The obligation arising out of a promise respecting the use of land can be extinguished as between any person subject to the obligation and any person entitled to enforce it by a release given by the latter person to the former.").

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

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

[37] *See* 9 Powell on Real Property § 60.04 n. 31 (listing the logical connection test as a different test than the traditional version of touch and concern).

land's value.'" *In re Badlands Energy, Inc.*, 608 B.R. at 868 (quoting *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 624 (Utah 1989)).

Third, were this Court to consider "the more recent development of this element in other producing states,"[38] it would support granting summary judgment. In multiple cases post-dating the two cited by RMM (including one from the court that authored *Alta Mesa*), courts have held that analogous midstream contracts do not touch and concern the land.[39]

Fourth, there are older cases too: the seminal *Sabine* line of decisions. In *Sabine*, the covenants at issue were: "(i) the Debtors' dedication to HPIP of the HPIP Products and certain leases to the performance of the HPIP Agreements; (ii) the Debtors' dedication to Nordheim of the Nordheim Products to the performance of the Nordheim Agreements; and (iii) the Debtors' covenant to pay Nordheim a gathering fee." *Id.* The court held these covenants "[did] not impact the value of the land 'independent of collateral circumstances' and [did] not affect any interest in the real property of, or its use by, the owner. Rather, [the] covenants constitute[d] an undertaking personal to the producer . . . and the midstream service providers . . . ." *Id.* at 77. Thus, the covenants did not touch and concern the land. *See id.* The same thing is true here.

CONCLUSION

The Court should grant Extraction's motion for summary judgment. The Gathering Agreements do not create covenants running with the land.

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[38] *Defendant's Resp*. at ¶ 36.

[39] *See, e.g.*, *In re Southland Royalty Co. LLC*, 2020 WL 6685502, at *12 ("[T]o the extent that there are benefits provided to or burdens imposed upon . . . unproduced reserves as a result of the L63 Dedication, including those related to value or use, they are indirect, arising from the provision of . . . services with respect to . . . personal property – the produced gas."); *In re Chesapeake Energy Corp.*, 2020 WL 6325535, at *6 ("Only after gas is produced and becomes personal property does an obligation regarding the disposition of that gas arise.") (citations omitted); *Elevation Midstream, LLC*, 2020 Bankr. LEXIS 2855, at *71–72 ("The dedications and commitments of Extraction's mineral interests to the performance of these services do not change the nature of the covenants contained in the Commercial Agreements; they simply identify the produced minerals and produced water subject to the parties' contractual obligations.") (citation omitted).

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Wilmington, Delaware

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