IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: EXTRACTION OIL & GAS, INC., *et al.*,[1] Debtors.	
GRAND MESA PIPELINE, LLC, Appellant, v. EXTRACTION OIL & GAS, INC., Appellee.	CIVIL ACTION NO. 20-cv-01411-CFC CIVIL ACTION NO. 20-cv-01521-CFC CIVIL ACTION NO. 20-cv-01458-CFC Bankruptcy Case No. 20-11548 (CSS) Bankruptcy BAP No. 20-53

GRAND MESA'S REPLY TO APPELLEE'S (i) RESPONSE TO JOINT MOTION TO CONSOLIDATE BANKRUPTCY APPEALS AND CONFORM BRIEFING SCHEDULES AND RESPONSE TO (ii) CROSS- MOTION FOR CONSOLIDATION OF BANKRUPTCY APPEALS

Appellant Grand Mesa Pipeline, LLC ("Grand Mesa"), pursuant to Local Rule 7.1.2 and Federal Rule of Bankruptcy Procedure 8013, hereby files its (i) Reply to the Response to Joint Motion to Consolidate Bankruptcy Appeals and Conform Briefing Schedules filed by Appellee, Extraction Oil & Gas, Inc. ("Extraction"), and (ii) Response to the Cross-Motion for Consolidation of Bankruptcy Appeals filed by Extraction. (collectively, "the Reply"). In opposition to the Reply, Grand Mesa states:

[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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1. Before the bankruptcy court, Extraction moved to reject transportation service agreements ("TSAs") between it and Grand Mesa in the bankruptcy court. (D.I. 14). The TSAs relate to an interstate crude oil pipeline—the Grand Mesa Pipeline—that is regulated by FERC under the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* (the "ICA"). (D.I. 363). Grand Mesa opposed this motion, in significant part on the grounds that FERC's consideration of whether rejection of the TSAs would advance the "public interest," as evaluated by FERC, is required because rejection, as Extraction seems to understand it, would involve non-compliance with FERC-approved rates, terms and conditions, and the public-interest test under the ICA accordingly applies. (D.I. 363). Ultimately, the bankruptcy court granted rejection. (D.I. 942; D.I. 1038). The bankruptcy court's bench ruling and order granting the motion to reject, *id.*, are the basis of the Grand Mesa Rejection Appeal and the FERC Rejection Appeals, docketed in this Court as No. 20-cv-01521 (the "Grand Mesa Rejection Appeal") and Nos. 20-cv-01506 and 20-cv-01564 (collectively, the "FERC Rejection Appeals").

2. Relatedly, prior to the bankruptcy court's granting of the rejection of the TSAs, Grand Mesa filed the Motion for Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief from the Automatic Stay, in which Grand Mesa requested the bankruptcy court to enter an order: (i) confirming that the declaratory proceeding that Grand Mesa seeks to commence at FERC to conduct a public interest analysis with regard to Debtors' non-compliance with the TSAs does not implicate the automatic stay or is subject to the police and regulatory exception of 11 U.S.C. § 362(b)(4); or, in the alternative, (ii) granting relief from the automatic stay to allow Grand Mesa to petition for an order from FERC regarding whether rejection of the TSAs is consistent with the public interest and ICA. (D.I. 364). FERC joined Grand Mesa's motion, and provided a separate statement to the bankruptcy court seeking similar relief.

(D.I. 653). Extraction opposed Grand Mesa's motion (D.I. 507), and the bankruptcy court denied it. (D.I. 831). The bankruptcy court's order denying Grand Mesa's motion, *id.*, is the basis of the Grand Mesa Lift-Stay Appeal and the FERC Lift-Stay Appeal, docketed in this Court as Nos. 20-cv-01411 ("Grand Mesa Lift-Stay Appeal") and 20-CV-01412 (the "FERC Lift-Stay Appeal").

3. On December 7, 2020, Grand Mesa filed its Joint Motion to Consolidate Bankruptcy Appeals and Conform Briefing Schedules with this Court (the "Consolidation Motion"). In the Consolidation Motion, Grand Mesa moved the Court for consolidation of the five related bankruptcy appeals in this matter, docketed as: No. 20-cv-01411 (the "Grand Mesa Lift-Stay Appeal"); No. 20-cv-01521 (the "Grand Mesa Rejection Appeal"); No. 20-cv-01412 (the "FERC Lift-Stay Appeal"); Nos. 20-cv-01506 and 20-cv-01564 (collectively, the "FERC Rejection Appeals") (the five appeals will be referred to as the "Lift-Stay/Rejection Appeals").

4. In the Consolidation Motion, Grand Mesa explained that it sought to consolidate the Lift-Stay/Rejection Appeals, as those cases each "involve a common question of law or fact." Consolidation Motion at 3 (citing Fed. R. Civ. P. 42(a)).

5. Simply put, the Life-Stay/Rejection Appeals involve substantially interrelated appellate issues from the same bankruptcy case, which results in a near-identical factual and legal basis for both appeals. Further, the appeals relate to the statutory role and jurisdiction of FERC, among other related issues. In turn, the orders on appeal (D.I. 942; D.I. 1038; D.I. 831) implicate overlapping legal precedent and principles concerning administrative agency procedures and jurisdiction.

6. In the Reply, Extraction "agrees the Court should consolidate the five appeals discussed in the Consolidation Motion," but requests that this Court also include three additional

appeals as part of the consolidation—that is, Case Nos. 20-cv-01458-CFC, 20-cv-01457-CFC, and 20-cv-01532-CFC (collectively, the "Unrelated Appeals"). (Reply at 2).

7. Of the Unrelated Appeals, only one was filed by Grand Mesa, Case No. 20-cv-01458-CFC.[2] Grand Mesa did not seek to include that case in the Consolidation Motion as it does not implicate the overlapping legal precedent and law in the Lift-Stay/Rejection Appeals. Instead, Case No. 20-cv-01458-CFC concerns the bankruptcy court's granting of summary judgment to Extraction and finding that Grand Mesa's TSA did not contain covenants running with the land. Accordingly, contrary to Extraction's statement (Reply at 8), the Unrelated Appeals do not address "the same ultimate issue" as the Lift-Stay/Rejection Appeals.

8. Case No. 20-cv-01458-CFC addresses a narrow issue of law that necessitates certification to the Colorado Supreme Court. Specifically, Grand Mesa will ask this Court to certify the following issues:

a. Can an equitable servitude that runs with the land be created by agreement of the parties under Colorado law?

b. Does Colorado law require privity of estate between covenanting parties in order to establish a real covenant running with the land?

c. Does the dedication and commitment in a TSA "touch and concern" the land with which it runs?

9. Unrelated to consolidation, in the Reply, Extraction also takes issue with how Grand Mesa plans to seek certification to the Colorado Supreme Court in Case No. 20-cv-01458-CFC, relying upon Third Circuit Local Rules to argue such a request must be made in appellate

[2] The remaining two appeals, 20-cv-01457-CFC, and 20-cv-01532-CFC, addressed on pages 12-13 of the Reply, were filed by a different party/appellant, Platte River Midstream, LLC ("Platte River"). Grand Mesa takes no position on the consolidation of Platte River's appeals, so long as it would not impact Grand Mesa's pending certification motion.

briefing, rather than through a motion to this Court. (Reply at 10 & n.5). Extraction is incorrect, for two reasons. First, Rule 21.1 of the Colorado Rules of Appellate Procedure provide that the Colorado Supreme Court may answer a question of law certified to it by a United States District Court "upon said court's own motion or upon the motion of any party in which the certified question arose." Colo. App. R. 21.1(b). Thus, the proper procedure before a district court is to pursue certification on motion. Second, Extraction's argument presumes the Third Circuit's Local Rules automatically apply to bankruptcy appeals before this Court (Reply at 10), but nothing in this Court's Local Rules or the Third Circuit's Local Rules would indicate such a result. *See* 3d Cir. L.A.R. 1.1 ("The following Local Appellate Rules (L.A.R.) are adopted by the United States Court of Appeals for the Third Circuit as supplementary to the Federal Rules of Appellate Procedure (FRAP) and apply to procedure *in this court*." (emphasis added)). Absent such a rule, a motion to certify may be independently considered by this Court. *See generally Pino v. United States*, 507 F.3d 1233 (10th Cir. 2007), *certified question answered,* 2008 OK 26, 183 P.3d 1001.

10. As to Extraction's argument that "Grand Mesa could not satisfy the relevant certification criteria" (Reply at 11-12), this argument is without merit.

11. First, the proposed certified questions present unsettled questions of Colorado property law. Specifically, whether the parties' agreement to create an equitable servitude is a covenant that runs with the land, is an open question under Colorado law. Clarity is required regarding whether Colorado law requires privity of estate between the covenanting parties at the time of the covenant's creation in order for the covenant to run with the land.

12. Second, resolution of the certified questions will have a broad impact as whether TSAs run with the land and thus, among other things, cannot be rejected in bankruptcy, is an issue that may affect all oil and gas operations in Colorado.

13. Finally, determination of the certified questions would provide the most efficient resolution of this litigation. Obtaining decisive answers to the proposed certified questions of Colorado law is not only in the Court's and the parties' interest, but also furthers judicial efficiency and the interests of justice. Particularly for Extraction—facing bankruptcy and multiple adversary proceedings on the same issue—efficiency dictates that these threshold issues raising novel questions of Colorado law be addressed sooner, rather than later, so as to avoid the multiple levels of appeal that will no doubt follow the Bankruptcy Court's attempt to divine Colorado law.

WHEREFORE, Grand Mesa requests that this Court grants Grand Mesa's Joint Consolidation Motion and deny Extraction's motion to consolidate the unrelated appeals.

Dated: December 18, 2020

Respectfully submitted,

Greenberg Traurig, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 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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