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*Counsel for Nordheim Eagle Ford
Gathering, LLC*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|-------------------------|
| In re: |) | Chapter 11 |
| SABINE OIL & GAS CORPORATION, <i>et al.</i> |) | Case No. 15-11835 (SCC) |
| Debtors. |) | (Jointly Administered) |
| |) | |
| |) | |

**NORDHEIM’S SURREPLY REGARDING REJECTION
OF CERTAIN EXECUTORY CONTRACTS**
(relates to Dkt. No. 410)

TO THE HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE:

1. Nordheim Eagle Ford Gathering, LLC (“Nordheim”) files this surreply to the Debtors’ Omnibus Reply to Objections to Debtors’ Omnibus Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts (the “Reply”, Dkt. No. 410). Sabine’s Reply raises several new legal issues that Sabine wholly omitted from its original motion, thus necessitating this surreply. In support thereof, Nordheim respectfully represents as follows:

I. PRELIMINARY STATEMENT

2. Much of Sabine’s reply rests on the faulty assumption that there was no conveyance of real property interests and therefore there can be no covenants that run with the

land. This assumption is incorrect for two reasons. First, Sabine conveyed title to real property to Nordheim for the purpose of constructing the Gathering Facilities¹ necessary to transport Sabine's gas. This conveyance of real property was made in conjunction with the Gathering Agreements, as part of the same transaction. The benefit of the covenants in the Gathering Agreements run with the parcel of real property conveyed from Sabine to Nordheim, and the burden of the covenants in the Gathering Agreements runs to Sabine's mineral estate. Second, Sabine conveyed rights in its mineral estate to Nordheim, namely the right of Sabine to transport its gas and condensate however it wished, and the right to determine the price at which it transported its gas and condensate. Sabine initially possessed the entire bundle of rights that together constitute fee simple ownership of Sabine's mineral estate. Sabine, as the fee simple owner, was free to transfer certain of those rights to others, and did just that by entering into the Gathering Agreements with Nordheim. A transfer of actual title is not necessary to create horizontal privity between parties; mere transfer of an *interest* in property to another creates horizontal privity between such parties, and such a transfer has occurred here.

3. As discussed herein, all other requirements for covenants running with the land are met.

II. RELEVANT BACKGROUND

4. As fully set forth in Nordheim's Objection (incorporated herein as if fully restated), Sabine and Nordheim are parties to the Gathering Agreements, under which Sabine has exclusively dedicated to Nordheim's gas gathering system Sabine's entire supply of natural gas

¹ As the term is defined in the Gathering Agreements.

and condensate attributable to all Interests² located in a specified geographical area in DeWitt County, Texas.

5. Pursuant to a Special Warranty Deed dated March 11, 2014 (the “Special Warranty Deed”), Sabine conveyed to Nordheim (the “Conveyance”) the surface estate of an approximately 17.11-acre tract of land located in DeWitt County, Texas (the “Nordheim Parcel”). (See Special Warranty Deed, attached as Exhibit A). On the same date, Sabine and Nordheim executed Amendment No. 1 to the Gathering Agreements (the “Amendment”) (filed separately under seal). The Amendment provides that the purpose of the Conveyance was “to provide for the sale, conveyance and assignment of the Gathering System Assets in a series of transactions to be consummated from time to time in connection with the development and construction of the Gathering Systems.”³

6. Paragraph 1(a) of the amendment provides that the first paragraphs of Section 2.4 of the Gathering Agreements are deleted in their entirety and replaced with:

[Sabine] shall sell, convey and assign to [Nordheim], free and clear of all liens, via one or more mutually acceptable assignments, bills of sale and deeds with special warranty of title by, through and under [Sabine], but not otherwise, and easements and similar conveyance documents, (i) a mutually agreed tract of land sufficiently sized for [Nordheim’s] construction and operation of the Gathering System...and (ii) that certain equipment more particularly described on EXHIBIT “H” attached hereto and made a part hereof (the “Equipment” and together with the Lands, the “Gathering System Assets”). On or about March 11, 2014, [Sabine] shall execute and deliver a special warranty deed and an easement (each as contemplated above) selling, conveying and assigning to[Nordheim] the Lands. Concurrently with [Sabine’s] delivery of such deed and easement, [Nordheim] shall pay [Sabine] an amount equal to...(\$111,684.00) as consideration for [Sabine’s] sale, conveyance and assignment to [Nordheim] of the Lands.

(Amendment to Gathering Agreements, Paragraph 1(a)).

² As the term is defined in the Gathering Agreements.

³ As the term “Gathering Systems” is defined in the Gathering Agreements.

III. SURREPLY

A. Rejection of the Gathering Agreements Fails the Business Judgment Standard

7. The business judgment standard and its applicability here are thoroughly described in Nordheim's Objection. (Objection ¶¶ 15-16).

B. The Gathering Agreements Contain Covenants that Run with the Land

8. Nordheim's Objection sets forth all of the elements required for a covenant to run with the land. (Objection ¶¶ 18 & 28). Further, contrary to Sabine's assertion, Nordheim does argue in the Objection that the dedication (which includes the Minimum Volume Commitment) and the transportation fees (which includes the Deficiency Payment) are covenants that run with the land.

i. Sabine's Conveyance to Nordheim of a Parcel of Real Property Created Horizontal Privity

9. Sabine's conveyance of the Nordheim Parcel to Nordheim in conjunction with the contemporaneously executed Amendment, establishes horizontal privity between the parties. The Amendment provides that its purpose was to reflect in the Gathering Agreements the conveyance of the Nordheim Parcel. Such conveyance was necessary to effectuate the purpose of the Gathering Agreements as Nordheim had to construct the Gathering Facilities in order to fulfill its obligations under the Gathering Agreements.

10. In *In re Energytec, Inc.*, 739 F. 3d 215, 217 (5th Cir. 2013), the conveyance of the real property and the grant of the related covenants are also found in two separate documents. There, the owner of certain leases conveyed such leases pursuant to an assignment and bill of sale, and conveyed the covenants, a transportation fee and consent rights, via a separate letter agreement on the same date. *Energytec*, 739 F.3d at 217. The Fifth Circuit held that the letter agreement was part of the conveyance, and found privity of estate. *Energytec*, 739 F.3d at 223.

Similarly here, the Gathering Agreements are part of the Conveyance and taken together establish horizontal privity by providing a grant of land that contains the covenants.

ii. The Gathering Agreements Grant an Interest in Property Even Without the Conveyance

11. Property rights are often referred to as a bundle of rights or sticks. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W. 3d 377, 382 (Tex. 2012). Unencumbered fee simple ownership includes the entire bundle of rights associated with a parcel of real property. *See Eastbrook Homes, Inc. v. Treasury Dep't*, 296 Mich. App. 336, 348, 820 N.W.2d 242, 249 (2012) (person having all possible rights incident to ownership of a parcel of property has the entire bundle of sticks or a fee simple title to the property); *see also United States v. 18.67 Acres of Land*, 793 F.Supp. 582, 586 (M.D. Pa. 1992) (fee simple is maximum possible interest in real estate as it includes the entire bundle of rights and privileges that pertain to a property); Danaya C. Wright and Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351, 389 (2000) (in property law parlance, refer to property rights as a bundle of rights, where fee simple title is envisioned as ownership of the entire bundle); Ronald R. Scott, *Private Land Use Controls and Biodiversity Preservation in Kentucky*, 11 J. Nat. Resources & Env'tl. L. 281, 284 (1996) (citing Olin L. Browder, Jr. *et al.*, *Basic Property Law* 226 (4th ed. 1984)) (fee simple absolute is potentially unlimited in duration and consists of the transferor's entire "bundle" of property rights).

12. A fee simple owner has the right to transfer any or all of the rights in its bundle to another party. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 76, 103 S. Ct. 407, 411, 74 L. Ed. 2d 235 (1982) (bundle of rights accruing to secured party smaller than that which accrues to fee simple owner, but government cited to no cases supporting the proposition that differences

such as these relegate secured party's interest to something less than property); *see also* Frona Powell, *Defeasible Fees and the Nature of Real Property*, 40 U. Kan. L. Rev. 411, 436 (1992) (notion that owner of real property in fee simple has a "bundle of rights" in property and can parcel out some rights while retaining others derives from English common law of estates). The transfer of any such right is a transfer of an interest in property. *See Dorsey v. C. I. R.*, 59 T.C.M. (CCH) 592 (T.C. 1990) (when a right is separated from the bundle and transferred or mortgaged, a partial or fractional property interest is created); *TMG Life Ins. Co. v. Cnty. of Goodhue*, No. C9-94-479, 1994 WL 725485, at *2 (Minn. Tax Dec. 15, 1994) *aff'd*, 540 N.W.2d 848 (Minn. 1995) (property may be divided into different interests and estates).

13. Sabine South Texas, LLC, the fee simple owner of the Interests, originally possessed a bundle of rights which, when taken together, constitute ownership of the Interests. Such rights included the right to transport gas and condensate produced from the Interests in any manner Sabine South Texas desired for any price to which Sabine South Texas wished to agree. In executing the Gathering Agreements with Nordheim, Sabine South Texas⁴ transferred its right to freely transport gas and condensate for the price of its choosing to Nordheim. Essentially, Sabine gave the "choose your transport" stick and the "choose your price" stick in its bundle to Nordheim by agreeing to the dedication and transportation fees in the Gathering Agreements. In doing so, Sabine South Texas transferred a portion of its property interests in the Interests to Nordheim. This transfer satisfies the requirement of horizontal privity that "some property interest in land" be transferred.

⁴ By and through its agent, Sabine Oil & Gas LLC (n/k/a Sabine Oil & Gas Company) as discussed below at paragraphs 24 through 29.

iii. Equity Requires Finding that the Covenants Run With the Land

14. In the event that the Court finds that horizontal privity does not exist, it is still the case that the Dedication Clauses and transportation fees (including the Deficiency Payment) in the Gathering Agreements are covenants running with the land. A personal covenant, often referred to as an equitable servitude, may be binding upon successors in interest even though the traditional legal test for a covenant running with the land is not met. *See Collum v. Neuhoff*, 507 S.W.2d 920, 922 (Tex. Civ. App. 1974). The key to enforcing an equitable covenant against subsequent owners is that the subsequent owners took the property with notice of the covenant or servitude. *Collum*, 507 S.W.2d at 922-23 (equity recognizes covenants which do not run with land, but are nevertheless binding upon subsequent owners of property who acquire same with notice, with key to enforceability being the fact that they took with notice of the covenant or servitude); *see also Reagan Nat. Adver. of Austin, Inc. v. Capital Outdoors, Inc.*, 96 S.W.3d 490, 495 (Tex. App. 2002), judgment vacated, cause dismissed (Dec. 9, 2003) (covenant that does not technically run with the land can still bind successors to the burdened land as an equitable servitude if: (1) the successor to the burdened land took its interest with notice of the restriction; (2) the covenant limits the use of the burdened land; and (3) the covenant benefits the land of the party seeking to enforce it (citations omitted)). Texas courts have held that in order for an equitable servitude to be enforced, the party seeking enforcement must own land that benefits from the restriction. *See Reagan Nat. Adver. of Austin, Inc.*, 96 S.W.3d at 495 (easement or equity in tract of land growing out of restrictive covenant as to use can hardly be conceived except in connection with another tract of land); *see also Davis v. Skipper*, 125 Tex. 364, 371, 83 S.W.2d 318, 321 (Comm'n App. 1935) (same).

15. As discussed in paragraph 5, pursuant to the Conveyance, Sabine conveyed the Nordheim Parcel to Nordheim for the purpose of constructing and operating the Gathering Facilities. The dedication clauses and transportation fees (including the Deficiency Payment) within the Gathering Agreements benefit the Nordheim Parcel because without these covenants, the value of the Nordheim Parcel would be severely diminished. Nordheim has made a significant investment in the Nordheim Parcel, including the \$111,684.00 purchase price, and the substantial cost of constructing and operating the Gathering Facilities. Nordheim made such a substantial investment in the Nordheim Parcel in reliance on Sabine's representation that it would ship its gas and condensate through Nordheim's pipeline to the Gathering Facilities.

16. It is evident as discussed below that all other elements for a covenant to run with the land are satisfied. Nordheim made a significant investment in reliance on the covenants contained in the Gathering Agreements, and equity requires that the Court find these agreements run with the land even if the parties lack horizontal privity.

17. Under Texas law, equitable servitudes are considered real property rights, not contractual rights. See Howard R. Williams, *Restrictions on the Use of Land: Equitable Servitudes*, 28 Tex. L. Rev. 194, 195 (1949) (without discussion, Texas courts have apparently adopted the position that equitable servitudes should be considered servitudes on land similar to easements or profits, as opposed to contracts regarding land) *citing Davis v. Skipper*, 125 Tex. 364, 371, 83 S.W.2d 318, 321 (Comm'n App. 1935) (the existence of an "easement" or "equity" in a tract of land growing out of restrictive covenant as to use can hardly be conceived except in connection with another tract of land, which may be said to be the dominant estate and for which the easement or equity is created) (emphasis added). Real property interests cannot be avoided through rejection of an executory contract. See *In re Banning Lewis Ranch Co., LLC*, 532 B.R.

335, 346 (Bankr. D. Colo. 2015) (rejecting agreements that run with the land will not alter the effect of covenants against non-debtor parties or the debtor's successors-in-interest and would therefore serve no purpose at all); see also *In re Bergt*, 241 B.R. 17, 34 (Bankr. D. Alaska 1999) (section 365 rejection is not an avoiding power that somehow clears title to the underlying property covered by the lease or contract. Section 365 rejection does not make the other party's interest in the property disappear). Regardless of whether the covenants in the Gathering Agreements are characterized as real covenants or equitable servitudes, they cannot be rejected under 365 because they are real property rights, not contractual rights.

iv. There is No Express Disclaimer of Conveyance in the Gathering Agreements

18. Sabine states that the "Agreements expressly disclaim any intent to convey property" but fails to cite any language from the Nordheim Gathering Agreements supporting such assertion, because there is no such language. The language of the Gathering Agreements expressly supports rather than disclaims the intent of the parties that a property interest has been conveyed. The Gathering Agreements each provide that they shall be "a covenant running with the land ... [a]s such, as to any transfer hereof ..., this Agreement shall remain binding on the applicable transferee...." (Gathering Agreements § 1.6). Also, each Gathering Agreement provides that, "[c]ontemporaneously with the execution of this Agreement, the Parties shall execute, acknowledge, deliver and record a 'short form' memorandum of this Agreement in the form of EXHIBIT "F" attached hereto which shall be placed of record in the counties in which the Dedicated Area is located." (Gathering Agreements § 1.7).

19. The fact that each Gathering Agreement states that it is a covenant running with the land, attaches a memorandum of the agreement for filing in the real property records, and requires the execution and recordation of such memorandum in the real property records in every

applicable county is evidence that the parties intended, and did, transfer a property interest to Nordheim in conjunction with the execution of the Gathering Agreements. There is no other reason to file the Gathering Agreements of record.

20. Next, Sabine looks to the Conveyance in an attempt to argue that Nordheim is capable of using “sell, convey, and assign” language when it wants to, and the lack of such language here shows a lack of intent to “consummate a conveyance or sale transaction.” (Reply ¶ 26). Sabine is correct that Nordheim was capable of using conveyance language when it intended to effectuate a conveyance in fee simple, however Sabine is incorrect that the language is lacking “here.” Through the Amendment, Sabine and Nordheim used “sell, convey, and assign” language in § 2.4 of the Gathering Agreements to reference the Conveyance with which the benefit of the covenants in the Gathering Agreements run. (*See* Amendment No. 1 to Gathering Agreements, ¶ 1(a)).

21. Additionally, as described in paragraph 11 above, ownership of property consists of numerous rights and interests with regard to such property. A total conveyance or sale is not required to create privity, as there need only be a “grant of some property interest in land.” *Wasson Interests, Ltd. v. Adams*, 405 S.W.3d 971, 973 (Tex. Ct. App. 2013) (describing the type of transfer necessary to satisfy privity for a covenant running with the land). An interest in property was transferred here by Sabine agreeing to the Dedication Clauses and transportation fees (including the Deficiency Payments).

v. The Gathering Agreements Relate to Real Property, Not Personal Property

22. Two arguments are set forth in the Reply to support the contention that no interest in an “estate” has been transferred to Nordheim. First, Sabine argues that a dedication of hydrocarbons is an interest in personal property, not real property. Second, it is argued that the

“‘land’ at issue is Sabine South Texas’s fee simple determinable ownership interest in the mineral estate” and since Sabine South Texas is not a party to the Gathering Agreements, no interest in its property can be transferred thereby. This second argument is refuted in the discussion at paragraphs 24 through 29 below regarding Sabine’s actual and implied authority.

23. In a rhetorical sleight of hand, Sabine argues that because severed minerals are personalty, an acreage dedication does not constitute a real property interest. However, upon closer inspection, the argument proves to be a *non sequitur*. It is not disputed that once oil or gas has been severed from the land, it is considered personal property under Texas law. Nonetheless, it is not severed gas and condensate that is burdened with the terms of the Gathering Agreements. It is the Interests. The Interests include gas and condensate “in place,” *i.e.* as real property. *See Phillips Petroleum Co. v. Adams*, 513 F.2d 355, 363 (5th Cir. 1975) (under Texas law, oil and gas are realty when in place). When the Interests are transferred, these covenants are intended by the terms of the agreements to follow the Interests, not the severed minerals.

vi. There Is Vertical Privity

24. Sabine asserts that there is no vertical privity between Sabine and Nordheim because the Debtors’ oil and gas leases located in the Dedicated Area are owned by Sabine South Texas (who is not a party to the Gathering Agreements), and not by Sabine. This assertion is incorrect. Sabine, as the parent of wholly-owned subsidiary Sabine South Texas, had the authority to, and did so bind Sabine South Texas under the Gathering Agreements.

25. Section 1.6 of both Gathering Agreements provides in pertinent part that:

So long as this Agreement is in effect, this Agreement shall (i) be a covenant running with the Interests now owned or hereafter acquired by [Sabine] and/or its Affiliates within the Dedicated Area and (ii) be binding on [Sabine] and enforceable by [Nordheim] and its successors and assigns against [Sabine], *its Affiliates* and their respective successors and assigns.

(Gathering Agreements § 1.6 (emphasis added)).

26. Additionally, Section 14.7 of Exhibit A of the Gathering Agreements provides in relevant part:

Each party represents that it has all necessary Power and authority to enter into and perform its obligations under the Agreement and that the Agreement constitutes a legal, valid and binding obligation of that Party enforceable against it in accordance with its terms...

(Gathering Agreements, Exhibit A, § 14.7).

27. In the ordinary course of business an agent may be cloaked with three types of authority: express, implied or apparent. *Liberty Mut. Ins. Co. v. Enjay Chem. Co. (now Exxon Corp.)*, 316 A.2d 219, 222 (Del. Super. 1974).

28. Express authority may be conveyed to an agent either orally or in writing. *Liberty Mut. Ins. Co.*, 316 A.2d at 222. Implied authority is actual authority evidenced by a principal's representations to its agent. *Liberty Mut. Ins. Co.*, 316 A.2d at 222. Apparent authority is evidenced a principal's representations to a third party. *Guyer v. Haveg Corp.*, 58 Del. 88, 93-94, (Del. Super. 1964), *aff'd*, 58 Del. 535, (1965). Apparent authority is the authority a reasonably prudent businessperson, using due care and discretion, would naturally assume an agent to possess. *Liberty Mut. Ins. Co.*, 316 A.2d at 222.

Sabine had the apparent authority to, and, in fact did, bind Sabine South Texas under the Gathering Agreements.⁵ Sabine South Texas acquiesced to Sabine's acts under the Gathering Agreements by allowing Nordheim to build a pipeline and gather gas from the Dedicated Area. Such acquiescence gave Nordheim the reasonable belief that Sabine had the authority to bind Sabine South Texas under the Gathering Agreements. *See Genger v. TR Investors, LLC*, 26 A.3d 180, 195 (Del. 2011) (implied ratification is where conduct of complainant, subsequent to

⁵ Nordheim intends to seek formal discovery to determine whether Sabine had the express authority to bind Sabine South Texas under the Gathering Agreements.

objected to transaction, is such that it is reasonable to conclude he has accepted or adopted the transaction ... ratification can be found from conduct which can only be rationally explained if there were an election to treat the supposedly unauthorized act as authorized ... ratification may also be found where a party receives and retains the benefit of a transaction without objection).

29. Sabine is the sole member manager of Sabine South Texas. (*See Declaration of Michael Magilton (I) In Support of First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2*, Dkt. No. 3 at 65). It was reasonable for Nordheim to assume that the sole member-manager had the authority to bind its wholly-owned subsidiary. *See* Del. Code Ann. Tit. 6, § 18-402 (unless otherwise provided in a limited liability company agreement, each member and manager has the authority to bind the limited liability company); *see also Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1051 (Del. Ch. 2006) (for the purpose of satisfying the knowledge requirement, courts have imputed the knowledge of corporate officers and directors to a seller when the agent was acting within the scope of his authority—was fair at pleading stage to attribute principal’s knowledge to various affiliate entities); *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, No. CIV.A. 3290-VCP, 2009 WL 1387115, at *16 (Del. Ch. May 18, 2009) *aff’d*, 988 A.2d 938 (Del. 2010) (general rule that knowledge of an officer or director of a corporation will be imputed to the corporation). Moreover the current officers of Sabine South Texas are all also officers of Sabine. It defies logic that the officers of Sabine would honor an agreement that binds Sabine South Texas, and then subsequently, in their role as officers of Sabine South Texas, argue that the officers of Sabine lacked the authority to bind Sabine South Texas.⁶

⁶ Nordheim intends to take formal discovery regarding whether the officers of Sabine South Texas were also all officers of Sabine Oil & Gas LLC at the time the Gathering

The sole purpose of the Gathering Agreements was for Nordheim to gather and transport gas owned by Sabine South Texas. Sabine has no interest in the property that is the subject of the Gathering Agreements, and therefore could only be executing the Gathering Agreements as an agent of Sabine South Texas. Sabine cannot simultaneously assert that Sabine had the authority to execute the Gathering Agreements, which relate solely to Sabine South Texas's property, and assert that Sabine South Texas is not in privity with Nordheim.

vii. The Covenants Touch and Concern the Real Property

30. The test for whether a covenant touches and concerns the land is set forth in Nordheim's Objection. *See* Objection, ¶¶ 19-23.

31. The covenants in the Gathering Agreements impact the value of both Sabine and Nordheim's land, and as such, they touch and concern the land. The Nordheim Parcel is rendered more valuable by the covenants. The purpose of purchasing the Nordheim Parcel and constructing the Gathering Facilities was to transport gas from the Dedicated Area. Without the ability to transport gas from the Dedicated Area, the Nordheim Parcel would no longer serve its purpose and its value would be significantly diminished. Sabine's inability to transport the gas in the Dedicated Area in any manner it desires renders the Interests less valuable. As discussed in paragraph 12 above, Sabine no longer possesses its full bundle of rights with respect to the Dedicated Area. Sabine must transport its gas in accordance with the Gathering Agreements, and such agreements are also binding on Sabine's successors.

viii. The Intent Is That the Agreements Run With the Land

32. As discussed in paragraphs 17 and 18 above, the Gathering Agreements plainly state that they are to run with the land, and be binding on the parties' successors and assigns.

Agreements were executed. If so, the argument against implied and apparent authority would seem absurd.

Nordheim does not give “short shrift to the intent of the parties to create a covenant running with the land.” (Reply ¶ 35). Rather, when the express language and controlling law are clear and undisputed as is the case here, the issue can be dealt with succinctly. It is undisputed that “to determine the parties’ intent, [courts] examine the express language of their agreement.” *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22 (Tex. 2014) (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011)). Similar language has been held to be a sufficient expression of intent in other cases. *See Schlup v. Bourdon*, 33 Kan. App. 2d 564 (Ct. of App. Kan. 2005). Sabine has not and cannot point to any contradictory language or law.

33. Finally, the nature of the Gathering Agreements and the practical understanding in the marketplace in Texas is that agreements such as the Gathering Agreements are intended to run with the land. Dedication agreements, which routinely include minimum commitment volumes and deficiency payments, are commonplace in the Texas oil and gas industry. Under such agreements, the capital investment for midstream oil and gas companies to acquire easements and rights-of-ways, plan and construct pipelines, and build facilities to treat hydrocarbons for delivery from wellhead to refinery/processor are enormous. Recapturing this capital outlay (and hopefully some profit margin) often takes up to twenty years for midstream oil and gas companies. Consequently, midstream oil and gas companies are only willing to commit this type of capital to such projects on the understanding that the covenants in dedication agreements run with the land, *i.e.* successors and assigns will be bound by such agreements. If oil and gas exploration and production companies could escape the terms of dedication agreements by selling their assets or filing bankruptcy and seeking rejection under section 365(a), then few if any midstream companies could justify the expense of building pipelines and

related facilities, and the existing long-term capital investment of every midstream service provider in Texas would be at risk. Simply put, the midstream oil and gas business in Texas would be left in disarray.

C. *Energytec* Is Wholly Applicable

34. Sabine's argument against *Energytec* rests on the incorrect assertion that there was no conveyance of real property. In actuality, the case at bar is on all fours with *Energytec*, as discussed in paragraph 10 above.

35. *Energytec* is still wholly applicable even if the Court only considers the transfer of the right of free transportation and the right to transport at any price. Sabine's argument against *Energytec* rests on the mistaken belief that a mineral estate or other real property must be transferred in title to achieve privity. If the Court rejects this monolithic approach and allows that the concept of ownership is nuanced such that interests in real property may be transferred while title to the real property is maintained, then the *Energytec* case is wholly analogous to the facts in this case.

D. Nordheim Is Entitled to Freely Assert Its Claims

36. There is no legal basis for a preemptive limitation of Nordheim's remedies under the Gathering Agreements. Nordheim is entitled to due process in relation to the assertion of any claims, and any order entered by the Court concerning the rejection of the Gathering Agreements should not limit Nordheim's ability to pursue any claim to which it is entitled.

IV. PRAYER

WHEREFORE, Nordheim requests that the Court deny the relief sought by Sabine in its Omnibus Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts, and that the Court grant Nordheim such other relief as the Court deems just.

Respectfully submitted,

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**COUNSEL FOR NORDHEIM EAGLE FORD
GATHERING, LLC**

EXHIBIT A

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

SPECIAL WARRANTY DEED

STATE OF TEXAS

§

§ KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF DEWITT

§

REFERENCE is hereby made to that certain Warranty Deed (the "Source Document"), dated effective October 1, 2013, recorded in Volume 487, Page 926, Official Public Records, DeWitt County, Texas, wherein Jo Ann Hoelscher conveyed 38.319 acres, more or less, as more particularly described therein, to Sabine Oil & Gas LLC, reference to which is hereby made for all purposes.

WHEREAS, Sabine Oil & Gas LLC desires to grant, sell and convey a portion of those lands described in the Source Document to the grantee herein named, such lands desired to be conveyed being more particularly described on Exhibit "A" attached hereto (the "Lands").

NOW, THEREFORE, for Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, **SABINE OIL & GAS LLC**, a Delaware limited liability company ("Grantor"), whose address is 1415 Louisiana Street, Suite 1600, Houston, Texas 77002, has GRANTED, BARGAINED, SOLD and CONVEYED, and by these presents does GRANT, BARGAIN, SELL and CONVEY unto **NORDHEIM EAGLE FORD GATHERING, LLC**, a Delaware limited liability company ("Grantee"), whose address is 700 Milam Street, Suite 800, Houston, Texas 77002, the Lands, together with all buildings and improvements thereon owned by Grantor, and any and all of Grantor's rights, easements, licenses and privileges presently thereon or appertaining thereto (collectively, the "Property").

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto in anywise belonging, unto Grantee, its successors and assigns forever, subject, however, to the following terms and conditions of this Special Warranty Deed (this "Deed").

1. Special Warranty. Grantor binds itself, its heirs, successors and assigns to warrant and forever defend all and singular the Property unto Grantee, its heirs, successors and assigns, against all persons claiming or to claim the same or any part thereof by, through or under Grantor, but not otherwise. Grantor and Grantee (the "Parties") acknowledge and agree that the foregoing warranty shall constitute and be considered a special warranty of title by, through or under Grantor under the applicable laws of the State of Texas.

2. Governing Law. THIS DEED SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW WHICH WOULD REQUIRE THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION. TO THE EXTENT PERMISSIBLE BY LAW, HARRIS COUNTY, TEXAS SHALL BE THE EXCLUSIVE VENUE FOR ALL LEGAL PROCEEDINGS BROUGHT BY EITHER PARTY REGARDING ANY CLAIM UNDER THIS DEED.

3. Exhibits. Exhibit "A" attached hereto is incorporated into and made a part of this Deed for all purposes.

4. Further Assurances. The Parties agree to take such further actions and to execute, acknowledge and deliver all such further documents as are reasonably requested by the other Party for carrying out the purposes of this Deed.

5. Counterparts. This Deed may be executed in any number of counterparts, each of which shall be considered an original, and all of which together shall be considered one and the same instrument.

{Signature and acknowledgment pages follow}

IN WITNESS WHEREOF, this Deed has been signed by each of the Parties on March 11, 2014.

"GRANTOR"

SABINE OIL & GAS LLC

By: _____

Name: _____

Title: _____

"GRANTEE"

NORDHEIM EAGLE FORD GATHERING, LLC

By:  _____

Name: Michael J. Wortley

Title: President and Chief Financial Officer

MD

STATE OF TEXAS §
COUNTY OF HARRIS §

This instrument was acknowledged before me on the 11th day of March, 2014, by _____, known to me to be the _____ of **SABINE OIL & GAS LLC**, a Delaware limited liability company, on behalf of such limited liability company.

Notary Public, State of Texas

My Commission expires: _____

STATE OF TEXAS §
COUNTY OF HARRIS §

This instrument was acknowledged before me on the 11th day of March, 2014, by MICHAEL WORTLEY, known to me to be the PRESIDENT & CFO of **NORDHEIM EAGLE FORD GATHERING, LLC**, a Delaware limited liability company, on behalf of such limited liability company.

Lillian B. Carroll
Notary Public, State of Texas



My Commission expires: April 10, 2016

After Recording Return To:
Nordheim Eagle Ford Gathering, LLC
700 Milam Street, Suite 800
Houston, Texas 77002
Attention: _____

IN WITNESS WHEREOF, this Deed has been signed by each of the Parties on March 11, 2014.

"GRANTOR"

SABINE OIL & GAS/LLC

By: _____

Name: Timothy D. Yang

Title: Senior Vice President & General Counsel

"GRANTEE"

NORDHEIM EAGLE FORD GATHERING, LLC

By: _____

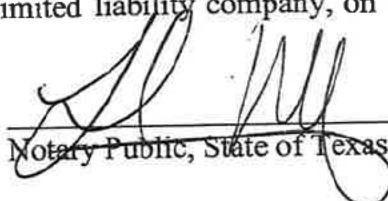
Name: _____

Title: _____

STATE OF TEXAS §
§
COUNTY OF HARRIS §

This instrument was acknowledged before me on the 11th day of March, 2014, by Timothy D. Yang, known to me to be the Senior Vice President & General Counsel of **SABINE OIL & GAS LLC**, a Delaware limited liability company, on behalf of such limited liability company.





Notary Public, State of Texas

My Commission expires: _____

STATE OF TEXAS §
§
COUNTY OF HARRIS §

This instrument was acknowledged before me on the 11th day of March, 2014, by _____, known to me to be the _____ of **NORDHEIM EAGLE FORD GATHERING, LLC**, a Delaware limited liability company, on behalf of such limited liability company.

Notary Public, State of Texas

My Commission expires: _____

After Recording Return To:
Nordheim Eagle Ford Gathering, LLC
700 Milam Street, Suite 800
Houston, Texas 77002
Attention: _____

EXHIBIT "A"

The surface estate of the hereinafter-described 17.11-acre tract of land. See attached for metes and bounds description and plat.



DEWITT COUNTY, TEXAS
A. BUROW SURVEY, ABSTRACT NO. 608

DESCRIPTION OF A 17.11 ACRE TRACT OF LAND OUT OF THE A. BUROW SURVEY, ABSTRACT NO. 608, DEWITT COUNTY, TEXAS AND BEING A PART OF THAT CALLED 38.319 ACRE TRACT OF LAND DESCRIBED IN A DEED DATED NOVEMBER 2, 1994 FROM DAVID P. STYRA, ET UX TO EDNA E. GRAVETT, RECORDED IN VOLUME 372, PAGE 760, OF THE DEED RECORDS OF DEWITT COUNTY, TEXAS FOR WHICH REFERENCE IS MADE AND THE SAID 17.11 ACRE TRACT BEING DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at a 1/2 inch iron pipe found (Grid Coordinates: N 13,527,808.91 USft E 2,409,588.69 USft) for the Easterly corner of said parent 38.319 acre tract, being the common Northerly corner of a called 30.3559 acre tract described in a deed dated January 15, 1999 from Gloris Seifert to Flavis Kozielski, et ux, recorded in Volume 52, Page 672, Official Public Records of DeWitt County, Texas and being also in the upper Southwest line of a called 80 acre tract described in a deed dated October 12, 2001 from the Estate of Edmund E. Mueller by Mildred Lee Mueller, Trustee to Mildred Lee Mueller, recorded in Volume 102, Page 549, Official Public Records of DeWitt County, Texas;

THENCE South 29° 02' 13" West (called South 30° 22' 40" West) with the Southeast line of said parent tract, being the common Northwest line of said 30.3559 acre tract a distance of 710.00 feet to a 5/8 inch iron rod set w/cap (Grid Coordinates: N 13,527,188.16 USft E 2,409,244.08 USft) for a Southerly corner of the herein described tract, being a common Easterly corner of a 90 foot utility easement surveyed also this day out of said parent tract, from said corner a 3/4 inch iron rod found for the Southerly corner of said parent tract, same being the common Southerly corner of said 90 foot utility easement in the Northeast line of Cabeza Road bears South 29° 02' 13" West a distance of 1220.45 feet;

THENCE across said parent 38.319 acre tract and being the Southwest line of the herein described 17.11 acre tract, the following:

- North 60° 57' 47" West a distance of 90.00 feet to a 5/8 inch iron rod set w/cap, same being the common Northerly corner of said 90 foot utility easement;
- South 29° 02' 13" West a distance of 137.21 feet to a 5/8 inch iron rod set w/cap;
- North 61° 12' 59" West a distance of 350.22 feet to a Mag Nail set w/stamped disc;
- North 28° 16' 27" East a distance of 71.80 feet to a 5/8 inch iron rod set w/cap;
- North 60° 57' 47" West a distance of 373.88 feet a 5/8 inch iron rod set w/cap (Grid Coordinates: N 13,527,525.21 USft E 2,408,498.96 USft) for an interior corner of the herein described 17.11 acre tract;

THENCE South 29° 00' 57" West continuing across the said parent 38.319 acre tract and being 50 feet and parallel to the Northwest line of said parent 38.319 acre tract and being the lower Southeast line of the herein described 17.11 acre tract a distance of 1158.63 feet to a 5/8 inch iron rod set w/cap in the Northeast line of Cabeza Road (meas. 60' right of way) for the most Southerly corner of the herein described tract, from said corner a 3/4 inch iron rod found for the Southerly corner of said parent 38.319 acre tract bears South 61° 19' 30" East a distance of 814.64 feet;

THENCE North 61° 19' 30" West (called North 60° 00' 00" West) with the Northeast line of Cabeza Road, being the common Southwest line of said parent 38.319 acre tract a distance of 50.00 feet to a 5/8 inch

iron rod found for the Westerly corner of said parent 38.319 acre tract, being the common Southerly corner of said 80 acre tract;

THENCE North 29° 00' 57" East (called North 30° 21' 06" East) with the Northwest line of said parent 38.319 acre tract, the common lower Southeast line of said 80 acre tract a distance of 1927.63 feet (called 1927.91') to a 1/2 inch iron rod found (Grid Coordinates: N 13,528,221.68 USft E 2,408,828.10 USft) for the Northerly corner of said parent 38.319 acre tract, being a common interior corner of said 80 acre tract;

THENCE South 61° 30' 41" East (called South 60° 10' 54" East) with the Northeast line of said parent 38.319 acre tract, the common upper Southwest line of said 80 acre tract a distance of 865.38 feet (called 865.66') to the **POINT OF BEGINNING**, containing 17.11 acres of land, more or less.

- Bearing Basis: Texas Lambert Grid, Texas South Central Zone, NAD 83/2011 (EPOCH: 2010)
- All distances are grid values, to obtain surface values divide grid distances by a Combined Scale Factor of 0.99987230
- Any reference to a 5/8" iron rod set w/cap is a 5/8" iron rebar 24" inches long and set with a 2" aluminum cap stamped "Frank Surveying Co - TX FIRM #1000100".

This metes and bound description and plat attached hereto represent an on-the-ground survey made under my supervision on February 5-6, 2014.

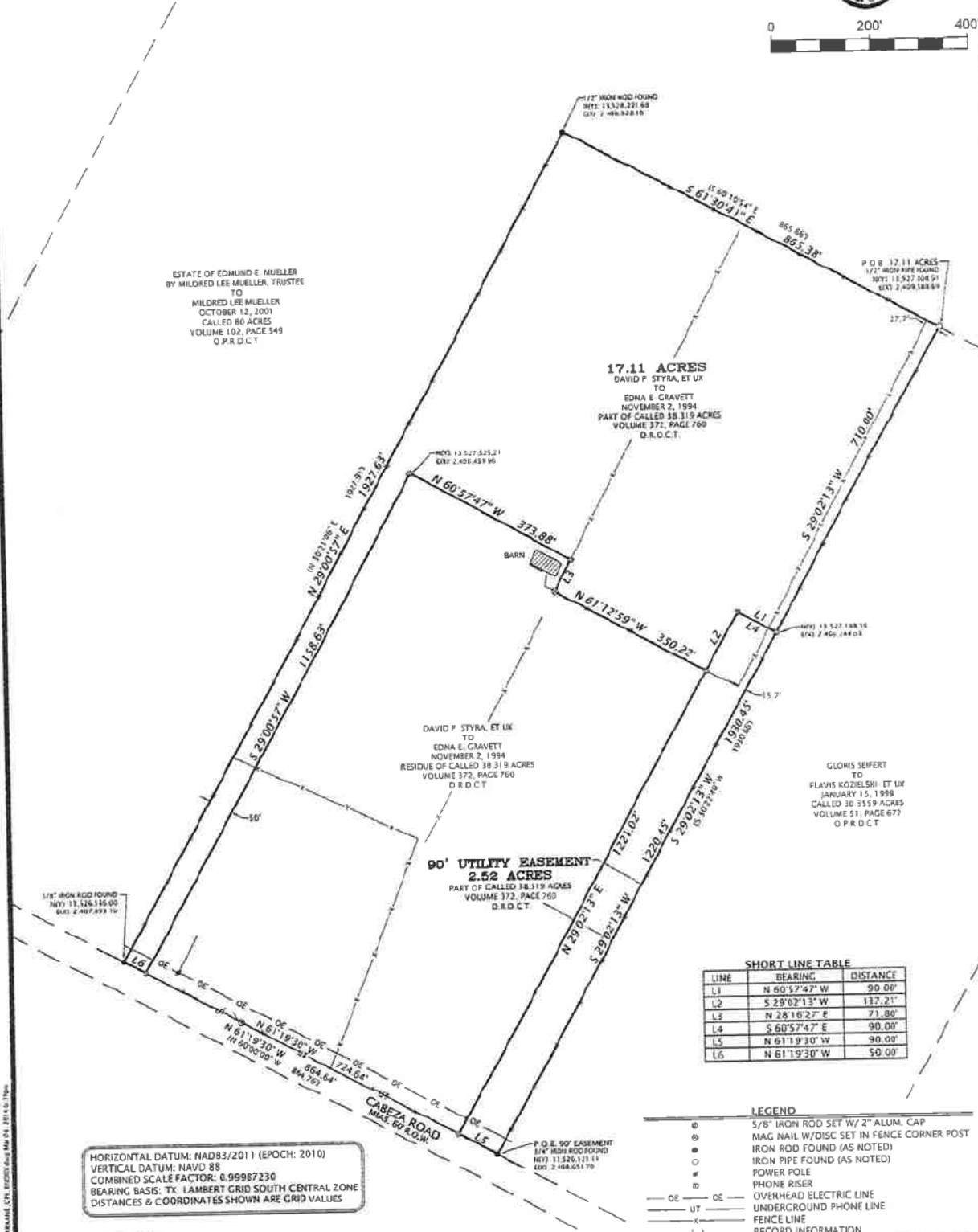
Matthew W. Loessin
Registered Professional Land Surveyor No. 5953
Frank Surveying Co., Inc.
TBPLS Firm No. 10000100
Project No. 201401065
Word File: 201401065 - 17.11 acre m & b.docx
ACAD File: 201401065_SUGARKANE_CPF_BNDRY.dwg

Date: 03/04/2014



A handwritten signature in black ink, appearing to read "Matthew W. Loessin".

DEWITT COUNTY, TEXAS
A. BUROW SURVEY
ABSTRACT NO. 608



ESTATE OF EDMUND E. MUELLER
BY MILDRED LEE MUELLER, TRUSTEE
TO
MILDRED LEE MUELLER
OCTOBER 12, 2001
CALLED 80 ACRES
VOLUME 102, PAGE 549
O.P.R.D.C.T.

17.11 ACRES
DAVID P. STYRA, ET UX
TO
EDNA E. CRAVETT
NOVEMBER 2, 1994
PART OF CALLED 38.319 ACRES
VOLUME 372, PAGE 760
O.P.R.D.C.T.

DAVID P. STYRA, ET UX
TO
EDNA E. CRAVETT
NOVEMBER 2, 1994
RESIDUE OF CALLED 38.319 ACRES
VOLUME 372, PAGE 760
O.P.R.D.C.T.

90' UTILITY EASEMENT
2.52 ACRES
PART OF CALLED 38.319 ACRES
VOLUME 372, PAGE 760
O.P.R.D.C.T.

GLORIS SEIFERT
TO
FLAVYS KOZIELSKI, ET UX
JANUARY 15, 1999
CALLED 30.3559 ACRES
VOLUME 51, PAGE 677
O.P.R.D.C.T.

SHORT LINE TABLE

| LINE | BEARING | DISTANCE |
|------|---------------|----------|
| L1 | N 60°57'47" W | 90.00' |
| L2 | S 29°02'13" W | 137.21' |
| L3 | N 28°16'27" E | 71.80' |
| L4 | S 60°57'47" E | 90.00' |
| L5 | N 61°19'30" W | 90.00' |
| L6 | N 61°19'30" W | 50.00' |

LEGEND

- ⊙ 5/8" IRON ROD SET W/ 2" ALUM. CAP
- ⊙ MAG NAIL W/DISC SET IN FENCE CORNER POST
- ⊙ IRON ROD FOUND (AS NOTED)
- ⊙ IRON PIPE FOUND (AS NOTED)
- POWER POLE
- PHONE RISER
- OE OVERHEAD ELECTRIC LINE
- UT UNDERGROUND PHONE LINE
- X FENCE LINE
- I RECORD INFORMATION

HORIZONTAL DATUM: NAD83/2011 (EPOCH: 2010)
VERTICAL DATUM: NAVD 88
COMBINED SCALE FACTOR: 0.99987230
BEARING BASIS: TX LAMBERT GRID SOUTH CENTRAL ZONE
DISTANCES & COORDINATES SHOWN ARE GRID VALUES

SURVEY NOTES

- THE SURVEYOR DID NOT ABSTRACT THE PROPERTY AND THIS SURVEY WAS PREPARED WITHOUT THE BENEFIT OF A TITLE COMMITMENT OR REPORT.
- PROPERTY IS SUBJECT TO THOSE EASEMENTS, RESTRICTIONS, ETC. THAT APPEAR OF RECORD OR UNRECORDED AND NOT SHOWN ON SURVEY.
- A SEPARATE METES AND BOUNDS DESCRIPTION ACCOMPANIES THIS PLAT FOR THE 14.90 ACRE TRACT AND TWO EASEMENTS.

SURVEYOR CERTIFICATION
THIS SURVEY WAS MADE ON THE GROUND DURING FEBRUARY 5-6, 2014 UNDER MY SUPERVISION AND REPRESENTS THOSE FACTS FOUND AT THE TIME OF SURVEY

FOR FRANK SURVEYING CO., INC.
BY: MATTHEW W. LOESSIN, RPLS
TEXAS REGISTRATION NO. 5953
03/04/2014



SURVEY PLAT OF A 17.11 ACRE TRACT AND A 90' UTILITY EASEMENT FOR THE SUGARKANE CPF - DEWITT COUNTY, TX

DATE: 03/04/2014
DRAWN BY: MWL
CHECKED BY: MWL
FIELD CREW: CDL/CLK
PROJECT NO: 201401065
COUNTY: DEWITT
SCALE: 1" = 200'
SHEET: 1 OF 1

FRANK SURVEYING COMPANY INC
2204 Walnut Street - Columbus, TX 76904
PH: 979.732.6114 - FAX: 979.732.4271
www.franksurveying.com
LAND SURVEYING/ENERGY/GIS SERVICES
SERVED FROM 1950 - 2014

© COPYRIGHT 2014 ALL RIGHTS RESERVED THIS SURVEY IS NOT ORIGINAL WITHOUT RED LICENSE SEAL AND BLUE SIGNATURE OF SURVEYOR

103706

Filed for Record

This, the 5 day of June 20 14
at 1:10 o'clock P M

NATALIE CARSON, COUNTY CLERK OF
DeWitt County, Texas

[Signature]
DEPUTY

Applied Field Services
2701 St. Hwy 322
Longview, TX 75603