TO DRILL OR NOT TO DRILL: DOES A LESSEE TRULY HAVE TO DRILL A WELL TO SATISFY THE HABENDUM CLAUSE OF AN OIL AND GAS LEASE?

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I. INTRODUCTION

Oil and gas companies have litigated disputes for as long as the industry has existed.[1] Companies frequently litigate certain disputes such as title or royalty disputes.[2] For a number of reasons, however, other disputes receive much less attention in court. For example, Texas courts have yet to rule on the legality of allocation wells, largely because companies within the oil and gas industry tend to settle the cases before the court reaches a definitive

1. *See, e.g.*, Ohio Oil Co. v. Indiana, 177 U.S. 190, 211–12 (1900) (litigating the effect of releasing gas from an oil and gas well in to the atmosphere); Brown v. Spilman, 155 U.S. 665, 666 (1895) (determining the rights and obligations of parties under certain oil and gas leases).

2. *See, e.g.*, Cannon v. Cassidy, 542 P.2d 514, 515 (Okla. 1975); French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797–98 (Tex. 1995).

ruling.[3] Other issues simply are not litigated by these companies because of one key reason: An oil and gas company does not want to take a position that would harm its interests in other leasehold ownership situations. This reality provides the framework of the factual situation analyzed in this Comment.

Oil and gas companies obtain oil and gas leases hundreds and thousands of times each year.[4] Many times, these companies will obtain leases covering the equivalent of a full 100% of the mineral interest, or in other words, the entire mineral estate of a tract.[5] Other times, however, companies will only be able to obtain leases on a portion of the mineral interest, or less than the full 100% interest owned in the mineral estate.[6] In these situations, the remainder of the mineral interest is generally leased by another oil and gas company.[7] Holding oil and gas leases as a cotenant with another oil and gas company poses a number of problems for the lessees and lessors alike.[8] Sometimes, one lessee will drill a well and refuse to allow the other lessee to participate in the drilling of the well.[9] This situation arises frequently but is almost never litigated.[10] Consider the following factual situation.

Several years ago, "Cimarex obtained an oil, gas, and mineral lease" covering 440 acres of a section in Ward County, Texas.[11] Cimarex's lease covered a 1/6 undivided mineral interest in the 440 acres and was set to remain in effect for a primary term of five years from the date of execution.[12] The lease also contained a habendum clause that stated the lease would remain in effect for a secondary term lasting "as long thereafter as oil or gas is produced from said land or from land with which said land is pooled."[13] The remaining 5/6 of the mineral interest was divided among a number of other lessees, including Anadarko Petroleum Corporation (Anadarko).[14] Anadarko eventually consolidated the remaining 5/6 mineral interest and

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3. *See* Conrad Hester, Gaye Lentz & Catherine Rowsey, Monroe v. Texas Railroad Commission*: Will a Texas Court Finally Address Allocation Wells?*, THOMPSON & KNIGHT (Mar. 16, 2018), http://www.tkoilandgasupdate.com/2018/03/monroe-v-texas-railroad-commission-will-a-texas-court-finally-address-allocation-wells.html.

4. *See generally* BUREAU OF LAND MANAGEMENT, *Table 1 Number of Leases*, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics (last visited Nov. 12, 2019) (showing the number of active oil and gas leases on federal lands).

5. Caleb A. Fielder, *Blood and Oil: Exploring Possible Remedies to Mineral Cotenancy Disputes in Texas*, 50 TEX. TECH L. REV. 173, 174 (2017).

6. *Id.*

7. *Id.*

8. *Id.* at 174 ("In such a scenario, there are three options: negotiate and agree on an operating agreement, trade out, or drill on a cotenancy basis.").

9. *See* Appellant's Opening Brief and Appendix at 7, Cimarex Energy Co. v. Anadarko Petroleum Corp., 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed) (No. 08-16-00353-CV), 2017 WL 1485414 [hereinafter Cimarex Brief].

10. *See* Hughes v. Cantwell, 540 S.W.2d 742, 743–44 (Tex. App.—El Paso 1976, writ ref'd n.r.e.) (demonstrating the only Texas case on point for this issue).

11. Cimarex Brief, *supra* note 9, at 5.

12. *Id.* at 6.

13. *Id.*

14. *Id.*

then controlled a 5/6 undivided leasehold interest in the 440 acres along with the entire 6/6 leasehold interest in the remaining 200 acres of the section.[15]

"In 2011 and 2012, Anadarko drilled and completed three wells on" the section.[16] Anadarko drilled two of these wells—the Murjo #1H and #2H—on the 440 acres it leased concurrently with Cimarex.[17] Cimarex repeatedly requested "the opportunity to join in the participation of the [Murjo] wells from inception" and volunteered to pay its share of costs and expenses to drill, complete, and operate the wells.[18] Anadarko declined these requests.[19] After declining Cimarex's requests to join in the drilling of the wells, Anadarko took top leases from Cimarex's lessors.[20] By taking top leases, Anadarko ensured that when the Cimarex leases terminated for failure to drill or produce, it would then hold the entire 6/6 leasehold interest in the tract.[21] Later in 2012, the wells on the Cimarex leasehold estate "paid out," essentially meaning that the cumulative proceeds from the wells had exceeded the drilling and operation costs of the same.[22] Even "after the wells paid out, Anadarko refused to pay Cimarex for the 1/6th share of production . . . that Cimarex owned."[23] Additionally, Anadarko refused Cimarex's requests for production and sales data from the wells.[24] In order to attempt to perpetuate its lease and to satisfy lease obligations, Cimarex paid its lessors their royalty share of sales out of its own pocket.[25] Cimarex then sued Anadarko.[26] Upon being served with the lawsuit, Anadarko began to pay Cimarex for its share of production from the two wells.[27]

On June 20, 2013, Anadarko and Cimarex entered into a confidential settlement agreement.[28] Under the settlement agreement, Anadarko agreed to pay Cimarex "its '1/16th non-participating co-tenant share of the value of production' from the Murjo Wells 'less only Cimarex's 1/6th co-tenant share of the reasonable drilling, completion and operations costs' through May 2013."[29] Anadarko also agreed that it "would, thereafter, 'account to Cimarex monthly for its share of production.'"[30]

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15. *Id.*
16. *Id.* at 7.
17. *Id.*
18. *Id.* (alteration in original).
19. *Id.*
20. *Id.* at 7–8.
21. *Id.*
22. *Id.* at 8.
23. *Id.* at 8.
24. *Id.* at 8–9.
25. *Id.* at 9.
26. *Id.*
27. *Id.* at 9–10.
28. Brief of Appellee Anadarko Petroleum Corp. at 5, Cimarex Energy Co. v. Anadarko Petroleum Corp., 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed) (No. 08-16-00353-CV), 2017 WL 2812542 [hereinafter Anadarko Brief].
29. *Id.* at 5.
30. *Id.*

On December 21, 2014, the primary term of the Cimarex lease ended.[31] As a result of the termination of the primary term of the Cimarex lease, Anadarko then paid the bonuses required under its top leases with Cimarex's prior lessors.[32] Therefore, Anadarko asserted that Cimarex no longer owned an interest in the wells, and thus its share of production after December 21, 2014 was nonexistent.[33] Cimarex then filed the lawsuit, alleging that Anadarko breached its contractual obligations as provided by the settlement agreement "by failing to account to Cimarex monthly for Cimarex's share of production from the wells."[34] Anadarko answered the lawsuit by claiming that Cimarex's leases terminated at the end of the primary term, making Anadarko's top leases effective and ending any obligation it previously had under the settlement agreement.[35]

The issue in this case may seem to be the breach of a settlement agreement.[36] However, the issue in this case is much, much deeper and hinges largely on whether Cimarex's lease can be perpetuated by the drilling of a well by Anadarko.[37] So who is right? Is Cimarex correct that Anadarko's drilling of the Murjo wells perpetuated its oil and gas leases into its secondary term?[38] Or is Anadarko correct that on December 21, 2014, the Cimarex leases terminated by their own terms for Cimarex's failure to drill a well and produce from the tract?[39] This Comment will examine that precise question by analyzing the history of the habendum clause and cotenancy case law. Further, this Comment will analyze similar factual situations in Texas and other oil-producing states. Part II of this Comment will provide the background and necessary context to solve the issue by discussing basic cotenancy law.[40] Part II will also discuss courts' construction of habendum clauses and the applicability of the same while establishing the facts of a Texas case with a similar issue to the Cimarex case: *Hughes v. Cantwell*.[41] Part III will analyze the main issue presented in this Comment: Does the drilling of a well by a cotenant perpetuate the non-participating cotenant's lease?[42] Finally, Part IV of this Comment will provide a recommendation for how Texas courts should proceed in resolving the issue discussed above.[43]

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31. *Id.* at 6.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 6–7.
36. *Id.*
37. *Id.*
38. *See* Cimarex Brief, *supra* note 9, at 7–8.
39. *See* Anadarko Brief, *supra* note 28, at 6–7.
40. *See infra* Part II (discussing cotenancy law and the habendum clause).
41. *See* Hughes v. Cantwell, 540 S.W.2d 742, 743–44 (Tex. App.—El Paso 1976, writ ref'd n.r.e.); *infra* Part II (discussing the habendum clause and *Hughes v. Cantwell*).
42. *See infra* Part III (discussing two competing views: the common sense approach versus the contractual approach).
43. *See infra* Part IV (providing a recommendation for Texas courts in resolving this issue).

While Texas courts would create a dangerous precedent by allowing oil and gas leases to perpetuate because of the drilling and production by someone other than the lessee, there are practical arguments on both sides of the spectrum that must be addressed.

II. WHAT EXACTLY HAPPENS IN A COTENANCY RELATIONSHIP? WHAT IS THE HABENDUM CLAUSE?

To better understand the main issue at hand, one must first understand two basic property and oil and gas law concepts. First, this Comment will analyze and discuss general cotenancy law, or the idea that multiple entities can have an ownership interest in the same tract of land. Next, this Comment will explain the intricacies of the habendum clause, which lays out the primary and secondary terms of oil and gas leases.

A. Cotenancy Relationships

A cotenancy relationship exists when two or more people concurrently own a possessory interest in the same property.[44] The concept of a cotenancy relationship is sometimes difficult for a layperson to understand because the layperson considers property ownership through the typical scenario of surface ownership. However, it is entirely possible that cotenants in a tract of land will each own undivided portions of that same tract of land.[45] For example, assume that Bob and Sue each own an undivided 50% interest in the minerals underlying a fictional tract of land, Greenacre. This means that Bob and Sue each own 50% of every single particle of the minerals underlying Greenacre.[46] In this situation, there are no property boundaries as each cotenant owns a 50% portion of every single particle of the mineral estate.[47]

No tenant in common is entitled to exclusive possession of the entire premises.[48] Each tenant in common is entitled to use and possess the property, and is not required to pay rent to the other cotenants for its lawful use.[49] Further, no tenant in common may exclude its other cotenants from any portion of the premises.[50] Despite that, well-settled law asserts that "[t]enants in common are the owners of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the

44. 16 TEX. JUR. 3d *Cotenancy and Joint Ownership* § 10 (2018); Fielder, *supra* note 5, at 176.
45. Fielder, *supra* note 5, at 176.
46. *Id.*
47. *Id.*
48. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 571 (8th Cir. 1924).
49. Estate of Gober, 350 S.W.3d 597, 601 (Tex. App.—Texarkana 2011, no pet.).
50. *Allen*, 2 F.2d at 571–72.

benefit and value of such ownership."[51] When a tenant in common grants her interest in the premises to an oil and gas company through an oil and gas lease, the lessee becomes entitled to possess and enter into the premises.[52] Moreover, as a result of its newly created cotenancy with the other owners of the tract, the lessee has the absolute right to explore and develop the minerals, and the cotenants may not exclude the lessee.[53]

The fact that tenants in common own a tract with one another does not create a fiduciary duty between the cotenants.[54] Each and every cotenant acts for himself, and for himself only.[55] A duty of good faith and fair dealing will only impute upon cotenants if they create it in a contract.[56] This is especially important in this Comment because it shows that a lessee that owns a majority of the leasehold underlying a particular tract—the majority lessee—does not owe a duty to the lessee that only owns a small portion of the leasehold—the minority lessee. It does not mean, however, that a cotenant can profit from the common property and keep all of the profits to themselves.[57] The opposite is actually true. A cotenant cannot obtain profits from the common estate and keep them all to themselves.[58] The profiting cotenant must account to their other cotenants for their share of proceeds, less expenses.[59] As the Texas Supreme Court noted in *Cox v. Davison*, "The Texas rule is that a cotenant who produces minerals from common property without having secured the consent of his cotenants is accountable to them on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same."[60] So in the case of *Cimarex Energy Co. v. Anadarko Petroleum Corp.*, it becomes clear that Anadarko has the right to produce from the property.[61] Anadarko owes Cimarex no duty of good faith and fair dealing.[62] After the Murjo wells pay out, however, Anadarko is required to pay Cimarex its fair share of the minerals produced, less the necessary and reasonable cost of producing and marketing the minerals.[63] But this duty to

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51. *Id.* at 571.
52. *Id.* at 573.
53. *Id.*
54. *In re* Fender, 12 F.3d 480, 486 (5th Cir. 1994).
55. *Id.*
56. *Id.*
57. Eddings v. Black, 602 S.W.2d 353, 358 (Tex. App.—El Paso 1980, writ ref'd n.r.e.).
58. *Id.*
59. *Id.*
60. Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965) (first citing Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. App.—San Antonio 1912), *aff'd*, 195 S.W. 1139 (Tex. 1917); then citing Stroud v. Guffey, 3 S.W.2d 953 (Tex. App.—Waco 1927), *aff'd*, 16 S.W.2d 527 (Tex. 1929); then citing White v. Smyth, 214 S.W.2d 592 (Tex. App.—San Antonio 1947), *aff'd*, 214 S.W.2d 967 (Tex. 1948); and then citing Davis v. Atl. Oil Producing Co., 87 F.2d 75 (5th Cir. 1936)).
61. *See* Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 571 (8th Cir. 1924) (explaining that an oil and gas cotenant has the ability to develop and produce oil on shared land).
62. *See In re* Fender, 12 F.3d 480, 486 (5th Cir. 1994) (explaining that Texas does not require good faith and fair dealing for oil and gas contracts).
63. *See Cox*, 397 S.W.2d at 203.

account to Cimarex only exists for as long as Cimarex actually owns an interest in the tract.[64] Anadarko's duty to account to Cimarex for its share of production from the Murjo wells depends entirely on whether Anadarko's drilling and production from the tract perpetuates Cimarex's oil and gas lease.[65]

B. The Habendum Clause and Secondary Term of Oil and Gas Leases

The term lengths of oil and gas leases have evolved over time.[66] Previous oil and gas leases provided for a long, fixed primary term.[67] These oil and gas leases were impractical for lessees because the lessees would invest large sums of money to develop a lease but then would lose the lease when the primary term expired.[68] Oil and gas leases evolved, however, to allow lessees to maintain oil and gas leases by satisfying certain conditions in the lease.[69] The modern oil and gas lease contains two terms: the primary term and secondary term.[70] The primary term generally consists of a short, fixed period of time—often one to five years.[71] The habendum clause of modern leases contains a "thereafter" clause which allows a lessee to maintain the oil and gas lease and perpetuate the same by producing oil or gas from the property.[72] The time following the thereafter clause is commonly known as the secondary term.[73]

The thereafter clause ordinarily creates a special limitation which automatically terminates or perpetuates the lease if the lessee fails to comply with its express terms.[74] A special limitation essentially creates a condition precedent to the extension of the lease beyond the primary term.[75] So if a habendum clause reads "for a [primary] term of [three] years, and [so] long thereafter as oil [and/]or gas . . . is produced from said lands," the lessee must produce oil or gas from the leased premises in order to perpetuate the lease into the secondary term.[76] Similarly, if the lease contained a primary term of three years, set to expire on January 1, 2019, and if the lessee is not producing oil or gas from the leased tract on that date, the lease automatically terminates

64. *Id.*
65. *See* Anadarko Brief, *supra* note 28, at 6–7.
66. Ivan Jr. Irwin, *The Habendum Clauses as a Special Limitation on Oil and Gas Leases in Texas*, 11 SW. L.J. 340, 340 (1957).
67. *See id.*
68. *Id.*
69. *Id.* at 342.
70. Trent Maxwell, *The Habendum Clause – 'Til Production Ceases Do Us Part*, HOLLAND & HART (Feb. 5, 2015), https://www.hollandhart.com/lease-provisions-part-2.
71. *Id.*
72. Irwin, *supra* note 66, at 342.
73. *See generally id.*
74. *Id.*
75. *Id.*
76. *Id.*; Maxwell, *supra* note 70.

and reverts to the lessor.[77] The final date of the primary term acts as a "trigger date," which only occurs once in the lease.[78] If the lessee is producing oil or gas as of the trigger date, the lease is perpetuated for as long as oil or gas is produced from the leased land.[79] But what happens if the oil or gas produced from the tract is produced by a different lessee?[80] The lease above does not say "as long thereafter as oil and/or gas is produced from said land *by lessee*." Will a court read into the habendum clause the phrase "by the lessee"? This exact question was addressed in *Hughes v. Cantwell*.[81]

C. Hughes v. Cantwell

In 1971, Hughes took an oil and gas lease from Cantwell.[82] The parties to the lease believed that the lease covered an undivided 1/128 interest in the section, the equivalent of five net mineral acres.[83] The lease was dated November 8, 1971 and "provided for a primary term of five years."[84] In 1973, Atlantic Richfield, the lessee of the majority of the undivided interest in the tract, notified Hughes of its intent to drill a well on the tract.[85] Hughes declined to join Atlantic Richfield in the drilling of the well and also declined to pay delay rentals from November 1973 to November 1974.[86] On April 14, 1973, Atlantic Richfield commenced the drilling of the well and completed the well on September 28, 1973 as a "rich producer."[87]

In that case, Hughes argued that he had satisfied the requirements of the "unless" clause in his lease through the actions of Atlantic Richfield in drilling the well.[88] The clause stated: "If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor" the delay rentals required by the lease.[89] Hughes's primary claim was that the absence of the phrase "by the lessee" from that clause in the lease allowed him to rely on the drilling and production of Atlantic Richfield to perpetuate his oil and gas lease.[90] The El Paso Court of Appeals rejected

77. *See* Irwin, *supra* note 66, at 342.
78. *See id.* at 342.
79. Maxwell, *supra* note 70.
80. *See* Hughes v. Cantwell, 540 S.W.2d 742, 743–44 (Tex. App.—El Paso 1976, writ ref'd n.r.e.).
81. *Id.*
82. *Id.* at 743.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

Hughes's argument over forty years ago.[91] However, in *Cimarex*, Cimarex is attempting to revive Hughes's forty-year-old argument to prevail in its case against Anadarko.[92] Should the El Paso Court of Appeals alter its prior ruling in *Hughes*? Or should precedent prevail, resulting in Cimarex's lease terminating and Anadarko's top lease taking effect?

D. Who Must Drill to Satisfy the Habendum Clause of an Oil and Gas Lease and Extend a Lease into the Secondary Term?

Oil and gas leases are contracts and must be interpreted as such.[93] As a contract, an oil and gas lease should be interpreted in a way that helps determine the intent of the parties to the lease.[94] The court will look at the "four corners" of the document, meaning that it will consider the oil and gas lease in its entirety.[95] If the lease is unambiguous, the court will not consider extrinsic evidence.[96] However, if the lease is ambiguous, the court will consider extrinsic evidence to determine the intent of the parties.[97] Importantly, whether the lease is ambiguous is a question of law for the court.[98]

In answering the question of who must drill to satisfy the habendum clause, the first issue a court will consider is whether the lease states that it will be extended into the secondary term by the drilling of a well "by the Lessee."[99] If the habendum clause of the lease clearly states that the lease will be perpetuated into its secondary term by "production from said land *by lessee*," the analysis ends, and it is clear that the lessee itself must drill a well and produce oil or gas to push the lease into the secondary term.[100] However, if the lease does not contain the phrase "by the lessee," the analysis continues, and courts take different approaches to determine whether the lease is perpetuated.[101] One approach is for the court to read into the lease the phrase "by the lessee."[102] When a court does this, it requires drilling or production by the lessee itself.[103] However, some courts will refuse to read the phrase

91. *Id.* at 743–44.

92. Cimarex Brief, *supra* note 9, at 2–3.

93. Timothy C. Dowd, *Current and Emerging Issues in Oil and Gas Title Examination*, 2 OIL & GAS, NAT. RESOURCES & ENERGY J. 505, 505 (2017).

94. *Id.* at 505–06.

95. *Id.* at 506.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See* Hughes v. Cantwell, 540 S.W.2d 742, 743 (Tex. App.—El Paso 1976, writ ref'd n.r.e.).

100. *See id.*

101. *Compare id.* at 743–44 (holding that the lessee is obligated to drill a well, regardless of the fact that the lease omitted "by the Lessee" from its habendum clause), *with* Brinkman v. Empire Gas & Fuel Co., 245 P. 107, 111 (Kan. 1926) (holding that drilling and production by a junior lessee satisfied drilling requirements imposed on a senior lessee).

102. *See Hughes*, 540 S.W.2d 742, 743–44.

103. *See id.*

"by the lessee" into the lease and will determine that the drilling or production by *anyone* on the tract will perpetuate the lease into the secondary term.[104] This Comment will not focus on the first scenario but will instead attempt to determine whether courts should read the phrase "by the lessee" into oil and gas leases.

III. COMPETING VIEWS: THE COMMON-SENSE APPROACH V. THE CONTRACTUAL APPROACH

As with most other lawsuits, there are two differing views on who can perpetuate an oil and gas lease. On one hand, there is a common sense approach that provides for lease perpetuation by the actions of the lessee only.[105] On the other hand, an argument exists that if the oil and gas lease does not specifically provide for production "by the lessee," courts should not impose such a requirement.[106] The next part of this Comment will analyze both approaches.

A. Oil and Gas Leases Can Only Be Perpetuated by the Actions of the Lessee That Is a Party to the Lease

Basic contract law establishes that a party must be in contractual privity to have any contractual right or obligation to the other party.[107] The argument follows, therefore, that a party to a contract cannot rely on the actions of a nonparty in order to satisfy its obligations under the contract or lease.[108] Further, contract law provides the framework under which courts should interpret contracts, and thus oil and gas leases.[109] The court must examine the contract as a whole to determine the intent of the parties,[110] which requires the court to examine all clauses of the contract and attempt to reconcile clauses that may be in conflict with one another.[111]

Texas courts have disposed of the notion that the phrase "by the lessee" is required in an oil and gas lease to actually require the lessee itself to fulfill lease obligations.[112] In *Hughes v. Cantwell*, a dispute existed over the delay rental's "unless" clause as opposed to the habendum clause.[113] However, the

104. *See, e.g.*, Brinkman v. Empire Gas & Fuel Co., 245 P. 107, 111 (Kan. 1926).
105. *See Hughes*, 540 S.W.2d at 743–44.
106. *See Brinkman*, 245 P. at 107, 111.
107. *See* William D. Warren, *Transfer of the Oil and Gas Lessee's Interest*, 34 TEX. L. REV. 386, 392 (1956).
108. *See id.*
109. Dowd, *supra* note 93, at 505–06.
110. N. Shore Energy, L.L.C. v. Harkins, 501 S.W.3d 598, 602 (Tex. 2016) (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003)); Dowd, *supra* note 93, at 505–06.
111. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) (citing Universal C.I.T. Credit Corp. v. Daniel, 243 S.W.2d 154, 158 (Tex. 1951)).
112. *See* Hughes v. Cantwell, 540 S.W.2d 742, 743–44 (Tex. App.—El Paso 1976, writ ref'd n.r.e.).
113. *Id.* at 743.

court's ruling is dispositive in this situation as well. In that case, the court absolutely rejected the argument that the absence of the phrase "by the lessee" allowed the lessee's lease to be extended by the acts of a third party.[114] The lease in question provided that the lease would be extended if operations for drilling were commenced.[115] However, the lease did *not* state who must commence operations to successfully extend the lease and excuse the payment of delay rentals.[116] The court then determined that the absence effectively did not matter.[117] In the court's view, the lease required the lessee to "perform either directly or constructively as provided by the contract to keep it alive."[118] Essentially, the lessee could commence a well to directly keep the lease alive or it could pay rentals, which would act as constructive performance, thus keeping the lease alive.[119] The court reached its conclusion by analyzing the lease as a whole and noticed several other clauses that directly required performance by the lessee.[120] For example, the royalty clause directly stated that "[t]he royalties to be paid by Lessee are . . . ."[121] In addition, the pooling clause stated that the "[l]essee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease."[122] Basically, throughout the rest of the lease, the lessee was explicitly required to fulfill its obligations.[123] The crux of the court's opinion is what makes the argument that the lessee must drill a well to satisfy the habendum clause of the lease so difficult to overcome. In summary, the court said:

> The stated purpose of the lease is for the drilling and producing of oil and gas. To accomplish that purpose, the land was let exclusively to the Lessee. It naturally follows that the intention of the parties was for the Lessee to do something to bring about that exploration and production of oil and gas. He could either do the drilling himself, or by the terms of the lease he was given permission to sublease or assign it to someone else, or to pool it with others and benefit from their drilling. . . . This exclusive letting to him evidences an intention that the obligations were his alone, and that the acts of third parties or strangers to the contract would not suffice to meet his requirements of performance.[124]

114. *Id.* at 743–44.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 743.
119. *Id.*
120. *Id.* at 743–44.
121. *Id.* at 744.
122. *Id.*
123. *Id.*
124. *Id.*

As a result of the lessee's failure to either commence operations or pay delay rentals, the lease automatically terminated by its own terms.[125] The ruling of *Hughes* essentially makes it known that Texas courts—at least the Eighth Court of Appeals in El Paso—will not allow a lessee to ride the coattails of another to satisfy the terms of its lease.[126] By doing so, Texas courts depart from the contract principle of adhering to the strict terms within the contract, and instead apply common sense to solve the problem at hand. But by doing so, couldn't the lessee argue that the court is allowing a forfeiture to take place? Long before *Hughes*, in 1959, the Fifth Circuit encountered the question posed by *Hughes* in *Mattison v. Trotti*.[127] There, the court noted that declining to allow the nonparticipating lessee's lease to be perpetuated by the drilling and operations of a cotenant does not effectuate a forfeiture.[128] "The equitable rule as to relieving against forfeiture has no application to the facts of this case, for there was no forfeiture; there was nothing to be forfeited, because the lease by its very terms had ceased to exist."[129] This statement is so key to the analysis because it hits on the characterization of the habendum clause previously discussed.[130] Because the habendum clause acts as a special limitation, the court is not the actor stripping the lessee of its lease.[131] In fact, the lease terminates by its own terms, and the court's ruling does nothing to terminate the lease because the lease had already terminated.[132]

Texas courts are not the only courts to determine that the production required by the habendum clause is that of the lessee.[133] For example, the Mississippi Supreme Court adopted a similar ruling in *Wagner v. Mounger*.[134] In that case, the Mississippi Supreme Court cited *Mattison* and held that:

> [T]he drilling operations of Pruet which were unknown to the appellants here and for which they did not pay, agree to pay, or in any way contribute to the cost of were not drilling operations of the lessee Wagner or his assignee . . . and that their lease was not kept in force thereby.[135]

As a result, the court interpreted that the drilling operations required by the lease were that of the lessee and not just drilling operations by anyone

125. *Id.*
126. *See id.*
127. Mattison v. Trotti, 262 F.2d 339, 340 (5th Cir. 1959).
128. *Id.* at 341.
129. *Id.* at 341–42 (quoting Empire Gas & Fuel Co. v. Saunders, 22 F.2d 733, 735 (5th Cir. 1927)).
130. Irwin, *supra* note 66, at 342.
131. *Id.*
132. *Id.*
133. *See* Wagner v. Mounger, 175 So. 2d 145 (Miss. 1965); Thomas v. Hukill, 12 S.E. 522 (W. Va. 1890).
134. *Wagner*, 175 So.2d at 145.
135. *Id.* at 151.

upon the lands.[136] The West Virginia Supreme Court has also required production by the lessee, even though the lease in question contained a different habendum clause than analyzed by the Texas or Mississippi courts.[137] In *Thomas v. Hukill*, the lease contained a habendum clause that provided for a "term of two years, or as long thereafter as gas or oil is found in paying quantities."[138] Again, the court held that it was the lessee's responsibility to produce oil or gas in paying quantities and not that of a third party.[139] Clearly, there is an abundance of case law that supports the proposition that only a lessee can satisfy its obligations under the habendum clause of the oil and gas lease.[140] Furthermore, common sense requires a logical understanding that only the actions of a party to the contract can satisfy its requirements under the same contract.[141] While such a conclusion may be contrary to the ordinary requirements of contract law that a contract be interpreted by the "four corners of the document" and the strict terms of the same, the conclusion is necessary to effectuate the intent of the parties to an oil and gas lease.[142]

B. Courts Should Follow the Strict Terms of the Lease, and Thus Allow an Oil and Gas Lease to Be Perpetuated by Production by Any Party

There is also something to be said for the argument that it should not matter who drills a well to perpetuate an oil and gas lease. The primary argument for this contention is that the oil and gas lease should be interpreted according to traditional canons of construction and that the court in *Hughes* got it wrong.[143] As stated multiple times throughout this Comment, oil and gas leases are contracts and should be interpreted as such.[144] As a contract, the oil and gas lease is subject to ordinary contract interpretation principles.[145] The most important of these principles is that, in the absence of ambiguity, a contract should be interpreted from the four corners of the document.[146] The four corners rule requires the court to ascertain the intent of the parties from the language present in the contract itself.[147] When the contract is determined

136. *Id.*
137. *Hukill*, 12 S.E. at 522.
138. *Id.* at 524.
139. *Id.* at 527.
140. *See, e.g.*, Mattison v. Trotti, 262 F.2d 339, 341–42 (5th Cir. 1959); Hughes v. Cantwell, 540 S.W.2d 742, 744 (Tex. App.—El Paso 1976, writ ref'd n.r.e.).
141. Warren, *supra* note 107, at 392.
142. *See generally* Dowd, *supra* note 93 (explaining that sometimes it is necessary to consider extrinsic evidence when determining the intent of the parties even when the contract is ambiguous).
143. *Hughes*, 540 S.W.2d at 744; *see* Dowd, *supra* note 93, at 505.
144. Dowd, *supra* note 93, at 505.
145. *Id.*
146. *Id.*
147. Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991) (citing Garrett v. Dils Co. 299 S.W.2d 904, 906 (Tex. 1957)).

to be unambiguous, the construction of the same is a question of law for the court to decide.[148] When the court attempts to determine the intent of the parties to the contract, it must attempt to harmonize all parts of the contract.[149] As the Texas Supreme Court stated in *Altman v. Blake*, "[T]he parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement."[150] Further, a court must not remove or ignore any part of the contract "unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part thereof."[151]

One could argue that a habendum clause that provides for lease perpetuation into the secondary term "as long thereafter as oil or gas is produced from said land or from land with which said land is pooled" is as unambiguous as it could possibly be.[152] As a result, the court should attempt to ascertain the intent of the lessor and lessee from the language of this clause in relation to the remainder of the lease.[153] The court should not, however, rewrite the lease to impose a condition,[154] nor should it add terms to the contract "under the guise of interpretation."[155] Thus, any reading that would add terms to the lease that are not explicitly stated in the same would be contrary to Texas contract interpretation principles.[156]

Further, as much as the other party would rely on *Hughes* to support its argument, the nonparticipating lessee can rely on a similar Texas case, *Cain v. Neumann*, to support the assertion that it does not matter *who* produces the oil and gas.[157] In *Cain*, the habendum clause of the relevant lease allowed for the perpetuation of the lease "as much longer as oil, gas or other minerals can be produced in paying quantities thereon."[158] The lease was to continue as long as there was continuous production of any mineral under the base lease.[159] There, the court rejected the argument that it mattered who produced the mineral from the tract the lease covered.[160] Specifically, the court stated: "The happening of the determining event, the cessation of production, expressed in the 1918 lease, was not tied to nor dependent upon who in the

148. Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (citing Ulbricht v. Friedsam, 325 S.W.2d 669 (Tex. 1959)).

149. *Id.*

150. *Id.*

151. *Luckel*, 819 S.W.2d at 462 (quoting Benge v. Scharbauer, 259 S.W.2d 166, 167 (Tex. 1953)).

152. Anadarko Brief, *supra* note 28, at 13–14 (using the clause in the agreement as an argument in the brief).

153. *Luckel*, 819 S.W.2d at 462 (citing Garrett v. Dils Co. 299 S.W.2d 904, 906 (Tex. 1957)).

154. Hyatt v. Radio Station WLOU, 354 S.W.2d 415, 417 (Tex. App.—El Paso 1962, no writ).

155. Wahlenmaier v. Am. Quasar Petroleum Co., 517 S.W.2d 390, 393 (Tex. App.—El Paso 1974, writ ref'd n.r.e.) (quoting Don Drum Real Estate Co. v. Hudson, 465 S.W.2d 409 (Tex. App.—Dallas 1971, no writ)).

156. *Id.*

157. *See* Cain v. Neumann, 316 S.W.2d 915 (Tex. App.—San Antonio 1958, no writ).

158. *Id.* at 917.

159. *Id.* at 920.

160. *Id.*

future would own the production."[161] Production on any tract the lease covered is considered production "thereon," and such production, regardless of who owned the production, would perpetuate the lease.[162]

The *Cain* case, however, is not the only example of a court finding that the actions of another extended an oil and gas lease.[163] While *Earp v. Mid-Continent Petroleum Corp.* was not decided in Texas, it was decided in another prolific oil and gas producing state—Oklahoma.[164] The factual situation in *Earp* follows.[165] In November of 1924, Claude Russell Earp owned an undivided 2/33 fee interest in the northeast quarter of section 8, township 15 north, range 6 east, Lincoln County, Oklahoma.[166] A variety of cotenants, including Mary F. Earp, owned the rest of the undivided interests in the tract.[167] On November 10, 1924, Mary F. Earp and her other cotenants leased their interests to the Cosden Oil & Gas Company (Cosden).[168] Cosden later assigned its interest in the lease to Mid-Continent Petroleum Corporation (Mid-Continent).[169] On November 19, 1924, Mary F. Earp granted a lease on behalf of Claude Russell Earp—a minor at the time—to John Wagner, purporting to cover the remaining 2/33 interest in the tract.[170] Among several other issues in that case, the court addressed whether the actions of Mid-Continent—namely the drilling and production of oil—were sufficient to perpetuate Wagner's lease.[171]

In *Earp*, the court reasoned that because the lease lacked the phrase "by the lessee," the drilling of a well by a different lessee would be sufficient to perpetuate the existing lease *during* the primary term.[172] In that case, however, the habendum clause expressly required production by the lessee to perpetuate the lease into the secondary term, so the third-party well was not sufficient to push the lessee into the secondary term.[173]

There are two alternative arguments for allowing the production of another to perpetuate an oil and gas lease. The first argument is general and would apply to most factual situations regarding a nonparticipating lessee. The second argument is specific to the *Cimarex* case referenced throughout this Comment. First, the nonparticipating lessee could argue that upon well payout, it now acts as a partner in the well with the lessee who actually drilled

161. *Id.*
162. *Id.* (citing Hillegust v. Amerada Petroleum Corp., 282 S.W.2d 892, 896 (Tex. App.—Beaumont 1955, writ ref'd n.r.e.)).
163. *Id.*; *see* Earp v. Mid-Continent Petroleum Corp., 27 P.2d 855, 864 (Okla. 1933).
164. *See Earp*, 27 P.2d at 855.
165. *See id.*
166. *Id.* at 857.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 861.
172. *Id.* at 864.
173. *Id.*

the well.[174] While it is true that Cimarex did not participate in the drilling of the wells, that reality is no fault of Cimarex.[175] Cimarex expressly volunteered to participate in the wells, but Anadarko rebuffed those requests.[176] Even more, despite Cimarex not paying for its share of drilling and completion costs out of pocket, Cimarex did pay for its share of the costs in an indirect manner.[177]

As discussed previously, Cimarex is considered a tenant in common with Anadarko.[178] As a tenant in common, Cimarex has the absolute right to drill and produce the oil under the section.[179] As a practical matter, however, it is highly unlikely that Cimarex would ever drill its own well on the section. As the lessee under the oil and gas lease, Cimarex would be required to bear 100% of the costs of drilling a well.[180] Despite bearing 100% of the costs of drilling the well, Cimarex would also have to pay its lessors their proportionate share of production as a royalty payment, which would mean it would receive less than 100% of the revenues.[181] Even then, the formula is not so simple. If Cimarex treated Anadarko the same way it was treated, Cimarex would not allow Anadarko to participate in the drilling of the well.[182] As a result, Cimarex would bear the entire risk of drilling the well without receiving any capital contributions from Anadarko.[183] Anadarko would not receive any revenues until the well paid out, but it also would have no risk in the endeavor except for the royalty payments it is required to make per the terms of its oil and gas lease.[184] Absent an operating agreement, Anadarko—just like Cimarex in the case at hand—would be required to pay lessor royalties prior to well payout while not receiving any revenues from the well.[185] The table below shows the companies' net revenue interests in a well drilled by Cimarex both before and after payout, assuming the Anadarko and Cimarex lessors are entitled to a 1/4 royalty interest, and keeping the parties' leasehold interests constant with the interests owned in the pending case.

174. Reply Brief for Appellant at 28, Cimarex Energy Co. v. Anadarko Petroleum Corp., 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed) (No. 08-16-00353-CV) [hereinafter Cimarex Reply Brief].
175. *Id.* at 25–26.
176. *Id.* at 26.
177. *Id.* at 28.
178. Fielder, *supra* note 5, at 179.
179. *Id.*
180. *Id.* at 179–84.
181. *Id.*
182. *See* Cimarex Brief, *supra* note 9, at 7.
183. *Id.*
184. *Id.*
185. TEX. NAT. RES. CODE. ANN. §§ 91.401–.402.

Table 1: Net Revenue Interest Calculations in *Cimarex Energy Co. v. Anadarko Petroleum Corp.* if Cimarex Drilled Well.[186]

Lessors and Lessees	Net Revenue Interest Before Payout	Net Revenue Interest After Payout
Cimarex	**95.833%** (Cimarex would receive 100% of revenues less a 1/4 royalty paid on 1/6 of the mineral estate.)	**12.4996%** (Cimarex receives only 1/6 of the revenue less a 1/4 royalty paid on 1/6 of the mineral estate.)
Cimarex Lessors	**4.167%** (1/4 royalty on 1/6 of the mineral estate.)	**4.167%** (1/4 royalty on 1/6 of the mineral estate.)
Anadarko	**0%** (Anadarko will actually lose money as it will be required to pay its lessors' royalty to satisfy lease obligations. This results in more than 100% of revenues being allocated.)	**62.5%** (Anadarko receives 5/6 of the revenues less a 1/4 royalty paid on 5/6 of the mineral estate. Anadarko will also be responsible for paying 5/6 of the reasonable costs of production.)
Anadarko Lessors	**20.833%** (1/4 royalty on 5/6 of the mineral estate.)	**20.833%** (1/4 royalty on 5/6 of the mineral estate.)

Clearly, there is very little incentive for Cimarex to drill its own well on the tract. Shown in the chart above, Cimarex's net revenue interest would drop by over 83% upon payout.[187] It would be an enormous risk for an operator to pay 100% of the drilling and completion costs of a well upfront,

186. Jacob L. Dow, Table 1: Net Revenue Interest Calculations in *Cimarex Energy Co v. Anadarko Petroleum Corp.* if Cimarex Drilled Well (2018) (unpublished table) (on file with author); *see* Fielder, *supra* note 5, at 179.

187. Dow, *supra* note 186.

while only expecting to receive 12.4996% of the revenues after it recoups the nonparticipating lessee's share of drilling and production costs.[188] Even more, there is no guarantee that the well drilled will be a producing well that would allow Cimarex to recover Anadarko's share of drilling and production costs.[189]

Recognizing the hardship facing the minority lessee, it is much easier to see why such lessee would hesitate to drill and complete its own well on the tract.[190] As a result, it makes sense that the minority lessee would hope to wait for the majority lessee to drill a well and then offer to participate in the drilling and completion of the same.[191] However, there is nothing that requires the majority lessee to allow the minority lessee to participate in the drilling of a well.[192] If the majority lessee allows the minority lessee to participate in the well, the analysis ends there; production from that oil or gas well will be considered production by the minority lessee as a partner in the well.[193] Is it really any different, however, if the majority lessee does *not* allow the minority lessee to participate in the well? Based on the principle of net-profits accounting, an argument could be made that the minority lessee actually did contribute to the drilling of the well, and is therefore a partner in the operation of the same.[194] If the minority lessee actually did participate in the drilling and completion of the well, it would pay its share of drilling and production costs up front and out of pocket.[195] As a result in Cimarex's case, it would have paid directly to Anadarko a sum of approximately $2 million—roughly equal to its 1/6 share of the leasehold interest.[196] However, that scenario is precisely the opposite of what actually occurred. Instead, Anadarko exercised its right to decline and did not allow Cimarex to participate in the drilling and completion of the Murjo wells.[197] Because of this decision, Anadarko did not pay Cimarex any revenues from the Murjo wells until after payout occurred, and Anadarko recouped drilling and completion costs.[198] So every time Anadarko received revenues from the well, 1/6 of the revenue was paying for Cimarex's share of drilling and

188. *Id.*
189. *Id.*
190. *Id.*
191. *See* Cimarex Brief, *supra* note 9, at 7.
192. *See* Cox v. Davison, 397 S.W.2d 200, 201–02 (Tex. 1965).
193. *See* Fielder, *supra* note 5, at 174. This situation generally occurs when the parties enter into an operating agreement. *Id.* When parties are subject to an operating agreement, the production of the elected operator constitutes production for all parties to the agreement. *Id.* at 188.
194. *Cox*, 397 S.W.2d at 201–02.
195. *See* Cimarex Reply Brief, *supra* note 174, at 28 (claiming that Anadarko falsely claimed that Cimarex did not pay any of the drilling or completion costs for the Murjo wells).
196. *Id.*
197. *Id.*
198. *Id.*

completion costs.[199] Upon payout, Anadarko will have recouped the entirety of Cimarex's share of drilling and completion costs.[200] Why is it any different that Anadarko received Cimarex's share of costs from well revenue as opposed to simply receiving a check from Cimarex? From Anadarko's perspective, by refusing to allow Cimarex to participate in the wells from inception, it takes on the entire risk of the enterprise.[201] As it relates to Cimarex's lease perpetuation, however, it is difficult to see the difference between the two options. As soon as the well pays out, Cimarex will begin receiving its 1/6 share of production, less operating costs.[202] Why? Because it is now a partner in the well, and it is entitled to receive its share of production because it has *contributed its costs*. Because of the partnership, it is virtually indistinguishable from a situation in which Cimarex actually contributes its costs upfront.

The final argument for allowing production on a tract to perpetuate a nonparticipating lessee's lease comes from the Texas case *Willson v. Superior Oil Co.*[203] The holding in *Willson* essentially states that lessees of different leases under the same tract can enter into an agreement to allow each party to claim the discovery and production of oil or gas under the property "as a compliance with the provision of the lease of each of the lessees."[204] Further, the court held that the nonparticipating lessee must be able to demonstrate "more than a mere passive acquiescence in the drilling by another lessee under a separate lease."[205] Remember, in 2013, Anadarko and Cimarex entered into a settlement agreement that resolved the first litigation battle.[206] As Cimarex notes, this settlement agreement provides three additional rights that extend beyond that of the normal cotenancy relationship.[207] The settlement agreement provides Cimarex with the right to an annual audit, the right to receive its attorney's fees if Anadarko fails to uphold its contractual or cotenancy obligations, and Anadarko's promise to pay severance taxes on Cimarex's behalf.[208] Because Cimarex has received these three additional rights, the company has a legitimate argument to claim Anadarko's production as its own. Furthermore, the *Willson* court declined to limit its ruling to operating agreements, instead noting, "[n]or do we think

199. *See Cox*, 397 S.W.2d at 201–02 (stating that where one cotenant develops mineral property, thereby acquiring minerals which at one time were under the common property, accounting to the nonconsenting cotenant becomes a problem).

200. Cimarex Reply Brief, *supra* note 174, at 28.

201. *See* Anadarko Brief, *supra* note 28.

202. *Id.*

203. Willson v. Superior Oil Co., 274 S.W.2d 947 (Tex. App.—Texarkana 1954, writ ref'd n.r.e.).

204. *Id.* at 951 (emphasis omitted) (quoting Earp v. Mid-Continent Petroleum Corp., 27 P.2d 855, 859 (Okla. 1933)).

205. *Id.*

206. Anadarko Brief, *supra* note 28, at 5.

207. Cimarex Reply Brief, *supra* note 174, at 31.

208. *Id.* at 31–32.

that any particular form of agreement is essential to accomplish this result."[209] As a result, the fact that this settlement agreement between the two companies is not an operating agreement should have no bearing on the court's determination of whether the agreement satisfies the requirements of a *Willson* agreement. However, whether the settlement agreement satisfies the requirements of a *Willson* agreement will depend greatly on the actual contents of the settlement agreement, which are not available to read at this time.

IV. COMMON SENSE: COURTS SHOULD NOT ALLOW PARTIES TO RIDE THE COATTAILS OF PRODUCING COTENANTS

Clearly, both sides of the argument have strong points from a legal perspective. More importantly, maybe, is the fact that each point of view carries strong practical implications. The specific facts of *Cimarex Energy Co. v. Anadarko Petroleum Corp.* notwithstanding, a reviewing court should carefully consider the practical implications of its decision. Most importantly, a reviewing court should be sure to make a decision that falls in line with the Texas Supreme Court's public policy concerns of encouraging oil and natural gas development.[210]

With these considerations in mind, consider the practical ramifications of a reviewing court deciding a case in favor of the developing lessee. If a court opts to decide a case in favor of the developing lessee—or in the case of the parties discussed throughout this Comment, Anadarko—the court will be taking a common-sense approach to oil and gas jurisprudence. Such a ruling from a court would ensure that oil and gas lessees are required to participate in the drilling and completion of a well to satisfy the requirements of its oil and gas lease. By requiring lessee participation in a well, Texas courts will be ensuring that nonparticipating lessees cannot ride the coattails of a developing lessee, thus allowing the nonparticipating lessee's lessor to enter into an oil and gas lease with someone else. While it is true that the "someone else" will often be the developing lessee that actually drilled and produced from the property, it is possible that the new lessee will be a completely separate entity that has special knowledge or a relationship with the developing lessee, encouraging future development of the minerals. Furthermore, by following this approach, Texas courts will be adhering to traditional contract—and oil and gas lease—interpretation techniques. The fact that an oil and gas lease fails to provide for operations or production from the lessee of that lease specifically does not necessarily mean that the parties

209. *Willson*, 274 S.W.2d at 951 (emphasis omitted) (quoting *Earp*, 27 P.2d at 859).

210. TEX. CONST. art. XVI, § 59(a) ("The conservation and development of all of the natural resources of this State . . . are each and all hereby declared public rights and duties . . . ."); *see also* Key Operating & Equip., Inc. v. Hegar, 435 S.W.3d 794, 798 (Tex. 2014) ("The policy of Texas is to encourage the recovery of minerals . . . .").

intended such an absurd result. Clearly, the lessor in an oil and gas lease intends to further bind itself into the secondary term of the lease by the actions of its specific lessee, and to decide otherwise would create an unreasonable outcome.

Conversely, there are a number of practical implications of a court ruling in favor of the nonparticipating lessee—or in the case of the parties discussed throughout, Cimarex. On one hand, it is easy to argue that Anadarko was a bad actor in its dealings with Cimarex and should not receive a reward for its unwillingness to cooperate. With that being said, it is important to consider this issue through a more general lens, as a court ruling on this issue will impact dozens of operators across the Permian Basin and beyond. As a practical matter, if a reviewing court sides with the nonparticipating lessee, it will demonstrate its desire to adhere to the specific terms enumerated within the oil and gas lease. As mentioned a number of times before, this issue only arises if the oil and gas lease does not specifically state who must produce the oil or gas to perpetuate the lease. Such a ruling, however, would discourage oil and gas development. There would be little incentive for an oil and gas lessee to participate in the drilling and completion of a well on a tract in which it owns an undivided leasehold interest. Without the incentive to participate in wells, lessees can opt not to participate and wait to see if the wells will be profitable. In this situation, the developing lessee that drills and produces from the property will bear the full financial burden of drilling, completing, and equipping a well, without any option for recourse against the nonparticipating lessee if the well is unprofitable or a nonproducer. If a reviewing court were to allow such a thing, there would be nothing stopping everyday investors from seeking out oil and gas leases covering very small portions of sections and then simply riding the coattails of a major exploration and production company such as Anadarko or Cimarex. This would result in production inefficiencies as well as poor development rates across the state of Texas. Even further, such a decision would incentivize lessees to draft habendum clauses in a way that allows for lease perpetuation because of the actions of another.

Recently, the Eighth Court of Appeals in El Paso issued its opinion in *Cimarex*.[211] There, following a line of thinking similar to the one discussed in this Comment, the court found in favor of Anadarko, holding that the lease required Cimarex to produce to perpetuate the lease into the secondary term.[212] The court reached this conclusion for a handful of reasons.[213] First, the court noted that "the Cimarex lease expressly stated that its purpose was for the production of oil and gas."[214] The court also noted the lease required

211. *See* Cimarex Energy Co. v. Anadarko Petroleum Corp., 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed).

212. *Id.* at 90.

213. *Id.* at 92.

214. *Id.* at 91.

Cimarex to take action in other contexts to keep the lease alive such as paying royalties on actual production, restoring production in the event of a cessation of production, and pooling or combining the lease with other cotenants on the tract.[215] In light of these facts, the court ultimately held:

> [T]he intent of the lease was in fact to require Cimarex to take some action to cause production on the subject property in order to keep the lease alive, and that it could not simply rely on a cotenant's production in the absence of any cash consideration paid to the lessors.[216]

The court also addressed the issue of whether the settlement agreement constituted a joint operating agreement.[217] The court held that while the settlement agreement "gave Cimarex the rights of a co-tenant," it did not include any language that suggested the parties intended to enter into a joint operating agreement.[218] Nothing suggested that the parties intended to jointly develop the property, and nothing suggested that "Cimarex was entitled to consider Anadarko's production as its own, or that the Agreement was intended to satisfy Cimarex's obligation to cause production on the land under the terms of its lease."[219] Most significantly, the settlement agreement did not allocate any costs or risks between the parties, and the settlement agreement expressly referred to Cimarex as a "'non-participating cotenant'" rather than a joint operator.[220]

Cimarex also asserted various other arguments that the court addressed but ultimately disagreed with.[221] Cimarex has since appealed the case to the Supreme Court of Texas, and the Court has requested a response from Anadarko.[222] Ultimately, if the Court is so inclined to grant review in this matter, the Court should affirm the Eighth Court of Appeals for the reasons discussed above.

V. DRILLING A PROVERBIAL DRY HOLE: A BRIEF CONCLUSION

In conclusion, allowing a nonparticipating lessee like Cimarex to ride the coattails of a producing cotenant would create a potential snowball effect. The State of Texas has continued to recognize the state public policy of encouraging development, and it is likely that the Supreme Court of Texas would continue to follow this principle in reviewing a factual situation

215. *Id.* at 92.
216. *Id.* at 93.
217. *Id.* at 96.
218. *Id.* at 97.
219. *Id.*
220. *Id.* at 99.
221. *Id.* at 98–101.
222. *See* Supreme Court of Texas's Requested Response, Cimarex Energy Co. v. Anadarko Petroleum Corp., No. 19-0324 (Tex. filed Aug. 16, 2019).

similar to the one presented in *Cimarex Energy*. While under the specific facts of that case, one could argue that a court should not reward Anadarko for its failure to allow Cimarex to participate in the drilling and completion of the Murjo wells; these facts call for a rule of general applicability that will allow oil and gas operators to proceed in these situations with certainty. If preventing waste and encouraging development is truly the state's goal, Texas courts should continue to pursue that goal by ensuring that a nonparticipating lessee cannot simply ride the coattails of a producing cotenant into the secondary term of its oil and gas lease. Until then, however, lessees will continue to ask: "To [drill], or not to [drill]; that is the question . . . ."[223]

223. *See* WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.