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"PLEASE CITE THIS ARTICLE: *CIMAREX ENERGY CO. V. ANADARKO PETROLEUM CORP*. & THE QUESTION OF WHO HAS TO PRODUCE"

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In *Cimarex Energy Co. v. Anadarko Petroleum Corp.*,[1] a mineral lessee that produced no oil or gas during its lease's primary term claimed to have maintained the lease by paying apportioned royalties based on a co-tenant's production. Before the expiration of the disputed lease and the resulting litigation, the non-producing lessee had sued the producing lessee for an accounting because the non-producing lessee was not paid proceeds from the captioned land's production. In the Settlement Agreement that followed, the producing lessee paid the non-producing lessee's lessor apportioned royalty arising during the primary term of the disputed lease. When the primary term of the disputed lease ended, however, the lessor declared the disputed lease expired and recognized the ascendancy of a top lease covering the same lands. The producing lessee was also the top lessee. The non-

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[1] 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. denied).

producing lessee again sued, this time challenging the expiration of its lease.

The court of appeals declared the disputed lease expired, holding that the lessee's unsuccessful attempt to enter into a joint operating agreement with the producing lessee before executing a Settlement Agreement was immaterial. In addition, the court believed that the intent of the parties to the disputed lease was for the lessee itself to bring about production of oil and gas before the primary term of the lease expired.

This result is erroneous given the express terms of the disputed lease, which do not require production by the lessee. Further, other clauses in the disputed lease did not serve to imply that the lessee of the disputed lease must produce. An implied covenant for the lessee to develop should not have been read into the disputed lease because: (1) the express terms suggest the lessor was not under the impression that the lessee would have to produce itself, and (2) a prudent operator would not have developed the leased minerals but instead would have relied on the Settlement Agreement with the majority working interest co-tenant to satisfy any requirement to produce. Finally, the Settlement Agreement between the lessees resulting from the first round of litigation should have been regarded as an agreement of joint development.

I. INTRODUCTION

Under common drilling clauses found in oil and gas leases, the lessee must drill a well or, as the lease provides, pay delay rentals on or before a particular date if the lease is to remain in force. At the same time, the minerals within a certain tract can be owned by separate co-tenants and subsequently leased out to different lessees. This results in co-tenant working interest owners/lessees vying to develop undivided mineral interests within a certain tract, each mindful of its obligations under its lease. If only one undivided working interest owner on a particular tract conducts drilling operations, the issue may then arise as to whether such drilling operations are enough to satisfy typical drilling clauses in a working interest co-tenant's lease.

Texas oil and gas leases most commonly require production in paying quantities after the end of the primary term to keep the lease alive. Texas courts have routinely imposed this production requirement on *each* lessee individually, meaning that production (in paying quantities, usually) from a lessee's co-tenant will not extend the non-producing lessee's lease. Under current case law, mere payment of proportionate royalties to the lessors of the non-producing lessee will fail to keep the typical Texas lease alive past the primary term. Thus, if the non-drilling, working interest owner is not developing or in some arrangement with the drilling lessee, like a joint operating agreement (JOA), the principal question becomes: what is keeping the lease going?

Absent pooling of the leases, unusual lease language, or some agreement of co-development between the lessees, the non-drilling working interest owner seemingly cannot rely on the drilling working interest owner's actions to perpetuate the lease, even if it pays its lessors royalty. A drilling working interest co-tenant armed with the knowledge of this state of law could rebuff entreaties to co-develop

a particular tract by a non-drilling working interest co-tenant while at the same time obtaining top leases from the lessors to those same non-drilling working interest owners and then simply wait for the bottom leases to expire. In *Cimarex Energy Co. v. Anadarko Petroleum Corp*., an operator did just that.

II. PRELIMINARY MATTERS

A. Co-tenant Development

The rights of co-tenants to develop oil and gas is a foundational concept in extraction law with roots going back over 700 years in the English legal tradition.[2] In 1705, an English statute was enacted that allowed for an accounting against one co-tenant by others if the first received a disproportionate share of resources derived from the common tract.[3] In the United States, the English tradition devolved into majority and minority positions. In a small minority of states, co-tenant rights to extract resources are significantly restricted. Generally, in such states, without the consent of all co-tenants, one co-tenant cannot extract minerals and cannot issue a lease allowing for mineral extraction.[4] In such states, the non-developing co-tenants may have code-supported actions for trespass or trover.[5]

It is a well-established general rule in most jurisdictions, including Texas, that the owners of undivided portions of gas and oil rights in and under the same land are tenants in common.[6] As each co-tenant may exercise the same right and privilege with reference to the same common property, so the majority of jurisdictions in the United States allow for one co-tenant to extract oil and gas without the permission of other co-tenants. Although the several courts in l oil and gas-producing states have not passed upon the issue, practitioners in those states have generally assumed that the courts would adopt the majority view. Further, each co-tenant acts for himself, and no individual co-tenant will act as the agent for the other co-tenant nor has any authority to bind the other merely because of their relationship unless authorized to do so.[7]

Each co-tenant may lease his undivided interest in the common tract without the consent of the other co-tenants and such lease is effective as to his interest in the property but ineffective as to the interest belonging to his co-tenant.[8] Further, a lessee from a co-owner in a majority jurisdiction acquires the same rights to explore and develop as were held by the lessor.[9] A landman who acquires the lease may not

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[2] Eugene Kuntz, OIL AND GAS LAW, §5.2, 138 (Matthew Bender, 2017).
[3] *Bogardus v. Trinity Church*, 4 Paige Ch. 178, 194 (N.Y. 1833).
[4] *See e.g.* Law v. Heck Oil Co. 145 S.E. 601 (W.Va. 1928),
[5] John S. Lowe, et al., CASES AND MATERIALS ON OIL AND GAS LAW, 460-61 (8th Ed. 2022).
[6] Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. App. —Texarkana 1954, writ ref'd n.r.e.).
[7] *Id.*
[8] Burnham v. Hardy Oil Co., 147 S.W. 330, 334 (Tex. App. San Antonio 1912), aff'd, 108 Tex. 555, 195 S.W. 1139 (1917).
[9] Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. App. Texarkana 1954, writ ref'd n.r.e.).

be able to perform a title search, so the lease usually purports to cover 100% of the mineral estate, even though the lessor often owns only a fractional interest. To avoid paying full lease benefits to a fractional owner, a lessee will generally insist on the inclusion of a lease clause that reduces rentals and royalty in proportion to the interest actually owned by the lessor.[10]

In most jurisdictions that have adopted the dominant view, the developing co-owner, who is usually a lessee, upon discovery of oil and gas on the premises must account to other non-leasing co-tenants for their proportionate share of the proceeds from production, less the proportionate share of the reasonable and necessary costs of development and production.[11] These accounting rights extend from co-tenants to their lessees.[12] The developing party (whose interest is often called the "cost-bearing interest") may not collect costs directly from the other co-tenants but may only deduct costs from the share of production attributable to the other co-tenants (whose interest is often called a "noncost-bearing" or "carried interest"); thus, the developing party typically assumes all the risk that the well will be dry.[13]

Co-owners of a mineral estate may be unable to agree upon how minerals should be developed, or even if they should be developed at all or stay in the ground. Moreover, identifying and locating all co-owners may be difficult or impossible because of the widespread fractionalization of mineral interests. Due to the inherent risks of drilling and development and the requirement of accounting to non-leasing co-owners, oil and gas companies generally drill a well only if the interests of the carried co-tenants are small or the co-tenants agree to pay their proportionate costs of the well beforehand, even if the well is unsuccessful.

B. Production Requirements

Habendum clauses vary, but the vast majority contain some type of drilling proviso within the habendum clause.[14] Some clauses provide that the lease will remain in effect for a term of years and as long thereafter as hydrocarbons are drilled and produced "by the lessee."[15] Others provide for the same primary/secondary term, but without the words "by the lessee" (or the equivalent) after the requirement of production.[16] Recent legal disputes have shown that the term of the lease and the possibility of an extension clause are hotly negotiated

[10] Burnham v. Hardy Oil Co., 147 S.W. 330, 334 (Tex. App. ―San Antonio 1912), aff'd, 108 Tex. 555, 195
S.W. 1139 (1917).
[11] *See, e.g.* Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. Okla. 1924).
[12] Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 573 (8th Cir. Okla. 1924).
[13] Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. App.―Texarkana 1954, writ ref'd n.r.e.).
[14] Kuntz, *supra* note 5, at 399.
[15] *Id.*
[16] *Id.*

terms.[17] Despite this, the absence or presence of the words "by the lessee" does not seem to have had much effect, particularly involving questions over exactly which party among working interest co-tenants much produce to perpetuate a lease.[18] In the author's experience, the inclusion (or not) of these words at the end of the drilling proviso of the habendum clause is rarely a negotiated point, perhaps as a result of case law (described below) that does not seem to place weight on these words for guidance on who must produce.[19] One commentator believes this indifference by lessors is because the parties expect development "and not speculation" on the part of the lessee.[20]

A common situation that arises when multiple lessees own leases covering undivided portions of one tract involves one or more lessees holding leases that cover a small interest in the minerals who do not participate in the drilling and production promulgated by another lessee that holds a lease (or leases) covering a large interest in the minerals. In such a situation, the Oklahoma Supreme Court ruled in 1933 that production by the lessee of the larger interest would not qualify as the necessary production under the habendum clause in the lease of the smaller interest where that habendum clause contained the words "by the lessee."[21] As discussed below, this rule has been extended to leases that do not contain the language "by the lessee" in the habendum clause by one Texas court of appeals and the 5th Circuit Court of Appeals.[22]

C. "Unless" and "Or" Clauses

While *Cimarex* itself did not revolve around the payment of delay rentals during the primary term, the cases cited within it did. Drilling and delay rental clauses are commonly integrated and divided into two different general categories—the "or" and the "unless" clauses, to use the industry parlance.[23] The "or" drilling clause provides that the lessee will either begin drilling a well *or* will begin to pay any necessary delay rentals.[24] The "unless" clause provides that if no drilling begins on or before a stipulated date, the lease will terminate on its own terms as a matter of law *unless* the lessee pays any necessary delay rentals.[25] The first involves a covenant while the second invokes a special limitation.[26]

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[17] *See generally* Cimarex Energy Co. v. Anadarko Petroleum Corp., 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet.
denied).
[18] Kuntz, *supra* note 5, at 399.
[19] *See generally* Cimarex, 574 S.W.3d 73.
[20] Kuntz, *supra* note 5, at 399.
[21] Earp v. Mid-Continental Pet. Corp., 27 P.2d 855, (Okla. 1933).
[22] *See generally* Cimarex, 574 S.W.3d 73.; *Mattison v. Trotti*, 262 F.2d 339, 340 (5th Cir. 1959).
[23] Kuntz, *supra* note 5, at 33.
[24] Kuntz, *supra* note 5, at 33 (the lessee may not have to pay delay rentals if the lease is, for example, a "paid up" lease).
[25] *Id.*
[26] *Id.*

Failure to drill under the "or" clause may result in a lawsuit by the lessor either seeking (if the lessor is cheeky) forfeiture of the lease or an action for breaching the covenant—an action to collect the rentals with interest and, likely, the costs associated with bringing the action.[27] Forfeiture of the lease is certainly a worrying measure for lessees, but unless the lease contains a provision that expressly provides for forfeiture or a statute applies, the weight of case law holds that the lessor has no right to a forfeiture of the lease when the lessee fails to pay rentals or commence operations. In contrast, the failure to drill or to pay delay rentals under an "unless" clause may sound less threatening but could lead to a potentially worse result for the lessee—automatic termination of the lease.[28] In Texas, the courts are reluctant to foist forfeiture on lessees in quiet title actions is not found where a lease had terminated; instead, this forfeiture is found because a lessee failed to pay rentals or drill.[29]

From the above, courts in Texas and elsewhere, when faced with conflicts over the (non) payment of delay rentals, will closely examine the exact verbiage of delay rental clauses and then hand down opinions with starkly different results based on their interpretations. The difference between a covenant and a special limitation clause regarding delayed rental payments is clearly a negotiated point that courts will respect. As we will see, this differentiation in outcomes, depending on the language, seems lost in disputes related to habendum clauses. Thus, the question emerges: who among leasehold co-tenants must produce?

III. *CIMAREX* CASE BACKGROUND

A. Interest Acquisition

The captioned land subjected to the dispute is composed of approximately 440 mineral acres in Ward County, Texas.[30] Between 2007 and 2010, Anadarko acquired an undivided 5/6th working interest from various prior lessees of the captioned land.[31] In addition, Anadarko obtained the entire working interest (via lease) covering a 200-acre tract of land also owned by the Estate of F. Kirk Johnson, III immediately south of the captioned land (the Southern Tract).[32]

In December 2009, Cimarex leased the remaining undivided 1/6th mineral interest also owned by the Johnson estate (the Cimarex Lease).[33] Typical in many ways, the Cimarex Lease contained a habendum clause, which provided for a primary term of five years, and a secondary term lasting "as long thereafter as oil

[27] *Id.* at § 29.3[c].
[28] *Id.* at § 29.2[c].
[29] *Id.* at §29.2, page 37. *See also e.g.*
[30] *Cimarex*, 574 S.W.3d at 81.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 80-81.

or gas is produced from said land or from land with which said land is pooled."[34] The habendum did not include "produced by lessee" or any words to that effect.[35] As the Cimarex Lease was a "paid-up" lease for the primary term, Cimarex could defer drilling operations during the first five years without paying any delay rentals to the lessor.[36] The Cimarex Lease, like nearly all leases, did place on the lessee "the obligation to pay royalties on actual production" during that time.[37] Cimarex did not commence operations for the drilling of a well on the captioned land during the primary term of the Cimarex Lease.[38]

In 2011 and 2012, the Texas Railroad Commission (hereinafter RRC) issued permits for Anadarko to drill two wells on the captioned land.[39] These wells were named the Murjo 1 and Murjo 2 wells (collectively, the Murjo Wells).[40] The Murjo 1 well paid out in or before February 2012 and continued to produce in paying quantities throughout the subsequent litigation.[41] The Murjo 2 well paid out in or before December 2012 and continued to produce in paying quantities throughout the subsequent litigation.[42] In February 2012, Anadarko drilled a third well, this time on the Southern Tract.[43] This well was so close to the captioned land that Anadarko sent Cimarex a Rule 37 notice of its intention to drill along the southern border of the captioned land.[44] Cimarex did not protest and the third well began producing on May 3, 2012.[45]

Meanwhile, on the lessor side of the ledger, F. Kirk Johnson, IV and Marsland Johnson became the subsequent Cimarex lessors in early 2011.[46] In late August 2011, the lessors granted Petro-Land Group, Inc. two top leases covering the captioned land.[47] These top leases were acquired by Anadarko in the middle of 2012.[48]

B. Initial Skirmishing

On September 14, 2012, the Cimarex lessors, having learned that drilling had begun on the captioned land, contacted the Cimarex lessees and demanded a

[34] *Id.* (note that the *Cimarex* case discusses and quotes the lease agreement between Cimarex and Anadarko. The original lease agreement is unavailable as a source, so this author relies on the case text for the contents of the lease.
[35] *Id.* at 94
[36] *Cimarex*, 574 S.W.3d at 81.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Cimarex*, 574 S.W.3d at 81.
[43] *Id.* at 82.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Cimarex*, 574 S.W.3d at 82.

proportionate share of royalties on the production.[49] A week later, Cimarex sent Anadarko a letter noting Anadarko had drilled and completed the three wells without seeking Cimarex's participation.[50] In addition, Cimarex, claiming to be a "cotenant with a carried working interest . . . in the subject wells[,]" asked for an accounting of the "costs and revenues associated with each of the subject wells[.]"[51] Cimarex also noted that it had previously asked Anadarko to "afford Cimarex the opportunity to join in the participation of the subject wells from inception," and that it was again making that request, perhaps to be memorialized with a JOA covering the production unit of each of the wells.[52]

After a second request for an accounting by Cimarex, Anadarko sent Cimarex a letter on January 2, 2013, in which it belatedly acknowledged Cimarex's 1/6th undivided leasehold interest on the captioned land while identifying Cimarex as a "non-participating cotenant" that was entitled to a "net share of proceeds after payout."[53] In addition, Anadarko presented Cimarex with data on the current payout status of each of the three wells.[54]

In December 2012, Cimarex sent Anadarko a letter recognizing that, while the well on the Southern Tract was not located on the captioned land, the well was drilled *one foot* from the southern boundary of the Cimarex Lease.[55] Cimarex, therefore, floated the idea of pooling portions of the Cimarex and Anadarko leaseholds to form a production unit around the third well, sharing both production and cost of the well.[56] Anadarko rejected this offer, noting that Cimarex had previously been given a Rule 37 notice regarding the well's proximal location and that Cimarex had not objected.[57]

Cimarex filed an application with the RRC on February 6, 2013, seeking to use the Texas Mineral Interest Pooling Act to force Anadarko to form a pooled production unit around the well just inside the Southern Tract.[58] Cimarex complained that the third well was "draining hydrocarbons from beneath Cimarex's leasehold," and that without compulsory pooling, Cimarex's correlative rights would be harmed.[59] Cimarex went on to claim that it would be wasteful to drill unnecessary wells to recover the drained hydrocarbons, so it would be prudent for both parties to use their voluntary pooling rights to form a production unit around the well, allowing both parties to recover its proportional fair share of oil and gas from the acreage.[60]

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Cimarex*, 574 S.W.3d at 82.
[55] *Id.* at 83.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Cimarex*, 574 S.W.3d at 83.

One week later, Cimarex filed suit against Anadarko, alleging that Anadarko owed Cimarex an accounting because the two parties were "tenants-in-common" on the captioned land, with Cimarex owning an undivided 1/6th leasehold interest, and Anadarko owning the rest.[61] Cimarex also pointed out that Anadarko had drilled two wells on the captioned land without its consent and had denied its offer to pay its share of drilling costs.[62] Cimarex also demanded an accounting of the proceeds from the two wells above the costs of production, estimating that, based on sales receipts, it was owed about $3.5 million for the net proceeds from the Murjo 1.[63] No estimate was made for the proceeds due to Cimarex for the Murjo 2.[64]

Cimarex and Anadarko negotiated and executed a Settlement Agreement (hereinafter Settlement Agreement) in June 2013 to resolve Cimarex's lawsuit and the pooling dispute.[65] Anadarko acceded to Cimarex's demand for an accounting of the share of production from the two wells on the captioned land due Cimarex, with Anadarko agreeing to pay Cimarex for its 1/6th "non-participating cotenant share of the value of production" through May 2013, while deducting from that amount Cimarex's 1/6th "cotenant share of the reasonable drilling, completion and operations costs" of the two wells.[66] In addition, Anadarko agreed to "account to Cimarex monthly for its share of production," and provide information on the costs and revenues of the Murjo wells to Cimarex.[67] Both lessees agreed to pay their respective lessors' royalties.[68] Cimarex dropped its lawsuit against Anadarko and pulled its application to force-pool the well on the Southern Tract.[69]

C. Litigation Begins

For a spell, the Settlement Agreement stilled roiling waters. Anadarko paid Cimarex from July of 2013 through 2014 for its share of production, minus a 1/6th share of expenses.[70] Cimarex then paid its lessor's royalties, calculated back to the first date of production on the Murjo Wells.[71] After the end of the primary term of Cimarex's lease—December 21, 2014—Anadarko stopped making payments to Cimarex, claiming that the Cimarex Lease had expired, and that Cimarex was no longer entitled to a share of the production or proceeds therefrom.[72] Anadarko

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Cimarex*, 574 S.W.3d at 83-84.
[67] *Id.* at 84.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Cimarex*, 574 S.W.3d at 84.

asserted that the top leases it had purchased were now in effect and paid the necessary bonus to the lessors to activate said leases.[73]

In response, Cimarex again filed suit on August 26, 2015, claiming that Anadarko breached its contractual obligations under the Settlement Agreement "by failing to account to Cimarex monthly for Cimarex's share of production from the wells."[74] Anadarko sought summary dismissal of this action based on its affirmative defense that Cimarex's lease had terminated at the end of its primary term because Cimarex failed to promulgate operations for drilling on the captioned land.[75] Anadarko argued that Cimarex could not rely on Anadarko's production to extend its lease and that Anadarko's top lease took effect when the Cimarex Lease terminated.[76]

Cimarex responded with a motion, one for partial summary judgment, arguing that Anadarko had breached the Settlement Agreement, and, as a matter of law, that its lease did not expire at the end of the primary term.[77] Specifically, Cimarex argued that, under the terms of its lease, Cimarex could rely on Anadarko's production to either extend the lease into the secondary term or that the Settlement Agreement could serve as a of "joint operating agreement between Cimarex and Anadarko, which served to satisfy any requirement that Cimarex may have had to actively participate in the production."[78] Cimarex also argued that the lessors, who had been accepting royalty payments from Cimarex, were estopped from asserting that Cimarex's lease was expired.[79]

D. The Ruling of the 143rd District Court

After holding a hearing to consider the cross-motions for summary judgment, the trial court, on July 18, 2016, granted Anadarko's motion for full summary judgment while denying Cimarex's motion for partial summary judgment.[80] In the order, the trial court ruled that Anadarko's summary judgment evidence had established, as a matter of law, that the Cimarex Lease terminated on December 21, 2014, at the end of its primary term.[81] The trial court also dismissed Cimarex's claim for breach of contract.[82] Cimarex appealed to the Eighth District Court of Appeals in El Paso.[83]

IV. OPINION OF THE COURT OF APPEALS

[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 85.
[78] *Cimarex*, 574 S.W.3d at 85.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 80.

On appeal, Cimarex first contended that the terms of the Cimarex Lease were ambiguous regarding Cimarex's required production on the captioned land to keep the lease from expiring in the secondary term, and this ambiguity resulted in a question of fact to be resolved at trial.[84] In addition, if no ambiguity was found, Cimarex contended that it did not need to independently initiate production because the lease terms provided it could rely on Anadarko's production to extend the lease beyond the primary term as a matter of law.[85] Further, Cimarex argued that the Settlement Agreement acted as a joint development agreement akin in important ways to a JOA, which therefore allowed Cimarex to claim a portion of Anadarko's production as its own to the extent necessary to lengthen the Cimarex Lease into its secondary term, also as a matter of law.[86] Ranging into equitable territory, Cimarex asserted that, even if the lease terms should be interpreted as the trial court ruled, Anadarko's and Cimarex's lessors were estopped from claiming that the Cimarex Lease terminated based on the lessors' acceptance of royalty payments from Cimarex for many months.[87]

In March of 2019, the El Paso Court of Appeals handed down an opinion and held that the Cimarex Lease required Cimarex itself to produce on the captioned tract (or land pooled therewith) in order to extend the primary term of the Cimarex Lease.[88] Anadarko's production, the court held, did not do so.[89] The court opined:

> [W]e conclude that the intent of the [Cimarex 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.[90]

Further, payment of royalties to Cimarex's lessors during the primary term did not extend the Cimarex Lease into its secondary term.[91] Finally, the Settlement Agreement had "no bearing" on whether Cimarex itself had to produce from the leased premises or if Anadarko's legwork in the field counted for the same.[92]

E. The Habendum Clause and Related Case Law

[84] *Cimarex*, 574 S.W.3d at 85.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 85-86.
[88] *Id.* at 93.
[89] *Id.*
[90] *Cimarex*, 574 S.W.3d at 93.
[91] *Id.* at 94.
[92] *Id.* at 95.

As expected, the opinion opined at length about the habendum clause of the Cimarex Lease. Two cases from Texas particularly informed the El Paso court as it interpreted the clause.

1. *Mattison v. Trotti*

In *Mattison v. Trotti*, the Fifth Circuit Court of Appeals analyzed an oil and gas lease with a five-year primary term that included a delay rental clause with a drilling proviso.[93] This proviso required that, unless the lessee conducted operations for the drilling of a well or paid annual delay rentals, the lease would expire.[94] Like most oil and gas leases, the lease in *Mattison* did not expressly provide that the lessee was the party required to produce.[95] The lessee did not commence any operations during the first year, nor did it pay any delay rentals.[96] When the lessors sued to cancel the lease, the lessees, as in *Cimarex*, defended the continued existence of the lease by claiming the lease did not specify which working interest owner on the captioned tract was required to produce, so the defendants could rely on their operations of co-tenants to keep the lease going after the first anniversary of the lease without drilling or the paying of delay rentals.[97]

The Fifth Circuit ruled the lease to be expired, pointing out that the clear intent of the parties was to require the lessees themselves to either commence drilling operations or pay delay rentals if they wanted to keep the lease.[98] The court affirmed Texas law: "where there is no cash consideration paid, the drilling for and the production of oil or gas by the lessee is the prime consideration, and if not so stated in the lease will be read into it."[99] The *Cimarex* court seized this reasoning for support when concluding "that the requirement that a lessee must take action to keep a lease alive, in the absence of some form of cash consideration, remains the same—regardless of whether the lease contains an 'unless' clause and/or a 'thereafter' clause."[100]

2. *Hughes v. Cantwell*

The court of appeals in *Cimarex* relied heavily on *Hughes v. Cantwell*.[101] In *Hughes*, the lessee (Hughes) leased a fractional mineral interest covering an undivided portion of the captioned tract from the lessor in November 1971.[102] The

[93] 262 F.2d 339, 340 (5th Cir. 1959).
[94] *Id.* at 340. (this type of delay rental clause is known as an "unless" clause).
[95] *Id.* at 341.
[96] *Id.* at 340.
[97] *Id.* at 340-41.
[98] *Id.*
[99] *Id.* at 341.
[100] *Cimarex*, 574 S.W.3d at 93 (by "thereafter clause" the court means that portion of the habendum clause that reads "[A]s long thereafter as oil or gas is produced from said land or from land with which said land is pooled.").
[101] 540 S.W.2d 742 (Tex. App.—El Paso 1976).
[102] *Id.* at 743.

five-year primary term of the lease was not paid-up but instead provided that "[i]f operations for drilling [were] not commenced on said land ... 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" a delay rental payment.[103] Doing nothing for a year, Hughes instead paid delay rentals on the first anniversary of the lease.[104] No delay rental payments were paid thereafter.[105]

Meanwhile, back at the captioned tract, another lessee, Atlantic Richfield, had acquired the leasehold over the remaining mineral interest and commenced drilling operations in April 1973, and brought a producer in September of that year.[106] Contrasting *Cimarex*, Atlantic Richfield contacted Hughes with its plan to conduct operations and invited Hughes to join in sharing the expenses and proceeds.[107] Again, contrasting *Cimarex*, Hughes declined.[108] Atlantic Richfield thereafter completed a producer.[109] Hughes then stopped making annual delay rental payments to the lessors.[110] The lessors, in turn, sued to terminate Hughes's lease because he did not commence drilling or paying delay rentals.[111]

After the trial court ruled for the lessors, Hughes appealed, arguing that he did not have to make delay rental payments under the lease because there *was* drilling on the property—by Atlantic Richfield.[112] Hughes claimed he could pay nothing to his lessors—no delay rentals and no royalty—but that Atlantic Richfield's activity kept his lease going with no required outlay.[113] The court soundly rejected this argument, instead interpreting the lease as requiring Hughes—not a co-tenant—to either pay delay rentals or to commence drilling operations on the captioned tract to keep the lease alive.[114]

The court of appeals affirmed, noting several provisions in the lease that required Hughes to take various actions in an assortment of situations.[115] This suggested to the court that the lessor intended the lease to impose obligations on the lessee to either drill or pay delay rentals to keep the lease from expiring.[116] The court noted, for example, that the lease terms expressly required the lessee to pay delay rentals payments and royalties.[117] The court noticed that the lease contained other standard provisions, such as a voluntary pooling clause, a cessation of production/dry hole clause (which provided that the lease would not terminate if Hughes commenced additional drilling or reworking operations after a dry hole),

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[103] *Id.* (this type of delay rental clause is also categorizable as an "unless" clause).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Hughes v. Cantwell, 540 S.W.2d 742, 743 (Tex. App.—El Paso 1976).
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Hughes*, 540 S.W.2d at 743. (
[114] *Id.* at 744.
[115] *Id.*
[116] *Id.*
[117] *Id.*

and a typical force majeure clause that provided that the lease would not terminate in the event the lessee was prevented from complying with the terms of the lease.[118]

The court of appeals in *Hughes* believed that the express purpose of the lease was to establish the production of hydrocarbons and that it followed that the lessors needed the lessee to "do something to bring about that exploration and production of oil and gas"—like drilling, assigning the lease, or "pool[ing the lease] with others and benefit from their drilling."[119] Since Hughes did none of these things, the court concluded that, "[e]ven though there was drilling and production by another, on the failure of Appellant Hughes to either pay the delay rental or to commence operations for drilling on the leased premises, personally or constructively" the lease terminated.[120] While the *Hughes* court noted that no Texas court had yet considered such a fact pattern, it did cite five cases that held in several situations that a lessee "must participate or pay his share of the drilling in order to keep his lease alive."[121]

V. APPLICATION TO THE PRESENT CASE: CIMAREX ENERGY CO. V. ANADARKO PETROLEUM CORP.

In *Cimarex*, the El Paso Court of Appeals found similar intent and purpose to develop in the Cimarex lease because it was for "investigating, exploring, prospecting, drilling and operating for and producing oil and gas," as well as seeking to "produce, save, take care of, treat, process, store and transport said minerals[.]"[122] The court concluded that the parties' intent was for the lessee to "'do something to bring about that exploration and production of oil and gas,' after the paid-up portion of the lease expired."[123]

The court of appeals also harped on what it saw as numerous examples in the Cimarex Lease of other clauses that it believed required the lessee to produce to keep the lease, such as the requirement to pay royalties on "actual" production.[124] It took note of what it called a "cessation" clause:[125]

> [A]fter the expiration of the primary term, all wells upon said land should become incapable of producing for any cause, this Lease shall not terminate if Lessee commences operations for additional drilling or for reworking within 60 days thereafter, and shall remain in force so long as operations are prosecuted with no cessation of

[118] *Id.* at 744–5.
[119] *Hughes*, 540 S.W.2d at 744.
[120] *Id.*
[121] *Id.*
[122] *Cimarex*, 574 S.W.3d at 91-92.
[123] *Id.* at 92 (citing Hughes, 540 S.W.2d at 744).
[124] *Id.*
[125] *Id.* (such a clause is typically known as a "cessation of production" clause).

> more than 60 consecutive days, whether such operations be on the same well or on a different or additional well or wells.[126]

Cimarex's lease had a typical voluntary pooling clause that gave it the ability to pool or combine the lease with other co-tenants on the property.[127] The pooling clause also required Cimarex to designate any pooled units—while providing that production from these pooled units would then be considered as "production"—under its terms.[128] The court also found it instructive that the lease granted Cimarex both the right to assign the lease and the right of use of oil, gas, and water from the land for its operations.[129] At the end of the lease's life, the lease granted Cimarex the right to remove its property from the captioned tract.[130] Therefore, the court of appeals held, as it did in *Hughes*, that these provisions implied the lessors' intent for Cimarex itself to pursue production on the captioned tract advancing it into the secondary term.[131]

Cimarex quibbled about the differences in the delay rental clauses, pointing out that the lease in *Hughes* contained an "unless" clause allowing the lessee to achieve constructive production with payment of delay rentals, while its lease was "paid up" and not requiring production until the secondary term only.[132] As expected, the court of appeals (having saluted *Mattison* and then nailing its own colors to the mast with *Hughes*) doggedly maintained that if an oil and gas lease "states that its primary intent is for the exploration, drilling and production of oil and gas" that it "naturally follows" that the lessor's intent was to require the lessee to, at some point, to *himself* cause production on the leased tract or to pay something like delay rentals as consideration, in order to maintain the lease.[133] The court of appeals certainly believed it was bound by its precedent in the 1970s and the 5th Circuit case in the 1950s, which held that the production had to be brought about by the lessee, notwithstanding the fact differences.[134] Of course, neither case was from the Texas Supreme Court, so neither are technically binding.

A. Payment and Production Did Not Extend Lease into Secondary Term

Cimarex argued that since it paid royalties during the primary term calculated on Anadarko's production, it would be contradictory for the lease to

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[126] *Id.* (emphasis omitted).
[127] *Id.*
[128] *Id.*
[129] *Cimarex*, 574 S.W.3d at 92.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Cimarex*, 574 S.W.3d at 92; *Hughes*, 540 S.W.2d at 743; *see also* Endeavor Energy Res., L.P. v. Energen Resources Corp., 554 S.W.3d at 597 (Tex. 2020) (Lessors generally want operators to fully develop the lease to maximize royalties because, after all, "the dominant purpose of a lease is to discover and produce oil and gas . . . .")(citing Rogers v. Osborn, 152 Tex. 540, 261 S.W.2d 311, 315 (1953) (Wilson, J., concurring)).
[134] *Cimarex*, 574 S.W.3d at 92-93.

require that the lessee pay royalties on Anadarko's production during the primary term, while also not allowing Cimarex to rely on a co-tenant's production to continue the lease into the secondary term.[135] Cimarex rummaged through the lease, looking for evidence outside of the obvious lack of "by the lessee" language in the habendum clause, to back this intent claim.[136] It seized upon the passive tense used by the lease in describing the requirement of the lessee to pay royalties on *any* production to keep the lease alive during the primary and secondary term, without specifying who was to cause the production.[137] Cimarex found it important that the passive voice was used in both instances, arguing that the two clauses should therefore be understood in the same light: during either, any production upon which royalties were paid would keep its lease alive.[138]

The appellate court disagreed with this argument for multiple reasons. First, it captioned the obvious: "a lessor has the right to impose additional or different requirements on a lessee to keep a lease alive during the primary term, in contrast to those imposed in the secondary term."[139] Thus, the court of appeals held there was:

> [N]othing inherently contradictory with a lessor requiring a lessee to make royalty payments on a cotenant's production during the primary term of a lease—particularly where the primary term is paid-up—while at the same time requiring the lessee to cause its own production on the subject property in order to extend the lease into a secondary term, where there is no cash consideration paid.[140]

Then the opinion of the appellate court got odd. It claimed that "to interpret the lease in the manner suggested by Cimarex, the court would in effect be concluding that there were no significant differences between the requirements imposed on Cimarex in both the primary and secondary terms in the lease" and that "the primary term and the secondary term would be identical, with Cimarex only being required to pay royalties on Anadarko's production during both terms."[141] This would somehow "render the secondary term completely superfluous and would go against the general principle that the parties intended every clause in the lease to have some effect."[142] Instead, the court declined to do this, claiming that in order to "harmonize" the primary and secondary term, it was necessary to interpret the lease to allow Cimarex to rely on Anadarko's production during the paid-up primary term of the lease, while requiring it to produce on its own in the secondary

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[135] *Id*. at 94.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Cimarex*, 574 S.W.3d at 94; *See generally* PEC Minerals LP v. Chevron U.S.A., Inc., 439 F. App'x. 413, 420 (5th Cir. 2011) (lessor has the right to establish various requirements on lessee during different periods of the lease).
[140] *Cimarex*, 574 S.W.3d at 94.
[141] *Id.*
[142] *Id.*

term.[143] The court curiously claimed that despite the royalty that would presumably continue to be paid to the lessor after the end of the primary term, "no cash consideration was given for [the secondary] term."[144]

B. The Settlement Agreement Counts for Naught

In contrast to the lessee in *Hughes*, Cimarex had repeatedly tried to instigate joint operations with Anadarko. Its efforts met no success.[145] Reflecting this forlorn hope, Cimarex argued policy, pointing out that minority-interest owners are often unable to economically commence operations without the cooperation of the majority working interest owner.[146] Cimarex asserted that if the Cimarex Lease was ruled terminated—despite Cimarex's attempts to join in Anadarko's operations—minority mineral interest owners would find themselves in an untenable financial position which would, in turn, discourage operators from acquiring minority interest leases in the future.[147] Anadarko responded that, as a co-tenant, it had no duty to jointly develop with Cimarex.[148] The court agreed, noting that the fact that Cimarex had tried to get Anadarko to allow it to participate, it "should have no bearing on our decision" because Anadarko was only Cimarex's co-tenant.[149]

Cimarex countered that the Settlement Agreement was similar enough to an agreement to jointly develop to count as being equivalent to a traditional JOA.[150] The court agreed that if this were so, and the operator then "causes production on the land, this may fulfill the lessee's requirement of causing production on the land."[151] The court noted differences between the Settlement Agreement and traditional JOA, noting that JOAs typically designate an operator and allocate expenses, risks, and liabilities among the signatories.[152] The court noted the Settlement Agreement merely reiterated the common law rules of accounting among co-tenants in a mineral development context.[153] The court particularly noticed that in the agreement, Cimarex was referred to as a "non-participating cotenant."[154] Therefore, the court discounted the similarities Cimarex claimed existed between the Settlement Agreement and traditional JOAs such as its right to audit documents related to revenues and deductions and Anadarko's right to pay severance taxes on Cimarex's share of production, claiming these were merely "negotiated terms."[155] Cimarex did not cite any authorities to support its argument

[143] *Id.* at 94-95.
[144] *Id.* at 95.
[145] *Cimarex*, 574 S.W.3d at 95.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 96.
[151] *Cimarex*, 574 S.W.3d at 96.
[152] *Id.* at 97.
[153] *Id.* at 98.
[154] *Id.* at 97.
[155] *Id.* at 98.

that the Settlement Agreement functioned as a JOA due to the Settlement Agreement's provisions.[156]

VI. DISCUSSION

A. "By the Lessee"—Magic Words or Superfluous?

Habendum clauses are commonly found in the first half of the first page of leases; they establish the structure and temporal extent of the grant underlying the entire lease.[157] These clauses effectuate one of the two major goals of all lessees—the ability to produce from the land for as long as production can be maintained in paying quantities.[158] The court of appeals held that the disputed lease *required* the lessee to *itself* achieve production in order to extend the primary term of its lease despite the lack of the words "by the lessee"—Anadarko's production as leasehold co-tenant did not count.[159]

When seeking to ascertain the intention of the parties in an instrument like an oil and gas lease, Texas courts attempt to harmonize all parts of the instrument.[160] Even if different parts of the deed appear contradictory or inconsistent, Texas courts strive to harmonize all of the parts, construing the instrument to give effect to all of its provisions.[161] They seek to give rational meaning to all provisions in the document, whenever possible.[162] Therefore, they avoid striking any part of an instrument in the absence of irreconcilable inconsistencies whereby one clause obliterates the effect of another.[163] While doing this, courts must keep in mind that "[l]anguage should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated."[164] Further, the law's "strong public policy favoring freedom of contract" in Texas should compel courts to "respect and enforce" the terms on which the parties have agreed.[165] The court must give the terms of an instrument their plain and ordinary meaning unless the instrument shows the parties' intent to interpret the terms in an alternative manner.[166]

Given the language, it seems to follow that leases that have the words "by the lessee" in the habendum clause should be, all other things being relatively similar, construed differently than leases that *do not* have "by the lessee" in the

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[156] *Id.*
[157] John S. Lowe, et al., CASES AND MATERIALS ON OIL AND GAS LAW, 200-01 (8th Ed. 2022).
[158] *Id.* at 201. (the other goal being providing the lessee with the option, but not the obligation, to explore and develop the leased acreage in the first place).
[159] *Cimarex*, 574 S.W.3d at 93.
[160] Altman v. Blake, 712 S.W.2d 117, 118. ("[T]he parties to an instrument intend every clause to have some effect and, in some measure, to evidence their agreement.").
[161] Benge v. Scharbauer, 152 Tex. 447, 451, 259 S.W.2d 166 (1953).
[162] Glencore Ltd. v. Degussa Eng'r Carbons, L.P., 848 F. Supp. 2d 410, 433 (S.D.N.Y. 2012).
[163] Luckel v. White, 819 S.W.2d 459, 463 (Tex. 1991).
[164] Caldwell v. Curioni, 125 S.W.3d 784, 792 (Tex. App.—Dallas, 2004).
[165] Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 554 S.W.3d 586, 595 (Tex. 2018) (citing Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468, 471 (Tex. 2016).
[166] Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996).

habendum clause, whether the parties spent much (or any) time considering or negotiating the inclusion of that phrase. The appellate court in *Cimarex* spent much time and ink examining the lease, searching for various other provisions imposing requirements on Cimarex to take action in other contexts to keep the lease alive and for case law to back up the meaning of the found provisions.[167]

The court of appeals claims to have found evidence of intent illustrating that the parties intended for the lessee to itself develop the lease.[168] It did not, however, clearly opine on why the absence of the words "by the lessee" in the Cimarex lease counted for nothing other than to suggest that such a finding would have rendered the secondary term superfluous.[169] Obviously, the secondary term of the captioned lease was not superfluous, or identical because actual or constructive production was not required to keep the lease going in the primary term (unlike the secondary term).[170] The parties clearly recognized that the secondary terms were not superfluous as they included extensive clauses in the lease describing ways the lessee could achieve constructive production in the secondary term—constructive production that was unnecessary to maintain the lease in the primary term.[171] Should Anadarko's production have ever ceased during the secondary term of the Cimarex Lease, Cimarex would have found itself faced with the need to achieve actual or constructive production itself to maintain the lease, in contrast to the situation that would have occurred if Anadarko's production had ceased during the primary term of the Cimarex Lease.[172]

B. Other Clauses of the Lease

The court embroidered its holding with an analysis of many of the other clauses in the lease, searching for proof that the lessor had expected the lessee to be the party to bring about the exploration and production of oil and gas.[173] Further, the court held that exploration and production by another working interest owner on the captioned land would not count.[174] As in *Hughes*, the court noted the lease expressly stated that its purpose was for the production of oil and gas—"that the parties were entering into it for the purpose of 'investigating, exploring, prospecting, drilling, and operating for and producing oil and gas,' as well as other minerals, and to erect various structures on the property to "produce, save, take care of, treat, process, store and transport said minerals[.]'"[175]

The court noted that the disputed lease contained other provisions "imposing requirements on Cimarex to take action in other contexts to keep the lease alive" such as paying royalty and commencing additional drilling operations

[167] *Cimarex*, 574 S.W.3d at 92.
[168] *Id.*
[169] *Id.* at 94.
[170] *Id.* at 92.
[171] *Id.*
[172] *Id.* at 93.
[173] *Cimarex*, 574 S.W.3d at 91-92.
[174] *Id.* at 92.
[175] *Cimarex*, 574 S.W.3d at 91-92 (citing *Hughes*, 540 S.W.2d at 744).

within sixty days in the event of a cessation of production.[176] The court even opined that the assignment clause; pooling clause; and clauses allowing free use by the lessee of oil, gas, and water from the land, for its operations and to remove its property from the lease, all somehow implied that the lessor intended the lessee—and no one else—to be the party that would promulgate exploration and production.[177]

While these clauses may suggest that Cimarex was the party required "to take action in other contexts to keep the lease alive," none of them trump the clause that is right on point in the dispute: the habendum clause, which clearly does not require the lessee to produce.[178] If the parties negotiating the Cimarex Lease wanted Cimarex to produce, it would have been easy for them to express that intent—as thousands of other leases have—with the simple and elegant inclusion of the "by the lessee" language. Perhaps the court would have been convinced of Cimarex's position if it included a ham-fisted provision such as "the parties agree that the Lessee does not have to be the party to produce for production on the captioned land to extend this lease into its secondary term" in the lease agreement.[179]

C. Habendum and Drilling Clauses

Despite the troubling aspects of the case, the court of appeals did not do or say anything that, initially, seemed particularly unexpected considering the *Hughes* decision. One reason proffered for requiring each lessee on a tract to produce even if the drilling clause does not specify that drilling or other operations are to be performed by the lessee is that if the drilling clause requirements could be fulfilled by any mineral co-tenant working interest owner, the lessee could hold the lease "for speculative purposes, which is in direct conflict with the primary purpose for which such a lease is executed."[180] The *Cimarex* court agreed with this view, stating that the parties were entering into the Cimarex Lease "for the purpose of 'investigating, exploring, prospecting, drilling and operating for and producing oil and gas,' as well as other minerals, and to erect various structures on the property in order to 'produce, save, take care of, treat, process, store and transport said minerals[.]'"[181]

Again, the quotes from the Cimarex Lease emphasized by the court do not expressly require the lessee itself to do these things. More importantly, this view is problematic when the non-operating working interest owner pays its lessee the proportionate share of lessor's royalty owed on the production, minus the proportionate share of the costs, following both the terms of the lease and the common law of co-tenancy accounting. It becomes particularly problematic when

[176] *Id.* at 92.
[177] *Id.* at 92.
[178] *Id.* at 92.
[179] The author has never encountered such a clause in a lease.
[180] Kuntz, *supra* note 5, at 98 (citing Earp v. Mid-Continental Pet. Corp., 27 P.2d 855, 864 (Okla.1933)).
[181] *Cimarex*, 574 S.W.3d at 91-92.

the non-operating working interest owner tries to engage the operating working interest owner in an agreement for the joint exploration and development of the common property, and the operating working interest owner simply refuses to allow the minority working interest owner to participate.[182] This is a much different situation than that encountered in *Hughes*, where the non-producing co-tenant turned down offers by the producing co-tenant to join in joint development.[183] How is that speculative on Cimarex's part?

The circumstances are aggravated in the present case by the fact that Anadarko took top leases on the mineral interest leased by Cimarex, a situation also not seen in *Mattison* and *Hughes*. Once the top leases were taken, it was clear that Anadarko had no intention of joint work with Cimarex to develop the common mineral estate but instead sought to wait out the clock of the primary term of the Cimarex Lease in order to enhance its position in the future.[184] How is that *not* speculative on Anadarko's part?

The question then becomes, what should Cimarex have done in the circumstances it faced as a reasonable and prudent operator? The captioned opinion and the supporting case law seemed to call for operations by Cimarex—but what if the operations called for were not steps a reasonable and prudent operator would take in the same circumstances? Texas, like many states, allows complete and perpetual separation of mineral rights from the surface, tacitly supporting the fractionalization of mineral ownership over time.[185] Ownership of small undivided shares of minerals, like the Cimarex or even much smaller, is very common. Due to the laws of co-tenant accounting, such small undivided interests are unlikely to develop on their own economically. A reasonable and prudent operator would likely attempt a joint development with the other working interest co-tenants—just like Cimarex tried to do.[186] The court in *Cimarex* held that the purpose of the Cimarex Lease was to require the lessor "to take some action to cause production on the subject property in order to keep the lease alive . . . ."[187] In response to its lessor's demand for a proportional share of royalties (not a demand for development by the lessee), Cimarex secured royalties and actively sought to jointly develop with Anadarko during the primary term of the Cimarex Lease.[188] This should have satisfied the court's call for "some action."

One might argue that, although Cimarex's lessors did get paid a royalty, allowing that royalty to determine the issue goes outside the lease and allows the conduct of a party with no interest in the captioned lease to determine the rights of the parties to it.[189] In response, it should be noted that the parties left that option

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[182] *Cimarex*, 574 S.W.3d at 83.
[183] *Hughes*, 540 S.W.2d at 745.
[184] See *Cimarex*, 574 S.W.3d at 84.
[185] Ridgefield Permian, LLC v. Diamondback E & P LLC, 626 S.W.3d 357, 363 (Tex. App. 2021).
[186] *Cimarex*, 574 S.W.3d at 82.
[187] *Id.* at 93.
[188] *Id.* at 82.
[189] Or, as it was put to the author in an email conversation with another Texas oil and gas lawyer, "Sort of like stranger who feeds the parking meter." To which the author's response was, "Like most

open when they decided to negotiate a lease that did not require production by the lessee but instead just required production by *somebody*.

D. The Desire to Participate

In contrast to the cases that informed the *Cimarex* court like *Hughes* and *Mattison*, the non-producing lessee in *Cimarex* wanted to participate.[190] This was not a case where the non-producing lessee was trying to avoid paying delay rentals or was hindering development.[191] Given the evidence that the lessee was ready, willing, and able to pay its share of costs *and* that the operating co-tenant repeatedly rejected its offer to join should indicate non-speculatory intent by the non-operating lessee provided that the lessors are paid royalty and rentals as necessary after production.[192]

In *A Treatise on Oil and Gas Law*, Eugene Kuntz proffered his belief that the key question is whether the non-drilling lessee was given a fair chance to participate in the drilling.[193] In Kuntz's view, if the non-drilling lessee is offered a chance to participate and declined, then the lessee should not be afforded the opportunity to claim the drilling lessee's activities satisfy his drilling clause under a typical oil and gas lease.[194] On the other hand, if the drilling lessee or lessees either ignore or refuse to allow the non-drilling lessee a chance to participate in drilling operations, then the non-drilling lessee should be able to successfully claim that the operations of the drilling lessee will satisfy the drilling clause under a typical oil and gas lease.[195]

In addition, Kuntz believed that if the non-drilling lessee co-tenant did not have an opportunity to pay his share of costs before drilling operations commenced, the lessee should be treated as a drilling participant if he paid his share of the costs after drilling.[196] This principle applies when drilling units are created—or an existing drilling unit is changed—such that the non-drilling lessee's lease is then included in a unit with a producing well. In such circumstances, the non-drilling lessee may not have had an opportunity to join in drilling the unit well.

In *Cimarex*, the non-drilling lessee desired to join with the drilling lessee, proposing to pool portions of the leaseholds to form a production unit, seeking forced pooling, and negotiating a Settlement Agreement that in some ways resembled a traditional JOA.[197] The non-drilling lessee had its share of production costs deducted from its share of proceeds.[198]

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lessors, the city doesn't care where the money comes from so long as it comes, on time, in the amount owed!" (on file with author).

[190] *Cimarex*, 574 S.W.3d at 95.
[191] *Id.* at 82-83.
[192] *Id*.
[193] Kuntz, *supra* note 5, at 100.
[194] *Id*.
[195] *Id.*
[196] *Id.*
[197] *Cimarex*, 574 S.W.3d at 82-84.
[198] *Id.* at 98.

The requirement of each working interest owner/lessee to drill and produce (or pay delay rentals, if necessary) in order to fulfill the terms of a typical lease falters on equitable grounds when the captioned tract is in a drilling unit in which only one well is allowed to be drilled. One case has rather harshly decreed that drilling by one fractional working interest cannot be used to satisfy the requirements to drill under a typical drilling clause for another fractional interest lessee.[199] Kuntz finds this acceptable "if tempered by a consideration of the lessee's opportunity to participate in drilling the well."[200]

In this context, "Consideration" is an evasive word. Does it mean that the "must drill yourself" rule subsides in the instance of a "one well" drilling unit, or is it merely tolled? Or does it mean that the drilling lessee must include the non-drilling party in development plans if a request is made to join in drilling the one allowed well?

Ultimately, as Kuntz notes, two poles emerge. On one side, in a tract where multiple undivided working interests exist, it seems that no lessee or group of lessees should be permitted to push aside an attempt by a co-tenant working interest owner to participate or to charge that party more than a proportionate share of development costs.[201] On the other side, one lessee should not be allowed to "claim the benefits of drilling by others" without having assumed some of the risks of drilling himself.[202] Here, unlike in *Hughes* and *Mattison*, Cimarex tried to join in joint development but was prevented by design and not given a fair opportunity to do so.[203] Therefore, Cimarex should be permitted to take advantage of Anadarko's drilling to satisfy the drilling clause of the Cimarex Lease if it pays its share of development.[204]

E. Agreements of Co-development Among Co-tenants

As described above, when lessees enter into an agreement to develop, with each agreeing to share in the expense of drilling and operations, production from the common tracts provides compliance with the lease provision of each of the lessees that requires development.[205] What kind of agreement suffices? Currently, JOAs are the only kind of agreement that seem to work definitively.[206] The court in *Earp v. Mid-Continent Petroleum Corporation* pondered what kind of agreement, past a JOA, might do, opining that no "particular form of agreement is essential to accomplish this result . . . ."[207]

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[199] Schank v. N. Am. Royalties, 201 N.W.2d 419 (N.D. 1972).
[200] Kuntz, *supra* note 5, at 100.
[201] *Id.*
[202] *Id.*
[203] *Cimarex*, 574 S.W.3d at 82-84.
[204] Kuntz, *supra* note 5, at 100.
[205] *Cimarex*, 574 S.W.3d at 96.
[206] *See generally Willson*, 274 S.W.2d at 951–952 ("[L]ease requirement that expressly required production on the land by the lessee was satisfied when lessee entered into a JOA with a co-tenant who successfully caused production on the land[.]")(citing *Cimarex*, 574 S.W.3d at 96).
[207] Earp v. Mid-Continent Pet. Corp., 27 P.2d 855 (Okla. 1933).

In *Cimarex*, the court noted that Anadarko was only a co-tenant to Cimarex and therefore had no duty to agree to joint operations.[208] Further, the fact that Cimarex tried to get Anadarko to allow it to participate "should have no bearing on [the court's] decision."[209] Then, turning to whether the 2013 Settlement Agreement was effectively a JOA between Cimarex and Anadarko, the court opined curiously that the agreement only expressed Cimarex's rights of a co-tenant and did not include any language demonstrating intent to execute a JOA.[210] The court did not address why the parties felt the need to caption the obvious. Further, the court noted that none of the subsequent actions of Cimarex or Anadarko suggested any hint that the parties intended for their agreement to act as a JOA might.[211]

Elaborate joint development schemes (such as those found in JOAs) consummated between the non-developing working interest owner/co-tenant and the developing working interest owner/co-tenant should not have been required to change the result of *Cimarex*. Certainly, a JOA would suffice. However, a farmout agreement, a production sharing agreement, or even an approved allocation or production sharing agreement should satisfy the requirements for an agreement among co-developers. Further, if the requirement that a lessee must produce is maintained, any other agreement that results in the operating and non-operating parties both receiving apportioned proceeds from production, minus operating costs, should suffice to alleviate the necessity of a non-operating lessee's production to push a lease into its secondary term, as long as royalties are paid and unless the lease expressly so requires. The result in *Cimarex* would be less troublesome if the court treated the Settlement Agreement as "close enough" to a JOA, a farmout agreement, or any other agreement that would have sufficed as co-development in the court's eyes.

Currently, however, every agreement or deal that apportions proceeds and costs is not enough to evidence co-development among working interest owners in a particular tract. Failing the requisite agreement (and, perhaps, privity of estate), the test now requires either (i) the working interest owner of the subject lease to produce, no matter the language of the habendum clause, or (ii) the developing working interest co-tenant somehow have an "interest" in the subject lease, such as a cross-conveyance commonly found in a JOA.[212]

F. The Origins of Symmetry

Having held that production by a third party will not perpetuate the lease, absent a JOA or similar, the court apparently believed that Cimarex was contractually required to pay a royalty on the same co-tenant production during the primary term. Specifically:

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[208] *Cimarex*, 574 S.W.3d at 95.
[209] *Id.*
[210] *Cimarex*, 574 S.W.3d at 97.
[211] *Id.* at 99.
[212] *Id.* at 91, 96.

> [I]n *Hughes*, the Cimarex lease contained various other provisions imposing requirements on Cimarex to take action in other contexts to keep the lease alive. For example, as set forth above, the lease expressly required Cimarex to pay royalties on actual production during both the primary and secondary terms of the lease.[213]

Two pages later, the court rejected Cimarex's argument that the obligation to pay a royalty should be read into the Cimarex Lease the same as the obligation to produce:

> Cimarex argues that given the similar use of the passive voice in both instances, the two should be construed in the same fashion; in effect, Cimarex argues that if this Court were to rewrite the lease to require it to cause production on the land to extend the lease, it would also be required to rewrite the lease to only require it to pay royalties on its own production as well, which would effectively entitle it to a refund of the payments that it made to the lessors. We disagree with this argument . . . .[214]

This is curiously asymmetrical. The court had rewritten the lease with regards to who had to produce, cordoning off Anadarko's production such that did not suffice to hold the Cimarex Lease, but the court interestingly found itself hesitant to do the same with the requirement to pay royalty on a co-tenant's production. The solution to this conundrum seems simple: either respect the express terms of the lease or, if that cannot be done, cordon off the co-tenant's production as to the requirement to pay royalty during the primary term, similar to howthe co-tenant's production has been cordoned off from holding the lease in the secondary term even if the non-producing lessee pays the royalty. [215]

G. The Cimarex Public Policy Argument

As often happens in oil and gas petitions and answers, Cimarex raised a public policy argument on appeal, contending that, unlike the lessee in *Hughes*, it had made repeated unsuccessful attempts to enter into some kind of agreement with Anadarko to co-develop the Murjo Wells.[216] Cimarex noted that as a minority mineral interest owner, it is at a distinct disadvantage when a majority interest owner rejects its attempts to join in operations.[217] Cimarex noted that, due to the

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[213] *Id.* at 92.
[214] *Cimarex*, 574 S.W.3d at 94.
[215] One experienced practitioner told the author that he advises clients that a "*Cimarex*-type lease" (*e.g.*, missing the "by the lessee" proviso) obligates its lessee to pay royalty on all production even if that lessee does not join the producing co-tenant in some kind of joint operation, but that the production in that case does not perpetuate the lease into the secondary term. A lose-lose situation.
[216] *Cimarex*, 574 S.W.3d at 95.
[217] *Id.*

need to account to co-tenants, minority interest owners typically cannot develop alone for simple economic and accounting reasons.[218] Cimarex asserted that making it develop in order to keep its lease would set a precedent that would discourage other operators from taking minority interest leases like its future lease.[219]

Anadarko believed that Cimarex's request to participate in operations should have had no bearing on the court's decision, and the court agreed.[220] Anadarko anchored its argument on the fact that, as co-tenants on the property, neither party owed any duty to the other and could act independently.[221] The court agreed, noting that co-tenants on the same tract may independently develop their own interests and may do so without the permission of a non-participating co-tenant.[222] On the other hand, one producer cannot force a non-participating co-tenant to enter into an agreement to pay a proportionate share of such production costs.[223] Instead, as the court quoted, 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."[224]

The court held that Cimarex knowingly took the risk that its working interest co-tenant(s) might refuse to jointly develop and that Cimarex "might be forced to, at some point, commence production on its own, as contemplated by the terms of the lease."[225] This would be true if the terms of the lease, as many do, actually provided that Cimarex had to produce. The Cimarex Lease, however, did not so provide. In addition, it seems that the lessee expects to see the lease developed while behaving as a reasonably prudent operator, while the lessors expect to profit through bonuses and royalties. Certainly, the demand of Cimarex's lessors for a proportionate share of royalties from production on the captioned lease—but not, apparently, a demand for self-development by Cimarex—suggests where their intention really lay. Reading in a requirement that the lessee must drill and produce itself because that is somehow surmised to be the parties' true intention is a stretch unsupported by the terms of the lease (lack of the words "by the lessee"), common sense, and simple economics—especially considering how fractionalized mineral estates have become over the decades.

H. Estoppel and Other Equitable Remedies

On the equitable front, Cimarex argued that Anadarko was estopped from claiming that the lease ceased because Cimarex had paid royalties during the

[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Cimarex*, 574 S.W.3d at 95.
[223] *Id.*
[224] Cox v. Davidson, 397 S.W.2d 200, 201; *See also* Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. App.—San Antonio 1912), aff'd, 108 Tex. 555, 195 S.W. 1139 (1917).
[225] *Cimarex*, 574 S.W.3d at 95.

primary term.[226] Cimarex contended that, because the lessors accepted these royalties, the lessors were also estopped from asserting that Cimarex could not rely on Anadarko's production to extend the lease into the secondary term—essentially reasoning that Anadarko had stepped into the shoes of the original lessors.[227]

This proved a forlorn hope. As the court opined, even if it accepted that Anadarko had stepped into those shoes, it still could not agree with Cimarex that the lessors were estopped from declaring the lease ended because they accepted royalties during the lease's primary term.[228] The court believed the habendum clause required Cimarex to pay royalties on *any* production on the land during the "paid-up" primary term of the lease while requiring Cimarex to cause actual production on the subject property to extend the lease into its secondary term.[229] Therefore, accepting royalties during the primary term based on Anadarko's production was a fundamentally different situation and did not preclude the lessors "from asserting that the lease terminated due to Cimarex's failure to cause production on the subject property after the primary term ended."[230] The court thus overruled Cimarex's estoppel issue.[231]

At least one commentator believes that a lessor can require a lessee to both pay royalty on a co-tenant's production and be required to produce itself.[232] This author agrees—provided that such requirements are expressly provided for in the lease. Nor are *Mattison* and *Hughes* the first and only words on this issue. In *Earp*, two mineral co-tenants in Oklahoma leased to two different operators. One of the leases was later the subject of a lawsuit, while the other was not. The disputed lease provided that it would last "five years and as long thereafter as oil and gas, or either of them, should be produced from said land *by the lessee*" (emphasis added).[233] The disputed lease also provided for the payment of delay rentals if "no well be commenced…" by the last day of each year of the primary term.[234] No requirement was made in the delay rental clause, however, that the commenced well be drilled "by the lessee."[235]

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[226] *Id.* at 99.
[227] *Id.*
[228] *Id.* at 100.
[229] *Id.*
[230] *Id.* at 100.
[231] *Cimarex*, 574 S.W.3d at 100.
[232] *See, e.g.*, John McFarland, *Cimarex v. Anadarko – Is a lease held by production if the lessee does not participate in the well and there is no operating agreement?* Oil and Gas L. Blog (Oct. 7, 2019), https://www.oilandgaslawyerblog.com/cimarex-v-anadarko-is-a-lease-held-by-production-if-the-lessee-does-not-participate-in-the-well-and-there-is-no-operating-agreement/ (favorably citing the *Cimarex* court: "There is nothing inherently contradictory with a lessor requiring a lessee to make royalty payments on a co-tenant's production during the primary term of a lease–particularly where the primary term is paid-up–while at the same time requiring the lessee to cause its own production on the captioned land in order to extend the lease into a secondary term, where there is no cash consideration paid.").
[233] *Earp*, 27 P.2d at 857.
[234] *Id.* at 864.
[235] *Id.*

The lessee of the undisputed lease drilled and achieved production. The lessee of the disputed lease did not pay delay rentals for two years or drill itself, so the lessor of that lease sued, claiming the lease expired due to non-payment of delay rentals.[236] That lessor *also* sued the producing operator for an accounting.[237] The lessee of the disputed lease countered that its lease had not expired as the delay rental clause did not require it be the party to drill a well as the habendum clause required.[238] In other words, its leasehold co-tenants well absolved it of the responsibility to pay delay rentals.

The Supreme Court of Oklahoma eventually interpreted the disputed lease and found it ambiguous with regards to the "…by the lessee" difference between the habendum and delay rental clauses.[239] The court found that, by executing a division order recognizing the leasehold ownership of the non-producing lessee and later accepting apportioned royalty payments from the producing lessee, the lessor of the disputed lease had, apparently inadvertently, construed the ambiguity such that the lease lasted through the primary term.[240]

The Supreme Court of Oklahoma correctly noted that, since there was no agreement making the producing lessee's well also that of the non-producing lessee, the production did not extend the disputed lease into its secondary term by the express terms of the lease.[241] After the disputed lease ended, the court further noted, the producing lessee would owe the now unleased mineral owner its apportioned share of production/proceeds, with production expenses deducted.[242]

Earp is instructive—if the habendum clause expressly requires the lessee to produce, it must itself produce. On the other hand, the delay rental clause did not have such definite language, so the lease did not so cease for non-payment by the lessee itself. The words "…by the lessee" were crucial to the holding. It is not a great leap to believe that if the disputed lease did not have the "…by the lessee" language in the habendum clause, the production by the other lessee (and the payment of royalty to both lessors) would have held the disputed lease into the secondary term. In *Earp*, the court took note of *Summers Oil and Gas Treatise:*

> The habendum clauses of leases usually provide that the discovery and production of oil or gas on the demised premises, to continue the life of the lease beyond the fixed term, must be by the lessee or his assigns, but in absence of such a clause, a production of oil or

[236] *Id.* at 858.
[237] *Id.* at 861.
[238] *Id.* at 863.
[239] *Earp*, 27 P.2d at 864.
[240] *Id.* at 865.
[241] *Id.* at 864 ("This provision [the habendum clause] is definite and explicit to the effect that in order for the lease to extend beyond the five-year term therein provided, production must be accomplished by the lessee.").
[242] *Id.* at 865.

> gas from the premises by another, without the lessee's assent and against his will, will not extend the lease beyond the definite term.[243]

In *Cimarex*, the production was certainly assented to by Cimarex and was demonstratively not against its will, per the terms of the Settlement Agreement.

Vortt v. Chevron is another case where a court considered an equitable remedy to a dispute very similar to *Cimarex.* [244] In Young County, Texas, Vortt and Chevron acquired separate interests in mineral rights to a 160-acre tract.[245] In 1978, Vortt asked Chevron to join in a farmout agreement concerning a particular portion of the captioned owned by Chevron.[246] Chevron rejected the request.[247] Vortt then suggested that the two parties execute a JOA.[248] Chevron alluded that it might be interested in such an agreement and requested a formal proposal from Vortt.[249] Chevron and Vortt dithered over the particulars of the agreement until 1983 without result.[250]

During these discussions, Vortt provided Chevron with valuable confidential seismic data to entice it join in a JOA.[251] Chevron thereafter brought in a producing well at a location determined with the help of the seismic data.[252] In a move not too dissimilar from Anadarko's actions in *Cimarex*, Chevron ultimately turned down the offer to join in a JOA but instead brought an action to cancel Vortt's leases.[253] Vortt countered by asserting the validity of its leases, or, if that was not successful, to recover under the equitable remedy of quantum meruit for the value of the seismic data.[254] The trial court ruled in favor of Vortt on its quantum meruit claim.[255] The court of appeals reversed, ruling for Chevron.[256] The Supreme Court of Texas agreed with the trial court, finding that Vortt could recovery via quantum meruit.[257] At trial, Vortt's president had testified that the seismic information had been shared "in the spirit of cooperation and that he would not have done so if he had not believed that a [JOA] would be reached."[258]

Certainly, some particulars of *Vortt* and *Cimarex* differ. But in both, one co-tenant strung along another until a lease's primary term ended. In both, equitable remedies were sought by the aggrieved party. Chicanery appears in both—top leasing, taking advantage of a majority interest position, stalling, inactivity until

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[243] 1 Walter Summers, A TREATISE ON THE LAW OF SUMMER OIL AND GAS, 296 (1927).
[244] 787 S.W.2d 942 (Tex. 1990)
[245] *Id.* at 942.
[246] *Id.* at 943.
[247] *Id.* at 942, 943.
[248] *Id.* at 943-944.
[249] *Id.* at 942, 944.
[250] *Vortt*, 787 S.W.2d at 944.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* at 943.
[256] *Vortt*, 787 S.W.2d 942, 944 (Tex. 1990).
[257] *Id.*
[258] *Id.* at 945.

litigation, and turning down prudent and reasonable offers to jointly develop. In *Vortt*, the Texas Supreme Court stepped in to correct a wrong on equitable grounds. It is an opportunity missed that it did not hear *Cimarex*.

VII. CONCLUSION

Cimarex's lease should not have been deemed expired at the end of its primary term. The drilling clause was not ambiguous. Since the Cimarex Lease did not require the lessee to produce (as many leases expressly do), payment of apportioned royalty to the lessors of the Cimarex Lease arising from Anadarko's production should have been regarded as constructive production by the non-producing lessee.

Unless the lease expressly so requires, doubt exists that lessors necessarily intend that the lessee of a small undivided mineral interest must itself produce. It is submitted that in most instances, the lessor's intention is simply that production be achieved on the captioned leasehold or lands pooled therewith and that the lessor will then be paid the apportioned royalty and other benefits in the amount and manner negotiated for in the lease.

Reading in an implied covenant that the lessee, particularly the lessee of a small fractional leasehold interest—and *only* that lessee in the absence of a JOA or similar—will be the one to seek and secure production goes beyond what was likely within the contemplation of the lessor in a lease without the crucial "by the lessee" language. This is doubly true for the lessee itself, particularly that of a small interest who does not expect to get spurned by a producing co-tenant unwilling to enter into a JOA or similar.[259] After all, and as we have seen, whether or not the lessee must be the party to seek and secure production—or, as case law has played out in Texas, enter into a JOA with a co-tenant—is and has been a negotiated point for over eighty years. If the parties wanted the lessee to produce, they could have included the three magic words "by the lessee" in the habendum clause. Why this singular contractual point is somehow outside the normal parameters of contract construction and interpretation that allow the parties to control the inclusion (or exclusion) and enforcement of contractual terms remains a mystery in Texas oil and gas jurisprudence.

Turning to lessee Anadarko, it seems remarkably mercenary for a majority working interest holder to first produce and then only account to the co-tenants after being sued and then, when an agreement finally is executed that results in the operating and non-operating parties both receiving apportioned proceeds from production, minus apportioned operating costs, to *not* have that count as production for Cimarex when its lessors were paid royalty. This is particularly avaricious because Anadarko top leased Cimarex. The court of appeals said that Cimarex "knowingly took the risk that other tenants on the land might refuse to agree to a joint operating agreement," but it could just as easily be argued that Anadarko, by

[259] Unwillingly, it took top leases over the endangered leasehold interest and bid its time, perhaps wearing a knowing *Blackadder*-esque smirk, waiting for the primary term of the bottom lease to expire.

drilling and producing without owning all the working interest in the captioned land should have anticipated that it would have to account to the nonproducing lessee, minus costs, and that that accounting—the Settlement Agreement in this case—would extend the Cimarex Lease.

From a policy perspective, it might be argued that Cimarex should have to take the same risks as Anadarko (that it would have to pay apportioned costs even if development was unsuccessful) to extend its lease. However, it could be argued that Anadarko shouldered the risk by going forward with exploration and development before engaging its mineral co-tenant. Both parties could have entered into an agreement that spread the risks before drilling, and mineral co-tenants would presumably be interested in considering such an agreement if only to satisfy an implied covenant to develop, as it appears Cimarex sought to do.

The court of appeals stated that Cimarex should have known, when it leased the minority interest, that it might have to itself produce. Because it is not reasonable to believe that a mineral lessee with a tiny fraction of the working interest would develop itself if it did not make economic sense, this position, designed to protect lessors, instead places majority working interest owners in a tactically superior position. Cimarex appears to have had four options. It could have: (1) drilled its own well, (2) paid royalty on production by another lessee co-tenant and then have its lease expire at the end of the primary term, (3) *not* paid such royalty and then get sued by its lessor and still watch as its lease expired at the end of the primary term, or (4) surrendered the lease.

As things stand, potential lessees of minority interests must look upon *Cimarex* as a cautionary tale. Potential lessees that are concerned with being charged with an implied covenant to produce themselves (in the absence of a judicially acceptable agreement between the working interest owners such a JOA—whatever that might be) should consider adding language to the lease that absolves the lessee of the requirement to produce themselves. Care, then, must be given to the case law of the pertinent state and whether it allows implied covenants to be expressly disclaimed in a lease.