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LEGAL ALERT

CACTUS v. COG: WASTE NOT WANT NOT

As well-established principles of Texas law: Groundwater belongs to the surface estate and oil and gas belong to the mineral estate. Equally axiomatic is that operators are responsible for their waste, including "produced water." 16 Tex. Admin. Code § 3.8(d)(5)(B). ***But, if the operator treats the produced water, who owns the treated water?*** The question is important in the desert of West Texas, where operators have begun treating produced water for, among other uses, reuse in hydraulic fracking.

The Eighth Court of Appeals (El Paso) answered this question in its opinion deciding *Cactus Water Services, LLC v. COG Operating, LLC*, No. 08-22-00037-CV, 2023 WL 4846861 (Tex. App.—El Paso July 28, 2023, no pet. h.). ***Here's what you need to know:***

First, the Court held that the mineral estate has "the exclusive right to the oil and gas product stream, including the produced water." *Cactus*, 2023 WL 4846861, at *6. The Court noted that the product stream could be exempt from the mineral estate by "express reservation"—an indication that, by default, the product stream belongs to the mineral estate. *Id.* The Court's reasoning leaned heavily on Texas's statutory and regulatory framework and industry custom and practice.

Second, because the *Cactus v. COG* opinion relies on statutory, regulatory, and industry standards, its holding is easily applicable to most mineral leases. To escape the *Cactus v. COG* holding, a surface estate owner would likely have to show: (1) the original mineral lessor and lessee did not expect the lessee-operator to dispose of produced water and other oil-and-gas waste; (2) the surface estate owner has consistently asserted ownership of the produced water; and/or (3) the lease includes an express reservation of the produced water from the mineral estate.

Third, more litigation is likely ahead. The ownership of treated produced water is hotly contested and has considerable industry importance. In *Cactus v. COG*, two justices joined the majority opinion with one justice in dissent. Given the novel question and divided appellate court, the case is a good candidate for review by the Texas Supreme Court. The Supreme Court has discretion in taking cases, considering—among other factors—"whether the justices of the court of appeals disagree on an important point of law;" and "whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court." Tex. R. App. P. 56.1(a). These two factors are satisfied here. Additionally, the majority opinion's reasoning walks a fine line between permissibly defining lease terms based on statutes, regulations, and industry custom and practice ***and*** impermissibly rewriting the leases to incorporate such definitions.

As a practical matter: the *Cactus v. COG* opinion gives reason for lessors and lessees to review their leases to see how their particular granting and royalty clauses fit into the opinion's framework. While operators may take some comfort in continuing to treat produced water for reuse, the issue is not yet settled. If you have any questions about how the opinion might affect your current leases and operations, or how to address the opinion in future leases and operations, do not hesitate to reach out.

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