

Texas' Cactus Ruling Clarifies 'Produced Water' Rules

By **Bonnie Fraase and Timothy McConn** (July 8, 2025)

Affirming the Eighth Court of Appeals, the Texas Supreme Court held in its long-awaited June 27 decision in *Cactus Water Services LLC v. COG Operating LLC* that "produced water" — water extracted alongside oil and gas — is waste, for which the mineral interest lessee bears the burden of disposal and the potential benefit of recycling.

Produced water is big business in Texas, so the court's opinion is consequential. Several industry implications deserve immediate attention — including the stability that will come from clearer rules, the possible environmental benefits that may follow and the questions that remain concerning royalties.

Background

Cactus purported to lease produced water from a surface estate owner, for the purpose of treating the water and paying the surface owner a royalty on the proceeds.[1]

COG operated oil and gas wells on the relevant tracts, and generated produced water along with oil and gas. Cactus asserted its right to such produced water, and this lawsuit ensued.[2]

COG sued for a declaration that it, not Cactus, "owns and has the exclusive right to possession, custody, control, and disposition of its production stream, including produced water." [3]

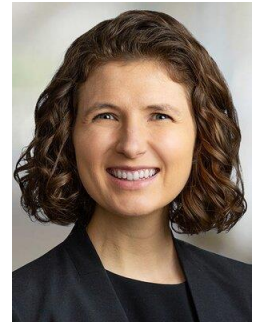
The trial court ruled in COG's favor on cross-motions for summary judgment, finding COG owned the "oil, gas and other products contained in commercial oil and gas bearing formations that are produced from COG wells on the four leases" and has the "right to exclusive possession, custody, control and disposition of the product stream produced from COG[s] wells," while Cactus has "no rights in or to the product stream from COG wells." [4]

The Eighth Court of Appeals affirmed, reasoning that "COG has the exclusive right to the oil and gas product stream, including the produced water," as produced water is waste. [5]

The Texas Supreme Court agreed, holding that a "deed or lease using typical language to convey oil-and-gas rights, though not expressly addressing produced water, includes that substance as part of the conveyance whether the parties knew of its prospective value or not." [6]

The court's ruling is narrow, settling only one among many important questions. Even so, the opinion has meaningful practical implications.

Takeaways



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Default rules bring stability.

A clear legal framework benefits economic activity, and the court's ruling provides the same. The Cactus opinion does not disturb the bedrock principle that groundwater belongs to the surface estate.[7] But it clarifies that oil and gas operators own their leased minerals, along with the minerals' corresponding waste.[8]

Cactus' business model — prospecting for produced water rights adverse to the operator or mineral interest lessee — is an industry outlier. In the more typical case, operators partner with water treatment companies to recycle produced water on their leases.

The Cactus ruling safeguards the operators' investment in recycling.

Recycling comes at a cost.

Notably, though, recycling produced water comes at a high cost. Recycling is commonly considered a low-cost activity — a way to save money. In contrast, water recycling is a capital-intensive endeavor.

For instance, COG has not profited from its water recycling.[9] As an amicus brief filed in the case by the Texas Independent Produced Water Association noted, industry participants have spent "hundreds of millions of dollars each year on construction and maintenance of the infrastructure required to responsibly manage produced water." [10]

And as the Texas Supreme Court observed, treating remains costlier than disposing of produced water.[11] Even so, companies continue to see economic opportunity in water recycling and invest in it.

Environmental benefits may abound.

Beyond dollars and cents, recycling produced water promises considerable environmental benefits. Mineral extraction is a water-intensive activity.

By recycling produced water, operators reduce the need for freshwater, thereby preserving groundwater for drinking and agriculture.[12] Additionally, recycling produced water limits the use of reinjection wells, which are linked to seismic activity.[13]

This reduction is especially important given the Texas Railroad Commission's new permitting guidelines for saltwater disposal wells in the Permian Basin, which include limits on maximum injection pressure and volume.[14]

Even so — and as the court emphasized — produced water is waste, and the operator bears the liability for disposal.[15] Operators should take care in the disposal of treated water, just as they would for raw produced water.

This is especially true in light of rising scrutiny over treated water's potential impact on freshwater sources.[16]

Royalty issues remain outstanding.

Notably, the Texas Supreme Court's opinion made no mention of royalties owed on the produced water. Justice Brett Busby, writing in concurrence, phrased this open question like

so: "Will the lessee owe royalties on the produced groundwater it leased?"[17]

As the question was not presented to the court, it was not addressed. Even so, lessors and lessees should be mindful of this question, and consider the language of their leases or deeds.

First, what does the granting clause say? The court's holding applies to any "deed or lease using typical language to convey oil-and-gas-rights, though not expressly addressing produced water," but the court did not define "typical language." [18]

At a minimum, "typical language" reasonably includes the phrasing in COG's own leases, which entitled COG to produce and keep "oil and gas" or "oil, gas, and other hydrocarbons." [19] If, though, a lease's granting clause varies from the COG example, there may be daylight between the Cactus v. COG default rule and the particular lease.

Second, does the lease address royalties on the byproducts of the produced minerals? The court's opinion did not expressly address such a provision, leaving open the possibility of royalties owed in the event the produced water is treated and sold or used — if a lease so provides.

Third, parties are free to "strike a different deal." [20] Texas law respects parties' freedom to contract, as Justice Busby's concurrence expressly observes. [21]

Parties may, then, expressly refute Cactus v. COG's default rule in entering into new contracts. And they should consider and negotiate this term, in light of the current costs and potential future benefits of water treatment.

Conclusion

In sum, the Texas Supreme Court's Cactus v. COG opinion offers a clear default rule for mineral interest lessees and lessors: Oil and gas waste, and particularly produced water, belongs to the lessee.

This rule is likely to support the trend toward on-lease recycling of produced water, which may have positive environmental benefits, alongside economic returns.

Even so, lessors and lessees should carefully review their leases and deeds to assess whether their language matches the language in COG's leases, which the court construed.

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[1] Cactus Water Servs. LLC v. COG Operating LLC, No. 23-0676, 2025 WL 1783686, at *5 (Tex. June 27, 2025).

[2] Id.

[3] Id.

[4] Id.

[5] Cactus Water Servs. LLC v. COG Operating LLC, 676 S.W.3d 733, 741 (Tex. App.—El Paso 2023), *aff'd*, ___ S.W.3d ___ (Tex. 2025).

[6] Cactus, 2025 WL 1783686, at *11.

[7] Id. at *9.

[8] Id. at *11.

[9] Brief for Respondent at 7, Cactus Water Servs. LLC v. COG Operating LLC, No. 23-0676, 2025 WL 1783686, at *5.

[10] Brief for Texas Independent Produced Water Association as Amicus Curiae in Support of Respondent at 2, Cactus Water Servs. LLC v. COG Operating LLC, No. 23-0676, 2025 WL 1783686, at *5.

[11] Cactus, 2025 WL 1783686, at *4.

[12] U.S. Dept. of Energy Office of Fossil Energy & Carbon Management, Produced Water from Oil and Gas Development and Critical Minerals (June 18, 2024), https://www.energy.gov/sites/default/files/2024-06/Produced%20Water%20from%20Oil%20and%20Gas%20Development%20and%20Critical%20Minerals%20Fact%20Sheet_6.18.24.pdf.

[13] Railroad Comm'n of Tex., Seismicity (Oct. 18, 2024), <https://www.rrc.texas.gov/media/3xe1c3/seismicity.pdf>.

[14] Railroad Comm'n of Tex., Notice to Operators: New Guidelines for Permitting Saltwater Disposal Wells in the Permian Basin (May 15, 2025), <https://www.rrc.texas.gov/announcements/051525-nto-permian-swd-guidelines/>; Railroad Comm'n of Tex., Energy News (May 2025), <https://www.rrc.texas.gov/media/n12dtmwb/energy-news-may-2025.pdf>.

[15] Cactus Water Servs., 2025 WL 1783686, at *3 & 9.

[16] Martha Pskowski & Dylan Baddour, Companies Aim to Release More Treated Oilfield Wastewater into Rivers and Streams, Tex. Trib. (April 29, 2024), <https://www.texastribune.org/2024/04/29/texas-treated-produced-water-disposal-discharge-rivers/>.

[17] Cactus Water Servs., 2025 WL 1783686, at *14 (Busby, J., concurring).

[18] Id. at *11.

[19] Id. at *7.

[20] Id. at *13 (Busby, J., concurring).

[21] Id.

