Produced Water Ownership in Texas: Is Cactus Water the Answer?

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On July 28, 2023, a divided Texas Court of Appeals in El Paso issued a long-awaited decision in *Cactus Water Services, LLC v. COG Operating, LLC*, addressing ownership of produced water. The case pitted surface owners against mineral owners over the rights to a byproduct of hydrocarbon production that was once thought of exclusively as a nuisance but that has taken on a new importance as technological innovation has created potential stand-alone value in produced water. The majority of the court of appeals sided with the mineral owners' rights to the produced water over a dissenting opinion that favored surface owners. The case and the likely appeal to the Supreme Court of Texas represents an opening in salvo in what is likely to be an increasing number of produced-water cases.

With that in mind, this alert (1) provides a background on produced water in Texas, (2) discusses the conclusion and reasoning of the majority opinion in *Cactus Water*, (3) discusses the dissenting opinion's contrary holding in *Cactus Water*, and (4) assesses the future of the issue as it heads towards the Texas Supreme Court.

I. Background: *What is the Importance of Produced Water Ownership?*

"Produced water" typically refers to the slurry of non-hydrocarbon liquids generated by oil and gas production. The slurry contains water that is also entrained with inorganic materials including various mineral salts, such as sulfides, lithium chloride, and sodium chloride. In its 2022 report to the Texas Legislature, the Texas Produced Water Consortium estimated that oil and gas operations resulted in 3.9 billion barrels of produced water were generated across Texas in 2019. Much of this large volume stems from hydraulic fracking operations. In those operations, produced-water is typically viewed as an unused byproduct—or waste—that historically was mostly disposed of underground through injection wells. For instance, over 2.7 billion barrels of produced water in 2019 were put to no beneficial use, accounting for almost 70% of all such volumes. This characterization of produced water as waste historically led to indifference to its ownership between the surface and mineral estate.

Recent technology innovations have, however, created intrinsic value in produced water. For one, Texas producers have begun re-using produced water in their own operations, which has created a substantial market for third-party companies to purchase, treat, transport, and sell produced water among producers. This itself is a lucrative market given the relative scarcity of water supply in West Texas. Apart from re-use in oil and gas operations, treatment and recycling of produced water has unlocked other economic opportunities. Treated produced water can be used in cement and concrete for construction and as coolant in electric-power generation processes. With additional treatment, produced water can be used in agriculture and livestock cultivation. Furthermore recently, there has been increased interest in technology capable of extracting valuable constituents from the produced water, such as lithium—a prized resource for electric vehicle manufacturing and a "critical mineral" under the Inflation Reduction Act.

Altogether, the variety of economic uses for produced water has generated significant commercial interest. However, the legal ambiguity as to who owns produced water represents an impediment to the efficient development of the produced water market. Without clear direction on whether a landowner or mineral owner has the right to produced water, many companies have been unwilling to invest substantial amounts of capital to capture, transfer, treat, and sell produced water. It is within these circumstances that *Cactus Water* was decided.

Read the full article here.