

Texas Appeals Court Rules Conoco Unit Owns Waste Water

By [Peter McGuire](#) · [Listen to article](#)

Law360 (July 31, 2023, 6:38 PM EDT) -- A divided Texas appeals court has ruled a [ConocoPhillips](#) unit owns "produced water," a waste byproduct from fracking operations, rejecting a challenge from another company with subsurface water rights in the area of oil and gas leases.

Four mineral leases in Southwest Texas controlled by COG Operating LLC gave the company all rights to its product stream, including oil, gas and produced water — a mixture of water, brine, hydrogen sulfide and other chemicals, a majority of the Eighth District Court of Appeals ruled Friday.

Even though Cactus Water Services LLC had an agreement with surface owners for all the water resources on the leased lands, it did not include waste from hydrocarbon drilling, Justice Yvonne T. Rodriguez said in the majority opinion.

"Reading the mineral leases in the context in which they were executed confirms COG has the exclusive right to the oil and gas product stream, including the produced water," Justice Rodriguez said. "The subsequent leases purporting to convey produced water rights to Cactus were thus ineffective."

COG sued in 2020 to protect its fossil fuel operations across about 37,000 acres in Reeves County, Texas, according to court records. Cactus, in 2019, had acquired water rights on the land and claimed it gave them ownership of all water produced from oil and gas wells. A lower court last year sided with COG in its legal challenge.

The appeals court majority backed that ruling. Until recently, produced water was regarded as a liability due to the high cost of handling and disposing of the substance to comply with Texas law, Justice Rodriguez said.

Surface owners have never tried to claim ownership over the substance since COG started drilling almost two decades ago, according to the ruling. Although the leases have no definition for water and produced water, the differences are clear from Texas law and regulation and industry practice, according to the ruling.

Produced water can now be treated and resold for hydraulic fracturing extraction, according to the majority. But that doesn't change the fact that when COG leased the land and assumed responsibility for what was then considered a waste product, nothing in the leases "indicates that the parties intended to upend the definitions of these terms or common practices," Justice Rodriguez said.

"Though the mineral leases restrict COG's use of 'water' on the leased lands, that has no bearing on COG's right to the oil and gas waste byproduct from its wells," the justice said.

But Justice Gina M. Palafox said in a dissent that the majority got it wrong. The express language of the leases conveyed oil, gas and hydrocarbons to COG, but not water incidentally recovered from the subsurface from which oil and gas have been removed, Justice Palafox said.

The leases allowed COG to use a reasonable amount of water for its operations, but never granted the company ownership over the resource, she added. Under [Texas Supreme Court](#) precedent, water always belongs to the surface estate except when it is transferred through a specific conveyance, the justice said.

In this case, that means COG can't claim the water, Justice Palafox said. She disagreed with the majority's finding that state regulations and industry habits meant the surface owners gave up their ownership of groundwater simply because it was considered waste the drilling company was obligated to remove.

A producer "is entitled to recover minerals granted under the lease from the product stream itself," Justice Palafox said. "But water by any other name, even when mixed with other substances, still remains as water."

In an email to Law360 on Monday, Cactus counsel Dana Livingston of [Cokinos Young](#) said the company intended to appeal the case to the Texas Supreme Court, which has for decades held that unless expressly severed, water belongs to the surface owners.

The "formation water underground that comes up when oil and gas is produced from those formations belongs to the surface estate owners who had assigned those water rights to Cactus Water Services," Livingston said.

A representative for ConocoPhillips declined to comment Monday.

Texas Appeals Court Justices Yvonne T. Rodriguez, Gina M. Palafox and Lisa Soto sat on the appeals panel.

Cactus is represented by Marvin W. Jones and C. Brantley Jones of [Sprouse Shrader Smith PLLC](#), and Dana Livingston of Cokinos Young.

COG is represented by John A. "Jad" Davis, Katherine L. Petroski and Ryan Clinton of [Davis Gerald & Cremer PC](#), and Macey Reasoner Stokes and Benjamin Gonsoulin of [Baker Botts LLP](#).

The case is Cactus Water Services LLC v. COG Operating LLC, case number 8-22-00037, in the Court of Appeals for the Eighth District of Texas.

--Editing by Kristen Becker.