

No. 08-22-00037-CV

IN THE EIGHTH COURT OF APPEALS OF TEXAS

CACTUS WATER SERVICES, LLC,
Appellant,

v.

COG OPERATING, LLC,
Appellee.

ON APPEAL FROM THE 143RD JUDICIAL DISTRICT COURT,
REEVES COUNTY, TEXAS, CAUSE NO. 20-03-23456-CV

**BRIEF OF AMICUS CURIAE
TEXAS OIL & GAS ASSOCIATION**

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IDENTIFICATION OF AMICUS CURIAE

This amicus brief is tendered on behalf of the Texas Oil & Gas Association (“TXOGA”), which is paying the fee for its preparation.

TXOGA is a statewide trade association representing every facet of the Texas oil and natural gas industry, including small independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas’s crude oil and natural gas, operates over 80 percent of the state’s refining capacity, and is responsible for the vast majority of the state’s pipelines. In fiscal year 2021, the oil and natural gas industry employed more than 422,000 Texans in direct jobs and paid \$15.8 billion in state and local taxes and state royalties, funding our state’s schools, roads, and first responders.

As a frequent amicus curiae in Texas appellate courts, TXOGA offers input on legal, policy, and practical questions in important cases affecting the oil and gas industry. *See, e.g., Energy Serv. Co. of Bowie, Inc., v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190,196 (Tex. 2007) (“[A]micus curiae Texas Oil and Gas Association has explained . . . significant policy and practical considerations . . .”).

This is such a case.

SUMMARY OF ARGUMENT

From Texas oil and gas’s infancy at Spindletop through the shale revolution in the Eagle Ford and Permian, the balance between hydrocarbon production and

protecting the public from oil and gas waste and by-products has been a focus of the State of Texas, oil and gas producers, and surface owners. For nearly a century, that balance has placed the duty on operators to protect usable groundwater from the impacts of oil and gas waste and to properly manage that waste.

As Texas oil and gas production has shifted to focus on hydraulic fracturing, the volume of oil and gas waste in the form of “produced water” has increased exponentially, with billions of barrels of produced water coming to the surface each year. Operators have continued to bear the burden of properly managing produced water at great expense. But recently, entities such as Appellant have sought to shift long-standing practice by claiming that produced water, a by-product of oil and gas production, belongs to the surface owner, despite the operator’s duties and obligations to safely manage that byproduct.

Appellant’s position, if accepted, would upend the State of Texas’s regulatory regime for oil and gas waste and threaten the continued operations of nearly every oil and gas producer in the State. Without the ability to manage oil and gas waste in a proper manner, operators like Appellee may be forced to shut in or permanently plug and abandon wells, rather than run afoul of the surface estate’s alleged ownership of produced water, or continue to operate wells at a loss due to increased operating expenses.

The trial court properly applied well-settled Texas law in granting partial summary judgment in favor of Appellee, and its decision should be affirmed.

ARGUMENT AND AUTHORITIES

I. Neither the State of Texas nor the oil and gas industry consider produced water to be anything other than oil and gas waste.

Appellant’s arguments contravene decades of legislation, regulation, industry custom and practice, and the well-settled expectations and obligations of oil and gas lessees and lessors. Appellants ignore what exactly produced water *is*. Appellants disregard the careful, complex regulatory system put in place by the Texas legislature and the Texas Railroad Commission (“RRC”) concerning groundwater (which must be protected) and oil and gas waste (which groundwater must be protected *from*); instead, Appellants claim the parties to the Lease intended—without explicitly saying so—a result contrary to the entirety of Texas’s oil and gas producing history. The district court correctly rejected Appellant’s attempt to rewrite history and upend expectations, and this Court should do the same.

A. Produced water is not groundwater.

Produced water is the fluid waste byproduct brought to the surface during oil and gas exploration/production. It is also often called “brine,” “saltwater,” “formation brine,” or “formation water.” Produced water is an inevitable portion of the oil and gas production stream, which has been known for nearly a century. *See Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 226 (Tex. 1936) (“One of the by-

products of oil production is salt water, which must be disposed of without injury to property or the pollution of streams.”).

The term “produced water” is a misnomer. While produced water contains H₂O, those molecules are synthesized with chemicals and other dissolved minerals, including salts, acids, waxes, mineral oils, inorganic/heavy metals (such as mercury, lead, and arsenic), trace amounts of oil and gas, bacteria, and naturally-occurring radioactive materials (such as radium, thorium, and uranium).¹ Additionally, a significant portion of produced water is comprised of flowback fluid that an operator has used to hydraulically fracture the well. The exact makeup of what is in produced water varies by region. In any case, even after separation, produced water bears little resemblance to water:

¹ See *Produced Water: From a Waste to a Resource*, U.S. DEPT. OF ENER., OFFICE OF FOSSIL ENER. & CARBON MGMT. (Sep. 2, 2020), <https://www.energy.gov/fecm/articles/produced-water-waste-resource>; see also Appellee’s Br. at 9–10.



Figure A: Example of Produced Water²

Produced water does not pass the eye test; it looks nothing like water. And that makes sense, because the produced water has taken on characteristics of the rocks, minerals, oil, and/or gas that it has been trapped with deep below the surface. This process is like distilling bourbon. The largest part of bourbon by weight is water. But that water undergoes chemical changes when fermented with corn mash, barley, rye, and yeast. The water undergoes more changes when heated, and then changes again while aging in oak. By the time that water is removed from the barrel

² DRILLING CONTRACTOR, *The Water Challenge* (Apr. 24, 2012), available at <https://www.drillingcontractor.org/the-water-challenge-15688>.

and bottled for consumption, it has become bourbon and ceases to be water. One would struggle to mistake bourbon for water, and likely no one would opt to grab a cup of bourbon halfway through a marathon in the summer heat. Similarly, through the application of time, heat, and contact with hydrocarbon-bearing formations, produced water has undergone a fundamental change and become something other than water.

B. Texas law distinguishes between water and produced water and places the burden for managing produced water on operators.

Texas law and regulations recognize the distinction between produced water and water. The Texas Natural Resources Code, Texas Water Code, and RRC Rules all categorize produced water as waste:

- “[O]il and gas waste’ means waste that arises out of or incidental to the drilling for or producing of oil or gas . . . includ[ing] **salt water, brine**, sludge, drilling mud, and other liquid, semiliquid, or solid waste material.” TEX. NAT. RES. CODE § 91.1011 (emphases added).
- “‘Fluid oil and gas waste’ means waste containing salt or other mineralized substances, brine, hydraulic fracturing fluid, flowback water, **produced water**, or other fluid that arises out of or is incidental to the drilling for or production of oil or gas.” *Id.* § 122.001(2) (emphasis added).
- “‘Oil and gas waste’ means waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources . . . includ[ing] . . . **salt water, brine**, sludge, drilling mud, and other liquid or semi-liquid waste material.” TEX. WATER CODE § 27.002(6) (emphases added).
- “The term ‘oil and gas wastes’ includes but is not limited to, **saltwater, other mineralized water**, sludge, spent drilling fluids, cuttings, waste

oil, spent completion fluids, and other liquid, semiliquid, or solid waste material.” 16 TEX. ADMIN. CODE § 3.8(a)(26).³

The Texas Water Code and RRC Rules also define water as distinct from waste:

- “Fresh water” means water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose.” TEX. WATER CODE § 27.002(8).
- “‘Groundwater’ means water percolating below the surface of the earth.” *Id.* § 35.002.
- “Surface or subsurface water [means] [g]roundwater, percolating or otherwise” 16 TEX. ADMIN. CODE § 3.8(a)(29).

This distinction is crucial. Texas law recognizes that the surface estate owns groundwater, including subsurface water. *See, e.g., Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012). But Texas law also imposes the burden of managing oil and gas waste and protecting water from oil and gas waste on operators, not the surface estate owner:

- “No person conducting activities subject to regulation by the [RRC] may cause or allow pollution of surface or subsurface water in the state” 16 TEX. ADMIN. CODE § 3.8(b).

³ The Texas Natural Resource Code also recognizes that produced water is itself a product or byproduct of oil and gas production, rather than groundwater. *See* TEX. NAT. RES. CODE § 85.001(a)(4) (“‘Product’ and ‘product of oil or gas’ mean a commodity or thing made **or thing made or manufactured from oil or gas** and derivatives **or by-products of oil or gas**, including refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, treated crude oil, fuel oil, residuum, gas oil, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, lubricating oil, casinghead gas, casinghead gasoline, blended gasoline, and blends or mixtures of oil, or gas, or any derivatives or **by-products of them.**”) (emphases added).

- “[N]o person may dispose of any oil and gas wastes by any method without obtaining a permit to dispose of such wastes.” *Id.* § 3.8(d)(1).

In fact, **the operator remains liable** (and subject to penalty) for improper management of oil and gas waste **even if a third-party performs the disposal or treatment.** *Id.* § 3.8(d)(5) & (h).

Both the onus placed on operators to properly manage oil and gas waste, including produced water, and the Legislature’s conscious decision to define “groundwater” and “oil and gas waste” separately, indicate that Appellant’s argument that a portion of the oil and gas waste stream amounts to groundwater is incorrect. “[W]hen the legislature uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended.” *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564 (Tex. 2016) (quoting *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995)) (alterations in original). If the Texas Legislature intended for “groundwater” and “oil and gas waste” to mean the same thing, it would not have created a separate definition for oil and gas waste that includes produced water entrained in an oil and gas product stream. *Id.* at 564.

Further underscoring the Legislature’s intent, Chapter 122 of the Texas Natural Resources Code states that ownership of fluid oil and gas waste, which necessarily includes produced water, lies with the *operator* that recycles the waste or transfers it to another for recycling:

[W]hen fluid oil and gas waste is produced and used by or transferred to a person who takes possession of that waste for the purposes of treating the waste for subsequent beneficial use, the waste is considered to be the property of the person who takes possession of it for the purposes of treating the waste for subsequent beneficial use until the person transfers the waste or treated waste to another person for disposal or use.

TEX. NAT. RES. CODE § 122.002.

Section 122.002 also provides a clear exception to the general rule that the operator takes possession of fluid oil and gas waste: the lessor may “expressly provide[] by an oil or gas lease, a surface use agreement, a contract, a bill of sale, or another legally binding document” that it maintains ownership over the fluid oil and gas waste. Cactus misinterprets this exception. In its Reply Brief, Cactus states that the well water reservation is sufficient to suggest that all water—including entrained produced water—was reserved. But the term “expressly” means “clearly and unmistakably communicated; stated with directness and clarity.” EXPRESS, Black’s Law Dictionary (11th ed. 2019). In other words, **the default understanding is that fluid oil and gas waste belongs to the lessee**, unless the lease expressly reserves the *waste*. That is not the case here.

It is presumed that “lawmakers enact statutes with complete knowledge of existing law.” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). Thus, the Legislature was aware of the statutory and regulatory definitions of oil and gas waste, groundwater, surface water, and subsurface water, as well as the

precedent holding that groundwater belongs to the surface estate. The Legislature would not have written Section 122.002 as it has—stating that oil and gas waste (including produced water) belongs to the operator—if it viewed waste and groundwater as one-in-the-same.

II. Industry and regulatory recognition of produced water as oil and gas waste provide the context against which oil and gas leases were struck and should be construed as such.

The overwhelming majority of oil and gas leases in the State of Texas today, including those at issue in this case, were bargained for and agreed to against the backdrop of the regulatory regime discussed above.⁴ Therefore, Texas oil and gas leases have been drafted with knowledge that the Legislature and RRC have distinct and *separate* definitions for oil and gas waste, groundwater, and surface water/subsurface water, and that the operator bears responsibility for management of oil and gas waste.

This legal framework, combined with the decades-long undertaking of oil and gas waste management by operators, provides the critical context in which the leases at issue in this case, and all other oil and gas leases in Texas, must be construed. *See URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 764 (Tex. 2018) (“[T]o home in on the meaning the parties intended, we have long allowed that words must be construed in the context in which they are used.”). Context is not limited to the words on the page

⁴ *See* § I.B, *supra*.

of a lease. Context “may also encompass the circumstances presenting when the contract was entered,” which includes “the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties.” *Id.* (citations omitted). Further, under Texas law, it is presumed that parties to a contract “contract with reference to the law, and they make the law a part of the contract.” *Click v. Seale*, 519 S.W.2d 913, 919 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.).

The leases at issue in this case were negotiated and signed against the regulatory backdrop placing responsibility for managing oil and gas waste with the operator. *See* 16 TEX. ADMIN. CODE § 3.8. The leases at issue in this case—and oil and gas leases in Texas for the last near-century—were entered knowing that “[o]ne of the by-products of oil production is saltwater,” or produced water/fluid oil and gas waste. *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 226 (Tex. 1936). Had the lessors in this case, or any other lessor, intended to reserve for themselves the known, chemically complex, and costly-to-dispose-of fluid oil and gas waste entrained within the production stream, that reservation needed to be *express*. *See Sharp v. Fowler*, 252 S.W.2d 153, 154 (Tex. 1952) (recognizing that, “to be effective,” a reservation must be clear, as “Courts do not favor reservations by implication”); *Ross v. Flower*, No. 03-19-00516-CV, 2021 WL 904864, at *2 (Tex. App.—Austin

Mar. 10, 2021, no pet.) (mem. op.) (“Reservations must be made by clear language, and courts do not favor reservations by implication.”).

But scant few lessors would have made such a reservation. As stated, fluid oil and gas waste is known to be laden with heavy metals, corrosive compounds, and *radioactive materials*. Produced water must be handled with care. Everyone has recognized for decades that produced water poses risks to the public if not properly treated or disposed of, which is precisely why oil and gas waste management is so heavily regulated. And this burden to safely manage oil and gas waste has rested with operators for decades. Appellants cannot upend this system through silence.

III. If Appellant’s arguments are correct, oil and gas exploration and production in Texas will be turned on its head.

If accepted by this Court, Appellant’s contention that the surface estate retains ownership over the entrained fluid oil and gas waste produced from an operator’s wells would cause a sea change in oil and gas exploration and production in Texas. A holding incorporating Appellant’s position could seriously impede significant portions of oil and gas production in Texas. Operators would be required to shut-in producing wells across the state. Surface owners, who are ill-equipped and, in many cases, financially unable to connect pipelines and facilities to producing oil and gas wells, would be required to receive, handle, and dispose and/or treat produced water from thousands of producing wells throughout the state. This result may lead to the plugging and abandonment of otherwise economically viable wells due to the

inability of surface owners to take and handle the vast quantities of produced water, and/or cause operators to bear increased oil and gas waste disposal and/or treatment costs. Such a holding would further imply that the State's regulatory scheme for management of fluid oil and gas waste has been unconstitutional for decades.

A. Appellant's contention that the surface estate has silently retained fluid oil and gas waste threatens the efficient production of minerals in Texas.

Appellant's claim to surface ownership of fluid oil and gas waste, if accepted by this Court, could bring oil and gas production in the busiest areas of Texas to a screeching halt. Oil and gas production in Texas produces a tremendous amount of fluid oil and gas waste each day. The Texas Produced Water Consortium, created in 2021 by an act of the Legislature to study beneficial uses of fluid oil and gas waste, submitted a report to the Legislature in July 2022. This report estimated that oil production in the Delaware and Midland Basins of the Permian also extracted over 3 billion barrels of produced water in 2021.⁵ That is over 9 million barrels of produced water *every single day* in one oil producing region in the state. For context, that is enough daily barrels to fill Olympic-sized swimming pools arranged end-to-end stretching almost 30 *miles*.

⁵ TEXAS PRODUCED WATER CONSORTIUM, *Beneficial Use of Produced Water in Texas: Challenges, Opportunities and the Path Forward* 96 (July 2022), available at <https://www.depts.ttu.edu/research/tx-water-consortium/downloads/22-TXPWC-Report-Texas-Legislature.pdf>.

Necessarily, oil and gas production goes hand-in-hand with removing a tremendous amount of waste from the production stream. *See TDC Eng'g, Inc. v. Dunlap*, 686 S.W.2d 346, 348-49 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (holding that an oil-and-gas lease grants to the lessee “the right to dispose of the salt water” produced with the minerals and recognizing that lessees “must dispose of the salt water (which is produced with the oil) in order to produce the oil”). If producers were to lose the ability to manage produced water safely and efficiently each day, it would cause a monumental disruption of the oil and gas industry, as discussed above.

Yet Appellant seeks to take away Appellee’s ability to manage produced water/fluid oil and gas waste without paying for the privilege. Appellee’s facilities for the leases at issue in this case can store about 24-hours’ worth of fluid oil and gas waste before the waste must be transported away for treatment or disposal.⁶ Appellee’s storage space for waste is not atypical for oil and gas operators in Texas. The oil and gas ecosystem in Texas relies on producers having the ability to transport oil and gas waste every day for treatment and/or disposal. Appellant’s position, if accepted, would preclude Appellee, or any other operator, from the necessary management of oil and gas waste, which would likely lead to the shutting in of wells to prevent exceeding waste storage capacity.

⁶ Appellee’s Br. at 55.

This would be inefficient and contrary to Texas policy. It is “the longstanding policy of this state to encourage maximum recovery of minerals and to minimize waste.” *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 51 (Tex. 2017) (citing TEX. CONST. art. XVI, § 59(a)); TEX. NAT. RES. CODE § 85.045; *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 816 (Tex. 1974). Appellant’s position would encourage reducing recovery of minerals and increase waste, either by encouraging producers to scale back mineral production or by forcing producers to pay companies like Appellant money to manage oil and gas waste in addition to the millions of dollars producers already spend each year on waste management.

B. Appellant’s contention that the surface estate owns fluid oil and gas waste could spur premature abandonment of productive wells.

In addition to creating inefficiencies and reducing production, Appellant’s contentions, if accepted, could lead to producers prematurely plugging and abandoning wells. As discussed above, the cost of managing produced water is a significant factor in the profitability of oil and gas production. Producers such as Appellee spend millions of dollars each year managing produced water.

If Appellant is correct that surface owners can extract additional funds from oil and gas producers for the right to manage produced water, that would impose an even greater cost per barrel of oil produced from any given well. This would turn low-profit wells into commercial failures, and, faced with losing money or cutting their losses and plugging a well, operators will largely opt for the latter. This in turn

would lead to less severance tax remitted to the State for mineral production and less royalty paid to mineral lessors.⁷ This state of the world would benefit no one but Appellant.

CONCLUSION

This Court should affirm the district court's decision in this matter. The district court's decision is in line with long-standing Texas statutes, regulations, case-law, and industry custom and practice concerning fluid oil and gas waste. Further, the district court's decision is in line with the Texas policy of maximizing oil and gas recovery and avoids the tremendous uncertainty and disruption that would result from upending well-settled industry practice.

⁷ The Amicus Curiae Brief filed by the Texas Farm Bureau ("TFB") has raised an argument that if Appellee is correct and produced water is part of the product stream, then royalties should be paid to the groundwater interest holder for all produced water. TFB Br. at 15. But Appellant has never argued for a royalty in either the trial court or before this Court, so the issue is not presented on appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word, this Brief contains 3,538 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i).

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2022, this Brief of Amicus Curiae was served on Counsel for all parties via electronic service through eFile.TXCourts.gov as indicated below:

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