

Summary of *The Edwards Aquifer Authority v. Day*

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The long-awaited decision in the *The Edwards Aquifer Authority v. Day* was released by the Texas Supreme Court on February 24, 2012. The case revolves around the nature of water rights in Texas. Day purchased property within the Edwards Aquifer Authority territory. The authority was created a year before Day purchased the property, but did not become operational until 3 years later. Authority rules require a permit for groundwater withdrawals. The only exception involves wells producing less than 25,000 gallons per day for domestic or livestock use.

Day filed an application for a permit to pump 700 acre-feet of water annually for irrigation based on historical use. The authority "preliminarily found" that Day had established a beneficial use of 600 acre-feet per year and notified Day of the preliminary findings. Day then had a well drilled at a cost of \$95,000. The authority then notified day that his application had been denied due to a failure to prove beneficial use. Day protested and, after a hearing, an administrative law judge found that Day was entitled to pump 14 acre-feet of groundwater per year, based on proof of historical use in that amount.

Day appealed to the district court, which found that Day had proven irrigation of 150 acres (about 1/2 of his original claim), but denied Day's constitutional claims, including a takings claim. The district court granted summary judgment to the authority on the takings claim. Summary judgment means that no genuine issues of material fact exist- all facts are either agreed upon or clear from existing evidence. Since only legal issues remain, the court needs no trial and can rule on the basis of existing law.

Day and the Authority appealed. The court of appeals agreed with the authority that Day was entitled to a permit for only 14 acre-feet per year. In addition the court found that landowners have ownership rights in the groundwater beneath their property that is entitled to constitutional protection, and that Day's takings claim should not have been dismissed.

The Texas Supreme Court held that land ownership includes an interest in "groundwater in place" that cannot be taken for public use without adequate compensation under the Texas Constitution. In examining the validity of the takings claim, the court found that there was not enough evidence in the record to rule on the issue. However, the court's language shows some support for a finding that the regulation amounts to a taking. The court then remanded the case to the district court for a trial on the takings claim.

This case is extremely important for those involved in water resources. The case joins several other state supreme courts that have recently found that groundwater rights are legally recognized rights subject to constitutional protection. In addition, the finding that landowners have a property right to groundwater "in place" is powerful. This means that the landowner's right is not merely a right to use, as has been found in other states, but the right to the groundwater beneath their property before it is

withdrawn. Just a few years ago, many legal commentators asserted that regulation of water use could NEVER be a taking. Now, state supreme courts have started to find that groundwater rights are powerful rights that are protected by the state and United States constitutions. Although this case is binding only in Texas, the result will likely have implications across the United States.