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**Day v. Edwards Aquifer Auth., No. SA-03-CA-0492-FB, 2004 U.S. Dist. LEXIS 8908 (W.D. Tex. Mar. 24, 2004)**

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Day v. Edwards Aquifer Auth., No. SA-03-CA-0492-FB, 2004 U.S. Dist. LEXIS 8908  
(W.D. Tex. Mar. 24, 2004)

resolution approving the out-of-district permit ("Resolution"). To connect their home to the water supply, the Dankos excavated a right of way adjacent to their land that appeared on the Dankos' survey as part of an unimproved street. The Cassaboons owned parcels of land on both sides of the right of way and claimed they owned the right of way under New York law because the Town abandoned it. No party disputed this claim. The Cassaboons claimed their property, if united with the right of way, would be very valuable. As a result, the Cassaboons filed suit.

The court concluded the Town did not violate the Cassaboons' federal rights because the Resolution only gave the Dankos the right to connect to the Town water supply, not to excavate the right of way. The Resolution, therefore, did not authorize the Dankos' excavation. Because the Town did not deprive the Cassaboons of a liberty or property interest, the court dismissed the takings claim and First Amendment claim. The court stated the Town's failure to give the Cassaboons notice of the meeting did not violate the Cassaboons' procedural due process rights because the meeting did not deprive the Cassaboons of property.

Since the Town did not deprive the Cassaboons of a property interest, the court also dismissed the claims for violations of federal rights against the Dankos. The Dankos did not act together with the Town to deprive the Cassaboons of their rights; furthermore, the Dankos were private actors. The court similarly dismissed the condemnation claim against the Dankos because the Town did not take the Cassaboons' property. However, the court allowed the trespass claim against the Dankos to go forward in the New York Supreme Court.

Thus, the court dismissed all of the Cassaboons' claims against the Town and all of the Cassaboons' claims against the Dankos, except for the state law trespass claim.

*Jared Ellis*

**Day v. Edwards Aquifer Auth., No. SA-03-CA-0492-FB, 2004 U.S. Dist. LEXIS 8908 (W.D. Tex. Mar. 24, 2004)** (granting Edwards Aquifer Authority's motion to dismiss because the Edwards Aquifer contained a limited amount of water, the water and its regulation was of vital importance to the citizens of Texas, and the state maintained a comprehensive regulatory system to manage the Aquifer).

On December 30, 1996, Burrell Day and Joel McDaniel (collectively "Day") filed an application with the Edwards Aquifer Authority ("Authority") requesting to withdraw 700 acre-feet of water from the Edwards Aquifer. The Authority approved Day's application in 1998. However, in 1999 Day realized that the existing well needed substantial repairs, and accordingly applied to the Authority to transfer the initial

permit for 700 acre-feet of water from the existing well to a new well that Day planned to drill. The Authority approved Day's request to drill a new well on December 10, 1999. However, on November 8, 2000, the Authority's general manager recommended that the Authority grant Day zero feet of water because Day failed to prove that the water satisfied a "purpose authorized by law." Day objected to this recommendation, and the Authority referred Day's objection to the State Office of Administrative Hearings where an administrative law judge ("ALJ") recommended the Authority grant Day a permit for fourteen acre-feet of water. Day appealed this decision to the Authority's board of directors ("Board"). On March 11, 2003, the Board adopted the ALJ's recommendation and issued Day a permit for fourteen acre-feet of water. Day filed suit in United States District Court for the Western District of Texas. The Authority filed a motion to dismiss the case from federal court because Day's case involved questions of state law and issues of vital state concern.

The Authority based its motion to dismiss on *Sierra Club v. City of San Antonio*, in which the Fifth Circuit Court of Appeals applied the Burford abstention doctrine in cases involving the Authority. The court noted the Burford abstention doctrine turned on whether the plaintiff's claim involved an issue of state law that a state court needed to rule on before the federal case could proceed. The court found the state of Texas retained great interest in the regulation of the Edwards Aquifer, and because the Aquifer contained a finite amount of water, the state should maintain the regulatory scheme. Furthermore, the state maintained a comprehensive administrative and appellate procedure for considering questions regarding the Edwards Aquifer and held greater interest and familiarity with the Aquifer than did the federal government. Therefore, the court granted the Authority's motion to dismiss the case based on the Burford abstention doctrine.

In sum, the court granted the Authority's motion to dismiss because the Edwards Aquifer, a completely intrastate source of water, contained a limited amount of water, because the water and its regulation were of vital importance to Texas, and because Texas already maintained a comprehensive regulatory system to manage the aquifer.

*Brett Johnson*

**Friends of the Earth v. United States Env'tl. Prot. Agency, 346 F. Supp. 2d 182 (D.D.C. 2004)** (holding the Clean Water Act was ambiguous as to whether the United States Environmental Protection Agency must calculate total maximum daily loads on a daily basis and upholding the United States Environmental Protection Agency's adoption of non-daily TMDLs as reasonable statutory construction and reasonably determined to achieve daily water quality standards).