

By: Lozano

H.C.R. No. 117

CONCURRENT RESOLUTION

1 WHEREAS, Sumitomo Mitsui Banking Corporation, as collateral  
2 agent for certain secured lenders and other entities, some of which  
3 are headquartered or incorporated in Texas, alleges that:

4 (1) Papalote Creek Wind Farm II, LLC, built, owns, and  
5 operates a wind farm that generates electricity in San Patricio  
6 County, Texas, on land leased from many San Patricio County  
7 landowners;

8 (2) before Papalote Creek Wind Farm II, LLC,  
9 constructed the San Patricio wind farm, Papalote Creek Wind Farm  
10 II, LLC, and the Lower Colorado River Authority, a conservation and  
11 reclamation district created by Chapter 7 (S.B. 2), Acts of the 43rd  
12 Legislature, 4th Called Session, 1934, now codified as Chapter  
13 [8503](#), Special District Local Laws Code, executed a power purchase  
14 agreement, under which Papalote Creek Wind Farm II, LLC, agreed to  
15 sell and the authority agreed to take and pay for all of the San  
16 Patricio wind farm's power generation;

17 (3) under the power purchase agreement's terms:

18 (A) the Lower Colorado River Authority promised  
19 to purchase at a set price all of the wind-generated power from the  
20 San Patricio wind farm during an 18 year term in accordance with the  
21 power purchase agreement; and

22 (B) the Lower Colorado River Authority is  
23 required to pay Papalote Creek Wind Farm II, LLC, damages if the  
24 authority fails to meet the authority's purchasing obligations

1 under the power purchase agreement;

2 (4) the Lower Colorado River Authority's promises to  
3 buy electricity or pay damages were crucial to the San Patricio wind  
4 farm's viability, and Papalote Creek Wind Farm II, LLC, built the  
5 San Patricio wind farm in reliance on those promises;

6 (5) in 2013, Papalote Creek Wind Farm II, LLC, sought  
7 financing from secured lenders and other entities for which  
8 Sumitomo Mitsui Banking Corporation serves as collateral and  
9 administrative agent;

10 (6) the Lower Colorado River Authority's long-term  
11 power purchase agreement commitments to Papalote Creek Wind Farm  
12 II, LLC, were important to the financing and payment of the  
13 obligations of Papalote Creek Wind Farm II, LLC, to Sumitomo Mitsui  
14 Banking Corporation and the other secured lenders and required  
15 that:

16 (A) Papalote Creek Wind Farm II, LLC, assign its  
17 rights under the power purchase agreement to Sumitomo Mitsui  
18 Banking Corporation as collateral for the financing; and

19 (B) the Lower Colorado River Authority make  
20 related agreements to ensure the authority's continued performance  
21 under the power purchase agreement in the event of the occurrence  
22 and continuance of an event of default under the financing;

23 (7) Papalote Creek Wind Farm II, LLC, Sumitomo Mitsui  
24 Banking Corporation, and the Lower Colorado River Authority  
25 executed the consent to assignment of the rights under the power  
26 purchase agreement, and the authority's obligations under the power  
27 purchase agreement were crucial to Sumitomo Mitsui Banking

1 Corporation's financing of Papalote Creek Wind Farm II, LLC;

2 (8) the consent to assignment of power purchase  
3 agreement grants Sumitomo Mitsui Banking Corporation the right to  
4 compel the Lower Colorado River Authority to specifically perform  
5 its obligations under the power purchase agreement and prohibits  
6 the authority from modifying the power purchase agreement without  
7 Sumitomo Mitsui Banking Corporation's prior written consent;

8 (9) the Lower Colorado River Authority has breached  
9 the consent to assignment of power purchase agreement by:

10 (A) modifying the power purchase agreement  
11 without Sumitomo Mitsui Banking Corporation's prior written  
12 consent through a separate arbitration to which Sumitomo Mitsui  
13 Banking Corporation was not a party; and

14 (B) ceasing performance under the power purchase  
15 agreement, in violation of the consent to assignment provision that  
16 the Lower Colorado River Authority must continue to specifically  
17 perform its obligations under the power purchase agreement when  
18 directed to do so by Sumitomo Mitsui Banking Corporation;

19 (10) the consent to assignment of power purchase  
20 agreement grants Sumitomo Mitsui Banking Corporation the right to  
21 compel the Lower Colorado River Authority to specifically perform  
22 the authority's obligations under the power purchase agreement, and  
23 provides that if the corporation notifies the authority in writing  
24 that an event of default has occurred and is continuing, and  
25 requests that the authority continue performance under the power  
26 purchase agreement, the authority must perform under the power  
27 purchase agreement in accordance with the terms of that agreement;

1           (11) Sumitomo Mitsui Banking Corporation has:

2                   (A) notified the Lower Colorado River Authority  
3 in writing that an event of default has occurred and is continuing;  
4 and

5                   (B) requested continued performance of the power  
6 purchase agreement by the Lower Colorado River Authority;

7           (12) Section 20 of the consent to assignment of power  
8 purchase agreement further provides: "This Consent does not confer  
9 any additional rights or obligations from the Consenting Party to  
10 the Assignor or the Assignee other than those contained in this  
11 Consent. THE PARTIES AGREE TO SEEK SPECIFIC PERFORMANCE AS THE SOLE  
12 AND EXCLUSIVE REMEDY FOR ANY AND ALL CLAIMS ARISING FROM THIS  
13 CONSENT AGREEMENT. THE PARTIES' REMEDIES UNDER THIS CONSENT ARE  
14 LIMITED TO SPECIFIC PERFORMANCE ONLY AND THE PARTIES AGREE THAT  
15 THEY WILL NOT SEEK DAMAGES OR ANY OTHER REMEDIES AT EQUITY OR LAW.";

16           (13) the purpose of the consent to assignment of power  
17 purchase agreement entered into by the Lower Colorado River  
18 Authority was to facilitate the financing arrangements of Papalote  
19 Creek Wind Farm II, LLC, by further guaranteeing that the authority  
20 would continue to buy power throughout the term of the power  
21 purchase agreement;

22           (14) Sumitomo Mitsui Banking Corporation and the  
23 secured lenders relied on the Lower Colorado River Authority's  
24 agreements and obligations as set forth in the consent to  
25 assignment of power purchase agreement in connection with the  
26 financing, including the authority's consent and agreement to the  
27 bringing of a specific performance action against the authority

1 with respect to the enforcement of the rights of Sumitomo Mitsui  
2 Banking Corporation and the secured lenders under the consent to  
3 assignment of power purchase agreement;

4 (15) the Lower Colorado River Authority has asserted  
5 that it is immune from suit for breach of the consent to assignment  
6 of power purchase agreement;

7 (16) the Lower Colorado River Authority's position is  
8 legally erroneous under Texas law;

9 (17) Sumitomo Mitsui Banking Corporation seeks to  
10 enforce the rights granted to it under the consent to assignment of  
11 power purchase agreement;

12 (18) Sumitomo Mitsui Banking Corporation does not seek  
13 authorization or permission to join any other agency or institution  
14 of the State of Texas in any other lawsuit; and

15 (19) Sumitomo Mitsui Banking Corporation is not  
16 seeking the recovery of monetary damages from the State of Texas,  
17 but only the ability to fully litigate and obtain relief against the  
18 Lower Colorado River Authority; now, therefore, be it

19 RESOLVED by the Legislature of the State of Texas, That  
20 Sumitomo Mitsui Banking Corporation, as collateral agent for  
21 certain secured lenders, is granted permission to sue the Lower  
22 Colorado River Authority subject to Chapter 107, Civil Practice and  
23 Remedies Code; and, be it further

24 RESOLVED, That the suit authorized by this resolution may be  
25 brought in San Patricio or Travis County; and, be it further

26 RESOLVED, That the attorney general, the general manager of  
27 the Lower Colorado River Authority, and the presiding officer of

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1 the board of directors of the Lower Colorado River Authority be  
2 served process as provided by Section [107.002\(a\)\(3\)](#), Civil Practice  
3 and Remedies Code.