

**ROMERO v. BERNELL**  
Cite as 603 F.Supp.2d 1333 (D.N.M. 2009)

1333

**Martin E. ROMERO and Dennis  
C. Romero, Petitioners,**

v.

**Ronald BERNELL, Respondent  
and Third-Party Plaintiff,**

v.

**Eliu E. Romero, Third-  
Party Defendant.**

**No. CIV 08-422 BB/WDS.**

United States District Court,  
D. New Mexico.

March 24, 2009.

**Background:** Tenants in common petitioned to partition section of land with alleged principal value for wind farm development, and third-parties opposed on ground that wind power rights allegedly were not capable of being partitioned.

**Holding:** The District Court, Bruce D. Black, J., held that inchoate interest in wind power rights did not prevent partition.

Petition granted.

#### **1. Partition ⇨34**

Under New Mexico law, partition is a much favored remedy because partition serves peace, promotes the enjoyment of property, and advances industry and enterprise. West's NMSA § 42-5-1.

#### **2. Partition ⇨13**

Under New Mexico law, a cotenant is entitled to a partition as a matter of right, not merely as a matter of grace, within the discretion of the district court. West's NMSA § 42-5-1.

#### **3. Partition ⇨14, 22**

Under New Mexico law, partition can be denied only when the partition is against public policy, legal principles, or equitable principles, or when partition is waived by an agreement of the parties. West's NMSA § 42-5-1.

#### **4. Mines and Minerals ⇨47**

##### **Property ⇨2, 7**

Minerals in place are considered real estate in New Mexico, and when severed, they become personal property; however, wind is never embedded in the real estate, but rather, is more like water or wild animals which traverse the surface and which do not belong to the fee owner until reduced to possession.

##### **5. Property ⇨2, 7**

The right to harvest wind energy is an inchoate interest in the land which does not become vested until reduced to possession by employing it for a useful purpose; only after wind energy is reduced to actual wind power can wind energy then be severed and/or quantified.

#### **6. Waters and Water Courses ⇨133**

Under New Mexico law, individual rights to water can be acquired only by appropriation and application of the water to beneficial use.

#### **7. Waters and Water Courses ⇨142, 151**

Under New Mexico law, once water is appropriated by being actually used for some beneficial purpose, the water right may become vested by continuous use or lost completely or partially through non-use.

#### **8. Partition ⇨14**

Third parties' objections to petition by tenants in common to partition section of land with alleged principal value for wind power development, on grounds that wind power rights purportedly were not capable of being partitioned, did not prevent partition of land, under New Mexico law, since right to harvest wind energy was inchoate interest in land that would not become vested until reduced to possession by employing wind energy for useful purpose. West's NMSA § 42-5-1.

### 9. Partition $\S$ 77(4)

In a partition proceeding, under New Mexico law, the party claiming that minerals prevent an equitable partition without manifest injury has the burden of demonstrating that the land contains such minerals. West's NMSA  $\S$  42-5-1.

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#### MEMORANDUM OPINION AND ORDER OF PARTITION

BRUCE D. BLACK, District Judge.

THIS MATTER is before the Court on a Petition to Partition [Doc. 22] a section of land in Taos County. The Court having considered the briefs of counsel and having held oral argument on November 13, 2008, and performed additional research, finds the Petition for Partition should be Granted.

#### Discussion

Petitioners Martin E. Romero and Dennis C. Romero allege they are owners as tenants in common of Section 11, Township 27 North, Range 10 East, N.M.P.M., located approximately eight miles east of Tres Piedras, Taos County, New Mexico. Petitioners also own Section 12 which adjoins Section 11 on the west, and they also own Section 15 which is located to the southwest of Section 11. They seek to partition the land under NMSA 1978  $\S$  42-5-1 (2007 Cum. Supp.). That provision provides:

When any lands, tenements or hereditaments shall be owned in joint tenancy, tenancy in common or coparcenary, whether the right or title be derived by donation, grant, purchase, devise or descent, it shall be lawful for any one or more persons interested, whether they be in possession or not, to present to the district court their complaint in chancery, praying for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition cannot be made without great prejudice to the owners.

Respondent opposes the Petition for Partition on the ground that "the property cannot equitably be partitioned because the principal value of the property appears to be for a wind farm development." (Resp. Br. p. 2). This is based on Respondent's underlying premise "that wind power rights, like mineral rights, are not capable of being partitioned." (Resp. Br. p. 4).

[1-3] Partition is a remedy much favored by the law. *Sims v. Sims*, 122 N.M. 618, 930 P.2d 153, 164 (1996). This is because "[p]artition serves peace, promotes the enjoyment of property, and advances industry and enterprise." *Id.* Under New Mexico law, a cotenant is therefore entitled to a partition as a matter of right, not merely as a matter of grace, within the discretion of the court. *Martinez v. Martinez*, 98 N.M. 535, 650 P.2d 819, 823-4 (1982). It can be denied only when the partition is against public policy, legal principles, equitable principles or is waived by an agreement of the parties. *Id.*

[4] Respondent's argument that he *might be* disadvantaged in the future if Petitioners develop a wind farm and if his share of the partitioned land is not invited to participate, is too speculative to contemplate. Initially, the Court rejects Respondents' premise that wind is analogous to

minerals *in situ*. While New Mexico has no relevant statutory or case law on the subject,<sup>1</sup> it does not appear minerals in the ground are the appropriate commodity to create a legal paradigm to analyze wind power. Minerals in place are considered real estate in New Mexico. *Bolack v. Underwood*, 340 F.2d 816 (10th Cir.1965). When severed they become personal property. *Townsend v. State ex rel. State Highway Dept.*, 117 N.M. 302, 871 P.2d 958 (1994). Wind is never embedded in the real estate; rather, it is more like water or wild animals which traverse the surface and which do not belong to the fee owner until reduced to possession. Attorney Terry Hogwood made this comparison:

Strictly speaking, the ownership of wind is a misnomer. Wind, in and of itself, does not appear to be susceptible of any ownership. It is not like oil and gas in place where there is a deposit of hydrocarbons which can be reduced to possession by one or more mineral owners of the tracts under which the hydrocarbon deposit resides. Wind itself is more akin to a wild animal or percolating waters which must first be reduced to possession before they have value. To reduce wind to "possession" appears to require that it be focused on driving the fins of a windmill which turn a generator and ultimately generates electricity. Then and only then can wind a) be reduced to possession and b) have value.

Terry E. Hogwood, *Against the Wind*, 26 Tex. Oil, Gas and Energy Resources Law Section 6 (Dec. 2001) (footnotes omitted). See also Roderick E. Wetsel, H. Alan Carmichael, *Current Issues in Wind Energy Law 2009*, 20th Annual Advanced Real Es-

tate Drafting Course, Texas Bar 2009, p. 17.

[5] The right to "harvest" wind energy is, then, an inchoate interest in the land which does not become "vested" until reduced to "possession" by employing it for a useful purpose.<sup>2</sup> Only after it is reduced to actual wind power can wind energy then be severed and/or quantified. See, e.g., *Contra Costa Water Dist. v. Vaquero Farms*, 58 Cal.App.4th 883, 68 Cal. Rptr.2d 272 (1997).

[6, 7] This analysis is consistent not only with logic but with New Mexico's legal treatment of the most analogous natural resource, water. It is long established in New Mexico that individual rights to water can be acquired only by appropriation and application of the water to beneficial use. *Hagerman Irr. Co. v. McMurry*, 16 N.M. 172, 113 P. 823 (N.M.Terr.1911); *Hydro Resources Corp. v. Gray*, 143 N.M. 142, 173 P.3d 749, 756 (2007). The only right obtainable in water is the right to appropriate so much as is actually used for some beneficial purpose. *Hydro Resources, supra*; *Walker v. United States*, 142 N.M. 45, 162 P.3d 882, 888-9 (2007). Once appropriated, the water right may become vested by continuous use or lost completely or partially through non-use. *Walker, supra*; *Albuquerque Land & Irr. Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357, 361 (N.M.Terr.1900), *aff'd*, 188 U.S. 545, 23 S.Ct. 338, 47 L.Ed. 588 (1903).

[8, 9] Respondents, then, have no legal objection to partition on the ground that the future "principal value of the Property appears to be for wind farm development." (Resp. Br. p. 2).<sup>3</sup> Nor would it necessarily

1. Wind is recognized as an alternative fuel in the Advanced Energy Technologies Economic Development Act, § 71-7-4 NMSA 1978 (2007 Repl. Pam.).

2. Traditionally, unharnessed wind has been viewed as a destructive force which diminish-

es the value of the land. See, e.g., *Wolff v. State of Illinois*, 47 Ill. Ct. Cl. 201, 203, 1991 WL 755930 (Ill.Ct.Cl.).

3. In the hypothetical event Petitioners actually build one or more wind propellers, it appears Respondent has traditional common

hold that even if the Court accepted Respondent's premise that wind is analogous to minerals *in situ* that partition would be inappropriate. In a partition proceeding, the party claiming minerals prevent an equitable partition without manifest injury has the burden of demonstrating that the land contains such minerals. *Sandoval v. Sandoval*, 61 N.M. 38, 294 P.2d 278, 281 (1956).

### ORDER

For the above stated reasons, Petitioners' Petition to Partition will be GRANTED. The parties may suggest the names of appropriate commissioners to go upon the premises and make partition of said land, said names to be submitted on or before April 8, 2009.

