Solar Rights in the United States

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CHAPTER X: SOLAR RIGHTS IN THE UNITED STATES

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Introduction

Solar rights are legal rights needed to ensure that a piece of land has access to sunlight. These rights may be of interest to property owners seeking to undertake a variety of activities: farming, lighting, and clothes drying, to name a few. But perhaps the most economically significant purpose for which solar rights may be utilized is for the purpose of solar collectors. Such devices are used to harness the rays of the sun and transform them into thermal, chemical, or electrical energy. In an era of increasing deployment of solar collectors across the globe, the fair and efficient allocation of solar rights is of increasing importance.

This chapter will focus on solar rights in the United States. It will address how solar rights are currently allocated and will suggest the need to formulate solar rights that will deliver more optimal policy results in the future.  

Current Means of Allocating Solar Rights

In the United States today, there are three primary methods of allocating solar rights: express agreements, governmental allocations, and court assignments. Each of these methods attempts to account for the natural path of sunlight – which runs over one parcel to get to another – and to resolve actual or potential disputes among neighbors.

Before describing each of these methods in greater detail, it is important to establish the legal framework within which they operate. In the United States, there is no national solar rights regime. Rather, the fifty states may choose to articulate the right to access sunlight, through legislatures, courts, and political subdivisions. Few states have adopted a statewide solar regime through their legislatures or expressly authorized political subdivisions to do so. Few courts

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3 Native American tribes, which have their own federally recognized tribal governments, and the territories (such as Puerto Rico) may also choose to articulate solar rights regimes.
have opined on the creation of solar rights. And few political subdivisions (such as cities and counties) have passed local rules establishing solar rights. The various articulations of solar rights thus form a patchwork, leading to inconsistencies from jurisdiction to jurisdiction. Moreover, there are many jurisdictions where solar rights are either hardly or not at all considered.

With that background in mind, we now turn to the three methods of allocating solar rights.

The first is through express agreements: arrangements between private parties who have bargained to establish solar rights. They may take the form of an access easement across the parcel of a neighbor, a covenant restricting the use or land, or a landlord-tenant arrangement. Such arrangements may be perpetual or finite in term; they may be assignable or not. The biggest benefit of an express agreement is that the parties subject to it have created a solar right by allocating associated burdens in the way they deem most suitable. From that perspective, the express agreement is a fair method. Unfortunately, not all jurisdictions explicitly allow for solar rights to be created by express agreements between private parties. Parties may, however, conceptually extend existing statutory provisions or common law authorizing easements, covenants, and tenancies to the solar context. Note, however, that if key parties do not agree to create a solar right, it will not be created. Moreover, even where rights are created through express agreements, they come in so many customized forms that their effectiveness may be difficult to track.

The second means of creating solar rights is through governmental allocation, namely, awards of solar permits or the enforcement of local solar zoning ordinances. Three states have established solar permitting regimes, which require applicants to apply to a public body if they want to protect their future utilization of sunlight for some beneficial use. The award of a permit prevents neighboring property owners in the path of the sun from blocking solar access of the permit holder. In addition, in the United States, political subdivisions are empowered by the respective states to create zoning rules: regulatory schemes specifying where certain land uses may occur, usually in the context of a local comprehensive plan. Several states allow localities to zone for solar access, and a handful of cities have developed full solar zoning regimes. The biggest benefit of governmental allocations is that the regime is set forth in advance, improving predictability and uniform application. However, the costs of obtaining and applying for permits may be high for individual applicants.

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4 New Mexico, Wisconsin, and Wyoming are the three states that have statewide solar permitting rules. However, Wisconsin and Wyoming delegate their power to approve solar permits to localities. See N.M. STAT. ANN. §§ 47-3-1 to -5; WIS. STAT. ANN. § 66.0403; WYO. STAT. ANN. § 34-22-103. Various cities, including Portland, Oregon, have established solar permitting regimes. PORTLAND, OR., CITY CODE & CHARTER § 3.111.050.

5 Arizona, Connecticut, Indiana, Iowa, Minnesota, Nebraska, New York, Oregon, Tennessee, Washington, Wisconsin, and Wyoming are among the states that expressly authorize localities to express solar energy. See ARIZ. REV. STAT. ANN. § 9-462.01(A)(3); COLO. REV. STAT. § 31-23-301; CONN. GEN. STAT. ANN. § 8-2(a); IND. CODE ANN. §§ 36-7-2-2, -8; IOWA CODE ANN. § 335.5 & 414.3; MINN. STAT. ANN. § 394.25(2) & 462.357(1); NEB. REV. STAT. § 66-913; N.Y. GEN. CITY LAW § 20(24); N.Y. TOWN LAW § 263; N.Y. VILLAGE LAW § 7-704; OR. REV. STAT. ANN. §§ 215.044, 227.190 & 227.290(2); TENN. CODE ANN. § 13-7-101; WASH. REV. CODE ANN. § 36.70.560; WIS. STAT. ANN. § 62.23(7)(c); WYO. STAT. ANN. § 34-22-105(a).

6 The most prominent of these cities is Boulder, Colorado. See BOULDER, COLO., REV. CODE § 9-9-17(d)(1); CITY OF BOULDER, SOLAR ACCESS GUIDE OR SOLAR SHADOW ANALYSIS 1 (2006).
The third means of creating solar rights is through court assignment of such rights. Private parties have attempted to persuade judges to create solar rights through theories of private nuisance, prescriptive easement, or implied easement. Courts in the United States have generally rejected these theories. In contrast, the English “ancient lights” rule allows for parties to establish a prescriptive easement in solar access after twenty years. American courts rejected this rule starting in colonial times, because they felt that adopting it would unduly limit growth in emerging cities and towns. These days, the biggest disadvantage for American applicants seeking to persuade courts to create solar rights is cost: litigation is time-consuming and expensive, and given judicial precedent unlikely to yield positive results.

**Future Means of Delivering Solar Rights**

As the preceding section described, the United States lacks a uniform approach to solar rights. Different state and local jurisdictions have experimented with different legal regimes, and private parties have also tried to adapt existing law to advance their own solar rights choices. That more attention has not been paid to developing consistent, universal best practices with regard to solar rights may be surprising for two reasons. First, sunlight is an increasingly valuable resource given the rapidly expanding market for solar collectors. Where access to sunlight is not well-articulated, economic value might not be maximized. Second, solar energy is highly subsidized by public entities, through grants, tax credits, low-interest loans, and special financing methods. Without appropriate and consistent solar rights rules, the value of these public incentives may be jeopardized.

A more deliberate and clear approach to solar rights is advisable. The appropriate jurisdiction to articulate solar rights is state governments, which are the jurisdictions that typically allocate property rights in the United States. First, state legislatures should explicitly authorize solar easements, solar covenants, and landlord-tenant arrangements that provide for solar rights. The authorization of such express agreements would ensure that private parties feel more secure bargaining with each other to allocate rights into the future. Second, state legislatures must allocate rights through permitting regimes, which would allow property owners to apply ex ante, and should explicitly allow localities to consider solar rights in their zoning ordinances. Adopting public processes and criteria for the allocation of solar rights may reduce the burdens of cost and time on individual property owners seeking to invest in solar energy. A thumb on the scales might be placed in favor of solar energy by providing that the initial entitlement be placed with the solar rights seeker, and not with the person or entity seeking to stop her, and by prioritizing energy first among various uses of sunlight (farming, lighting, and clothes drying, for example). Third, state legislatures might establish scenarios in which courts may find solar rights are established through nuisance, prescriptive easements, and implied easement theories. A small handful of states have already begun to do this, particularly in the situation where blocking a solar collector is a nuisance, and more should follow suit.

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7 The English “ancient lights” rule dates back to the sixteenth century. See Prescription Act, 1832, 2 & 3 Will., 4, c. 71, § 3 (Eng.) (codifying this rule by establishing a permanent easement for property owners whose uninterrupted access to light lasts for twenty years).

8 California is one of those states. See CAL. PUB. RES. CODE §§ 25980–25986 (naming as a public nuisance any tree or shrub which, during the hours of ten a.m. and two p.m., shades more than ten per cent of the area around a previously installed solar collector).
With more explicit rules allocating solar rights, more people may be willing to invest in solar energy. This may particularly be true in urban areas where neighboring property owners are located closer to each other than in rural areas and thus have a greater likelihood of blocking the other’s sunlight.