

I'm Walking on Sunshine: Key Contract Terms and Other Pitfalls & Pointers in Solar Leasing



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Today's Presentation

- ▶ Policy Drivers for Solar Development
- ▶ Types of Solar Leasing Clients
- ▶ Leasing Questions to Explore
- ▶ Common Clauses in Options and Leases and Negotiation Points
- ▶ Solar Leasing Due Diligence
- ▶ Mineral Rights
- ▶ Water Rights
- ▶ Related and Supporting Infrastructure
- ▶ Habitat Mitigation
- ▶ Public Lands Leasing

Policy Drivers for Solar Leasing

- ▶ State-adopted Renewable Portfolio Standards (RPS)
- ▶ Investment Tax Credits (ITCs)
- ▶ Production Tax Credit (PTCs)
- ▶ Improved technology, falling cost of technology
- ▶ Corporate purchasing of renewable energy
- ▶ Energy independence and resiliency
- ▶ Increasing awareness of climate crisis

Lawyer Caveat

This presentation is intended to cover general topics, contract provisions, and situations related to solar leasing in the United States, particularly in the West. It is not intended to cover every potential situation or provision nor any particulate state's law.

Types of Solar Leasing Clients

New solar developer client

Existing solar developer client

New landowner client

Existing landowner client

Large resource landowner for Higher Better Use (HBU) opportunities

Investors

Leasing Questions to Explore

- ▶ Client Type: Landowner approached by Solar Developer



- ▶ Buckets of questions:



- ▶ Questions about the client;
- ▶ Questions about the premises;
- ▶ Questions about the economics; and
- ▶ Questions about what terms have been agreed to already.



Leasing Questions to Explore

- ▶ Client Type: Solar Developer begins negotiation with Landowner



- ▶ Buckets of questions:



- ▶ Questions about the project generally;
- ▶ Questions about the strategy;
- ▶ Questions about the timelines; and
- ▶ Questions about the end goal of the project.



Common Clauses in Options & Leases that Need Review and Revisions

- ▶ Payment structure
- ▶ Due diligence review
- ▶ Options for renewals
- ▶ Construction obligations
- ▶ Coordination between landowner and developer during project phases
- ▶ Ongoing obligations associated with maintenance
- ▶ Damage to timber/crops/land
- ▶ Representations and warranties
- ▶ Assignability
- ▶ Termination rights
- ▶ Restoration and decommissioning obligations and performance bonds
- ▶ Insurance
- ▶ Taxes
- ▶ Dispute resolution (arbitration or jury trial)
- ▶ Attorneys' fees
- ▶ Confidentiality
- ▶ Legal descriptions and depictions of property
- ▶ Recorded memorandums

Solar Leases in Project Due Diligence

- ▶ Time period for diligence, mile markers;
- ▶ Local or state permitting pathways;
- ▶ Critical environmental issues;
- ▶ Land partition/division;
- ▶ Title;
- ▶ Access;
- ▶ Mineral rights;
- ▶ Water rights; and
- ▶ Taxes.

Solar Leasing and Mineral Rights

Can they coexist?

- ▶ If representing a solar developer, it is generally recommended to obtain a mineral reports if the area is known for minerals or the preliminary title reports identifies a severance of the mineral rights.
- ▶ Avenues to address mineral rights:
 - ▶ Agreement with the mineral rights owner in which the owner consents to the solar lease and waives its surface and subsurface rights for the duration of the lease term.
 - ▶ Dormant, lapsed or abandonment minerals statute.
 - ▶ Example is RCW 78.22.

Solar Leasing and Water Rights

- ▶ Is a water right attached to the land?
- ▶ Is site within an irrigation or other water district?
- ▶ Water needs for construction?
- ▶ Water needs for operation?
- ▶ Transfers of water rights
- ▶ Preservation of rights

Solar Leasing and Battery Storage, Transmission, Substations

- ▶ What facility components are allowed under the lease?
 - ▶ Solar pv arrays only?
 - ▶ Other related or supporting infrastructure?
 - ▶ High voltage transmission lines?
 - ▶ Battery storage - lithium or flow or both?
- ▶ Factors
 - ▶ Fire and safety
 - ▶ Noise levels
 - ▶ Visual impacts

Habitat Mitigation

- ▶ Solar project may require in-kind mitigation
- ▶ Landowner may have land suitable for mitigation
- ▶ Solar developer may want to limit number of involved landowners

Examples of Scale (7-10 acres/MW)

- ▶ 3,000-acre solar pv in Oregon Category 2 Big Game Habitat = up to 6,000 acres for in-kind mitigation to achieve habitat mitigation goal
- ▶ 3,000-acre solar pv in Oregon Category 4-5 Habitat = @ 3,000 acres +/-
- ▶ 3,000-acre solar pv in Oregon Category 6 Habitat = no in-kind mitigation

Lease Portfolio Management

Opportunity

- ▶ Large landowner negotiating and holding multiple leases and projects
- ▶ Solar developer negotiating and holding multiple leases and projects

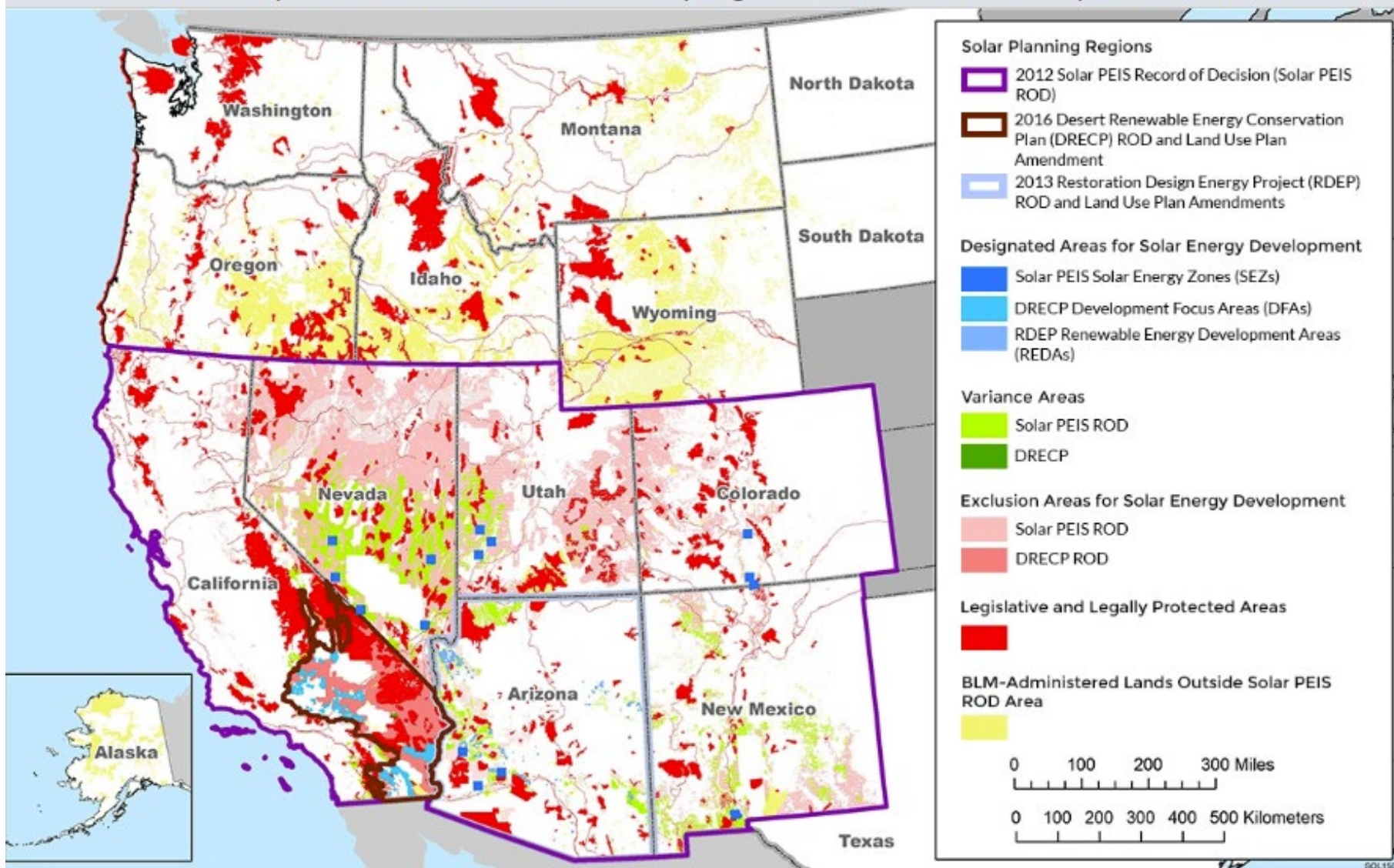
Solution

- ▶ Portfolio management for proposed, new and existing leases
- ▶ Help standardize templates, terms, range of negotiation gives, critical dates, performance measures, etc.
- ▶ Local counsel network

Public Land Solar Development

- ▶ BLM 2023 Solar Programmatic Environmental Impact Statement
 - ▶ Updates to 2012 Western Solar Plan (AZ, CA, CO, NV, NM, and UT)
 - ▶ Seeking comments to include ID, OR, WA, and WY
- ▶ BLM Competitive and Non-Competitive Solar Leasing ([43 CRF 2809](#))
 - ▶ Solar Energy Zones
 - ▶ Desert Renewable Energy Conservation Plan Development Focus Areas
 - ▶ Restoration Design Energy Project Renewable Development Areas
- ▶ BLM rulemaking to evaluate conservation to a permitted use for federal land
 - ▶ [88 CRF 19583](#), Proposed Rule (4/3/2023)

Click on your area of interest in the map legend below for location-specific information: ↓



Concluding
Thoughts
and
Questions?





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► Thank you!