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Deborah S. Grout

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ACCESS TO SUNLIGHT: NEW MEXICO'S SOLAR RIGHTS ACT

PROPERTY LAW—SOLAR RIGHTS

The New Mexico Legislature has enacted a statute for the purpose of protecting a solar collector's access to sunlight. The statute creates a new type of property right, called a "solar right," which is similar to a New Mexico water right.

INTRODUCTION

As fossil fuels become more scarce and expensive, the sun's rays will become an increasingly important source of energy. On-location solar collection systems for heating and cooling buildings are expected to be the first applications of solar energy to receive widespread use. These systems require that the solar user invest a large sum when the system is installed. Because fuel costs are negligible, this investment is repaid over the life of the system. But because the sun's rays usually strike the earth at a slant, developments on neighboring property can interfere with a collector's access to sunlight and render the system useless. Would-be solar users will require some guarantee of solar access before they can be expected to risk an investment in a solar energy system.

Some state legislatures have already taken steps to help ensure solar access for solar collectors. Two states have focused on protecting solar access in new subdivisions: a Minnesota statute allows municipalities to plan for solar access through subdivision regulations;¹ California has a statute which provides that local government may require the dedication of easements for solar access in the course of approving new subdivisions.² But the most common approach has been the adoption of statutes which define and specifically allow express solar easements. At present California, Colorado, Georgia, Idaho, New Jersey, North Dakota, and Virginia have statutes of this type.³

1. MINN. STAT. ANN. §462.358(2) (Supp. 1979).

2. CAL. GOV'T. CODE §66475.3 (West 1978).

3. CAL. CIV. CODE §801 (West 1979); COLO. REV. STAT. §§38-32.5-101 to 5-102 (Supp. 1978); GA. CODE ANN. §§85-1411 to 85-1414 (Supp. 1978); N.J. STAT. ANN. §§46:3-24 (West Supp. 1979); VA. CODE §§55-352 to 55-354 (Supp. 1979); N.D. CENT. CODE §§47-05-01.1 to 47-05-01.2 (Repl. 1978); 1978 Idaho Sess. Laws, Ch. 296.

The advantages of the solar easement approach are that easements may be contracted for privately, and that they provide security in established neighborhoods as well as new ones. One disadvantage is that voluntary easements will often have to be obtained from a large number of landowners.⁴ These easements could add a significant expense to the cost of a solar system and in some cases might make it prohibitively expensive. As public policy increasingly favors solar development, means of protecting solar access must be found which do not place the entire cost of acquiring protection on the individual solar user. The most far-reaching approach of this type to date is New Mexico's Solar Rights Act.⁵

NATURE OF THE SOLAR RIGHT

In 1977, the New Mexico Legislature passed a statute which protects solar access by creating a new type of property right. This new right, called a "solar right," is based on the concepts of beneficial use and prior appropriation and is in some ways similar to a New Mexico water right. Just as the owner of a water right does not "own" water but rather has a right to divert it and put it to a beneficial use,⁶ so the owner of a solar right does not own sunlight but has the right "to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector."⁷ In order for a solar right to vest, the sunlight must be put to a beneficial use. This beneficial use is the "basis, measure and limit of the solar right, except as otherwise provided by written contract."⁸

Another similarity between water rights and solar rights is the application of the rule of prior appropriation. Although the statute is not perfectly clear, a solar user apparently establishes a right only to the sunlight which is not blocked at the time the collector is first beneficially used.⁹ Any buildings or structures which exist at the time the solar right vests have a "prior right" to the space they occupy. After the solar right vests, no new structures (vegetation is not mentioned) may impair the collector's access to direct sunlight at any time while the collector is being beneficially used. Thus, a collec-

4. Miller, Hayes & Thompson, *Solar Access and Land Use: State of the Law*, LEGAL BARRIERS TO SOLAR HEATING AND COOLING OF BUILDINGS 11, Environmental Law Institute, Wash., D.C. (19____).

5. N.M. STAT. ANN. §§ 47-3-1 to 47-3-5 (1978). See APPENDIX A for text of statute.

6. N.M. STAT. ANN. §§ 72-1-1 to 72-1-4 (1978).

7. N.M. STAT. ANN. § 47-3-3(B) (1978).

8. N.M. STAT. ANN. § 47-3-4(B)(1) (1978).

9. N.M. STAT. ANN. §§ 47-3-4(B)(1), (2) (1978).

tor which is put to beneficial use immediately appropriates the airspace that it will require at all times during the year.

Like a water right, a solar right is also freely transferable.¹⁰ A solar user may sell his or her solar rights to anyone who wishes to put the collector's airspace to another use. Section 4(B)(3) provides that the transfer of a solar right is to be recorded in the same way that deeds, mortgages, and other instruments affecting title to real estate are recorded.

POTENTIAL PROBLEMS WITH THE SOLAR RIGHTS ACT

New Mexico is the first state to grant the owner of a solar collector the right of access to sunlight. Because the concept of a solar right is quite new, some problems regarding the implementation and effects of this statute can be expected to arise. Although the Solar Rights Act has been in effect for less than a year, some of these problems can already be identified.

Absolute Solar Rights

The language of the Solar Rights Act effectively grants a solar right to anyone who puts a solar collector to beneficial use.¹¹ Once the beneficial use requirement is fulfilled, the statute contains almost no limitations on the solar right. Thus, the practical effect of the Solar Rights Act is to create an absolute solar right.¹² No known disputes have yet arisen over the shading of an existing solar collector. But this type of a solar right is likely to create problems in the future as solar energy systems become more commonplace.

The most serious problem with an absolute right is that it may be unconstitutional. Once a solar right is established, neighboring landowners cannot develop their property in any way that would impair the collector's access to sunlight. In some cases, granting a solar right to certain collectors might so diminish the value of neighboring property that it would constitute a taking without just compensation in violation of the fifth amendment.¹³

In addition to this constitutional problem, unrestricted solar rights could also lead to inefficient land use. A single-story collector in a

10. N.M. STAT. ANN. §47-3-4(B)(3) (1978).

11. See N.M. STAT. ANN. § §70-8-4(A), 4(B)(1), (2) (1978).

12. The statute does not define "beneficial use" as this term is applied to solar energy. From the other definitions it can be inferred that beneficial use at least involves collecting solar energy with a device that meets the requirements of a "solar collector" and applying that energy to accomplish one or more of the enumerated purposes.

13. *United States v. General Motors Corp.*, 323 U.S. 373 (1945) ("taking" within the fifth amendment includes depreciation in the value of property).

downtown area could conceivably impede the growth of a high-rise district to the south. Certain sites may not be suited for solar development or may require that solar collectors be located above certain heights. To aggravate this problem, the statute does not require that solar collectors be placed at reasonable locations on their lots. A ground-level collector placed along a southern boundary unnecessarily restricts the ways in which nearby property may be used. Efficient land use would require that solar rights only be granted to collectors that are reasonably located within their community and on their individual lots.

The solar right granted in the Solar Rights Act is also unnecessarily broad. This right is protected even during the early morning and late afternoon hours when shadows are longest and benefit to the collector is minimal. The solar right could easily be restricted to the 3 or 3½ hours before and after solar noon without affecting the usefulness of the solar energy system.¹⁴ Because the Solar Rights Act establishes an inflexible preference for one type of land use, it is likely to prove politically unacceptable in the future. Disputes between competing land uses are essentially political questions, and they should be resolved through the process of compromise and tradeoff that characterize other political disputes. This does not mean that the concept of a guaranteed solar right is unworkable, but it does suggest that the establishment of individual solar rights should be subject to the political process in some way.

Permit Systems

Another problem with the Solar Rights Act as it is currently drafted is that the purpose and effect of certain important provisions are not entirely clear. Section 4(C), for example, provides that "permit systems for the use and application of solar energy shall reside with county and municipal zoning authorities."¹⁵ Where local zoning authorities adopt a solar permit system, it is not clear whether a permit is a mandatory prerequisite to establish a solar right. If the analogy to water law is extended, a permit would be necessary to perfect a solar right.¹⁶ But a strict reading of the statute would lead one to believe that priority in time is the only factor to be considered in disputes involving solar rights.

It is also not clear whether a local zoning authority could deny a permit to a solar collector that did not comply with zoning ordi-

14. See the discussion of "Tradeoffs," Eisenstadt & Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 NAT. RES. J. 363 (1976).

15. N.M. STAT. ANN. § 47-3-4(C) (1978).

16. N.M. STAT. ANN. §§ 72-5-1 to 7 (1978).

nances. These questions are important because if permits were mandatory, and if local zoning ordinances could define the conditions upon which solar rights could be granted, many of the problems associated with absolute solar rights could be eliminated.

Disputes involving solar access will primarily occur in urban areas where land use patterns are most complex. Zoning authorities in these areas can protect solar access with a variety of traditional land use controls such as height and setback restrictions. But municipalities also have an interest in reserving airspace for high-rise development. To protect optimal development of urban areas, the Solar Rights Act should grant local zoning authorities the power to place conditions on the location of solar collectors and to deny permits to collectors that would interfere with airspace reserved for development.

The language of Section 4(C) allows local zoning authorities to establish permit systems for the "use and application of solar energy."¹⁷ It is quite possible that this section was intended to act as enabling legislation, empowering local government to require compliance with county or municipal ordinances before a solar right could be created. If this is the case, the language of Section 4(C) does not adequately achieve the legislature's purpose. New Mexico courts tend to construe enabling legislation strictly.¹⁸ While a grant of power may be made in general terms, each grant must contain an express delegation of the power to act.¹⁹ Section 4(C) does not authorize local zoning authorities to modify or impose conditions on the creation of a solar right. Moreover, if Section 4(C) were construed to be enabling legislation, it would probably constitute an overbroad delegation of authority. This is because the act contains no standards or guidelines which define the local government's authority and protect solar users from abuses of its discretion.²⁰

Eminent Domain

Section 4(B)(2) provides that "the state and its political subdivisions may legislate, or ordain that a solar collector user has a solar right even though a structure or building located on neighboring property blocks the sun from the proposed solar collector site."²¹ The next sentence states that "[n]othing in this paragraph shall be

17. N.M. STAT. ANN. §47-3-4(C) (1978).

18. *City of Clovis v. Crain*, 68 N.M. 10,357 P.2d 667 (1961).

19. *In re Environmental Planning Comm'n of Albuquerque*, 87 N.M. 215, 531 P.2d 949 (1974); *Sanchez v. City of Santa Fe*, 82 N.M. 322, 481 P.2d 401 (1971).

20. *See Cox v. City of Albuquerque*, 53 N.M. 334, 207 P.2d 1017 (1949).

21. N.M. STAT. ANN. §47-3-4(B)(2) (1978).

construed to diminish in any way the right of eminent domain of the state or any of its political subdivisions or any other entity that has such a right."²² The purpose of the second sentence is probably to protect public utility poles and the like, but these two provisions, read together, imply that state or local governments are empowered to condemn existing structures in order to provide solar access for solar collectors. The problem with this provision is that private property may be taken through eminent domain only if it is to be used for a public purpose.²³ As the statute now reads, it is not clear that a court would construe the provision of solar access (particularly if the collector were privately owned) to be a public use.

In New Mexico, the decision whether a use is public is for the courts, and there is a presumption that a use is public if the legislature so declares.²⁴ The use of solar energy does provide many public benefits. It strengthens the state's energy independence, conserves fossil fuel for more important uses, and reduces the environmental degradation which accompanies the use of fossil and nuclear fuels. Furthermore, the United States Supreme Court has held that condemnation of private property or urban renewal is a public use even though private individuals and corporations are the primary benefactors.²⁵ Thus, the harnessing of solar energy might well constitute a public use.

But if the legislature intends for state and local governments to employ their powers of eminent domain for the benefit of certain solar users, then it should declare that solar energy utilization serves a strong public purpose. Additionally, the legislature should provide guidelines which specify the circumstances under which it is appropriate to aid a solar user. Without these clarifications, the use of eminent domain powers to provide for solar access might not withstand a constitutional challenge. Either the provision of solar access would not be considered a public use or the powers granted would be considered overbroad.

The Definition of Solar Collector

The statute defines a solar collector as any device which "relies upon sunshine as an energy source, and which is capable of collecting not less than twenty-five thousand Btu's of thermal energy on a clear winter solstice day."²⁶ The required number of Btu's is small enough

22. *Id.*

23. *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

24. *Kaiser Steel Corp. v. W. S. Ranch*, 81 N.M. 414, 467 P.2d 986 (1970).

25. *Berman v. Parker*, 348 U.S. 26 (1954).

26. N.M. STAT. ANN. §47-3-3(A) (1978).

to include the domestic water heaters which are currently the most popular solar device. The definition also includes solar collectors which serve additional purposes as windows or walls.²⁷ This sentence is intended to recognize passive as well as active solar systems. The inclusion of passive systems is important because these systems are much less expensive than active systems and are exceptionally well suited to New Mexico's climate. But this definition may also create some problems in the future.

If the energy collected by a building's east-, south-, and west-facing windows is added together, many buildings gather 25,000 Btu's of thermal energy. If insulated drapes are used to retain this heat, the windows of these buildings probably qualify as passive solar systems. This situation would present no problem if local governments have licensing powers over the creation of a solar right. But if the Solar Rights Act is construed to grant a solar right to any collector which meets the act's broad criteria, then these windows may already be subjecting large segments of land to potential restrictions.

Recording Solar Rights

Section 4(B)(3) requires that "[t]he transfer of a solar right shall be recorded in accordance with Chapter 71, Article 2 (71-2-1 to 71-2-11 NMSA 1953)."²⁸ The statute, however, does not prescribe any formula for describing the solar right. To avoid confusion, the statute should specify exactly what information should be included in the description. In addition, title companies and developers have expressed concern that the solar rights themselves be recorded in a clear and accessible manner. Since solar rights may place use restrictions on adjoining property, a standardized way of recording these rights does seem necessary so that they can be researched quickly when land is transferred.

SUGGESTED REVISIONS TO THE SOLAR RIGHTS ACT

The protection of solar access essentially involves a problem of competing land uses. As with other land use problems, the resolution of this problem is best made at the local level. Thus, the most needed revisions of the Solar Rights Act involve clarifying the powers of local governments with respect to solar zoning and the granting of solar permits.

Appendix B contains a revised version of the Solar Rights Act

27. *Id.*

28. N.M. STAT. ANN. §47-3-4(B)(3) (1978).

proposed by this author. Section 47-3-6 of the proposed act expressly grants local governments the authority to use traditional land use regulations to promote and facilitate solar development. This provision is intended to ensure the constitutional validity of solar zoning ordinances by declaring that encouraging solar energy use is a valid purpose for exercising the police power.

Sections 47-3-6(C)(1) and (2) define the power of zoning authorities to condition the granting of a solar permit. The effect of these sections would be to create a system whereby local zoning authorities could engage in comprehensive solar land use planning, set height and location regulations for the various types of neighborhoods, and then restrict the creation of solar rights that would interfere with other planned uses.

The other major proposed revisions of the Solar Rights Act are the restrictions listed in Section 47-3-5. These restrictions would apply to all solar rights but are primarily intended to govern the establishment of solar rights in areas where permit systems have not yet been adopted. The addition of Sections 47-3-6(C)(3) to (6) clarifies important aspects of the vesting process and provides for uniform recording of solar permits and transfers of solar rights. The language in Section 47-3-4(B)(2) of the original act pertaining to the granting of solar rights for shaded collectors is deleted on the ground that it is confusing. If the legislature feels that the state or local governments should use the powers of eminent domain to provide for solar access, then a separate statute should be enacted for this purpose.

CONCLUSION

New Mexico's Solar Rights Act is the strongest action yet taken by a state for the protection of solar access. As solar energy systems become more popular, and as the owners of these systems begin to demand greater protection of their solar access, the New Mexico statute may well become a model for other states. But the statute as it is currently drafted is seriously flawed and is likely to prove unacceptable to property owners who do not own solar collectors. During the 1979 New Mexico legislative session, a bill²⁹ was introduced which would have corrected some of the statute's major problems. The bill passed the House 55 to 1 but then died in a Senate committee. An adequate revision of the statute should be adopted in the near future. If no action is taken, New Mexico can expect its future development to be impeded by an unplanned array of solar rights restricting the use of its urban airspace.

DEBORAH S. GROUT

APPENDIX A: SOLAR RIGHTS ACT

47-3-1. Short title.

This act [47-3-1 to 47-3-5 NMSA 1978] may be cited as the "Solar Rights Act."

47-3-2. Declaration and findings.

The legislature declares that the state of New Mexico recognizes that economic benefits can be derived for the people of the state from the use of solar energy. Operations, research, experimentation and development in the field of solar energy use shall therefore be encouraged. While recognizing the value of research and development of solar energy use techniques and devices by governmental agencies, the legislature finds and declares that the actual construction and use of solar devices, whether at public or private expense, is properly a commercial activity which the law should encourage to be carried out, whenever practicable, by private enterprise.

47-3-3. Definitions.

As used in the Solar Rights Act [47-3-1 to 47-3-5 NMSA 1978]:

A. "solar collector" means any device or combination of devices or elements which rely upon sunshine as an energy source, and which are capable of collecting not less than twenty-five thousand Btu's on a clear winter solstice day. The term also includes any substance or device which collects solar energy for use in:

- (1) the heating or cooling of a structure or building, [*sic*]
- (2) the heating or pumping of water;
- (3) industrial, commercial or agricultural processes; or
- (4) the generation of electricity.

A solar collector may be used for purposes in addition to the collection of solar energy. These uses include, but are not limited to, serving as a structural member or part of a roof of a building or structure and serving as a window or wall; and

B. "solar right" means a right to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector.

47-3-4. Declaration of solar rights.

A. The legislature declares that the right to use the natural resource of solar energy is a property right, the exercise of which is to be encouraged and regulated by the laws of this state. Such property right shall be known as a solar right.

B. The following concepts shall be applicable to the regulation of disputes over the use of solar energy where practicable:

(1) "beneficial use." Beneficial use shall be the basis, the measure and the limit of the solar right, except as otherwise provided by written contract. If the amount of solar energy which a solar collector user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise;

(2) "prior appropriation." In disputes involving solar rights, priority in time shall have the better right except that the state and its political subdivisions may legislate, or ordain that a solar collector user has a solar right even though a structure or building located on neighborhood property blocks the sunshine from the proposed solar collector site. Nothing in this paragraph shall be construed to diminish in any way the right of eminent domain of the state or any of its political subdivisions or any other entity that currently has such a right; and

(3) "transferability." Solar rights shall be freely transferable within the bounds of such regulation as the legislature may impose. The transfer of a solar right shall be recorded in accordance with Chapter 14, Article 9 NMSA 1978.

C. Unless a singular overriding state concerns occur [*sic*] which significantly affect the health and welfare of the citizens of this state, permit systems for the use and application of solar energy shall reside with county and municipal zoning authorities.

47-3-5. Prior rights unaffected.

Nothing in the Solar Rights Act [47-3-1 to 47-3-5 NMSA 1978] shall be construed to alter, amend, deny, impair or modify any solar right, lease, easement or contract right which has vested prior to the effective date of the Solar Rights Act.

APPENDIX B: PROPOSED REVISION TO THE SOLAR RIGHTS ACT

(Amended or revised language shown in italics)

47-3-1. Short title.

This act [47-3-1 to 47-3-7] may be cited as the "Solar Rights Act."

47-3-2. Declaration and findings.

The legislature declares that the State of New Mexico recognizes that *the use of solar energy promotes the public health, safety and welfare and can provide economic benefits for the people of the state*. Operations, research, experimentation and development in the field of solar energy use shall therefore be encouraged. While recognizing the value of research and development of solar energy use techniques and devices by governmental agencies, the legislature finds and declares that the actual construction and use of solar devices, whether at public or private expense, is properly a commercial activity which the law should encourage to be carried out, whenever practicable, by private enterprise.

47-3-3. Definitions.

As used in the Solar Rights Act [47-3-1 to 47-3-7]:

A. "solar collector" means any device or combination of devices or elements which rely upon sunshine as an energy source, and which are capable of collecting not less than 25,000 Btu's on a clear winter solstice day. The term also includes any substance or device which collects solar energy for use in:

- (1) the heating or cooling of a structure or building;

- (2) the heating or pumping of water;
- (3) industrial, commercial or agricultural processes; or
- (4) the generation of electricity.

A solar collector may be used for purposes in addition to the collection of solar energy. These uses include, but are not limited to, serving as a structural member or part of a roof of a building or structure and serving as a window or wall; and

B. "solar right" means a right to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector.

47-3-4. Declaration of solar rights.

A. The legislature declares that the right to use the natural resource of solar energy is a property right, the exercise of which is to be encouraged and regulated by the laws of this state. Such property right shall be known as a solar right.

B. The following concepts shall be applicable to the regulation of disputes over the use of solar energy where practicable:

(1) "beneficial use." Beneficial use shall be the basis, the measure and the limit of the solar right, except as otherwise provided by written contract. If the amount of solar energy which a solar user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise;

(2) "prior appropriation." In disputes involving solar rights, priority in time shall have the better right, *except as provided in this act*. Nothing in this paragraph shall be construed to diminish in any way the right of eminent domain of the state or any of its political subdivisions or any other entity that currently has such a right; and

C. Solar rights shall be freely transferable within the bounds of such regulation as the legislature may impose. *Any instrument transferring a solar right shall include, but not be limited to, a description of the vertical and horizontal angles, expressed in degrees, at which the solar right extends over the real property acquiring the right.*

47-3-5. Restrictions upon solar rights.

A. *So much of the solar right as relates to radiation of the sun before 9:00 A.M. or after 3:00 P.M. Mountain Standard Time is de minimus and may be interfered without compensation to the owner of the solar collector.*

B. *If a municipal or county ordinance sets height or locational limits on structures or floras, no structure or flora which is within the regulations of the zoning ordinance shall be a compensable infringement on a solar right.*

C. *Solar collectors must be located on the solar user's property so as not to unreasonably and unnecessarily restrict the uses to which neighboring property may be put. Unless otherwise permitted by the zoning authority, this paragraph shall be construed to deny a solar right to any solar collector, or any portion of a solar collector, that would be shaded by a ten foot wall located on the property line on a winter solstice day.*

47-3-6. Delegations of authority.

A. *The purpose clause in all land-use regulations of local governments may include a provision for encouraging the use of solar energy systems. Local governments may exercise all powers delegated by this and other statutes to regulate the height, location, setback, and use of structures; the height and location of vegetation with respect to property lines; the type and location of energy systems or their components; and the design and construction of structures to encourage or require the use of solar energy systems.*

B. *Unless singular overriding state concerns occur which significantly affect the health and welfare of the citizens of this state, permit systems for the use and application of solar energy shall reside with county and municipal zoning authorities.*

C. *Where county or municipal zoning authorities do establish permit systems for the use and application of solar energy, the following provisions shall apply:*

(1) *A solar permit must be granted before a solar collector may establish a solar right.*

(2) *The local zoning authority shall grant a solar permit to any proposed or existing solar collector which complies with the provisions of this act, except that if a municipal or county ordinance sets height or locational limits on structures or florals, the zoning authority may restrict the granting of a solar permit to that airspace above or surrounding these height or locational restrictions. The extent of the solar right granted by this act shall not exceed the extent of the solar right granted by the solar permit.*

(3) *The solar right shall vest on the date that the solar permit is granted, providing that the solar collector is put to beneficial use within 2 years or within such time as the local zoning authority may consider reasonable.*

(4) *Existing solar collector users must apply for permits within 5 years after the date that permit systems are established in their jurisdictions. The priority date for these solar rights shall be the date that the solar collector was first beneficially used.*

(5) *The instrument granting a solar permit shall include, but not be limited to, a description of the collector surface, or that portion of the collector surface, to which the solar permit is granted. This description shall include the dimensions of the collector surface, the angle of inclination, the direction of orientation, the height above ground level and the location of the collector on the solar user's property.*

(6) *Both the grant of a solar permit and the transfer of a solar right shall be recorded in accordance with Chapter 14, Article 9 [14-9-1 to 14-9-9], NMSA 1978.*

47-3-7. Prior rights unaffected.

Nothing in the Solar Rights Act [47-3-1 to 47-3-7] shall be construed to alter, amend, deny, impair or modify any solar right, lease, easement or contract right which has vested prior to the effective date of the Solar Rights Act [47-3-1 to 47-3-7].