

City of Scottsbluff, Nebraska

Monday, August 19, 2019

Regular Meeting

Item Reports3

Council to discuss and consider action on the First Amendment to Solar Facilities Lease Agreement and Estoppel and authorize the Mayor to execute the Agreement.

Staff Contact: Nathan Johnson, City Manager

FIRST AMENDMENT TO SOLAR FACILITIES LEASE AGREEMENT AND ESTOPPEL

This FIRST AMENDMENT TO SOLAR FACILITIES LEASE AGREEMENT AND ESTOPPEL (this “***Amendment***”) is made as of August [], 2019 (the “***Amendment Effective Date***”) by and between the CITY OF SCOTTSBLUFF, NEBRASKA (“***Landlord***”) and [], a Delaware limited liability company (“***Tenant***”). Landlord and Tenant are sometimes individually referred to as a “***Party***” and collectively as the “***Parties***.” Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Lease (as defined below).

RECITALS

WHEREAS, Landlord and Sol Systems, LLC entered into that certain Solar Facilities Lease Agreement, dated as of November 5, 2018 (the “***Lease***”), as assigned by Sol Systems, LLC to Sol CES Projects, LLC pursuant to that certain Assignment and Assumption Agreement, dated as of May 3, 2019, as further assigned by Sol CES Projects, LLC to Tenant pursuant to that certain Assignment and Assumption Agreement, dated as of August [], 2019 (the “***Tenant Assignment***”);

WHEREAS, pursuant to the terms of the Lease, Tenant leased from Landlord a portion of the property located at the corner of Fifth Avenue and East 42nd Street, Scottsbluff, NE 69361, as more particularly described on Exhibit A attached hereto (the “***Premises***”) in order to construct, operate and maintain a solar electric generation facility thereon (the “***System***”); and

WHEREAS, the Parties desire to amend the Lease to make certain clarification thereto, as further described herein.

NOW, THEREFORE, in consideration of the promises and the mutual covenants contained herein, the sufficiency of which is acknowledged by both Parties, the Parties do hereby agree as follows:

ARTICLE I AMENDMENTS AND COVENANTS

1.1 The Parties hereby agree to amend the Lease as follows:

(a) The first sentence of Section 2.2 of the Lease is hereby amended and restated in its entirety as follows:

“The “***Development Period***” means the period commencing on the Effective Date and expiring on the earlier of: (i) the date specified by Tenant in a notice of intent to begin the Operating Period (the “***Operating Period Notice***”), (ii) the date Tenant provides notice of lease cancellation, or (iii) the Commercial Operation Date (as defined below).”

(b) Exhibit B of the Lease is hereby amended and restated in its entirety by replacing it with the form attached hereto as Annex A.

ARTICLE II ESTOPPEL

2.1 The representations and certifications in this Article II are being delivered in connection with the Tenant Assignment. As used in this Article II, the “Lease” means the Lease, as modified hereby. Based on the foregoing, and recognizing that Tenant and its financing parties will rely hereon, Landlord hereby certifies as follows:

(a) The execution, delivery, and performance by Landlord of the Lease and this Amendment have been duly authorized by all necessary corporate, partnership, limited liability, or other action on the part of Landlord and do not require any approvals, filings with, or consents of any entity or person which have not previously been obtained or made.

(b) A copy of the Lease attached hereto as Annex B constitutes a true, correct, and complete copy of the Lease (including, without limitation, all prior amendments thereto except for the amendments set forth herein), and the Lease has not been modified or amended in any way except as shown on the instrument(s) attached hereto or as otherwise set forth herein. The Lease is in full force and effect and, together with this Amendment, constitutes the entirety of the agreements between Landlord and Tenant relating to the matters set forth therein.

(c) Landlord is not in default under the Lease. To the best of Landlord’s knowledge, (i) Tenant is not in default under the Lease, and (ii) no facts or circumstances exist which, with the passage of time or the giving of notice or both, would constitute a default or breach by either such party under the Lease. Landlord has not delivered to Tenant any notice of default, whether or not cured, under the Lease.

(d) All payments due and payable as of the date hereof, either by or to Landlord under the Lease, have been paid in full.

(e) All representations and warranties made by Landlord in the Lease are true and correct as of the date hereof.

(f) There are no actions pending against Landlord under the bankruptcy or any similar laws of the United States or any state. There are no proceedings pending or threatened against or affecting Landlord in any court or by or before any court, governmental authority, or arbitration board or tribunal which could reasonably be expected to have a material adverse effect on the ability of Landlord to perform its obligations under the Lease. To the best of Landlord’s knowledge, there are no disputes or proceedings currently in existence between Landlord, on the one hand, and Tenant, on the other.

(g) Landlord is not aware of any event, act, circumstance, or condition constituting an event of *force majeure* or otherwise excusing the performance of any party under the Lease. Landlord has not received written notice nor has knowledge of any pending eminent domain proceedings, condemnation or threatened condemnation, or other governmental actions or any judicial actions of any kind against Landlord’s interest in the Property.

(h) To the best of Landlord’s knowledge, Tenant does not owe any indemnity payments to Landlord, and to the best of Landlord’s knowledge, Landlord has no existing counterclaims, offsets, or defenses against Tenant, under the Lease. Tenant has not received or claimed any amounts under the indemnification obligations of Landlord set forth in the Lease.

(i) As of the date hereof, Landlord (A) is the fee simple owner of the Property, and (B) holds the entire interest of "Landlord" under the Lease. Landlord has not transferred, pledged, or assigned, in whole or in part, any of its right, title or interest in, to, or under the Lease or any of its right, title, or interest in or to the Property, and has not executed, assumed or taken subject to any mortgage, deed of trust or other consensual lien encumbering Landlord's interest in the Property or the Lease. There are no leases, licenses or occupancy agreements by Landlord of any portion of the Premises except the Lease.

(j) Landlord has no knowledge of any right of possession or claim of right of possession to the Premises or portion thereof by any party other than Tenant or any party claiming a right pursuant to a lien or encumbrance.

(k) Landlord has no option to terminate or otherwise modify the terms and conditions of the Lease other than as specifically provided in the Lease.

(l) Landlord has not received written notice that it is in violation of any governmental law or regulation applicable to its interest in the Property and its operation thereon, including, without limitation, any environmental laws, and has no reason to believe that there are grounds for any claim of any such violation.

ARTICLE III MISCELLANEOUS

3.1 **Governing Law.** This Amendment and the rights and duties of the Parties hereunder shall be governed by and shall be construed, enforced and performed in accordance with the laws of the State of Nebraska without regard to principles of conflicts of law. Actions brought hereunder shall be brought in the State of Nebraska.

3.2 **No Modification.** Except as otherwise modified by this Amendment, all terms and conditions of the Lease shall remain in full force and effect, and the Parties do hereby ratify and confirm the Lease as modified hereby. As of the Amendment Effective Date, the terms and conditions of this Amendment shall be deemed a part of the Lease for all purposes and all references to the Lease shall hereafter refer to the Lease as modified by this Amendment.

3.3 **Authority.** Each Party has duly authorized the execution and delivery of this Amendment and represents that the individual executing this Amendment on behalf of the Party has the legal authority to bind the respective Party.

3.4 **Binding Agreement.** This Amendment shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns.

3.5 **Counterparts.** This Amendment may be executed in any number of counterparts, and by the different Parties in separate counterparts, each of which when executed shall be deemed to be an original and all of which, taken together, shall be deemed to constitute one and the same instrument.

[Signature page to follow]

IN WITNESS WHEREOF, the Parties have executed this Amendment under seal as of the Amendment Effective Date.

CITY OF SCOTTSBLUFF

as Landlord:

By: _____

Name: _____

Title: _____

[_____] ,

as Tenant

By: Sol CES Projects, LLC, its sole member

By: Sol Customer Solutions, LLC, its sole member

By: Sol Systems, LLC, its managing member

By: _____

Name: _____

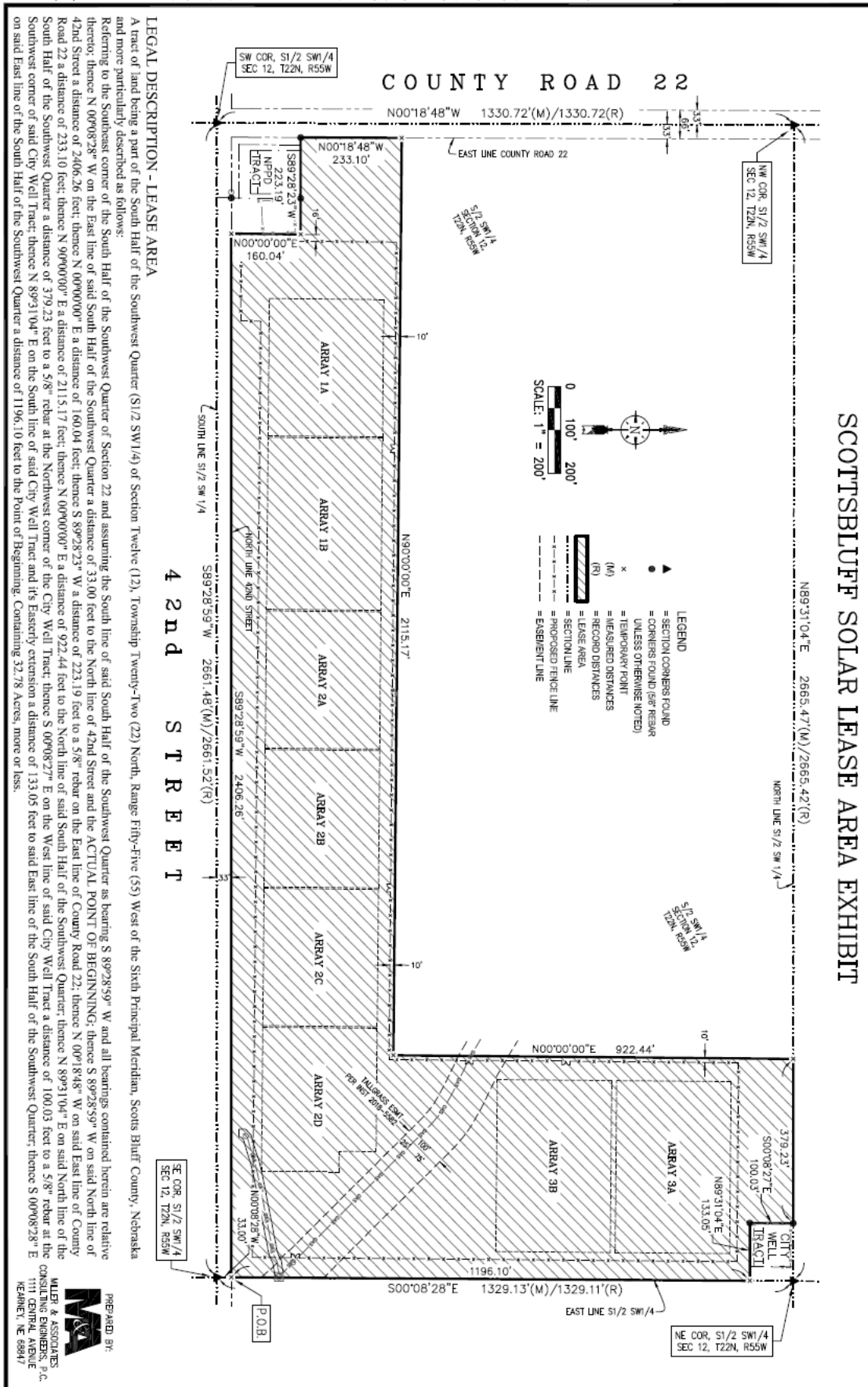
Title: _____

[Signature Page to First Amendment and Estoppel]

Annex A

Premises

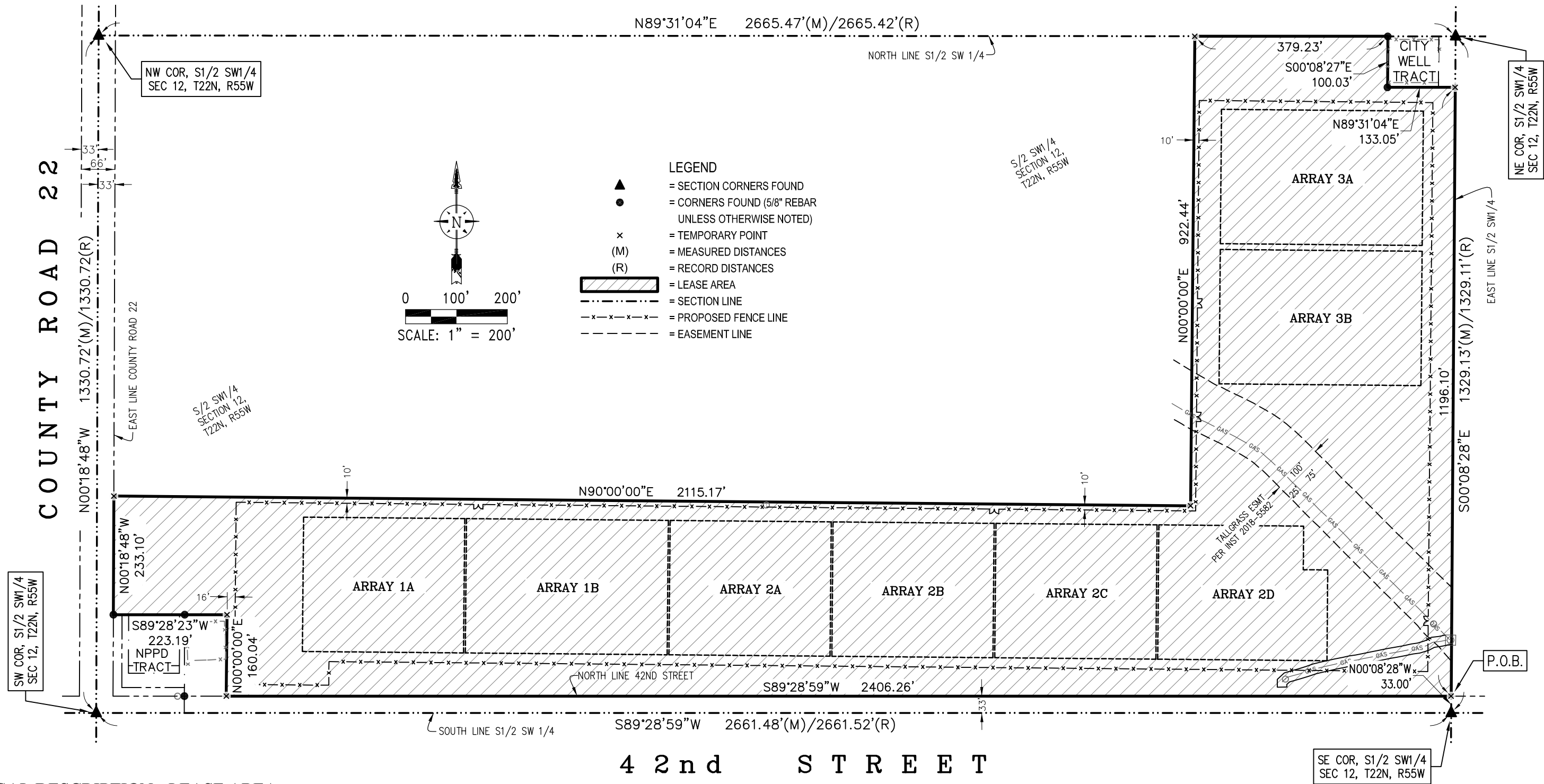
PLOTTED: 8/15/2019 1:40 PM G:\Projects\487\487-P1-010 Scotts Bluff\Civil-Dwgs\Design Drawings\Survey Design\Scottsbluff-Sol Systems Lease Area.dwg



Annex B
Lease

[See Attached]

SCOTTSBLUFF SOLAR LEASE AREA EXHIBIT



LEGAL DESCRIPTION - LEASE AREA

A tract of land being a part of the South Half of the Southwest Quarter (S1/2 SW1/4) of Section Twelve (12), Township Twenty-Two (22) North, Range Fifty-Five (55) West of the Sixth Principal Meridian, Scotts Bluff County, Nebraska and more particularly described as follows:

Referring to the Southeast corner of the South Half of the Southwest Quarter of Section 22 and assuming the South line of said South Half of the Southwest Quarter as bearing S 89°28'59" W and all bearings contained herein are relative thereto; thence N 00°08'28" W on the East line of said South Half of the Southwest Quarter a distance of 33.00 feet to the North line of 42nd Street and the ACTUAL POINT OF BEGINNING; thence S 89°28'59" W on said North line of 42nd Street a distance of 2406.26 feet; thence N 00°00'00" E a distance of 160.04 feet; thence S 89°28'23" W a distance of 223.19 feet to a 5/8" rebar on the East line of County Road 22; thence N 00°18'48" W on said East line of County Road 22 a distance of 233.10 feet; thence N 90°00'00" E a distance of 2115.17 feet; thence N 00°00'00" E a distance of 922.44 feet to the North line of said South Half of the Southwest Quarter; thence N 89°31'04" E on said North line of the South Half of the Southwest Quarter a distance of 379.23 feet to a 5/8" rebar at the Northwest corner of the City Well Tract; thence S 00°08'27" E on the West line of said City Well Tract a distance of 100.03 feet to a 5/8" rebar at the Southwest corner of said City Well Tract; thence N 89°31'04" E on the South line of said City Well Tract and it's Easterly extension a distance of 133.05 feet to said East line of the South Half of the Southwest Quarter; thence S 00°08'28" E on said East line of the South Half of the Southwest Quarter a distance of 1196.10 feet to the Point of Beginning. Containing 32.78 Acres, more or less.

PREPARED BY:



MILLER & ASSOCIATES
CONSULTING ENGINEERS, P.C.
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KEARNEY, NE 68847