



Source: Edwin Remsburg, University of Maryland, College of Agriculture and Natural Resources

Solar Lease Considerations for Landowners

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Solar companies are actively searching for agricultural land to lease to build solar projects. Solar energy development in Texas is still in its early stages, and there is surprisingly little information available for landowners considering the pros and cons of entering into a solar lease agreement.

Lease rates can be very enticing for agricultural landowners, especially when commodity prices are low. To minimize unintended consequences and avoid a deal too good to be true, always consult an attorney who has experience with solar leases to review any lease agreement before you sign it.

Here are some key considerations to keep in mind when negotiating solar lease agreements.

Who owns the rights to sunlight on your land?

The Texas Supreme Court has never ruled on whether the sun is part of the surface or mineral estate. Most legal scholars assume that the Court would conclude that solar rights belong to the

surface owner, making that person the one who has the right to enter into and negotiate solar lease agreements.

But, separating the solar rights from the surface of the land can modify who owns these rights. For example, Adam owns both the surface and mineral rights of a piece of land. He enters into an agreement to sell the land to Beth but reserves the solar leasing rights. Now, the solar rights are severed from the surface rights. Even though Beth owns the surface of the land, Adam owns the solar rights.

What rights belong to mineral and groundwater owners?

An important consideration for both landowners and solar companies is the status of the mineral and groundwater estate beneath the land being considered for a solar project. Because the mineral and groundwater estates are dominant in Texas, the mineral or groundwater owner can use as much of the surface estate as is reasonably

necessary to produce oil and gas or groundwater, including building drill pads, preparing roads, installing pipelines, and drilling injection wells.

Solar companies looking to install a solar facility on the same land will carefully analyze the status of the mineral and groundwater estates, including how many ownership interests exist in it and whether a lease agreement is currently in place. The issue is much simpler if the surface owner also owns the minerals and the groundwater. But, the situation becomes more complicated if the property has been severed and there are multiple owners or existing mineral or groundwater leases. If you are the landowner, do not agree to serve as a “middleman” or negotiator between solar and mineral lessees, particularly if you have no relationship with the mineral or groundwater owners.

Solar leases are a long-term commitment.

Because solar lease agreements can last 20 to 30 years, tying up property for a significant time, it is important to carefully evaluate the lease terms. Usually, there are two phases to a solar lease: development/construction and operations.

The **development phase** involves testing to see if the project will work, conducting environmental studies, analyzing transmission capabilities, and other information-gathering.

The **operations phase** occurs when the project begins producing and selling energy. When reviewing draft leases, pay attention to how these phases are defined and what must happen to move from the development to the operations phase.

Royalties are not common in solar leases.

Unlike oil and gas lease agreements, it is uncommon for a solar lease agreement to offer a royalty as the payment method. Instead, annual payment terms are usually defined in dollars per acre. The price is often lower in the development phase and higher during the operations phase (since income is generated during the operations period, but not always during the development phase). You want



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the development phase as defined in the lease agreement to be as short as possible because rental rates are usually lower in that phase.

Solar leases can prevent any other use of the property.

In Texas, it is common to see a tractor farming around oil pump jacks or cattle grazing beneath wind turbines. Because of the way oil, gas, and wind production occurs, the surface owner can make agricultural uses of the property even while oil, gas, or wind leases exist.

The same is not always true for solar leases. Often, a solar farm requires many continuously placed panels that prevent other uses of the surface of the land. When evaluating solar leases, assume that the lease payment will be the only income you will receive for the property and negotiate accordingly.

Watch for prohibitions on the use of other properties.

Solar lease agreements sometimes require that the landowner not construct anything that could impede the sunlight flowing to the solar project. This restriction could affect not only the land where the solar panels are located, but also neighboring land owned by the landowner.

For example, some solar leases prohibit crop dusting in the area of the solar farm because it leaves

a film on the panel that reduces power efficiency and must be cleaned off. The particulates in the film can also degrade the panels.

Carefully consider whether these types of prohibitions could be a problem for your operation.

A solar project can impact your eligibility for special-use tax valuation.

In Texas, many rural landowners take advantage of the special tax valuation available for agriculture or open space land. If a landowner meets the criteria, property tax calculations are based on a percentage of the agricultural productive capacity versus the fair market value of the land, which is usually much greater and gives the landowner a substantially lower tax bill.

A solar project could impact whether a property qualifies for this special-use valuation and create issues such as the need for a rollback period where you might owe the difference between the normal tax value and the modified value paid. Even after the solar project has left the land, it could be years before the property can qualify for agricultural or open-space valuation again.

Visit with your local appraisal district about how solar projects affect special-use valuation. Include a term in the solar lease agreement requiring the solar company to cover any additional real property taxes owed as a result of the solar project and also to pay for any personal property taxes on the solar equipment.



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Watch for common legal technicalities.

Be sure you understand the following technical legal terms often included in solar agreements:

- ◆ **Guarantee of title.** Commonly included in lessee-drafted oil and gas contracts, solar contracts sometimes include a term in which the landowner guarantees or warrants good title to the property. Delete this term since the company is in a better position to investigate deed records and determine the ownership of the property.
- ◆ **Confidentiality clauses.** Sometimes a solar company will include a confidentiality clause that prohibits the landowner from discussing or disclosing the terms of his or her lease agreement with others. Reject this type of clause so that you can talk to your neighbors and work together to obtain the best possible lease terms.
- ◆ **Forum clauses.** A contract will often contain a forum clause identifying the location where a dispute will be heard. For example, a lease might state, “Any and all disputes over this agreement will be heard in New York City, the principal place of business of the solar company.” There are several reasons why you would not want to agree to this clause.
 - You do not want to fly to New York City every time a meeting, hearing, or deposition is scheduled.
 - You want home-field advantage, including a judge and jury pool of your peers who live in the area. Although most real property disputes are properly resolved where the land is located, the court will usually enforce this type of forum clause if the parties agreed to it.
- ◆ **Attorney fee provisions.** The general rule in the United States is that each party in a legal dispute pays for his or her attorney fees, win or lose. A contractual agreement is one way to modify this, so some lease agreements include attorney fee provisions providing that the winning party may recover reasonable attorney’s fees from the

unsuccessful party. Be careful to ensure that the provision is reciprocal. Companies will sometimes sneak in a provision that allows them to recover fees if successful, but includes nothing about your right to do the same.



Source: NASA

- ◆ **Dispute resolution clauses.** Nearly all contracts include some form of a dispute resolution clause. While these provisions can help resolve disputes quickly and avoid expensive litigation, they can also waive certain rights of the parties involved. If a solar agreement contains a dispute resolution clause, determine if the agreement provides for mediation or arbitration and be sure you understand the pros and cons of each before agreeing to this provision.

A solar lease might be a profitable option for some landowners, but because of the complex nature and extensive length of these agreements, always consult an experienced attorney before signing a solar lease agreement.

For more information:
Ag Law Education Initiative Solar Energy Leasing webinar at
<https://vimeo.com/172991201>

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