

KANSAS FARM BUREAU LEGAL FOUNDATION

A Guide to Solar Leasing for the Agricultural Landowner

Solar leasing is making an entrance into Kansas. Members from all over the state have been approached by renewable energy companies interested in leasing land to develop solar projects. These long-term, intensive use leases can have a major impact on an agricultural operation, so it is important that farmers and ranchers are well-informed about the likely benefits and potential pitfalls of entering into a solar lease.

Solar energy in Kansas?

Yes, Kansas is a good environment for the development of solar energy. From abundant sun and wide-open spaces, to large capacity transmission lines and relatively friendly regulations, Kansas has many things that are attractive to solar energy project developers. While there is still very little solar development in the state currently, growth in the solar industry appears imminent.

Is solar energy right for your operation?

There are some big picture items that a landowner should consider before entering into a solar lease. First, it is important to understand that solar energy projects involve an intensive use of the land (more so than wind energy projects), so the impact is substantial. In fact, landowners are rarely able to continue any agricultural production on property leased for a solar energy project. Additionally, these are long-term contracts, often lasting for 20-50 year terms. So whatever impacts a solar lease has will not only affect today's generations, but tomorrow's, too. Landowners will also want to consider what other agreements exist on the land (e.g. CRP or other government programs, farm leases, mineral leases, or hunting leases), and determine whether a solar lease will interfere with any of those existing leases, or vice versa. Keep in mind, depending on the desirability of a parcel of land to an overall project, energy companies may be willing to pay fees associated with the early termination of an existing contract.

What contract provisions should landowners be on the lookout for?

The following list may be considered the tip of the iceberg when it comes to a discussion of important provisions in a solar lease, but rather than provide an

exhaustive list of lease issues, the goal here is to help landowners begin to think about some of the important issues. For deeper, more detailed discussions of solar lease considerations, view the resources gathered on our Legal Foundation website.¹ For a brief summary of some of the most important lease issues, read on.

- **Legal description:** When agreeing to an area to be covered by a solar lease, make sure to weigh the financial benefit of maximizing lease payments (by maximizing the leased area), with preserving land for farming. In the event that the developer has an opportunity to release part of the property from the lease agreement after the completion of feasibility studies, consider adding a clause to the lease that limits the amount of land that can be released. This will help ensure larger lease payments and prevent a patchwork of land released that will not provide rental income, and cannot be used in a practical way.
- **Lease term:** The lease agreement will likely be broken down into multiple terms. The first term may be an option period in a range of 2-5 years, in which the developer will complete feasibility studies to determine if they can develop a successful solar project on the leased land. This period could be followed by a short development term, and then a 20-30 year lease term (with renewal periods possibly adding decades more to the lease term). When establishing the length of the lease periods, the solar energy company is considering the duration of power purchase agreements through which it agrees to sell the electrical energy produced by the project, as well as the payback of loans, and the desire to maximize its return on investment. Finally, there should be a decommissioning period at or following the end of the main lease term.
- **Compensation:** With very little solar development in Kansas to date, it is difficult to suggest fair rates of compensation for solar leases. Some resources would propose that several hundred dollars per acre per year would be an average lease rate during the main lease term (though rates as low as farm lease payments, and as high as thousands of dollars, are not unheard of). Lease compensation may also be calculated based on royalties, in which case it is very important for the lease agreement to clearly describe how gross revenues are calculated. There could also be a combination of a base rate and a royalty. Additional compensation can come in the form of a

signing bonus, plus option period payments. With the long-term nature of solar leases, it is important to have an annual inflation adjuster built into the lease. A landowner will need to review the proposed timing of lease payments and determine if that timing works well with their cash flow needs.

- **Taxes:** Land leased for a solar project often loses its agricultural classification for valuation purposes. The installation of solar panels on agricultural land, therefore, can increase real estate taxes exponentially. A solar company will commonly pay the difference in real estate taxes before development, and after development, and any agreement to that effect should be contained in the written lease agreement.
- **Maintenance:** It is important to set forth what obligations the parties have for maintaining the property. Typically, most maintenance obligations rest with the developer (e.g. roads, vegetation, drainage, buffer zones, fire safety, etc.). However, if the developer fails to perform one or more of its maintenance duties, then the landowner may want the option to perform the necessary maintenance and be compensated for it. All maintenance responsibilities should be clearly set forth in the lease agreement.
- **Landowner's obligations:** Pay special attention to any lease provision that states something like, "the lessor shall." A landowner should carefully review those provisions, and the timing requirements set forth therein, and make sure that they are capable of meeting those requirements.
- **Liability, Indemnification, and Insurance:** From physical injuries to curious trespassers, to nuisance claims by neighbors, or interference with an endangered species, landowners face increased liability risks when leasing land to a solar energy project. It is very important to make sure that the solar company carries substantial liability coverage through a reputable insurer, and the landowner may want to be named as an additional insured on the policy. The landowner may also want to increase their own insurance coverage or limits, and may request from the developer additional compensation to cover the increased insurance premiums. The landowner will also want the developer to agree to hold the landowner harmless and provide indemnification for any landowner liabilities connected to the solar energy project.
- **Damages:** Financial damages to the landowner can come in many different forms, but most commonly they are the result of damage to crops or livestock grazing capacity. These types of losses are

predictable, and it is helpful to lay out how the landowner will be compensated for them. This is called a liquidated damages clause. For example, a lease can provide for the ways that yield and price are determined in calculating damages to a crop.

- **Mortgages:** There may be several issues involving mortgages in the lease agreement. If a landowner has an existing mortgage on the property, their mortgage lender will have to approve of the lease, and likely sign a subordination agreement stating that they will honor the lease agreement if they have to foreclose on the property. The developer may need to have a mortgage on their leasehold interest, which would also need to be approved by any existing mortgage lender. Finally, the landowner may want to reserve the right to mortgage the property at some point during the lease term.
- **Water, minerals, and natural resources:** Within the lease agreement, landowners should reserve their rights in water, minerals, and other natural resources. If any of those natural resources have been severed, then the landowner may need to get a written agreement from the parties owning those resources, providing that they will not interfere with the solar project.
- **Regulatory requirements:** The solar company should be made responsible for obtaining all necessary permits on the local, state, and federal levels. Furthermore, the landowner will want to ensure that the indemnification clause is broad enough to provide for indemnification of the landowner should the landowner face any liability as a result of inadequate permits.
- **Confidentiality:** Most leases presented to landowners will include a confidentiality clause aimed at preventing landowners from discussing the matter with third parties (except for their counselors and advisers). It may be possible for a landowner to negotiate the removal of that clause from the lease.
- **Decommissioning:** Decommissioning involves removing the solar project at the end of the lease term, and restoring the land to its original state. This is a costly endeavor, and includes removing solar panels, roads (if removal is desired), substations, transmission lines, underground cables, etc. It also involves regrading the property, replacing topsoil, and reestablishing vegetation. Because of the great expense involved, it is recommended that landowners require a decommissioning bond from the developer to help provide some assurance that the project will be property decommissioned even in the event of the developer's financial insolvency.

Separate easement agreements

In addition to a lease agreement, there will also be some easements necessary to complete the project. These easements could cover transmission lines, access to roads, solar (nonobstruction) easements, and temporary construction easements. There should be separate compensation associated with these easements, and the easements can last for a specified term or be perpetual in nature. Some renewable energy developers seek a so-called “nuisance” easement from neighboring properties. These agreements can go a long way in compensating neighbors for any perceived nuisance they might experience, as well as deterring neighbors from bringing lawsuits against landowners or developers.

Any other words of wisdom?

- Know who you are dealing with: Not all solar energy developers are created equal.² A little due diligence into the solar energy developer can go a long way to protecting a landowner’s financial interests.
- Get it in writing: Regardless of who a landowner is negotiating with, it is important to get all promises in writing. Remember, with only a few exceptions, contracts involving land must be made in writing for them to be enforceable. If a matter is of importance to

a landowner’s decision of whether or not to enter into a lease agreement, then a landowner should demand that the matter be covered explicitly and clearly in the lease agreement, without the necessity of verbal explanation by an employee or agent of the solar developer.

- Get the right help: It is important for landowners to consult with a private attorney and their tax adviser, who can each review the landowner’s situation and make recommendations to help ensure benefit to the landowner, while reducing downside risks and potential liabilities. Renewable energy companies often provide a stipend to landowners for attorney fees for contract review as part of the lease agreement. Solar energy attorneys are hard to find in Kansas, so landowners should look for an attorney that has a lot of real estate experience, with oil or wind energy experience a plus.

Conclusion:

Solar leasing can provide a great revenue source for a farm or ranch operation, but there are many more things to think about besides the financial opportunity. Moreover, having the right legal and tax advisers is imperative to a good outcome to a solar leasing arrangement.

¹ Solar leasing resources for landowners are somewhat scarce compared to resources on other legal topics. However, there are plentiful resources regarding wind energy, and there is a great deal of overlap of the legal concepts for both wind and solar leases. Resources regarding solar and wind leasing issues are available on the Legal Foundation website at www.kfb.org/legalfoundation.

² Landowners should be aware of who they are dealing with – whether it is an agent of the company that intends to develop a solar energy project in their area, or someone who is accumulating leases on a mass of land that they can then offer to a solar energy company. Landowners should do some research on any company offering them a lease for a solar energy project. Research can be done by reviewing the company’s website, performing a Better Business Bureau search and a general internet search, and by asking the company for a list of references or nearby projects that the landowner can view (which may be a little difficult until solar energy becomes more prevalent in the Midwest).

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