



Here Comes the Sun

Key considerations for landowners considering solar leases.

BY TIFFANY DOWELL LASHMET

For Texas landowners who have been contacted by companies seeking to lease agricultural land for solar projects, there is surprisingly little information available to assist with weighing the pros and cons of entering into such an agreement. This article outlines some of the key considerations when negotiating a lease. As always, landowners should consult an experienced attorney to review any lease agreement before it is signed.

To which estate does the sun belong?

Interestingly, 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 hold 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. Of course, this can be modified by agreement between the parties. For example, assume that Adam owns both the surface and mineral rights of a piece of land. Adam enters into an agreement to sell the land to Beth, but he reserves solar leasing rights. If that happened, even though Beth would own the surface of the land, Adam, rather than Beth, would own the solar rights.

Rights of mineral owners. Because the mineral estate is dominant in Texas,

the mineral owner has the right to use as much of the surface estate as is reasonably necessary to produce oil and gas. This includes building drill pads, preparing roads, installing pipelines, and drilling injection wells. The Texas Supreme Court recently held the same with respect to severed ground water estates. This poses a major concern for solar lessees looking to put in a solar facility on the same land. Solar companies will likely carefully analyze the status of the mineral and groundwater estates including how many ownership interests exist and whether a lease agreement is currently in place. Some solar companies refuse to enter a lease unless the surface owner owns or controls the leasing of all minerals as well. Landowners should take care not to agree to serve as a type of “middle man” or negotiator between solar and mineral lessees, particularly if they have no relationship with the mineral owners.

Solar leases are usually not short in duration. According to a Texas attorney who frequently represents solar companies in lease agreement negotiations, these agreements typically last between 20 and 30 years. They tie up property for a significant period of time, so it is important to carefully evaluate the terms.

Royalties are not common in solar leases.

Unlike oil and gas lease agreements, it is uncommon for a solar lease agreement to set forth a royalty as the payment method. Instead, annual payment terms are usually defined in dollars per acre. Commonly, the price offered is lower in the development phase and higher during the operations phase. This makes sense because there should be income generated during the operations period, while the same is not true during the development phase. Because rental rates are usually lower in the development phase, a landowner has reason to want that phase to be as short as possible in the lease agreement. Lease rates, not surprisingly, vary greatly based on a number of factors, chief among those being the value of the land and proximity to the grid.

Solar leases will likely prevent any other use of the property. All of us in Texas have likely driven by a piece of property and seen a tractor farming around oil pump jacks or cattle grazing beneath wind turbines. Because of how oil, gas, and wind production occurs, it is quite possible for the surface owner to make agricultural uses of the property even during the time while the oil, gas, or wind lease exists. The same is often not true for solar leases. Often, a solar farm requires numerous continuously placed panels that would prevent other uses of the surface of the land. Landowners evaluating solar leases should usually assume the lease payment will be the only income for the property and negotiate accordingly.

A solar project could impact special tax use valuation eligibility. 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, the special use valuation allows the property taxes to be calculated based on a percentage of its productive capacity versus the fair market value of the land, which is usually much greater. A solar project could impact the ability for property to qualify for this special use valuation. If that is the case, a host of issues arise, including a rollback period where the landowner may owe the difference between the normal tax value and the modified value paid. Importantly, 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.

Landowners should visit with their local appraisal district to determine how solar projects are treated with regard to special use valuation. It is important that landowners include a term in the solar lease agreement whereby the solar

company covers any additional real property taxes owed as a result of the project and that the company pays for any personal property taxes on the solar equipment. **TBJ**

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