



Solar Leases: Common and Uncommon Provisions

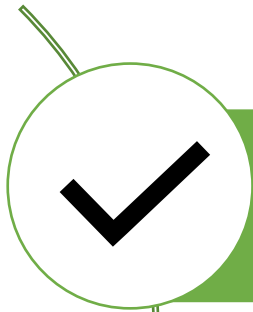
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About the Center

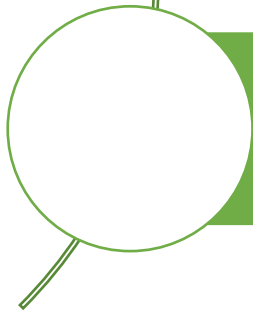
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 - Created in 1987, the NALC is a unit of the University of Arkansas System Division of Agriculture
 - The Center also works in close partnership with the USDA Agricultural Research Service, National Agricultural Library
- We provide objective, non-partisan research and information regarding laws and regulations affecting agriculture



Overview



Background on Solar



Solar Leasing Agreements



Why Solar?

- Growing voluntary demand for renewable energy
- It's getting cheaper
 - Between 2010 & 2020 the cost of utility scale PV systems fell 82%
 - National Renewable Energy Laboratory
- Not as helpful with baseload power needs
 - Storage is an issue and it's not always sunny when we need electricity



Land Use and Solar Developments

Competing issues are the name of the game

- Renewable energy vs. location (i.e. “Not in My Backyard”)
- Opportunities for landowners vs cost to farmers that rent land
- The loss of land (typically ag land) vs other locations



This even impacts other landowners in the area that choose not to participate in the leasing program

- TX pastureland rental rates in 2022 averaged \$7.70 per acre...want to guess the highest solar rental rate I've heard of from TX?

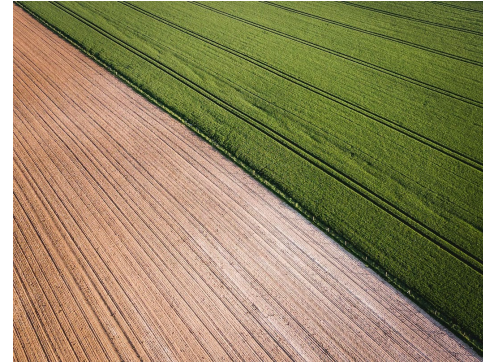
Many types of solar arrangements...we'll look at “typical” and “non-typical” lease provisions for Mid-South ag land

- I chose some “interesting” ones for this presentation...



What are Developers Looking for in Solar?

- Lots of sunshine
- Flat ground
- Well drained soils
- Close to transmission lines w/ capacity



What other group of potential users of real property like these same conditions?



Dual Use Wind and Solar Projects

- Both project have an initial construction phase where they use a lot of land, but after that they can vary.
 - With wind projects it is common to see normal agricultural operations happening all the way up to the concrete pad where the turbine tower is located.
 - They also typically bury any cables deep enough that not even plowing poses a threat to them.
 - The concrete pad can be massive though...up to 40 truckloads of concrete plus rebar
 - Solar is not so simple because the panels take up a lot of room at the surface of the property
 - Much more difficult to use the property for agriculture here.
 - Potential though for wildlife habitats or other environmental benefits
 - Infrastructure to make these types of projects has to largely be specially manufactured at this point making it much more expensive



State Laws on Solar

- States are passing laws and regs regarding solar
- They are not all created equally
- Relevant laws may be scattered throughout state law
- These should influence how you review and negotiate a lease

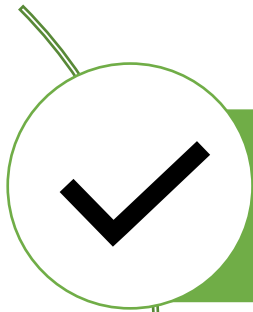
States are stepping up efforts to regulate solar development...

- Not nearly as well developed as mineral developments in states with a long history like TX & OK

State	General Lease Terms	Decommissioning	Tax	Zoning
Arkansas			Ark. Code § 26-26-407	
Georgia			GA Code § 48-5-7.1 (2019)	
Kentucky			Application of Kentucky Ad Valorem Tax and Sales and Use Taxes on Equipment	Model Solar Zoning Ordinances
Mississippi			MS Code § 27-35-50 (2019)	
Missouri			MO Rev. Stat. § 137.017 (2019)	
North Carolina		S.L. 2021- 165, H.B. 951	N.C.G.S. § 105-129.16A	N.C.G.S. § 153A-49
Tennessee	Tenn. Code Ann. § 66-9-204	Tenn. Code § 66-9-207		



Overview



Background on Solar



Solar Leasing Agreements



What this is not...

OIL AND GAS LEASE (Paid Up)

THIS AGREEMENT, is made as of the _____ day of _____ 20____, by and between _____ of _____ hereinafter called Lessor (whether one or more), and _____ of _____ hereinafter called Lessee:

1. Lessor, for and in consideration of \$10.00 and more, the receipt of which is hereby acknowledged, and the covenants and agreements of the Lessee hereinafter contained, does hereby grant, lease and let unto Lessee the land described below, including all interests therein Lessor may acquire by operation of law, reversion or otherwise, (herein called "said land"), exclusively, for the purposes of exploring by geophysical and other methods, drilling, mining, operating for and producing oil and/or gas, together with all rights, privileges and easements useful or convenient in connection with the foregoing and in connection with treating, storing, caring for, transporting and removing oil and/or gas produced from said land or any other land adjacent thereto, including but not limited to rights to lay pipelines, build roads, drill, establish and utilize wells and facilities for disposition of water, brine or other fluids, and for enhanced production and recovery operations, and construct tanks, power and communication lines, pump and power stations, and other structures and facilities. Said land is in the County of _____, State of Michigan, and is described as follows:

Containing _____ acres, more or less, and all lands and interests therein contiguous or appurtenant to the land specifically described above that are owned or claimed by Lessor, or to which Lessor has a preference right of acquisition, including but not limited to all lands underlying all alleys, streets, roads or highways and all riparian or submerged lands along and/or underlying any rivers, lakes or other bodies of water. The term "oil" when used in this lease shall mean crude oil and other hydrocarbons, regardless of gravity, produced at the well in liquid form by ordinary production methods, including condensate separated from gas at the well. The term "gas" when used in this lease shall mean hydrocarbons produced in a gaseous state at the well (not including condensate separated from gas at the well), helium, nitrogen, carbon dioxide and other gases.

2. It is agreed that this lease shall remain in force for a primary term of 3 years from the date of this lease, and as long thereafter as operations are conducted upon said land or on lands pooled or unitized therewith with no cessation for more than 90 consecutive days; provided, however, that in no event shall this lease terminate unless production of oil and/or gas from all wells located on said land, or on lands pooled or unitized therewith, has permanently ceased. If operations commenced during the primary term are discontinued less than 90 days before the end of the term, this lease shall not terminate at the end of the primary term if operations are again conducted within 90 days after the discontinuance. Whenever used in this lease the word "operations" shall refer to any of the following and any activities related thereto: preparing location for drilling, drilling, testing, completing, equipping, reworking, recompleting, deepening, plugging back or repairing of a well in search for or in an endeavor to obtain production of oil and/or gas, and production of oil and/or gas whether or not in paying quantities.

3. Lessee covenants and agrees to pay the following royalties: (a) To deliver to the credit of Lessor into tank reservoirs or into the pipeline to which Lessee may connect its wells, one-eighth of the oil produced and saved from said land, Lessor's interest to bear one-eighth of the cost of treating oil to render it marketable pipeline oil, or from time to time, at the option of Lessee, Lessee may sell the oil produced and saved from said land and pay Lessor one-eighth of the net amount realized by Lessee, computed at the wellhead; (b) To pay Lessor on gas produced from said land (1) when sold by Lessee, one-eighth of the net amount realized by Lessee, computed at the wellhead, or (2) when used by Lessee for purposes other than those specified in Paragraph numbered 7 of this lease, one-eighth of the net market value at the wellhead of the gas so used. As used in this lease, the term "net amount realized by Lessee, computed at the wellhead" shall mean the gross proceeds received by Lessee from the sale of oil and gas minus post-production costs incurred by Lessee between the wellhead and the point of sale, and the term "net market value at the wellhead" shall mean the current market value (at the time of production) of the gas at a market point where gas produced in the general area is commonly purchased and sold, minus the post-production costs that would be incurred by Lessee between the wellhead and such market point in order to realize that market value. As used in this lease, the term "post-production costs" shall mean all cost and expense of (a) treating and processing oil and/or gas to separate and remove non-hydrocarbons including but not limited to water, carbon dioxide, hydrogen sulfide and nitrogen, and (b) separating liquid hydrocarbons from gas, other than condensate separated at the well, and (c) transporting oil and/or gas, including but not limited to transportation between the wellhead and any production or treating facilities, and transportation to the point of sale, and (d) compressing gas for transportation and delivery purposes, and (e) metering oil and/or gas to determine the amount sold and/or the amount used by Lessee for purposes other than those specified in Paragraph numbered 7 of this lease, and (f) sales charges, commissions and fees paid to third parties (whether or not affiliated) in connection with the sale of the gas, and (g) any and all other costs and expenses of any kind or nature incurred in regard to the gas, or the handling thereof, between the wellhead and the point of sale. Lessee may use its own pipelines and equipment to provide such treating, processing, separating, transportation, compression and metering services, or it may engage others to provide

Lessor's initials: _____

- Anyone recognize this?
- Solar leases have some similarities to mineral leases, but they are not the same.
 - They're almost always longer!
- This is a surface use agreement (like an ag lease) but includes other issues that you should be aware of.



These Leases are...Different

- If you are used to ag leases then these might not “look right” to you.
 - They are longer in length
 - Typically more complicated
 - Require a substantial amount of work to do your due diligence

*Photo Credit to Harrison Pittman



Some Questions to Ask Right off the Bat



- Have they ever done a solar project before?
 - If so, find out where it is and talk with the landowners.
- Do they operate the project or sell them off?
 - Are you working with a local utility or a landman?
- Do they have a timeline?
- Do they have a purchaser and a high voltage transmission line available?
- Can they have a copy of the lease to review?



Signing a Solar Lease Won't Make you Rich



- Typically, there is no guarantee that the developer will build a project once you've signed
- Similar to wind and minerals...they have an option to develop and they will likely enter into many agreements that will not come to fruition
 - Depending on the developer



Payment

- How is the lease structured?
 - Option, construction, generation and decommissioning
 - Compensation for permanent easements?
 - OK wind lease example
- **Option Phase**
 - Sometimes called the “Due Diligence period”
 - 3-7 years and exclusive
 - Flat bonus payment per acre?



Payment, Continued

- **Construction Phase**

- Be specific on how to calculate damages for crops
 - What land “may” they use? If your client can’t plan because they may use adjacent land then they should be compensated for it.

- **Generation Phase**

- 1) Per acre – Varies! - \$400-\$1,600
 - How many acres will they use and pay you for
 - 2) Generation capacity
 - What if it is upgraded during the life of the project?
 - 3) Royalties
 - Based on gross or net proceeds?
 - 4) Combination of two or more
- *** These leases can last from 25-50 years so have an escalation clause

- **Decommissioning Phase**

- Payments through the decommissioning process



Length of the lease

Initial Term. The initial term of this Agreement (Initial Term) shall commence upon the Commencement Date and unless terminated pursuant to Early Termination, shall terminate on the last day of the last month of the last annual anniversary, twenty-five years from the Commencement Date.

Extension Term. Upon at least sixty (60) days prior notice before the end of the Term, _____ shall have the right to extend the Term of this Agreement for two additional five (5) year periods (each, an Extension Term) on the same terms and conditions as set forth herein, including the same Base Lease Payment set forth in this Agreement. The Initial Term, and any Extension Term, if exercised, shall be referred to, together, as the Term.

- Leases tend to be much longer than ag leases and different phases can have different lengths
 - This lease has a 5 year exclusive option period for due diligence
 - Early termination is solely in favor of the developer
- Leasing decisions can impact not only your client, but their heirs as well so they need to think about that
- Payment escalation clauses are a good idea...what might be a good rental rate today probably won't be in 2050

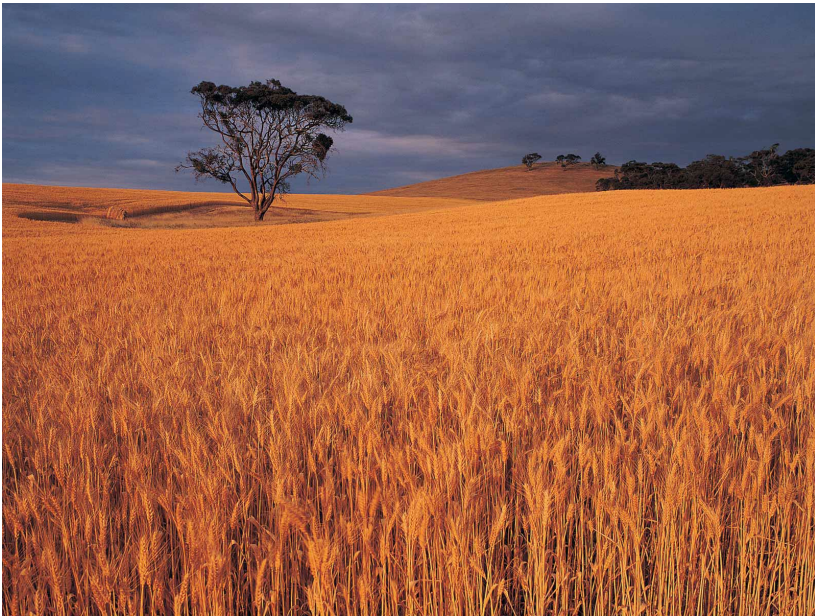


What Land is Covered in the Solar Agreement?

- Not always an easy answer
- What land does the project developer pay for?
 - All of the leased acreage?
 - Only that which is fenced in?
 - What about access roads, substations, transmission lines?
 - What about the laydown yard during the construction phase?
 - How broad is the easements and are they permanent?



What about Agriculture?



Don't assume that they understand farming

- How much notice should your client have before construction?
 - “Tenant shall inform Landlord of Tenant’s construction schedule at least five (5) business days prior to commencement of Installation Work.”
- How are damages calculated?
- Will powerlines be buried below plow depth?
- How will roads or the solar development impact drainage, irrigation, etc...
- Will there be a laydown yard to store equipment during construction and how is your client being compensated for it?



Easements

- Are easement tied to progressing into the construction and generation phase while terminating at decommissioning?

Easement(s). The Easement(s) granted herein shall include the following rights for the Term of this Agreement, or such additional time as is required by *** to remove the System(s) and restore the Premises:

(a) The non-exclusive right of access to the Premises across or through the surrounding or adjacent area and Remaining Property owned or leased by Owner which is necessary for *** to gain access to the System(s);

(b) The exclusive use of, and right to test, design, finance, construct, install, own, operate, maintain, repair, replace, and remove the System(s) within the Leased Area; and

(c) To the extent required by the System, the exclusive right to receive sunlight (Insolation) at and over the Leased Area (Insolation Easement) during every hour of every day that sunlight can be received by the System(s).

The Easement(s) shall be appurtenant to the Property, run with and benefit the Property, and inure to the benefit of and be binding upon Owner and ***, and their respective successors and assigns. No act or failure to act on the part of *** shall be deemed to constitute an abandonment, surrender, or termination thereof, except upon recordation by *** of a quitclaim deed specifically conveying the Easement(s) back to Owner or the termination of this Agreement pursuant to its Terms and Conditions.

- Sometimes there may be multiple easements to review

Lessor shall sign and deliver to Lessee the Construction, Access, and Transmission Easement attached hereto as Exhibit C (the “Construction Easement”) and the Wind Non-Obstruction Easement attached hereto as Exhibit D (the “Wind Easement”), each of which shall be recorded in the [County] Records.



People on the Property



- There will be people on the property
 - Some during the Option period
 - Many during Construction
 - Some for maintenance, mowing, etc... during the Production phase
 - Many (hopefully!) during decommission phase
- Does your client know and understand this?



Property Taxes

- Critical consideration
- Agricultural use typically has the lowest tax rate
- Who pays the difference?

Property Taxes. To the extent that the installation of the System(s) on the Premises results in any Property Taxes being assessed against the Property, Owner shall be solely responsible for the payment of all such Property Taxes.



Decommissioning the Solar Project

Read your contract carefully:

- Some are silent about it
- Some expressly cover it and may provide a bond
- Others are more...creative

Decommissioning the System. **** shall be responsible for removal of the System. **** shall have no obligation to remove any road, utility installation, or building foundation installed upon the Premises.

- What about the easements?
- Are you still being paid during this period?



Read Everything – Even the Attachments

Insurance – Even clauses that are typically mundane can be tricky!

“Typical” Insurance clause

Insurance for Tenant’s Work. During the performance of the Installation Work or other work done on or to the Premises, Tenant shall have and maintain in force public liability and property insurance, builder’s risk insurance covering Landlord, environmental insurance, and workmen’s compensation insurance affording applicable statutory coverage and containing statutory limits, all in compliance with the provisions of Section ***.

“Different” Insurance clause

By Owner. During the Term, Owner shall carry at its sole cost and expense, a minimum of (i) commercial general liability insurance with limits of not less than One Million Dollars (\$1,000,000) for bodily injury or death, and property damage, (ii) an umbrella “all risk” insurance policy of not less than Five Million Dollars (\$5,000,000) covering the Property, and (iii) workers’ compensation insurance coverage in accordance with the applicable requirements of federal and state law.



Miscellaneous Clauses

- Watch for impossible/very difficult promises

Indemnity. Lessor shall indemnify, defend, protect and hold Lessee harmless from and against all damages, losses, costs, expenses (including reasonable attorneys' fees), liabilities, injuries and claims arising out of or caused by the operations or activities of Lessor or its invitees, employees, agents, contractors or other tenants.



“Legalese”

- Assignment clauses
 - Typically very favorable to the company, but researching the company is still a great idea.
- Termination clause
 - Adequate notice and a cancellation fee if possible
- ADR
 - If you can take it to court locally things may go better for you...
- Limitations of Liability
- Confidentiality clauses
 - Still prevalent
- Venue and Choice of Law
 - Keep it local if at all possible



Summary

- Not all leases will turn into solar projects!
- Make sure that the lease does not give away other rights if you don't get a solar farm
 - OK wind farm example
- Prices can vary substantially
 - I've seen/heard of between \$400 and \$1600 per acre, but these can vary
 - It's a good idea to be able to increase the rent over time based off of inflation or other built-in measures
- Be careful with the easements
- Watch out for mineral estates
- Read the contract carefully and have an attorney that is familiar with the issue review it as well!



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