Indiana Farm Bureau®

Landowner Toolkit

Legal Considerations for Solar Leases

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Many landowners have questions regarding solar leases. This document aims to help landowners, attorneys, and other interested parties negotiate a solar lease. This lease serves as a guide, not legal advice. Landowners are advised to consult with an attorney before signing a solar lease to ensure their rights are adequately represented. Please share this document with your attorney, who will have access to statutes and local land use ordinances which may affect the proposed solar development. Indiana Farm Bureau is not endorsing solar developments by sharing this guide; instead, we aim to help members and attorneys who are faced with a solar lease.

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1. Legal Documents a Landowner May Encounter During a Solar Development

A solar developer seeking to lease property will likely make initial contact with landowners by sending legal documents via the mail or presenting legal documents in person. Legal documents a landowner may encounter include a letter of intent, an option to lease contract, and the solar lease itself. Regardless of what the document is titled, hastily signing it may bind an owner to a solar lease for decades. Lucrative payments are not a reason to neglect giving the document due care. Consult an attorney before signing any document presented to you.

- **Letter of Intent:** A letter of intent serves as a preliminary agreement between the landowner and the developer. Once signed, the contract reserves the property, giving the developer time to investigate the site. This agreement prohibits the landowner from entering a lease with another solar developer while the first developer investigates the property. A letter of intent will likely contain a "confidentiality clause," meaning the landowner cannot tell others about the proposed project or negotiate with other developers. Considerations:
    - Does the letter bind the owner to lease the land?
        - Some letters of intent may do more than merely reserve the property for investigation; they may contain language that legally binds the landowner to the development. Be leery of this and ask to see the full lease before signing any letter of intent.

[1] You can access their guide at the link below:
chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/https://nationalaglawcenter.org/wp-content/uploads/assets/articles/hall_solar_Leasing.pdf

- **Option to Lease Contract:** An option to lease contract binds the landowner to lease the land to the developer at a future date if the developer exercises the option. The developer has the option to enforce the lease or walk away; the landowner may not sue to enforce the lease if the developer walks away. Option periods may vary in length, ranging from two to five years or even longer. Know exactly what the document entails before signing. A document titled "Option to Lease" may also serve as the actual solar lease, or may refer to a solar lease you have yet to see. Be adamant about seeing the lease in addition to the option contract if they are mutually exclusive. Considerations:
    - How must the developer give notice of intent to enforce the option to lease?
    - Can a landowner continue to use the land during the option period?
        - What types of activity are permitted? Can an owner continue to farm the land?

- **Solar Lease:** The solar lease serves as the long-term agreement between the landowner and the developer and governs all aspects of the relationship. The solar lease contains multiple stages that can span several years.

2. Payments and Stages of a Solar Lease

- **Option period:** A developer seeking to use a solar lease may include an option period in the lease instead of using a separate option to lease contract.
    - Sample language: "*Option Term: Five (5) years. Developer shall have the right to terminate the option. Initial Consideration: Within fifteen (15) days of execution of the Option, the developer shall pay to owner $X as the initial consideration. Option Payments: $X per acre per year shall be paid to Owner on an annual basis during the term of the Option.*"
    - Rental payments: Payments may be extremely low compared to the rent the developer is bound to pay once the project comes online. Lower payments are arguably justifiable during this period as the developer is still solidifying the feasibility of the project, and the owner may still be using the land for agricultural or other purposes. Though payments are low, the developer will likely have made a high enough offer for you to sign the initial lease.

- **Development or construction period:** Begins once the option is exercised and ends at some specified time in the future or once construction is complete.
    - Sample language: "*Development Period: The period commencing at the end of the Option Period and expiring on the date three (3) years thereafter. Development Period Payments: $XX/acre/year*."
    - Rental Payments: Again, payments during this period may be lower than the payments the landowner can expect once the project comes online. But because the owner may no longer use the land, the developer will likely have increased payments for the construction period.

- **Solar operations period:** Begins once construction is complete and the project begins to produce energy; it terminates once the lease runs its course. This stage typically lasts 20-50 years, depending upon the language of the lease.
    - Sample language: "*Operations Period. The solar operations phase of the Project will be for a period of thirty (30) years from the date when at least one solar generating facility is installed and operational on the Premises. Operations Rent. During the Operations Period, an annual payment equal to the sum of $XXX per acre of land within the Solar Project Area and $XX per acre of Property outside of the Solar Project Area. The Operations Rent shall be adjusted upward annually by two and one-half percent (2.5%) each year (the "Inflation Adjustment Factor")*."
    - Rental Payments: During this period, payments are at their highest and may range from $600 to over $1,500 per acre, depending on location, the type of project, and the developer. Like the sample language above, ensure the solar lease contains an inflation adjustment factor so that the payments reflect the rising value of the land. What may seem like a good price today may not be 20 years from now when the value of land may have increased.
    - Rental Payments for Use Outside the Lease: If a solar developer needs to utilize land outside the specified solar lease, ensure you are compensated. If the solar lease will interfere with your land use outside the solar development, negotiate rental payments so you can recoup your loss.

3. **Terms of a Solar Lease**
    - **The parties:** The solar developer is called the lessee or tenant. The landowner is called the lessor or owner.
    - **Description of the property; excluded property:** Ensure the lease accurately describes the property subject to the lease, especially if the owner wants to exclude part of the parcel from the lease. A prudent way to ensure the description is accurate is to have a survey of the property. If a survey is performed, the lease should state whether the developer or owner pays. Typically, the developer will pay for the survey.
        - Option to renew**:** Allows the developer to renew the lease at the end of the lease period. Renegotiations may be allowed depending upon the language of the renewal clause. Sample language: "*Developer will have the right at its option to extend the solar operations phase for up to two additional periods of five years. To exercise its option, Developer must deliver a written extension notice to the Owner at least six months prior to the expiration of the solar operations phase. Developer will have no right to extend the lease term beyond its two additional periods*."
    - **Compensation for property damages:**
        - **Drainage systems:** A solar development may interfere with drainage on your land. It is prudent to assume there will be damage. Think of the ways drainage could be damaged during the solar development, then negotiate language with the developer that addresses these concerns. Most developers will be willing to

negotiate these matters, as proper drainage is important for their development. Below are a few applicable considerations:

- Map any surface drains or underground tile on your property so the developer is aware of their location. You could map the drainage digitally, or physically. Just ensure the developer knows where the drainage system lies.
- Have a plan and procedure in the lease for when damage occurs: Who is responsible, who is liable, and who is going to fix the issue(s)? For instance, a landowner may request a specific contractor who he trusts will be tasked with repairing any damage.
- Importantly, a solar development may interfere with a mutual drain, which is a drain that is located on two or more tracts of land, created by mutual consent among the owners.[2] Interference with a mutual drain means landowners up or down the drainage line could be negatively affected. Naturally, landowners near the development have a legitimate interest in ensuring the developer does not damage the drain. A landowner should ensure the lease indemnifies the landowner, and rather holds the developer liable to other persons affected by damage to a mutual or regulated drain.
- If a solar developer seeks to plant cover crops or otherwise use the land for another use, consider how these uses may affect drainage.

- **Crop damage:** When the developer initiates construction, the owner may be actively using the land. For farmers, crops may be in the field. As such, the solar lease should state how the developer is to compensate the farmer for any damage to unharvested crop or use.
  - Sample language: "*Crop damage will equal the amount of damaged acres (based upon Owner's reasonable estimate as agreed upon by Developer's representative) multiplied by the average yield in the county where the property is located multiplied by Price multiplied by 1.1. The average yield in the county where the property is located shall be based on the average yield for the latest three years in the county as published by the National Agricultural Statistics Service. The price shall be based on the respective commodity's futures price for December delivery with the Chicago Board of Trade as of the close of the 15th day of the month during which the damage occurs.*"
  - Note: Farmers should advocate for a "bonus payment" because the price at harvest could be higher than the price when construction began.

[2] *Frazee v. Skees*, 30 N.E.3d 22, 33 (Ind. Ct. App. 2015) (citing Ind. Code § 36–9–27–2).

- **Expert expenses:** A solar lease may contain a clause offering to pay for you to seek legal representation up to a certain amount. If the lease does not have one, try and negotiate this addition.
- **Real and personal property taxes:** The solar lease should specify the developer is liable to recoup the owner for any increase in real property taxes that occur when the land is reclassified out of agricultural use. When land is reclassified out of agricultural use, property taxes will likely increase. A solar lease should clearly state that the developer is liable for all personal property taxes due for the equipment on the land housing the solar development.
- **Conservation withdrawal penalties:** If the owner's land is in a conservation program, the solar lease should require the developer to pay any penalties and fees associated with withdrawing the land from the program.
- **Easements:** A solar lease may require an owner to grant easements to a developer outside the leased area. Owners should be cautious of broad and vague language contained in easements—especially in a catch-all easement. Ensure easement language is specific and tailored to the particular parcel. A typical lease may contain the following easements:
    - Construction easement: the right to access property to prepare it for development and installation of solar panels.
    - Access easement for ingress and egress: the right to cross the owner's property, use roads, or develop new roads for travel in and out of the development.
    - Transmission easement: the right to install power lines, underground wires, and other transmission equipment to connect the solar development to the energy grid.
    - Nuisance easement: waives nuisance claims arising from conditions common to solar developments, like glare, reflections, and noise.
    - Solar easement: the right to receive sunlight without obstruction.
    - Catch-all easement: a broad and vague easement giving the developer a right to use the property as needed for the solar development.
- **Property maintenance:** A solar lease should contain provisions indicating who is responsible for the property maintenance in and around the solar development. Generally, the developer will be liable for typical tasks like mowing, weed control, and maintaining access points. Farmers may seek to require the developer to control any noxious weeds that could arise on the leased land or on fence rows.
- **Landowner obligations:** A solar lease typically contains provisions directed at the landowner:
    - A non-interference provision states that an owner cannot interfere with the developer's lawful lease.
    - An exclusivity provision ensures the developer has sole possession of the leased property—and may even exclude owners from granting new leases to other developers on nearby property.
    - A quiet enjoyment provision typically states the owner promises not to hinder or interrupt the developer's use for the duration of the lease.

- **Landowner improvements:** The solar lease may require the landowner to seek approval from a solar developer for any new construction or improvements near the solar panels to ensure the project does not interfere with the solar easement. For instance, if an owner wants to plant trees or construct a building near the solar development, the owner may need to contact the developer.
- **Termination:** The solar lease should state when parties may permissibly terminate the solar lease and the consequences of such. Typically, owners cannot terminate the lease except in circumstances of a material default by the developer. But a developer may have more range in terminating the lease. Frequently, contracts allow the developer to terminate the lease upon written notice to the owner.
- **Cleanup**
    - Post-Construction: The solar lease should require the developer to remove any construction debris and restore portions of the land not used for the solar development to the condition the land was in before the construction began.
    - Post-Project: Upon termination of the lease, the developer should remove all its solar equipment within a specified amount of time, often within one year of termination. A post-project clause may also grant an easement for the removal of the equipment since the prior easements may have terminated. The lease should require the developer to restore the land to its original state.
    - Removal Bond / Security: Owners should ensure the developer obtains a bond or places funds in escrow as security for the cost of cleanup and restoration. Typically, the formula for the bond value determination includes a credit for the salvage value of the solar equipment but attempt to negotiate this. The bond value should be determined independent of the salvage value.
- **Confidentiality clauses:** Solar leases usually contain strict confidentiality clauses that require the owner to keep the financial and operational details of the lease and project in strict confidence. These clauses may even bind the owner to confidentiality after the lease period terminates.
- **Carbon and Tax Credits:** These usually go to the developer, not the owner.
- **Owner's warranty of title:** A representation by the owner that he or she is the fee simple owner and possesses the right to encumber the land. Such a warranty should exclude any encumbrances already recorded or disclosed.
- **Hazardous materials and environmental concerns:** Solar leases may require a representation by the owner that the land is free of hazardous waste. Leases should also require developers to use the land in compliance with all environmental laws and regulations, holding the developer liable for any violations.
- **Indemnity:** An indemnity clause holds the developer liable for harm resulting from the solar project and holds the owner liable for harm or other acts on property outside the lease.
- **Condemnation:** The solar lease should address what happens if the government exercises eminent domain on part or all the leased land. Because the owner holds title to the land, the owner should receive the award in full.

- **Force majeure:** If an uncontrollable or unforeseeable act of God occurs and affects the solar project, the developer may escape paying rent for a period as it is impossible or improbable to use the land. These are common in most contracts, though not optimal for owners.
- **Lender protections:** A developer's lender may seek to hold a security interest in the solar development and, in the event of foreclosure, may reserve the right to possess the lease or have a receiver appointed to operate the lease.
- **Most favored nations:** An owner should request that a solar lease contain a most favored nations clause, which means that the developer must pay to all lessors the highest price offered to another. But because solar leases generally contain confidentiality clauses, an owner will not know what the developer is paying others in the project area. The duty to follow this clause would rest with the developer.
- **Arbitration:** Commonplace in many contracts, these clauses require disputes between the Owner and the developer to be resolved by arbitration rather than a court of law. This generally favors the developer and not the owner. Seek to remove this clause.
- **Jury trial waiver:** Because a jury may be more likely to side with the owner over a developer, the owner should seek to remove a clause waiving a right to trial by jury.
- **Damages waiver**: Ensure the solar lease does not contain a damage waiver, as the waiver attempts to avoid compensating the owner for damage caused by the developer.
- **Attorney's fees**: Clauses that shift the costs of litigation onto the owner should be removed if possible.
- **Choice of law and choice of venue**: The owner should ensure the choice of law is the state where the land is located. The owner may seek to have the county where the solar development exists as the proper venue.

4. Learn about the Solar Developer and the Specific Project

Learning who the developer is and building a relationship from the first meeting is vital to maintaining a good relationship through the solar project. Consider asking the developer these questions when approached about a solar lease:

- How long has your company operated in Indiana?
- Are you involved in other developments in Indiana?
- Can you refer me to other landowners that your company has partnered with?
- What is your timeline for this project?
- Do you intend to sell the solar facility after it is constructed?
- How frequently will your agent(s) be on site?
- Will you notify me when construction will begin?
- Do you take precautions to protect neighboring lands from harm during construction?
- How can I contact your company?
- How quickly can I expect a response to a question or concern?

5. Consulting Experts

Once you have the lease, don't sign it until after you have thoroughly reviewed the lease with an attorney, accountant, and insurance provider.

- **Attorney**. It may be wise to find an attorney who has experience with solar leases. When you meet with an attorney, use the information in Section 1 of this document to guide your questions about the lease itself. But there are legal considerations outside the lease itself. Consider asking your attorney these questions:
  - How does this lease affect my estate plan and farm transition plan?
  - How does this lease affect my property taxes, government programs, and existing farm leases?
  - Are there any liability concerns?
- **Accountant**. Along with legal questions, there are also financial questions to consider. Ask your accountant:
  - What are the tax consequences of signing the lease?
  - What else should I be aware of financially?
- **Insurance provider**. The lease may require the owner to require a certain amount of insurance coverage. Ask your insurance provider:
  - Do I have adequate liability coverage as the lease requires?
  - Do you recommend I increase my coverage?

6. Other considerations

- **Family**. There are more people than experts you need to consult: Talk to your family. An owner should consider whether a solar lease aligns with the family's long-term plans for their farm or tract of land. It may be important to consider what the next generation of farmers in the family think before subjecting the land to a decades-long lease. This is not a decision you can easily reverse a few years down the road.
- **Neighbors**. Your neighbors would rather hear about the solar project from you rather than read about it in the local newspaper or learn about it in town. While signing a solar lease is the owner's decision, it is important to tell nearby neighbors about your plans and hear any concerns they may have. But still the decision rests with you and your family—not the neighbors.
- **Records and documentation**. Keep and maintain all records. Keep a lookout for property damages and record and document any violations you find. Maintain a healthy relationship with the developer so issues can be remedied.
- **Other leases**. Are you currently leasing your land to a farmer or hunter? Their lease may dictate when you can enter another.