

Ten Tips for Negotiating a Solar Lease

A Guide for Landowners and Local Governments

by Kent Holsinger, Esq. and Robert Veldman



Entering into a solar lease can generate welcome additional income on rural properties. With Colorado's abundant sunshine,¹ mandates for renewable energy, and incentives for renewable development, interest in developing solar farms is skyrocketing.

1. Seek Competent Help

Solar agreements are complex and lengthy documents that can have significant implications for many years to come. The form document may be more than twenty pages long and is drafted to be most favorable to the solar developer. Oil and gas leases, by contrast, are typically two-page forms. However, solar energy development is new and does not come with more than a century of experience, laws and interpretation. The form agreement may entail an option, easements and a lease agreement in one document. Financing arrangements for solar projects account for much of the complexity and terms. All lessors² should seek competent professional advice to help

negotiate these agreements and tailor them to their specific needs.

2. Research the Solar Company

Do your diligence on the solar energy developer and their history. You may be working with them and their successors for decades to come. Investigate how they've worked with other landowners, and ask landowners for other referrals too. Is the company in good standing with Colorado's Secretary of State? What can you find about the company online? Are they members of the Solar Energy Industry Association (SEIA) and do they abide by the SEIA Code?³

Lease Rates

Leases are generally broken into three phases: (1) preconstruction planning to hold the land while finding a buyer for the power; (2) construction; and (3) operation. There are different lease rates for the different phases. Lease rates are generally calculated by the acre and can vary considerably by location and appraised land values. A good consultant may be able to help you determine if lease rates are competitive and within current market range. Include provisions in

the lease for payment of all outstanding monies owed the landowner within a certain time period after notice of termination.

3. Duration

With significant investment required, solar leases generally provide for thirty (or more) year terms with an automatic renewal. This includes repowering or using new solar panels with advanced technology. There is no opportunity to renegotiate the renewal. With terms as long as 70 years, be sure to address the ability to sell the property subject to the solar lease. Alternatively, the developer may entertain an option or outright purchase for appraised value. Any such agreements should be legally reviewed.

4. Access

Form solar leases may require property owners to provide access not only across their property, but adjoining properties! To effectively negotiate a solar lease, one must first understand the nature and extent of their own access rights. If not, significant liability may befall the unwary landowner.

Prior to signing any lease, consider:

- Does the road to my property cross other owners' property?
- What if access is needed across federal or state land?
- Are there recorded easements, permits or agreements to cross these lands?
- If so, do the documents allow for commercial uses like solar farms?

If there are no agreements for access, landowners may have prescriptive rights across historic access roads. A prescriptive easement is evidenced by open, notorious, adverse and continuous use of a road for more than 18 years.⁴ But the use of a prescriptive right is generally limited to its initial purpose. Additional uses may be allowable provided they are balanced against the increased burden to the other property owner.⁵

In Colorado, solar easements must be created in writing and cannot be acquired by prescription.⁶ Please consult legal advice before signing a lease or granting access!

Roads crossing state or federal land may be authorized by easement or,

more likely, by permit. Permits may require renewals at five, ten or twenty year intervals and could be revocable by the granting agency. They often come with terms and conditions such as limits on the type of use and the number of dwellings served. Please consult with the state or federal agency prior to granting anyone else rights to cross using your

5. Thinking Ahead

Landowners should consider:

- Are existing roads, gates and crossings are wide enough for large commercial vehicles or construction equipment?
If not, who is responsible for

improving the road and access? At whose expense? To what standard? Are existing roads, gates and crossings are wide enough for large commercial vehicles or construction equipment? If not, who is responsible for improving the road and access? At whose expense? To what standard?

- How will gates and locks be addressed?
- Who is allowed to use the road?
- What kind of notice is required prior to undertaking any activity on the land?



- Who is responsible for road maintenance? At what standard?
- What if a dispute arises?

Solar farms require utilities to operate and to connect energy produced to the electric grid. Where will power lines be sited? Will they be above-ground or below-ground? Solar developers will obviously prefer the less expensive, but more obtrusive, above-ground power lines.

Consider how power poles, transformers, power lines and guy wires might affect the property and negotiate in advance where and how power lines are constructed. If new power lines are brought to the property, the landowner may wish to negotiate the ability to use that power. Utilities should be addressed and demarcated in a detailed site plan as discussed below.

Landowners should require an easement for utilities with rental fees.

6. The Extent of the Solar Development: Preliminary Site Plans

The impact to the landowner may far exceed the solar panels

Solar farms may need access to water or sand and gravel for construction or operation. Ensure that any water or other materials removed from the property is covered by a separate agreement with separate compensation.

themselves. For example, the solar developer could seek to store supplies or equipment on the Property. They may plan to erect and use buildings such as a repair shop or even employee housing. Often the developer will require a communication tower. Does the developer seek purchase rights to construct an electrical substation?

The solar developer will require a buffer around the operating solar panels to ensure panels are protected from shadows and dust. These buffers may justify additional rental fees and should be clearly spelled out in the lease.

The risk of injury or environmental contamination could also increase with these activities.



Unlike oil and gas or wind energy leases, solar use of the property is incompatible with virtually all other uses. As a result, landowners should ensure the solar farm is sited to avoid interference with agricultural operations. Consider requiring the developer to fence the site and maintain such fencing for the duration of the lease. It also pays to consider what impacts could occur to neighboring properties. Ask the developer for maps of projected glare and reflection and consider how that may impact your property and your neighbors.

Develop a preliminary site plan in advance so both the landowner and the solar developer have a clear understanding of what facilities are

allowed and where they may be located. Once the project is surveyed, a final site plan should be presented to the landowner. In addition, the landowner needs to have a separate surface use agreement or easement in place for roads and other infrastructure like transmission lines to ensure terms are in place including payments to be made.

7. Landowner Obligations

What must the landowner do? First, the landowner must continue to pay property taxes. Ensure the solar developer is responsible for any other taxes or increase in taxes as a result of the solar farm. Solar leases generally include prohibitions on the landowners' continued use of the property for the solar farm (and perhaps even surrounding lands)!

Restrictions may include: keeping the leased area free of shadows from trees, buildings, power lines or cellular phone towers. The lease form may even require the landowner to remove existing obstructions (like trees) that currently shadow the solar farm site. These items can all be negotiated—at least to a degree.

8. Existing Leases and Encumbrances

Check to make sure the proposed solar lease will not interfere with existing rights or encumbrances. If the property is mortgaged, does the mortgage preclude any solar development? A subordination agreement with the lender might be required.

Is the property encumbered by a conservation easement or enrolled in a federal conservation program through the Natural Resources Conservation Service (NRCS)? If so, solar development may be prohibited.

Is the property leased for recreational purposes such as hunting? Many solar leases do not allow hunting on or near the solar farm. Solar leases will also likely attempt to nullify the development of mineral rights or sand and gravel in the leased area. Again, these issues may all be negotiable.



9. Insurance and Indemnification

Consider requiring the solar developer and its contractors to carry insurance and name the landowner as an additional insured. Require a certificate of insurance that confirms this has been done. A waiver of subrogation in favor of the landowner adds yet another layer of protection as it precludes the insurance company from seeking reimbursement when a claim must be paid. Finally, it is important that the developer indemnify the landowner in the event anything goes wrong. Indemnification is an agreement to reimburse a party for damages from the result of another's actions. Form leases usually provide for mutual indemnification but the details are key. If hunting or other recreational uses are allowed on adjoining land, work towards language that protects the landowner from the actions of lessees or guests and ask hunters or other users to agree to indemnify you through a separate agreement.

10. Decommissioning and Reclamation

What happens when the solar lease terminates? If a solar farm and

related infrastructure was built on the property, landowners should carefully consider decommissioning and reclamation requirements.

- What will be removed and what might stay?
- What about recontouring the land?
Revegetation? Seed mix?
How will seeding be accomplished?
- How long must reclamation obligations last? Until the seed has germinated and taken, or simply upon seeding?
Does reseeding require water?

Leases should provide for a detailed reclamation plan and an appropriate bond to ensure the developer has an incentive to properly reclaim the land and the landowner isn't left

Reclamation for solar development must be carefully addressed in the lease agreement.

with an expensive mess. Solar development lacks agency oversight when compared to other resource uses like oil and gas or sand and gravel. As a result, reclamation for solar development must be carefully addressed in the lease agreement.

Conclusion

Demand for renewable energy continues to rise. Landowners in sunny states like Colorado may be able to generate additional revenue by leasing or selling property for solar farms. There are many important considerations in doing so. We hope these ten tips will help spark ideas and thoughts. Please seek competent legal and consulting advice prior to entering into binding agreements. Consider asking the solar developer to pay for a landowner's legal and consulting fees. Neighboring landowners might also consider banding together to engage common legal and consulting representation. Sharing the burden can be an efficient way to stretch resources while receiving good, experienced help.

Footnotes

¹ See National Renewable Energy Laboratory's solar maps, available at <https://www.nrel.gov/gis/solar.html>.

² Lessors are the legal owners of the property. A lessee is anyone to whom a lease is granted (the tenant).

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<https://www.seia.org/initiatives/seia-solar-business->

⁴ C.R.S. § 38-41-101.

⁵ *Wright v. Horse Creek Ranches*, 697 P.2d 384, 388 (Colo. 1985).

⁶ C.R.S. § 38-32.5-101 *et seq.*

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