

Who owns rights to the sun?

As solar leases increase in popularity, landowners have an opportunity to make extra income, but they also face complicated questions about the pros and cons of entering into such an agreement. Learn more about what landowners should consider before negotiating their solar rights.

by **Tiffany Dowell Lashmet**

I've heard from several Texas landowners who have been contacted by solar companies seeking to lease agricultural land for solar projects. Here are some important points for landowners considering or negotiating a solar lease.

To which estate does the sun belong?

The Texas Supreme Court has never ruled on whether solar rights are part of the surface or mineral estate. Many legal scholars assume 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 an 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.

The fact that solar rights are likely part of the surface estate is important from a legal standpoint with regard to implied rights. The mineral estate is dominant under Texas law. That means a mineral owner has the right to use as much of the surface as is reasonably necessary to produce minerals, without permission from or payment to the surface owner. The same is not true for other surface substances. Because one surface substance is not dominant over others, the implied right of use does not exist.

Assume an oil company leases oil rights to a piece of property. Because oil rights are part of the mineral estate, the oil company would have the implied right to use the surface to produce the minerals, even if the lease was silent on this issue. If, however, a solar company leased solar rights, all of its rights would need to be set forth in the lease agreement because no implied rights would exist since solar is not part of the mineral estate.

Rights of mineral owners

An important consideration for landowners and solar companies is the land being considered for the solar project and the status of the mineral estate beneath it. Because the mineral estate is

dominant in Texas, the mineral owner has the right to build drill pads, prepare roads, install pipelines, and drill injection wells. Not surprisingly, this poses a major concern for solar lessees looking to put a solar facility on the same land.

Solar companies will likely carefully analyze the status of the mineral estate, including how many ownership interests exist in the estate and whether a lease agreement is currently in place. Landowners should take care not to agree to serve as a middleman 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

These lease agreements typically last between 20 to 30 years and tie up property for a significant period of time, so it is important to carefully evaluate the lease terms. Often, there are two phases to a solar lease: development/construction and operations. The development/construction period involves testing to see if the project will work, conducting environmental studies, analyzing transmission capabilities, and other information gathering. The operations phase occurs when the project actually begins producing and selling energy. When reviewing draft leases, pay careful attention to how these phases are defined and what is required to occur to move from the development/construction phase to the operations phase.

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/construction phase and higher during the operations phase. This makes sense, as there should be income generated during the operations period. Because rental rates are usually lower in the development/construction phase, a landowner will want that phase to be as short as possible in the lease agreement.

Solar leases will likely prevent any other use of the property

Many Texans have 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 possible for the surface owner to make agricultural uses of the property even while an 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 prevent other uses of the surface of the land. Landowners evaluating solar leases should usually assume the lease payment would be the only income for the property and negotiate accordingly.

Watch for prohibitions on use of other properties

A term sometimes included in draft solar agreements is a requirement that the landowner does not construct anything that could impact the sunlight flowing to the solar project. This could affect not only the land where the solar panels are located, but also neighboring land owned by the landowner. Similarly, some solar leases attempt to limit certain agricultural operations, such as crop dusting. Landowners should carefully consider whether these types of prohibitions could be problematic for their operations.

Solar energy and solar leases are relatively new developments for Texans to navigate. A landowner who is considering entering into a solar lease should consult an experienced attorney to review any lease agreement before it is signed.

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There's much more for landowners to consider when it comes to solar leases. Read the digital edition of this issue at texasrealestate.com/magazine for more details, including how a solar project could affect special tax-use valuation eligibility and five legal terms your clients might see in their agreement.

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