

Utility-Scale Solar Energy Contracts: *Considerations for Landowners*

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Contact Information

Kristine Tidgren

Center for Agricultural
Law & Taxation

ktidgren@iastate.edu

www.calt.iastate.edu

@CALT_IowaState

General Considerations

- Agreements are developed by attorneys for the energy companies.
 - The proposed provisions will be written broadly and in the best interest of the company (that's their job!).
- Landowner should secure their own legal counsel to review the proposed agreement and **negotiate amendments** where landowner is not comfortable with proposed terms.
 - These are long-term agreements that **control** your land for decades to come.
 - You must understand and be okay with the terms **before you sign**.

What is in a typical agreement?



Agreements

- Agreements will vary, but most contain very similar provisions.
- Many Start with an **option**.
- *Exclusive* **easement and lease** to convert, maintain, and capture the solar energy over, across and through the surface estate of the property.
 - Watch “purposes” language.

Option Agreement

- Landowner gives the company an **exclusive** option to acquire a lease and easement agreement.
- Landowner has said “yes” to it all, but company has not.
 - Company can **terminate** at any time.
 - Payment during option (usually five years), is usually a low yearly payment.
 - Option may have a renewal provision.

Lease and Easement Agreement

- **Lease:** Grants the possession and use of land to another in exchange for a rental payment.
- **Easement:** The right to use or control someone else's property for a specific limited purpose.
- These contracts typically purport to be purchasing both.



What Does the Lease Provide?

- Construction Rights
- Access Rights
- Rights to Build & Maintain Solar Panels
- Rights to Build & Maintain Collection Facilities
- Rights to Building & Maintain Substations
- Telecommunications Rights
- Weather instrument Rights

Construction Rights

- Company may use the property for:
 - Constructing, operating, maintaining, repairing, replacing, and removing **all or any part or component of the Improvements whether located on Owner's Property.**
 - Operator may exercise its right to use **all or any part of the Owner's Property as and when Operator deems it necessary or advisable to do so (including parking).**



Access Rights

- Landowner provides unobstructed **access**:
 - To and from the Improvements, landowner's property and any public roadways,
 - To construct, maintain, and use **roadway improvements** on property.
 - Owner shall not permit others to obstruct or damage the roads or improvements or in any other way interfere with these rights.



Access Rights – *Roadway Improvements*

- **"Roadway Improvements"** shall mean all improvements that may be necessary to construct, maintain and repair any new and existing roadways and other ways to come and go.
 - Includes paving or surfacing of the roadways with asphalt, gravel or other roadway materials, installation of road signs and the construction and installation of culverts, bridges, drainage ditches, gates, cattle guards and similar structures and facilities.



Right to Build and Maintain *Solar Panels*

- Company may: Construct, operate, replace, relocate, remove, and maintain **solar panels** and the appurtenant **Collection Facilities**, together with **associated roads and parking areas**.
 - "**Solar Panels**" shall mean any photovoltaic energy system designed for the generation of electrical power from the collection of sunlight, including without limitation, the photovoltaic panels, foundations, support structures, braces and related equipment.



Right to Build and *Maintain Collection Facilities*

- Company may:
 - Construct, operate, maintain, replace, relocate or remove **Collection Facilities** on and under the Owner's Property.
 - Improvements whose purpose is to deliver electrical power generated by the Solar Panels to an electrical power grid including **transformers, overhead and underground electrical collection lines, telecommunication lines**, splice boxes and interconnection facilities.



Right to Build and *Maintain Substations*

- Company may: Construct operate, maintain, replace, relocate or remove one or more **Substations** on the property.
 - Electrical lines, meters, monitoring and control equipment, switches, transformers, energy storage facilities, batteries and other devices for storage of electrical energy, all structures, equipment, enclosures, fencing, security devices, and other electrical and communications equipment...



Right to Build and *Maintain Telecommunications*

- Company may:
 - Construct, operate, maintain, replace, relocate or remove **Telecommunication Facilities** on and under the property.
 - All improvements whose purpose is to provide telecommunication services, including telephone, closed-circuit television, microwave, internet, computer data and other telecommunication services.



Right to Build and Maintain *Weather Instruments*

- Company may:
 - Construct, operate, replace, relocate, remove, and maintain a **Weather Instrument** and the collection facilities on property.
 - Instruments used primarily to gather and transmit sunlight and meteorological data and include the instrument's foundations, guy wires, sunlight and meteorological data acquisition equipment, power source, and any required data.

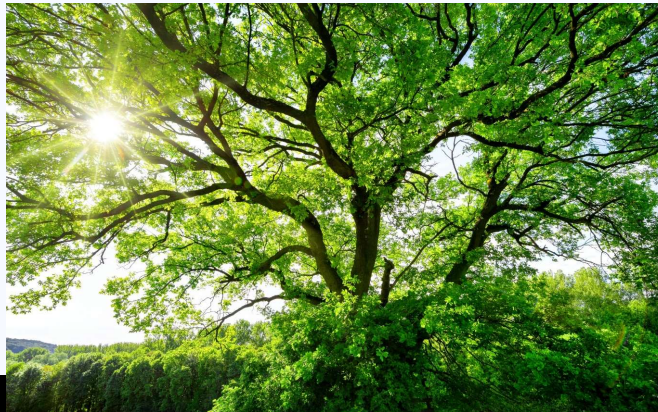


What Typical *Easements* Would the Agreement Provide?

- Don't Block the Sun Easement (Non-obstruction Easement)
- We Can Cause Annoying Effects Easement (Effects Easement)

Non-Obstruction Easement

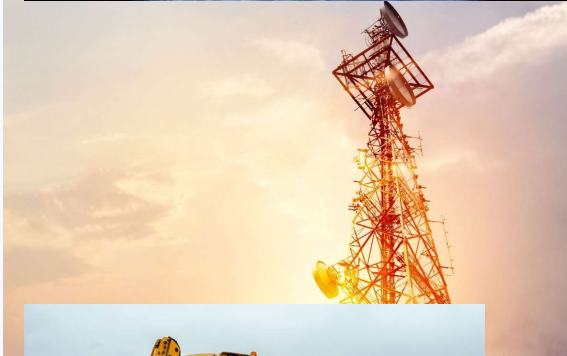
- Owner cannot engage in any activity that might interfere with the **sunlight direction**, cause a **decrease in the output or efficiency** of any Solar Panel or Weather Instrument, or otherwise **interfere**.
- Company may enforce its rights by removing trees and structures causing interference (except existing trees and structures).



Effects Easement

- Owner grants the company an easement for visual, view, light, flicker, noise, shadow, vibration, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the project.
- Can't sue for nuisance or seek damages, regardless of these impacts.





What uses are left for the owner?

- Good question for the company.
- There may be no viable uses remaining.
- Income from these agreements is likely going to **replace** income opportunities for the land in question.
 - And it's not guaranteed.

Length of the Contract

- Terms vary.
 - Usually divided into stages.
 - Sometimes an **option period** (5 years or so).
 - Sometimes a **construction or development** period (~5 years).
 - Often a **25 year or so initial term** with option (at sole discretion of the company) to extend for another term.
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- In other words, **very long**. Will pass on to your heirs and successors.

Payment Terms

- Payments for the option are usually a **lower yearly payment** during the option term.
- Payments under the lease and option agreement are usually **yearly payments** based upon the number of acres actually used.
- Agreement may try to delay the determination of actual acreage (and thus the payment amount) until after agreement is signed.
- May provide for an “inflation adjustment” after so many years or upon a second term.
 - Consider the impact of inflation on yearly payment!

Can the agreement be terminated?

- Generally no ability for landowner to terminate, except for non-payment.
 - Other breaches must be handled through action for damages.
 - No jury trials.
- Company, however, can generally **terminate at will**.
 - “at any time during the Term of the Agreement, as to all or any part of the Operator Property.”
 - “Termination shall be effective 30 days after written notice of such termination to Owner.”

What happens at termination?

- Generally, the company must remove all improvements and restore the area formerly occupied by the improvements to **substantially the same physical condition** that existed immediately before the construction of the improvements.
- At the landowner's request, all or any part of the roadway improvements may be left for use by owner.

Company Has Lots of Rights

- If there is a regulatory suspension or a **force majeure**, the term will be extended for the number of days impacted.
- Company has the **exclusive** right to use the property for its purposes.
- Company does not have to build panels or complete the project.
- Company can contest the validity of any law, regulation, assessment, etc. applying to the land, and the owner **must cooperate** in any reasonable way.

Company Has Lots of Rights

- Company may usually unilaterally mortgage and/or assign its interest in the improvements *or the agreement*.
- “To minimize the need for temporary fencing, **owner will cooperate** with Operator to avoid pasturing animals on or near the Improvements during periods of construction, maintenance or removal activity by Operator.”

What About Property Taxes?

- Owner must continue to pay property taxes.
- Company will pay *personal property taxes on Improvements and/or any taxes that were directly attributable to Improvements installed by company and all increases in the ad valorem property taxes levied against the Property that are assessed for the period from and after the date of this Agreement until the end of the Term hereof and are **directly attributable** to Improvements.*
- **What about the agricultural classification?**
- Understand who is paying what and what happens if your taxes increase.

Indemnification and Insurance

- Company usually agrees to defend, indemnify and hold the owner harmless against claims resulting from its own negligence, willful misconduct or breach (including conduct by employee or agents).
- But owner must indemnify defend, indemnify and hold the company harmless from claims arising from its own negligence, willful misconduct or breach (including conduct by employees or agents).
- Company must usually including owner as additional insured under insurance policy, but is the company's insurance promise enough?

Confidentiality

- Owners may not generally provide copies of the agreement or disclose the terms to anyone except legal counsel or others authorized to view it.



Bankruptcy, Foreclosure of Company

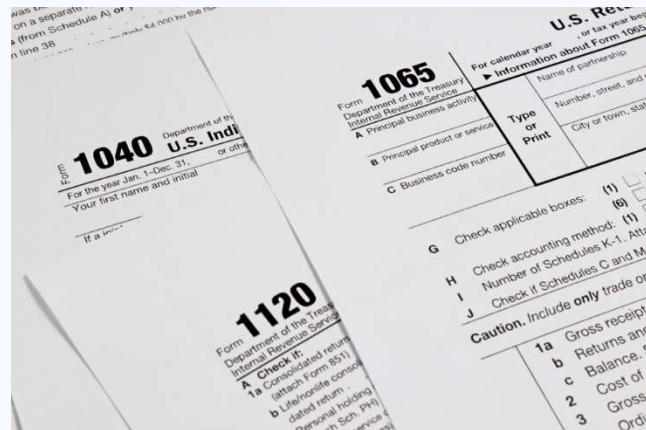
- Consider the impacts.
 - What if no money for removal?
 - Seek protections.
- “Any Operator Mortgagee or other party who acquires Operator’s interest in all or a portion of the Operator Property pursuant to foreclosure or assignment in lieu of foreclosure shall **not be liable to perform the obligations imposed on Operator by this Agreement**, which are incurred or accruing after such Operator Mortgagee or other party no longer has ownership or possession of the Operator Property.”

Other Considerations

- Cannot enter into contract if under:
 - Farm lease
 - CRP
 - Conservation easement
 - Other programs
- Might be possible to restructure, but must consider.
- Must work with lender if property has a mortgage before entering into any contract.

How will payments be taxed?

- These yearly payments appear to be rental-like payments.
- Taxed as ordinary income, when received.
 - No self-employment tax.
 - No qualified business income deduction.



Final Thoughts

- Seek trusted counsel.
- Consider all you're giving up.
- Don't be afraid to negotiate.
- Talk to heirs and successors.



Discussion