

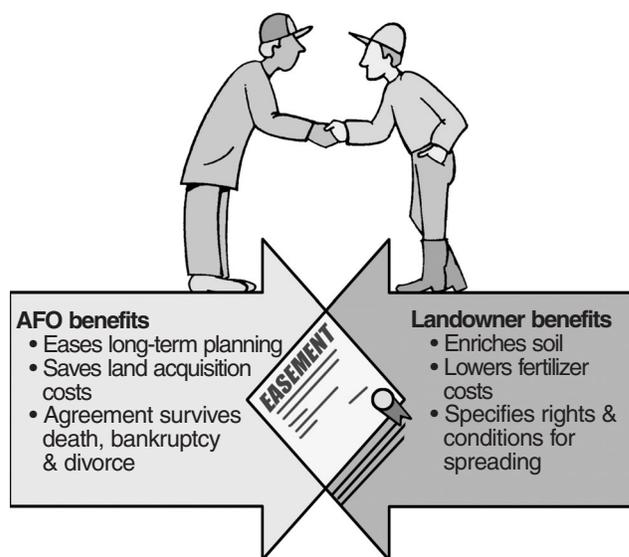
MU Guide

Securing Manure Spreading Rights Through Easements

Chris Boessen and Ray Massey
Department of Agricultural Economics

Several trends in modern animal agriculture are causing people to look at easements as a legal tool to help them meet their business objectives. Animal feeding operations are getting larger, and animals are housed in facilities engineered to capture and store manure. These larger animal feeding operations are highly specialized, sometimes owning less land than would be necessary to use the manure agronomically. Another trend is an increase in environmental regulation affecting many of these animal feeding operations. Recent concerns over the environmental impacts of animal feeding operations have led to new regulations. These trends often create a need to regularly export manure to neighboring farms; easements can be used to formalize this arrangement.

The Environmental Protection Agency rules released in 2002 governing concentrated animal feeding operations (CAFOs) increase the potential interest in easements in two ways. First, more AFOs will need to obtain permits, which require that the AFO operator have a plan for properly managing manure. This plan must specify where the manure is to be applied and whether the AFO owner controls the land receiving manure. Second, the CAFO rule specifies that application must consider phosphorus transport from the field to waters. Practically speaking, many AFOs will need to reduce their land application rates per acre to minimize



Mutual benefits of an easement for manure spreading rights.

phosphorus runoff. This will require accessing more spreading land than was previously used.

Access to more land can be achieved in several ways. With sufficient financial resources, the AFO could purchase the additional farmland necessary. However, large land investments may be inconsistent with other goals and could weaken the financial strength of the AFO operator. Leasing land is less expensive but, like purchasing land, makes a crop farmer out of a livestock producer. Manure can be marketed if it is concentrated enough to offset the cost of transportation to farmers desiring manure. Spreading contracts and manure easements are ways to gain access to the land without having to make large investments and stretch management and labor farming the additional acres.

This article provides nontechnical information on manure spreading arrangements, including contracts and easements, and outlines some of the important considerations for landowners on either side of an easement transaction. Individuals with specific questions regarding easements should contact an attorney and

Clear water requires clear definitions

The U.S. Environmental Protection Agency, under authority of the federal Clean Water Act, defines an *animal feeding operation (AFO)* as a lot or facility where (1) animals are confined and fed for at least 45 days in a 12-month period, and (2) crops, vegetation, forage growth or post-harvest residues are not sustained in the normal growing season.

Concentrated animal feeding operation (CAFO) is a regulatory term designating large AFOs or AFOs with a history of pollution. CAFOs must have a permit to operate.

possibly will also need the assistance of a tax adviser. Retaining professional assistance when pursuing or granting an easement is essential.

What is an easement?

Many landowners whose land does not adjoin a public road are familiar with easements, as they must have some form of easement to cross their neighbor's land to get to their own. With an easement, one landowner gains the right to use the land of another for a specific purpose.

An easement is a legally binding agreement between two parties. Once written and signed, it becomes part of the public record by being recorded against the property title of the party granting the easement (servient tenement) at the county courthouse. It is a deeded right that remains with the property for the duration of the easement, which is in perpetuity if no duration is specified. *With a manure easement, a landowner conveys to a livestock producer the right to spread manure on a specified tract of land for a specified period of time.*

Depending on the circumstances and desires of landowners, easements are often the "best" way to achieve a long-term goal with respect to a tract of real estate. In the long run, an easement is likely to have less uncertainty about the intended objective. Because an easement is a deeded right, it is not subject to events that might affect an agreement between individuals, such as death, divorce, bankruptcy or sale of the land.

Rights and easements

When an AFO owner needs to spread manure on land belonging to someone else, it is most important that both parties clearly understand the arrangement. Solutions range from a simple year-to-year (or shorter) contractual agreement to spread manure, to one in which the AFO owner formally leases the land to gain more control over the property. Leased rights could include the right to grow crops and apply manure in order to control cropping practices that maximize the use of phosphorus. A manure easement is another way to secure the right to spread manure on another owner's land and for a number of reasons can be a desirable approach from the perspective of the AFO owner. The most appealing aspect of an easement is the certainty that the easement holder gains with the easement. Large AFO operators must plan manure applications for several years in advance, and, as part of the permitting process, provide written documentation to prove access to sufficient spreading acres. The easement ensures access to acres and allows the AFO owner to plan ahead with greater certainty relative to a spreading agreement or annual lease. A second advantage an easement offers over leasing land is that the livestock producer need not have the equipment or expertise to engage in crop production on the leased land, which could be better managed by another farmer.

Easement clause considerations

The AFO owner needs to manage the risk associated with manure application and compliance with the AFO permit. A written manure spreading agreement, in many cases, may not achieve the needed risk management in that the agreement can be nullified or "set aside" in the event of the death, divorce or bankruptcy of the other party. An easement ensures that the right to spread "goes with his land".

The basic concept of a manure easement is that one party receives the right to spread manure on another's land. The parties involved in an easement transaction will need to live with the arrangement for the life of the easement. Clearly specifying, in the easement, the understanding of both parties prevents the easement from becoming a problem.

Below are some questions and observations for a landowner thinking of granting an easement to an AFO.

To whom are you granting the easement? When granting a manure easement, you are granting the AFO owner the right to spread manure on your land. If the original AFO owner sells the AFO, the easement will continue unless specified in the original easement that it is only with the current owner. If the easement is permanent or long-term, you must be comfortable with the possibility of some other person or entity owning the easement in the future.

Understand that the AFO owner will probably want the easement to reside with the business rather than with him. This allows him to assure potential purchasers that they too will have adequate land upon which to spread manure.

How long do you want the easement to exist? Easements can be written to expire on a certain date or upon certain specified events, such as one party's death or the sale of either property. In manure deficit areas of crop production, manure can be valuable, and a long-term easement makes good business sense. If you think you may want to sell your land at some point in the future and if the easement would deter some buyers, a shorter easement may be more appropriate.

Understand that the AFO may want an easement that lasts the life of the animal feeding facility. They may have a regulatory obligation to secure spreading rights for the duration of a feeding permit – usually five years.

Where will the manure come from, and what kind of manure will it be? The assumption going into an easement may be that manure from a specific facility is going to be spread on the land. However, due to changing business situations, the AFO may have manure from a different facility or even from a different species of animal. With changing technology, the form of the manure may change. Specify what kind of manure you are granting the right to be spread on your land.

Understand that the AFO will want flexibility to modernize facilities, including manure-handling facilities. Specifying the form (liquid rather than dry) may

prevent the AFO from installing technologies such as a solid separator. AFO owners will benefit from having the flexibility to purchase another facility and spread the manure on the land on which they have an easement. Specifying the source of manure creates a need to discuss any changes before they occur.

Where will the manure be applied? The easement can be on a “whole farm” (blanket easement) or just on certain tracts that are legally described in the easement.

Understand that the AFO usually wants to spread manure as close to the animal feeding facility as possible. Rules for when manure can be applied to certain fields may need to be specified.

When will the manure be applied? Knowing when manure will be applied is critical to efficient crop production. This can be a difficult issue because it can be hard to articulate in an agreement.

Lagoon effluent can be applied to growing crops with irrigation equipment, whereas slurry and solid manures are usually applied before row crops are planted. Specifying application dates can be accomplished by stating that manure will not be applied on certain dates or that it must be accomplished within a flexible cropping system that the landowner controls but communicates to the AFO owner. Advance notification of a certain number of days is important regardless of the specified appropriate spreading windows.

Timing limits should also include environmental and soil conditions that prohibit manure application. These conditions need to be clearly defined. For example, application using tanker equipment on wet soil can cause excessive compaction or severe ruts. Prohibition against application on wet soils needs to have a measurable definition of “wet.” Furthermore, some states’ environmental rules may preclude spreading on frozen or saturated ground.

Understand that the AFO owner needs to have flexibility. The AFO’s manure storage capacity affects the amount of flexibility needed. An AFO with only 6 months’ storage capacity will have less flexibility about when manure must be applied than one that has 12 months’ storage. Also, your cropping system affects the AFO owner’s ability to apply. For example, if you currently raise wheat, the AFO expects that land will be available to receive manure after harvest in July. If you stop growing wheat, the AFO’s plan is affected and the earliest possible notice is desirable.

How will the manure be applied? Usually, the form of the manure heavily influences the method of application. However, within certain application methods, other factors can be important. For example, as tankers get larger, their potential for causing soil compaction increases. Specifying levels of pressure permitted rather than size of tanker permits the AFO to change equipment (use a larger tanker) so long as it meets the pressure requirement (uses flotation tires).

Other concerns about application methods include

capping any risers in the fields, not applying within specified distances of sensitive areas such as streams, and determining whether injection, aeration or surface application is acceptable.

How much manure can be applied in a given year? By regulation, large AFOs have limits on manure application rates. Such rates are usually determined by manure and soil test levels of nutrients and by crop removal of nutrients. If the AFO is not required to have a permit, it has greater flexibility in its application rates.

Stipulating that manure that can be applied according to regulatory limits reinforces the idea that manure is used as a crop fertilizer. Other ways of specifying application rates include (1) restricting or prohibiting the amount of manure when certain soil test levels of phosphorus or potassium are reached, and (2) restricting the amount to the quantity of manure nutrients that can be removed by crops in a single year.

Application of manure to certain crops within a crop rotation maximizes the nutrient value of manure. For example, application of enough hog slurry to meet the nitrogen needs of corn provides enough phosphorus and potassium for a subsequent soybean crop. A specification might state that manure should be applied to land being planted to corn, when possible, and that no manure be put on that land the subsequent year.

Who will maintain records for applicable environmental rules? Under federal AFO rules, a permitted operation must keep records of how much manure is transferred to others. An easement for spreading manure may specify that a nutrient management plan be developed and implemented for the land. The CAFO is ultimately responsible for implementing the plan and keeping records to that effect. Understand that if land under easement is considered controlled by the AFO and, therefore, subject to a nutrient management plan, it affects other fertility decisions that the crop producer would normally make independently.

Are there any real estate fixtures involved? Lagoon effluent can be applied through irrigation systems. When there is a long-term easement, the AFO owner may be willing to purchase or construct fixtures such as center pivots and piping to the pivot to facilitate manure application or roadways for access to fields. The easement needs to specify who owns and is responsible for any improvements arising from manure application.

Will there be a cost sharing arrangement? Manure can meet many of the fertilizer nutrient needs of crops. Some farmers pay to receive manure on their land or reimburse the manure provider for some or all of the cost of applying the manure. If a payment is to be made, specify how it will be determined.

Are there any events that should warrant the cancellation of the easement? While it is difficult to foresee these types of situations, it may be worth some thought. A drastic change of environmental regulation or environmental liability, or the documented violation

of environmental rules by the owner of the livestock operation or its agents may warrant cancellation of the easement.

Two aspects of easements require special attention: their effect on legal liability and on creditors. These issues are addressed below in a little more detail.

Easements and legal liability

Consider how various possible outcomes from the spreading of manure on your farm by an AFO owner could affect you as the landowner. For example, what would be the legal liability if a manure tanker load were spilled in one location or if runoff from your land, resulted in a fish kill in a neighbor's stream or pond? You might require that the AFO owner agree to a clause in your agreement whereby the AFO owner agrees to "indemnify, defend and hold harmless" with respect to his actions related to spreading manure on your land. By "indemnifying", the AFO owner is agreeing to reimburse for expenses (including attorney and litigation costs) you incur due to the AFO owner's actions. "Defend" means the AFO owner agrees to pay for your legal fees, should a third party bring a claim against you. By "hold harmless" the AFO owner agrees to protect you from suits by third parties or even the AFO owner. The benefit derived from these clauses will for the most part be determined by the financial capacity of the AFO owner; that is, these promises may be of little value if the AFO owner does not have the financial resources to deliver in time of need. Also, the AFO owner's liability insurance coverage may exclude coverage for "pollution claims," and the activities occurring off the property "owned and/or operated" by the AFO owner may be excluded from coverage. Consider requiring riders to insurance policies so that pollution claims and activities occurring off the property of the AFO are covered.

Easements and lending agencies

A number of issues surrounding an easement are related to the financing of land. The lenders financing the AFO and the lender financing the land upon which an easement might be granted both have an interest in the easement. A decade ago, many lenders did not push the issue of documented and formalized manure spreading agreements or easements where a loan applicant did not own sufficient acres on which to spread manure. Since then, lenders and their regulators have recognized the risks of not formalizing these arrangements.

Two problems arise for lenders from non-formalized spreading agreements. First, if the lender is forced to foreclose on a CAFO owner or if the owner declared bankruptcy, the lender's investment in the loan would

be harder to recover if the CAFO collateral does not have sufficient spreading acres or if there is not a manure easement. The property would be much less sellable. Second, a simple manure spreading agreement between two individuals does not manage the lender's risk as well as the easement in that a contract may not survive a bankruptcy, divorce or death of one of the contract parties or be transferable or assignable to the next owner. The desirability of the easement is that it "goes with the land" and the next owner of the AFO has the same right to spread manure as the previous owner.

Most lenders require an easement for a period of time at least as long as the term of the real estate loan.

Just as the lender of an AFO prefers a manure easement, the creditor for the land on which an easement is to be granted may have reservations about the granting of an easement. Landowners with debt against their land need to discuss this with their lender when contemplating granting an easement. The AFO owner's lender will ask the cropland owner's lender to "subordinate" their mortgage or deed of trust to the easement. In effect, this means your lender's collateral may not be as attractive as it was before the easement and subordination. Depending on other factors associated with your credit situation, your lender may be reluctant to agree to the subordination of his or her lien position.

While easements are often considered detrimental to property value, this is not always the case. Realtors and appraisers will often assume that land with one less right is less valuable. But if your land or farming operation can benefit from the manure and selling your land within the life of the easement is not considered likely, the transaction is often a "win-win" for both parties. In many agricultural crop enterprises, the manure is a valuable asset. But a poorly thought out, open-ended easement or one that does not clearly describe the true business agreement, will be detrimental in almost any case.

In summary

A manure easement gives the owner of an animal feeding operation the right to spread manure on land belonging to another. An easement does not necessarily grant the right to spread manure on the land every year. It may be a safeguard that is used only infrequently.

Easements require that the involved parties work through many of the possibilities before entering into the agreement. Clear communication in the process of establishing the easement increases the chance that both the landowner and the animal feeding operation benefit from the arrangement. A qualified attorney should write these terms and conditions into the easement or into an agreement referred to in the easement.