Ontario Federation of Agriculture

200 Hanlon Creek Boulevard
Guelph, ON N1C 0A1

Tel: 519.821.8883
Fax: 519.821.8810

Cropland Out of Production in a Right-of-Way, Lease or Easement Agreement

FACT SHEET

Whether leasing cropland within a right-of-way, or farming land that is under an easement agreement granting access to a third party, farmers need to ensure the agreement covers compensation for in-year crop damage caused by the granted access. Crop damage payments should relate to the actual crop type impacted. They are typically paid at the time the damage occurs, valued at the current market price, or valued at an appropriate benchmark.

Granted access events may also reduce yields, or delay, interrupt, reduce, or suspend production. In addition to in-year production losses, events may also impact future year production and yield.

For example, agreements should address compensation to cover future losses related to soil compaction, or a requirement to cease crop production over new pipelines until the ground settles.

Cropland out of production compensation can be paid at the time, or negotiated as periodic or annual payments.

When proponents need early access to cropland, easement agreements typically pay an immediate one-time payment for the total area of land under the agreement. Pre-construction access compensation is a separate up-front payment regardless of other accesses that may take place. Farmers working leased land should negotiate similar clauses in their agreement.

Agreements should also address construction, post-construction (operational, maintenance), and asset relocation or decommission.

When considering what cropland out of production entails, consider that some crops require significant pre-planting preparation and planning, including soil treatments, leaving fields fallow, or acquiring greenhouse seedlings. The need to fulfill these types of early preparation may also result in cropland out of production, and should be covered in easements and rights-of-way.

Farmers with specialty processing crop contracts, should consider wording in a right-of-way or easement agreement to cover the entire area under their crop production contract, if the crop contract stipulates minimum crop tonnage required for payment from the processor or marketer.

For example, a farmer may have a contract to produce 100 tonnes of processing tomatoes. A third party access event resulting in the reduction of harvestable tomatoes to 45 tonnes may void a processor contract minimum tonnage delivery clause for all production.

Easement agreements typically include a clause to pay an up front amount if third party access events compact cropland. Farmers should consider negotiating for a clause to recognize that third party access events can also have negative impacts to future crop production. A True Up Option or an Incentive Option can address lower crop production in future years.

A true-up option pays an annual sum for a period of years for reduced future yields. This can be verified through records such Agricorp's Production Insurance Average Farm Yields. An Incentive Option Payment pays an equivalent lump sum amount for compaction, designed to cover the expected future yield reductions.

Lump sum, periodic or annual payments is an important decision to make. Payments could have tax implications, and can impact succession planning or have farm retirement implications. In addition to speaking with a lawyer about easement and right-of-way agreements, it is a good idea to discuss the tax implications of lump sum and periodic payments with an accountant.

I.N. Jan 26, 2022 (Rev. Feb. 2024)