



## Navigating Well and Pipeline Construction Liens in North Dakota

By [Karen Spaulding](#)

In today's economic climate, oil field contractors fail to pay subcontractors who then record liens against the operator's wells, facilities, and production. What are the top five issues that an owner and operator should consider in its defense when a lien is recorded against its North Dakota oil and gas field assets?

### Who may file a lien?

The first issue under North Dakota's well lien statute is who may file a lien against an "owner's" oil and gas assets? The statute only permits a lien to be filed when all three of the following elements are met:

- (1) The person claiming the lien is under contract with the owner of any leasehold for oil or gas purposes;
- (2) The person claiming the lien has performed labor or furnished any material or services used or employed, or furnished to be used or employed in the drilling or operating of any oil or gas well upon such leasehold; and
- (3) The oil or gas well, or facilities, for which the lien is claimed are located on the leasehold.

N.D.C.C. § 35-24-02 (emphasis added). The statute is ambiguous as to the meaning of the phrase "under contract with the owner" as was evidenced by a recent decision by a North Dakota District Court Judge, who denied a motion to dismiss the case for failure to state a claim.

Case Note - In a case handled by Beatty & Wozniak, P.C. (the "Firm"), the owner was an operator which contracted with the lienholders, and before payment was made it filed for bankruptcy protection. The lienholders received partial satisfaction of their liens in the bankruptcy case, and they retained their rights to file a state court lien foreclosure action against the remaining working interest owners ("WIO") in the respective wells, none of whom was "under contract" with any of the lienholders.

The WIO filed a motion to dismiss the lien foreclosure action because the lienholders failed to plead a contract with any WIO. The lienholders argued that because there was a contract with one owner of the leasehold (the operator), they could foreclose the lien as to all other non-contracting owners. The District Court denied the WIO's motion to dismiss the complaint because there is no North Dakota case law interpreting this phrase, and there is a split of authority in Texas and Oklahoma.

In Texas, liens do not attach to a non-operator WIO's leasehold interest if the WIO never entered into a contract directly with the lienholder. *Berchelman v. W. Co.*, 363 S.W.2d 875, 876 (Tex. App. –El Paso 1962). Our North Dakota judge cited an Oklahoma case for the contrary proposition that non-operating WIO may be held severally liable for a contracting owners' debts even when no mining partnership is formed, citing *e.g.*, *Sparks Bros. Drilling Co. v. Tex. Moran Exploration Co.*, 829 P.2d 951 (Okla. 1991).

So, if you are a non-operating WIO who did not execute a contract and a lien is recorded against your leasehold interests, it is arguably an improper lien in North Dakota. To bolster this argument, other sections of the North Dakota well lien statute, when read together with the initial section detailing who is entitled to file a lien, make a convincing argument that the North Dakota Supreme Court might find the language unambiguous, and applicable only against the contracting owner.

While Section 35-24-02 specifically states that the lienholder must be under a contract with “the owner,” the property subject to a lien may include the “materials and fixtures owned by the owner or owners of such leasehold . . .” and “proceeds inuring to the working interest” on the date of the labor or services. N.D.C.C. § 35-24-03.2 (emphasis added) and § 35-24-03.3. Thus, the argument can be made that the statute contemplates the property of WIO not under contract being subject to a validly filed lien, but for lien entitlement purposes, the owner shall be under a contract with the person filing the lien, or its subcontractors.

### **What are the Requirements of a Valid Lien Statement?**

Second, if the lien statement is not verified by affidavit or the statutorily required information is not contained in the statement, it is not an enforceable lien. N.D.C.C. § 35-24-11. The affiant must set forth the amounts claimed and dates on which labor or services were performed or materials provided; the name of the owner of the leasehold or pipeline; the name of the claimant and mailing address; and a description of the leasehold or pipeline.

### **Where must the Lien Be Filed?**

Third, the verified statement of lien must be filed in the proper county in which the leasehold or pipeline, or some part of it, is located and it must be recorded within six (6) months “after the date on which the labor was last performed or the material or services were last furnished under a single contract . . . *Id.* A single contract means labor performed or material and services delivered with no more than a six (6) month gap between first and next labor, material or services provided. N.D.C.C. § 35-24-10. Check to make sure the lien statement was recorded in the proper county and within the required time frame.

Case Note - The Firm handled a case in which a lienholder filed its lien well over six months after the last materials and services were provided, although on the face of the verified lien statement, the company claimed the last services were provided on the leasehold within the six month statutory period. However, when the actual work statements were produced in the litigation, it was obvious that the verified lien statement was not correct and the lien was filed out of time so was not enforceable.

### **What does the Lien Cover?**

Fourth, the lien statement may only be filed against (1) the whole of the leasehold to which the materials or services were furnished; (2) the materials or fixtures owned by the owner or owners of that leasehold and used or furnished in the drilling or operating of any oil or gas well on the leasehold; (3) all oil and gas wells located on the leasehold; and (4) the oil and gas produced from the leasehold inuring to the working interest (not to a royalty or overriding royalty) which existed on the date the first labor or material and services were furnished. N.D.C.C. § 35-24-03. A lien statement that claims a lien on the owner's property or revenues in excess of these permitted encumbrances is an unenforceable lien statement.

### **When must the Lien Foreclosure Action be Commenced in Court?**

Fifth, check that the lien foreclosure action was timely filed in court. A lien foreclosure action must be commenced by filing the complaint within two years of the time of recording the lien statement in the appropriate county's records. N.D.C.C. § 35-24-14. A claim for lien is assignable (N.D.C.C. § 35-24-22), and attorneys' fees are recoverable in a lien foreclosure action by the party "for whom judgment is rendered. . . ." N.D.C.C. § 35-24-19.

In conclusion, North Dakota's well and pipeline construction lien statute is specific, except for the most critical issue involving a person being permitted to file a lien against which "owner" of any leasehold.

There are other lien statutes in North Dakota which may be utilized by contractors or workers:

- Repairman's Lien for repairs made to a well machine, among other repairs. N.D.C.C. §§ 35-13-01 *et seq.*
- Miner's Lien for work or material furnished to owner or contractor. N.D.C.C. §§ 35-15-01 *et seq.* (applies to a miner or "other person" who works on oil and gas wells).
- Materialmen's Construction Lien/Mechanic's Lien. N.D.C.C. §§ 35-27-01 *et seq.* (lien may be on building or land upon which the improvement was made).

For further information on North Dakota's Well and Pipeline Construction Lien statute or other applicable lien statutes, contact [Karen Spaulding](#) or [Malinda Morain](#).