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August 29, 2003

Jere J. Crean
Credit Manager, Oil Field Services
NAM-Oil Field Financial Center
100 Gillingham Lane (MD100/18)
Sugar Land, TX 77478

Re: Petroleum Equipment Suppliers Association - Lien Law Committee
Indiana Oil & Gas Lien Law

Dear Mr. Crean:

Enclosed please find information with regard to the current status of oil and gas lien laws for the State of Indiana. I am licensed in both Indiana and Illinois and a large percentage of my practice is Indiana-based.

Thank you for the opportunity to participate in the project of your Lien Law Committee.

Yours truly,

William I. Kohn

WIK:dm
Enclosure

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PETROLEUM EQUIPMENT SUPPLIERS ASSOCIATION
LIEN LAW COMMITTEE

INDIANA OIL & GAS LIEN LAW

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This memorandum addresses certain questions relating to oil and gas liens under Indiana mechanic's lien law, Ind. Code § 32-28-3.[1] The key Indiana statutes governing mechanic's liens; include: descriptions of real property, § 32-19-1-1; acknowledgement and the authority of notaries to acknowledge, §§ 32-21-2-7 and 33-16-2-5; and fees of county officers, § 36-2-7-10. Attached is a model Statement of Intention to Hold a Lien form.

I. Persons Entitled to a Mechanic's Lien

Any contractor, equipment lessor, laborer, or other furnisher of materials or machinery (a "Contractor") "for the erection, alteration, repair, or removal of . . . [a] structure . . ." may acquire a lien under Indiana mechanic's lien law. § 32-28-3-1(a). The statute does not define "structure," but courts have held that an oil well is a structure.[2] *Dinsmore v. Lake Electric Co.*, 719 N.E.2d 1282, 1288 (Ind. App. 1999), *citing Haskell v. Gallagher*, 50 N.E. 485, 485-86 (Ind. App. 1898) (overruled on other grounds by *Niagara Oil Co. v. McBee*, 91 N.E. 250 (Ind. App. 1910)). Furthermore, courts have held that boilers, engines, shafting, beams, derricks, reels, ropes, and drills, "when put in place and action . . . constitute a structure." *Dinsmore*, 719 N.E.2d at 1287, *citing McElwaine v. Hosey*, 35 N.E. 272, 276 (Ind. 1893) (internal quotes omitted). However, a structure generally must be attached to or a part of the land. *Dinsmore*, 719 N.E.2d at 1288 (holding that a bagger system that sat on a pallet and could be moved in truck was not a structure).

II. Scope of Lien

A. Attachment and Value

The mechanic's lien may attach to two different pieces of property. § 32-28-3-1(b). First, the Contractor may hold a lien on the "structure . . . that the [Contractor] erected, altered, repaired, moved, or removed[] or for which the person furnished materials or machinery[.]" § 32-28-3-1(b)(1). Second, the Contractor may hold a lien on the entire interest of the owner of the land on which the structure is situated (the "Owner"), "including the part of the land not occupied" by the structure. §§ 32-28-3-1(b)(2), 32-28-

[1] All code sections cited are of the Indiana Code.

[2] The cases actually interpret § 32-8-3-1, which was recodified in 2002 as § 32-28-3-1.

3-2(a). A lien on the interest in land can exist only to the extent of the value of the Contractor's labor, furnished materials, and leased equipment and tools, § 32-28-3-1(b), and to the extent of the "right, title, and interest of the Owner for whose immediate use or benefit the labor was done or material furnished." § 32-28-3-2(a). For example, a Contractor who erects a barn on an Owner's farm can obtain a lien against both the barn and the farmland itself, and the value of this lien is equal to the value of what the Contractor provided the Owner.

B. Time of Effectiveness of Lien

The lien is created when the county recorder records the Contractor's notice of intent to hold a lien (see filing procedure, below). § 32-28-3-5(b). However, "the recorded lien relates back to the date the [Contractor] began to perform the labor or furnish the materials or machinery." *Id.*

C. Priority Among Multiple Liens

The general rule is that a mechanic's lien has priority over a lien created after it. § 32-28-3-5(b). However, an important exception exists to this rule: one mechanic's lien does not have priority over another mechanic's lien, regardless of the time of creation of the two liens. § 32-28-3-5(c). That is, multiple Contractors working on a single structure but starting work at different times will each hold a lien that relates back to the date that the first of these Contractors began work. The funds obtained by enforcement of these liens would then be distributed to these Contractors pro-rata. The practical implication for a third-party lender (or other potential future lienholder) is that such lender must ensure that no work has begun on the property before making the loan; otherwise, the lender's lien could be subordinated to all mechanic's liens, even those liens for work that has not commenced at the time of the loan.

An additional noteworthy point is that a mortgage on multiple properties that has priority over mechanic's liens encumbering each of these properties individually generally cannot be cross-collateralized, but such a mortgage can be cross-collateralized if the property is "for the construction, alteration, or repair of property that is [both] owned, operated, managed, or controlled by a [public utility] and intended . . . for the production, transmission, delivery, or furnishing of heat . . . or power to the public." § 32-28-3-5(d)(3).

D. Leaseholds

If the Owner has only a leasehold interest in the property and forfeits on its lease, the Contractor's lien on the structures continues notwithstanding that forfeiture. § 32-28-3-2(b). That is, the lease is still valid against the lessor, the party who obtains the benefit of the Contractor's work.

III. Procedure for Filing Lien

A. Filing of Notice

In order to acquire a lien, the Contractor must file in the county recorder's office two copies of a sworn Statement and Notice of Intention to Hold a Lien on the property for the amount of the claim. § 32-28-3-3(a)(1). The Contractor must file this notice within 90 days after its provision of labor, materials or machinery. § 32-28-3-3(a)(2). The notice must contain the following information:

- The amount claimed;

- The Contractor's name and address;
- The Owner's name and latest address as shown on county property tax records; and
- The street and number, if any, and the legal description of the land to which the structure is connected.[3]

§ 32-28-3-3(c).

The county recorder will record the notice when it receives both the notice and the appropriate fees discussed below.

B. Recorder's Fees

The county recorder charges several fees for the filing of the notice. First, the Contractor must pay the mechanic's lien fee of $2 per Owner named in the notice. § 32-28-3-3(d). Second, the Contractor must pay a document recording fee depending on the size of the pages: if the pages are not larger than 8½ by 14, the fee is $6 for the first page and $2 per additional page; if the pages are larger than 8½ by 14, the fee is $15 for the first page and $5 for each additional page. § 36-2-7-10(b)(1)-(2). Third, the Contractor must pay a supplemental fee of $3 "for recording a document that is paid at the time of recording." § 36-2-7-10(b)(10).

C. Additional Requirements for Certain Lienholders

If the prospective lienholder (in this section, the "Person") is either (1) the Contractor's subcontractor, journeyman, or laborer; or (2) a lessor who leases equipment and tools to the Contractor, then Indiana law imposes further requirements for obtaining a lien on the Owner's property. § 32-28-3-9(a). The Person must provide to the Owner written notice of three things: that the Contractor is indebted to the Person, that the Person holds the Owner responsible for this indebtedness, and the value of the Person's claim. § 32-28-3-9(b). The purpose is to alert an Owner of the possibility of an enforcement action by not only the first Contractor but also any other downstream parties.

If the Person fulfills this additional written notice requirement, it can acquire a lien in the same way as a Contractor. The value of the Owner's liability to the Person has two caps. First, it is capped at the value of the Owner's liability to the Contractor. § 32-28-3-9(d). Second, the Person may only recover the remainder of (1) the amount due from the Owner to the Contractor minus (2) the amounts of any claims having priority, such as mortgages. § 32-28-3-9(e).

IV. Enforcement of Lien

A. Procedure and Time Limitations

The Contractor enforces the lien by filing a complaint in the circuit or superior court in the county in which the property encumbered by the lien is located. § 32-28-3-6(a). Indiana law imposes two time limitations on the Contractor. First, the Contractor must file its complaint within one year of the later of

[3] "The name of the owner and legal description of the lot or land will be sufficient if they are substantially as set forth in the latest entry in the transfer books . . . of the county auditor or . . . township assessor at the time of filing of the notice of intention to hold a lien." § 32-28-3-3(c).

(1) the date that the county recorder recorded the Contractor's notice of intention to hold a lien or (2) the date of expiration of a qualifying credit. § 32-28-3-6(a)(1)-(2). A credit qualifies only if (1) its terms are in writing; (2) both the lienholder and all owners of record executed it; and (3) the county recorder recorded it both "in the same manner as the original statement and notice of intention to hold a lien" and within one year after he recorded the original statement and notice of intention. § 32-28-3-6(c). If the Contractor fails to file within the above time limitations then the lien is void. §§ 32-28-3-6(b).

The second time limitation is that, if the Owner or a mortgagee or other lienholder gives the Contractor a written notice to file its complaint on the lien, the Contractor has 30 days to file its lien action in the proper county court. § 32-28-3-10(a). If the Contractor fails to file within 30 days, the Owner must file an affidavit with the county recorder stating "the facts of the notice[,]" that the 30 days has expired, that the Contractor did not file a complaint, and that no court has rendered a judgment on the lien. § 32-28-3-10(b). The recorder will then record the affidavit and certify the release of the lien. § 32-28-3-10(c).

B. Remedy

The court can order that the property subject to the lien be sold and the proceeds used to satisfy the lien and costs, including reasonable attorney's fees. §§ 32-28-3-7(b), 32-28-3-14(a). If such proceeds are insufficient to satisfy all liens, the lienholders shall "be paid in proportion to the amount due each claimant." § 32-28-3-8. However, the sale must neither impair a previous encumbrance nor harm an Owner that is a non-party. § 32-28-3-7(b).

V. Liens Precluded by Agreement

A contract between the Owner and Contractor may contain a provision that precludes the attachment of a lien if the contract is "for the construction, alteration, or repair of property that is [both] owned, operated, managed, or controlled by a [public utility] and intended . . . for the production, transmission, delivery, or furnishing of heat . . . or power to the public." §§ 32-28-3-1(e); 32-28-3-16(a)-(b). The contract must be in writing, contain the legal description of the real estate, be acknowledged,[4] and be filed and recorded in the recorder's office of the county in which the structure is located. § 32-28-3-1(f). The filing and recording must occur within five days of the date of execution of the contract. § 32-28-3-1(f)(4). The filing of the contract is key because the contract will not invalidate a mechanic's lien "for labor, material, or machinery supplied before the filing . . . ." § 32-28-3-1(f).

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[4] Acknowledgement here means notarized or otherwise officially recognized. According to § 32-21-2-7: "The following or any other form substantially the same is a good or sufficient form of acknowledgement of a deed or mortgage: 'Before me, [judge or justice, as the case may be] this ___ day of ___, [grantor] acknowledged the execution of the annexed deed . . . .'"

Recording Information

STATEMENT AND NOTICE OF INTENTION TO HOLD A LIEN

Indiana Code § 32-28-3-3

State of Indiana

County of _____

_____ claims a statutory mechanic's lien
Name of Claimant

against _____, in conformance with
Name(s) of Owner(s)

Indiana mechanic's lien law as codified in Indiana Code sections 32-28-3-1 through 32-28-3-18, in the principal sum of _____ plus attorneys fees as allowed by law for
Dollar Amount Claimed

performing labor or furnishing materials or machinery, including the leasing of equipment or tools, for the erection, alteration, repair, or removal of a structure related to the production, extraction, refinement, or transmission of oil or gas on the lot or land described below.

The address of the Claimant is: _____

_____

_____

The latest know address of the Owner, as shown on the property tax records of the county, is: _____

_____

_____

The street number, if any, of the lot or land on which the structure may stand or be connected with or to which it may be removed: _____

_____

_____

Legal description of the lot or land on which the structure may stand or be connected with or to which it may be removed: _____

_____

_____

_____

Attach additional page if necessary

SUBMITTED by CLAIMANT: _____

Name of Company

BY: _____

Signature

_____

Printed Name

ITS: _____

Office

Subscribed and sworn to me this ____ day of _____, 20___.

_____

Signature of Notary Public

_____

Printed Name of Notary Public

My commission expires:

_____

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