



## North Dakota's Definition of "Engaged in Drilling or Reworking Operations"

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As the television infomercials would try to pitch it, "Now you too can hold a lease by 'engaging in drilling or reworking operations.'"

This year, the Eighth Circuit Court of Appeals in *Anderson v. Hess Corp.*, 649 F.3d 891 (8<sup>th</sup> Cir. 2011), affirmed a 2010 ruling by the U.S. District Court of North Dakota which gave the industry a better look into North Dakota's definition of "engaging in drilling or reworking operations".

The dispute in *Anderson v. Hess Corp.*, 733 F. Supp. 2d 1100 (D.N.D. 2010) involved four executed mineral leases on May 4, 2004 and one on May 10, 2004 by members of the "Anderson Family." By series of assignments, Hess Corporation (Hess) became the owner of the Anderson leases. All five leases were for a term of five (5) years and included identical Pugh and habendum clauses that were the subject of a quiet title action in which the Anderson family sought to declare the leases expired by their natural terms. Each clause is respectively as follows:

Notwithstanding the provisions of this lease to the contrary, this lease shall terminate at the end of the primary term as to all of the leased lands except those within a producing or spacing unit prescribed by law or administrative authority on which is located a well producing or capable of producing oil and/or gas or on which lessee is **engaged in drilling or reworking operations**. However, this lease shall not terminate as to any of the leased lands so long as **drilling or reworking operations** are being continuously prosecuted. . . .

It is agreed that this lease shall remain in force for a term of five (5) years . . . . If, at the expiration of the primary term of this

lease, oil or gas is not being produced on the leased premises or on acreage pooled therewith but Lessee is then ***engaged in drilling or re-working operations thereon, then this lease shall continue in force so long as operations are being continuously prosecuted*** on the leased premises or on acreage pooled therewith; and operations shall be considered to be continuously prosecuted if not more than ninety (90) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well. If after discovery of oil or gas on said land or on acreage pooled therewith, the production thereof shall cease from any cause after the primary term, this lease shall not terminate if Lessee commences additional ***drilling or re-working operations*** within ninety (90) days from date of cessation of production or from date of completion of dry hole. If oil or gas shall be discovered and produced as a result of such operations . . . .

(If you wish to see the full, non-condensed clauses please contact our firm).

In 2008 and 2009, Hess engaged in activities to prepare for drilling a well on some of the leased land. On October 27, 2008, Hess surveyed and staked a well. On December 28, 2008, Hess submitted an application for a drilling permit to the Oil and Gas Division of the North Dakota Industrial Commission, which was approved on January 2, 2009. On January 23, 2009, Hess moved equipment to the well location and began to prepare the surface. From January 26, 2009 through February 4, 2009, Hess continued to prepare the surface of the well, and on February 6, 2009, Hess leveled and lasered the pad. Encumbered by heavy snow, Hess finished digging the drilling pit on February 13, 2009. It then spread scoria, graveled, and lined the pit.

On April 28, 2009, Hess drilled the hole for the main conductor pipe. Hess moved the tanks used to store drilling fluid to the location on April 30, 2009, and drilled the mouse hole 4 for the rig on May 1, 2009. According to Hess's records, the well was complete and ready for a rig on May 1, 2009. Problems at another well, however, delayed the arrival of the rig. Hess spud the well on May 11, 2009. The well was completed on June 30, 2009, and has produced continuously since that date.

The Andersons filed suit to quiet title on September 22, 2009, arguing that the leases had expired at the end of the primary term because Hess was not then engaged in drilling. Hess argued that the leases did not expire because it

was engaging in drilling operations.<sup>1</sup>

The District Court in 2010, originally held that “Drilling operations commence when (1) work is done preparatory to drilling, (2) the driller has the capability to do the actual drilling, and (3) there is a good faith intent to complete the well; it is not necessary that the drill bit actually penetrate the ground.” Anderson v. Hess Corp., 733 F.Supp.2d at 1107. In determining so, the court cited Professor W.L. Summers’ treatise on oil and gas law, citing:

The general rule seems to be that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations within the meaning of this clause of the lease. If the lessee has performed such preliminary acts within the time limited, and has thereafter actually proceeded with the drilling to completion of a well, the intent with which he did the preliminary acts are unquestionable, and the court may rule as a matter of law that the well was commenced within the time specified by the lease.

*Anderson v. Hess Corp.*, 733 F. Supp. 2d at 1108, (citing 2 W.L. Summers, *Oil and Gas* § 349 (1959)).

The Andersons appealed the District Court’s ruling, arguing that the language in the Pugh clause and habendum clause is ambiguous. The Circuit Court rejected the Anderson’s argument and affirmed the District Court’s ruling.

For more information, please contact [Dante Tomassoni](#).

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<sup>1</sup> Prior to their expiration dates, Hess actually contacted the Andersons and offered them extensions of the leases with increased royalty terms up to 14%. The Andersons rejected Hess’s offer and requested 18.75% royalty. Hess did not accept and continued with operations seeking to hold the original leases based on the clauses above.