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Sixty-second
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1046

Introduced by

Legislative Management

(Taxation Committee)

A BILL for an Act to create and enact a new subsection to section 57-39.2-04 and chapter 57-65 of the North Dakota Century Code, relating to a sales tax exemption for potash and byproducts of potash and taxation of potash and byproducts; to amend and reenact subsection 32 of section 57-02-08 of the North Dakota Century Code, relating to exemption of minerals subject to in lieu of taxes; to provide for a legislative management study; to provide ~~an appropriation and~~ a continuing appropriation and a statement of legislative intent regarding a future appropriation; to provide a penalty; ~~and~~ to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 32 of section 57-02-08 of the North Dakota Century Code is amended and reenacted as follows:

32. Minerals in place in the earth which at the time of removal from the earth are then subject to taxes imposed under chapter 57-51 ~~or~~, 57-61, or 57-65.

SECTION 2. A new subsection to section 57-39.2-04 of the North Dakota Century Code is created and enacted as follows:

Gross receipts from the sale of any potash or byproducts taxable under chapter 57-65.

SECTION 3. Chapter 57-65 of the North Dakota Century Code is created and enacted as follows:

57-65-01. Definitions.

As used in this chapter:

1. "Byproducts" includes any mineral product, or combination or compound thereof, produced during the processing of potash that is sold and includes aluminum, antimony, arsenic, barium, beryllium, bismuth, boron, cadmium, calcium, cerium, cesium, chromium, cobalt, columbium, copper, gallium, gemstones, germanium, gold, gypsum, hafnium, indium, iridium, iron, lanthanum, lead, lithium, magnesium,

manganese, mercury, molybdenum, nickel, osmium, palladium, platinum, praseodymium, rare earth metals, rhenium, rhodium, rubidium, ruthenium, samarium, scandium, selenium, silicon, silver, sodium, strontium, tantalum, tellurium, thallium, thorium, tin, titanium, tungsten, vanadium, yttrium, zinc, and zirconium. The term does not include oil, natural gas, or liquid hydrocarbon, individually or in any combination, coal, carbon dioxide, or severed sand or gravel subject to an extraction or severance tax under any other provisions of this title.

2. "Commissioner" means the tax commissioner.

3. "Gross receipts" means all revenue valued in money, whether received in money or otherwise, realized by the taxpayer for sale of potash or byproducts, whether the sale is before or after transportation, manufacturing, and processing of the product.

4. "Mining facility" includes contiguous land and all structures and improvements on the permit area used for mining potash and byproducts and includes the act, process, or work of extracting potash from its naturally occurring environment and transporting or moving potash or byproducts to the point of processing, use, or sale. The term includes the process of leaching potash from its naturally occurring deposit. The term also includes an "extraction facility" as defined in chapter 38-12.

5. "Person" means every individual, partnership, firm, association, joint venture, corporation, limited liability company, fiduciary, trustee, receiver, administrator, representative of any kind, or any other group or combination acting as a unit.

6. "Potash" includes muriate of potash [the chemical compound potassium chloride, KCl], sulfate of potash [the chemical compound sulfate, K_2S0_4], and langbeinite [the chemical compound potassium magnesium sulfate, $K_2S0_4 \bullet 2MgS0_4$], or any other potassium, magnesium, or mixed-potassium salts, and includes ores, intermediates, products, and reaction products of such compounds.

7. "Processing" includes breaking, crushing, cleaning, drying, sizing, milling, treating, heating, separating, compressing, beneficiation, or loading or unloading for any purpose.

8. "Processing plant" means any facility in North Dakota in which potash or byproducts are extracted, recovered, or produced from a mineral resource and includes any

facility in North Dakota associated with the mine in which the primary production from the mining facility is processed or refined.

9. "Taxpayer" includes any person that is a producer of a subsurface mineral or byproduct subject to the tax imposed under this chapter.

57-65-02. Imposition of tax on potash.

A tax at the rate of ~~four~~one and one-half percent is imposed upon all potash produced within this state. The tax levied attaches to the whole production of potash except any byproducts of potash taxed under section 57-65-03.

1. The tax on potash is assessed against the sales price of the potash in an arm's-length contract between the taxpayer and the purchaser. If a potash sale or transfer is not the result of an arm's-length contract, the tax is calculated by taking a ton of two thousand pounds [907.18 kilograms] of potash produced times the potash tax rate times the annual average price of potash. The "annual average price of potash" for each twelve-month period beginning July first is the potash producer price index (commodity code PCU212391212391) as calculated and published by the United States department of labor, bureau of labor statistics, for the previous calendar year. For taxable production for the twelve months beginning July 1, 2011, the "annual average price of potash" is three hundred fifty-seven dollars and ten cents.
2. The tax department shall provide the annual average price of potash for the fiscal year to affected taxpayers by written notice mailed before June first.
3. If the potash producer price index is discontinued, a comparable index must be adopted by the department by an administrative rule.

57-65-03. Imposition of tax on byproducts of potash production.

A subsurface mineral tax of four percent is imposed upon the gross value of all subsurface mineral byproducts produced during the processing of potash produced within this state. The tax levied attaches to the whole production of byproducts. Inventory is not taxable until it is sold. The gross value at the processing plant is the price paid for the byproducts under an arm's-length contract between the taxpayer and the purchaser~~, less, when applicable, transportation costs associated with moving the minerals or byproducts from the point of production to the point of sale under the contract~~. In the absence of an arm's-length contract, the gross value at the processing plant is established by the price paid under an arm's-length

contract, to which the person paying the tax is a party, for the purchase or sale of byproducts of like kind, character, and quality~~, less, when applicable, transportation costs associated with moving the byproducts to the point of sale~~.

57-65-04. Type of tax.

For purposes of interpreting section 5 of article X of the Constitution of North Dakota, relating to federal land bank taxation and to the taxation of other governmental entities if their immunity from taxation has been waived, the tax under this chapter is a real property tax on subsurface mineral-producing estates and interests.

57-65-05. Potash and byproducts tax to be in lieu of other taxes.

The payment of the taxes under this chapter must be in full and in lieu of all ad valorem taxes by the state, counties, cities, school districts, and other taxing districts upon the processing plant, mining facility, or satellite facility and any associated pipelines; any property rights attached to or inherent in the right to producing potash and potash byproducts; upon producing potash and potash byproducts leases; upon machinery, appliances, and equipment used in and around any well producing potash or potash byproducts and actually used in the operation of the well; and upon any investment in property. The land~~ and the processing plant, mining facility, or satellite facility~~ must be assessed and taxed as other property within the taxing district in which the property is situated. The tax under this chapter is not in lieu of income taxes.

57-65-06. Duties of tax commissioner and state treasurer.

The tax commissioner shall deposit promptly with the state treasurer all moneys collected under this chapter and accompany each remittance, when possible, with a certificate showing the county where the potash and byproducts were processed. The state treasurer, no less than monthly, shall pay over to the county treasurer ~~and city auditor~~ of the several counties the money to which they are entitled.

57-65-07. Allocation of revenue - Continuing appropriation.

The tax collected as provided in this chapter is appropriated and must be apportioned as follows:

1. The first one million dollars of the taxes collected under this chapter from production within each ~~spacing unit~~mining permit area must be allocated to the county in which the ~~spacing unit~~mining permit area is located. If a ~~spacing unit~~mining permit area is located in more than one county, the first one million dollars of the taxes collected

under this chapter from production within that ~~unit~~area must be allocated among the counties on the basis of the acreage of the ~~spacing unit~~mining permit area within each county. Amounts allocated to the county under this subsection must be deposited by the county treasurer in the county ~~road and bridge~~general fund. Five percent of each monthly allocation to counties under this subsection and subsection 2 must be retained by the state treasurer and deposited in the state general fund until a total of two million dollars has been deposited in the state general fund under this subsection.

2. After the allocation under subsection 1 has been made, revenue from taxes collected from production within each ~~spacing unit~~mining permit area must be allocated as follows:

a. ~~For the first calendar year, sixty~~Ten percent to the producing county~~ and forty percent to the state general fund~~.

b. ~~For the first calendar year after the allocation under subdivision a is completed, fifty percent to the producing county and fifty~~Ninety percent to the state general fund.

~~c. For the first calendar year after the allocation under subdivision b is completed, forty percent to the producing county and sixty percent to the state general fund.~~

~~d. After the allocation under subdivision c is completed, thirty percent to the producing county and seventy percent to the state general fund.~~

~~e. Before deposit of revenue allocated to the state general fund under this subsection, the state treasurer shall deduct thirty percent of that revenue and deposit that amount in the legacy fund.~~

~~3. The county treasurer shall deposit ten percent of the revenue received by the county under subsection 2 in a special potash impact grant fund for the county.~~

~~**57-65-07.1. County potash impact grant fund - Grants - Reports.**~~

~~Amounts deposited in the county potash impact grant fund under section 57-65-07 must be allocated through grants by the board of county commissioners to or for the benefit of the county or townships or cities within the county. Grants also may be awarded to the county on behalf of unorganized townships in the county. Grants may be awarded on the basis of applications for funding to offset potash development impact. Grants under this section may be~~

~~awarded to grantees only to meet initial impacts affecting basic governmental services and directly necessitated by potash development impact.~~

57-65-08. Returns and payment of tax on monthly basis - Due date - When delinquent - Extensions.

1. Any person engaged in the production, within this state, of potash or byproducts shall before the twenty-sixth day of the next succeeding month after production, file with the tax commissioner a statement upon forms prescribed by the tax commissioner.
2. The tax under this chapter must be paid on a monthly basis. The tax is due and payable on the twenty-fifth day of the month succeeding the month of production. If the tax is not paid as required by this section, the tax becomes delinquent and must be collected as provided in this chapter.
3. The tax commissioner, upon request and a proper showing of good cause, may grant an extension of time, not to exceed fifteen days, for paying the tax. When the request is granted, the tax is not delinquent until the extended period has expired. A taxpayer who is granted an extension of time for filing a return shall pay, with the tax, interest at the rate of twelve percent per annum from the date the tax was due to the date the tax is paid.
4. All calculations of the tax under this chapter, including production, distribution, and claims for credit or refund, are based on the month of production and must be credited to that month.
5. The tax commissioner may prescribe alternative methods for signing, subscribing, or verifying a return filed by electronic means, including telecommunications, that shall have the same validity and consequence as the actual signature and written declaration for a paper return.

57-65-09. Tax commissioner to audit returns and correct tax.

1. The tax commissioner may determine whether a return required to be filed with the tax commissioner under this chapter is a true and correct return of gross production, and of the value, of the potash and byproducts. If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient, the tax commissioner shall determine the amount of tax due from any information the tax commissioner may be able to obtain, and, if necessary, may estimate the tax on the basis of external indices.

2. The tax commissioner shall have three years after the due date of the original return or three years after the original return is filed, whichever period expires later, to assess the tax and, if additional tax is due, provide notice of the determination of the additional tax to the taxpayer. If there is a change in tax liability on any return by an amount in excess of twenty-five percent of the amount of tax before any credits, any additional tax determined to be due may be assessed anytime within six years after the due date of the return or six years after the return was filed, whichever period expires later.

3. If a taxpayer files an amended return, the tax commissioner has two years after the return is filed to audit the return and assess any additional tax attributable to the changes or corrections even though other time periods prescribed in this section for the assessment of tax may have expired. The provisions of this section do not limit or restrict any other time period prescribed in this section for the assessment of tax that has not expired as of the end of the two-year period prescribed in this section.

4. If false or fraudulent information is given in the return, or if the failure to file a return is due to the fraudulent intent or the willful attempt of the taxpayer in any manner to evade the tax, the time limitations in this section do not apply, and the tax may be assessed at any time.

5. If before the expiration of the time periods prescribed in subsections 1, 2, and 3 the tax commissioner and a person consent in writing to an extension of time for the assessment of the tax, an assessment of additional tax may be made at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If a person refuses to consent to an extension of time or a renewal thereof, the tax commissioner may make an assessment based on the best information available. The period agreed upon in this subsection, including extensions, expires upon issuance of an assessment by the tax commissioner.

6. Any person who consents to an extension of time for assessment of tax must be presumed to have consented to a similar extension for refund.

57-65-10. Interest and penalties.

1. Reports from the taxpayer are delinquent after the last day fixed for their filing, and every person required to file a report is subject to a penalty of twenty-five dollars per day of delinquency for each property upon which the person fails or refuses to file the reports. The penalties under this subsection are for failure to file reports and are in addition to the penalties imposed by subsection 2 and constitute a lien against the assets of the person failing or refusing to file the reports. The penalties prescribed under this section must be collected in the same manner as potash and byproducts taxes and must be apportioned as other potash and byproducts tax penalties.
2. In addition to the tax and interest prescribed in this chapter, a taxpayer is subject to penalties as follows:
   a. If any taxpayer, without intent to evade any tax imposed by this chapter, fails to pay the amount shown as tax due on any return filed on or before the due date or extended due date prescribed, there must be added to the tax a penalty of five percent of the tax due, or five dollars, whichever is greater.
   b. If any taxpayer, without intent to evade any tax imposed by this chapter, fails to file a return on or before the due date or extended due date prescribed, there must be added a penalty equal to five percent of the tax required to be reported, or five dollars, whichever is greater.
   c. If upon audit of a taxpayer's return additional tax is found to be due, there must be added to the tax the penalty provided in subdivision a or b.
3. In addition to other increases to tax and penalty provided in this chapter, a taxpayer is subject to interest as follows:
   a. Any taxpayer who requests and is granted an extension of time for filing a return shall pay, with the tax, interest on the tax at the rate of twelve percent per annum from the date the tax would have been due if the extension had not been granted to the date the tax is paid.
   b. If any amount of tax imposed by this chapter is not paid on or before the due date or extended due date for the payment, there must be added to the tax interest at the rate of one percent per month or fraction of a month during which the return was required to be filed or the tax became due.

c. If upon audit an additional tax is found to be due, there must be added to the additional tax due interest at the rate of one percent of the additional tax for each month or fraction of a month during which the tax remains unpaid, computed from the due date of the return to the date paid, excepting the month in which the return was required to be filed or the tax became due.

d. If the mathematical verification of a taxpayer's return results in additional tax due, there must be added to the additional tax interest at the rate of one percent of the additional tax due for each month or fraction of a month during which the return was required to be filed or the tax became due.

4. The tax commissioner, for good cause shown, may waive the penalty or the interest provided in this section.

57-65-11. Refund claims.

1. A taxpayer may file a claim for credit or refund of an overpayment of tax within three years of the due date of the return or three years after the return was filed. However, if there is a change in tax liability on any return by an amount in excess of twenty-five percent of the amount of tax before any credits, a claim for refund of tax may be filed within six years after the due date of the return or six years after the return was filed, whichever period expires last.

2. If any taxpayer consents to an extension of time for the assessment of tax under subsection 5 of section 57-65-09, the period of time for filing a claim for credit or refund will be similarly extended. If an assessment is issued under this circumstance, the taxpayer has sixty days from the assessment to file a claim for refund. If a claim for refund is filed in any year extended by an agreement under subsection 5 of section 57-65-09, the tax commissioner may assess additional tax for any year extended by the same agreement which has otherwise expired. The additional assessment is limited to the issues raised in the claim for credit or refund.

3. Every claim for credit or refund must be made by filing with the tax commissioner an amended return, or other report as prescribed by the tax commissioner, accompanied by a statement outlining the specific grounds upon which the claim is based.

4. In all cases of overpayment, duplicate payment, or payment made in error, the tax commissioner shall issue a certificate containing the facts and the amount of the

refund to which the taxpayer may be entitled. Upon presentation of the certificate to the office of management and budget, a warrant must be issued to the taxpayer for the purpose of refunding any overpayment, duplicate payment, or payment made in error out of the unapportioned potash and byproducts tax in the state treasury and a pro rata share must be charged against the county entitled to share in the tax. Interest arising from refunds of overpayments, duplicate payments, and erroneous payments must be allowed and paid at the rate of ten percent per annum and accrues for payment from sixty days after the due date of the return or after the return was filed or after the tax was fully paid, whichever comes later.

57-65-12. Minimum refunds and collections.

1. A refund may not be made by the tax commissioner to any taxpayer unless the amount to be refunded, including interest, is at least five dollars. The tax commissioner shall transfer any amount that is not refunded to a taxpayer under this subsection to the state treasurer for deposit in the same manner as other revenue under this chapter.
2. A remittance of tax need not be made and any assessment or collection of tax may not be made unless the amount is at least five dollars, including penalties and interest.

57-65-13. Protest and appeal.

1. If upon audit the tax commissioner finds additional tax due or disallows a credit or a claim for refund, the tax commissioner shall notify the person of that finding. The notice must inform the person of the reasons for assessment of additional tax or the change in refund or credit claimed. Notice of deficiency must be sent by first-class mail and must set forth the reasons for the finding.
2. A person has thirty days, or ninety days if the person is outside the United States, to file a written protest objecting to the tax commissioner's assessment of additional tax due or disallowance of a credit or a claim for refund. The protest must set forth the basis for the protest and any other information which may be required by the tax commissioner. If a person fails to file a written protest within the time provided, the tax commissioner's finding becomes finally and irrevocably fixed. If a person protests only a portion of the tax commissioner's finding, the portion that is not protested becomes finally and irrevocably fixed.

3. If a protest is filed, the tax commissioner shall reconsider the assessment of additional tax due or disallowance of a credit or claim for refund. The reconsideration may include further examination by the tax commissioner or the tax commissioner's representative of a person's books, papers, records, or memoranda. The tax commissioner, upon request, may grant the person an informal conference.

4. Within a reasonable time after protest, the tax commissioner shall notify the taxpayer of the tax commissioner's reconsideration of assessment of additional tax due or disallowance of a credit or claim for refund. The amount set forth in that notice becomes finally and irrevocably fixed unless the person within thirty days commences formal administrative review as provided for in chapter 28-32 by the filing of a complaint. The complaint must be personally served on the tax commissioner or sent by certified mail.

5. Upon written request, the tax commissioner may grant an extension of time to file a protest as provided for in subsection 2 or an extension of time to commence formal review as provided for in subsection 4.

57-65-14. Lien for tax - Preservation of lien - Satisfaction of lien.

1. The tax, penalty, and interest assessed under this chapter is, at all times, a first and paramount lien against the taxpayer's property, both real and personal. The provisions of this chapter requiring the taxpayer to pay the tax do not release the taxpayer from that liability. If the tax, penalty, and interest are not paid, the tax, penalty, and interest may be recovered at the suit of the state, upon relation to the tax commissioner, in any court of competent jurisdiction of the county where any such property, assets, and effects are located.

2. Any judgment creditor or lien claimant acquiring any interest in or lien on any property situated in this state, before the tax commissioner files in the central indexing system maintained by the secretary of state a notice of the lien provided for in this section, takes free of or has priority over the lien. The tax commissioner shall index in the central indexing system the following data:

   a. The name of the taxpayer.

   b. The tax identification number or social security number of the taxpayer.

   c. The name "State of North Dakota" as claimant.

d. The date and time the notice of lien was indexed.

e. The amount of the lien. The notice of the lien is effective as of eight a.m. of the first day following the indexing of the notice.

3. Upon payment of tax, penalty, and interest, if applicable, or a penalty assessed under section 57-65-10, as to which the tax commissioner has indexed a notice in the central indexing system, the tax commissioner shall index a satisfaction of the lien in the central indexing system.

4. The tax commissioner is exempt from the payment of the fees otherwise provided for by law for the indexing of the lien or satisfaction.

57-65-15. Delinquent taxes - Sale of property.

When any tax provided for in this chapter becomes delinquent, the tax commissioner shall issue warrants directed to the sheriff of any county where the tax is due, or any part of the tax accrued, for the collection of the tax, interest, and penalty. The sheriff to whom the warrant is directed shall proceed to levy upon the property, assets, and effects of the person liable for such tax and shall sell the same and make return upon execution. The state of North Dakota, through the tax commissioner, is authorized to make bids at any such sale to the amount of tax, penalty, and costs accrued.

57-65-16. Bond - Reports - Actions.

1. The tax commissioner may require a sufficient bond from any person charged with the making and filing of reports and the payment of the taxes imposed under this chapter. The bond must run to the state of North Dakota and must be conditioned upon the making and filing of reports as required by law, upon compliance with the rules and regulations of the tax commissioner, and for the prompt payment by the principal of all taxes justly due the state under this chapter.

2. When any reports required have not been filed, or may be insufficient to furnish all the information required by the tax commissioner, the tax commissioner shall institute in the name of the state of North Dakota upon relation of the tax commissioner any necessary action or proceedings in the courts having jurisdiction to enjoin such person from continuing operations until such reports have been filed as required. In all proper cases an injunction must issue without bond from the state of North Dakota. Upon

showing that the state is in danger of losing its claims or the property is being mismanaged, dissipated, or concealed, a receiver must be appointed.

57-65-17. Penalty.

Any person intentionally violating this chapter is guilty of a class A misdemeanor.

57-65-18. Powers of tax commissioner.

The tax commissioner is charged with the administration of this chapter and shall enforce the assessment, levy, and collection of taxes imposed under this chapter. The tax commissioner may require any person engaged in the production of subsurface minerals or byproducts to furnish any additional information the tax commissioner determines necessary for the purpose of correctly computing the amount of potash and byproducts tax. The tax commissioner may examine the books, records, and files of such person, and conduct hearings and compel the attendance of witnesses, the production of books, records, and papers of any person, and may make any investigation or hold any inquest determined necessary to a full and complete disclosure of the facts as to the amount of production from any potash mining facility, processing plant, or satellite facility, or of any company or other producer for taxing purposes.

~~**57-65-19. Powers of industrial commission.**~~

~~The industrial commission shall adopt and maintain rules for potash mining, environmental protection, and reclamation. Environmental protection and reclamation rules, at a minimum, must establish a high degree of protection for surface owners, surface and underground water, productive capacity of soils, public health and safety, and participation of public officials and members of the public in counties in which potash mining will be conducted.~~

SECTION 4. LEGISLATIVE INTENT - IMPACT GRANT FUNDING 2013-15 BIENNIUM. It is the intent of the sixty-second legislative assembly that the sixty-third legislative assembly will appropriate out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $2,000,000, or so much of the sum as may be necessary, to the energy development impact office, or its successor, for the purpose of impact grant funding for potash development-impacted political subdivisions, for the biennium beginning July 1, 2013, and ending June 30, 2015. The appropriation described in this section must be transferred and deposited in a special account within the impact grant fund and is not subject to section 54-44.1-11. The unexpended portion of this appropriation may be carried over through June 30,

2017. An expenditure may not be made from this appropriation until a building permit has been issued for a potash processing plant in this state.

SECTION 5. LEGISLATIVE MANAGEMENT STUDY - POTASH MINING TAXATION. During the 2011-12 interim, the legislative management shall study potash mining and taxation issues. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-third legislative assembly.

SECTION 6. EFFECTIVE DATE - EXPIRATION DATE. This Act is effective for taxable production occurring ~~after June 30, 2011~~from July 1, 2011, through June 30, 2017, and is thereafter ineffective.