

September 2010

Introduced by

1 A BILL for an Act to create and enact a new subsection to section 57-39.2-04 and chapter
2 57-65 of the North Dakota Century Code, relating to a sales tax exemption for potash and
3 byproducts of potash and taxation of potash and byproducts; to amend and reenact
4 subsection 32 of section 57-02-08 of the North Dakota Century Code, relating to exemption of
5 minerals subject to in lieu of taxes; to provide a continuing appropriation; to provide a penalty;
6 and to provide an effective date.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

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

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

14 Gross receipts from the sale of any potash or byproducts taxable under chapter
15 57-65.

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

18 **57-65-01. Definitions.** As used in this chapter:

19 1. "Byproducts" includes any mineral product, or combination or compound thereof,
20 produced during the processing of potash that is sold and includes aluminum,
21 antimony, arsenic, barium, beryllium, bismuth, boron, cadmium, calcium, cerium,
22 cesium, chromium, cobalt, columbium, copper, gallium, gemstones, germanium,
23 gold, gypsum, hafnium, indium, iridium, iron, lanthanum, lead, lithium, magnesium,
24 manganese, mercury, molybdenum, nickel, osmium, palladium, platinum,

- 1 praseodymium, rare earth metals, rhenium, rhodium, rubidium, ruthenium,
2 samarium, scandium, selenium, silicon, silver, sodium, strontium, tantalum,
3 tellurium, thallium, thorium, tin, titanium, tungsten, vanadium, yttrium, zinc, and
4 zirconium. The term does not include oil, natural gas, or liquid hydrocarbon,
5 individually or in any combination, coal, carbon dioxide, or severed sand or gravel
6 subject to an extraction or severance tax under any other provisions of this title.
- 7 2. "Commissioner" means the tax commissioner.
- 8 3. "Gross receipts" means all revenue valued in money, whether received in money
9 or otherwise, realized by the taxpayer for sale of potash or byproducts, whether the
10 sale is before or after transportation, manufacturing, and processing of the product.
- 11 4. "Mining facility" includes contiguous land and all structures and improvements on
12 the permit area used for mining potash and byproducts and includes the act,
13 process, or work of extracting potash from its naturally occurring environment and
14 transporting or moving potash or byproducts to the point of processing, use, or
15 sale. The term includes the process of leaching potash from its naturally occurring
16 deposit. The term also includes an "extraction facility" as defined in chapter 38-12.
- 17 5. "Person" means every individual, partnership, firm, association, joint venture,
18 corporation, limited liability company, fiduciary, trustee, receiver, administrator,
19 representative of any kind, or any other group or combination acting as a unit.
- 20 6. "Potash" includes muriate of potash [the chemical compound potassium chloride,
21 KCl], sulfate of potash [the chemical compound sulfate, K_2SO_4], and langbeinite
22 [the chemical compound potassium magnesium sulfate, $K_2SO_4 \cdot 2MgSO_4$], or any
23 other potassium, magnesium, or mixed-potassium salts, and includes ores,
24 intermediates, products, and reaction products of such compounds.
- 25 7. "Processing" includes breaking, crushing, cleaning, drying, sizing, milling, treating,
26 heating, separating, compressing, beneficiation, or loading or unloading for any
27 purpose.
- 28 8. "Processing plant" means any facility in North Dakota in which potash or
29 byproducts are extracted, recovered, or produced from a mineral resource and
30 includes any facility in North Dakota associated with the mine in which the primary
31 production from the mining facility is processed or refined.

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

3 **57-65-02. Imposition of tax on potash.** A tax at the rate of five percent is imposed
4 upon all potash produced within this state. The tax levied attaches to the whole production of
5 potash except any byproducts of potash taxed under section 57-65-03.

6 1. The tax on potash is calculated by taking a ton of two thousand pounds [907.18
7 kilograms] of potash produced times the potash tax rate times the annual average
8 price of potash. The "annual average price of potash" for each twelve-month
9 period beginning July first is the potash producer price index as calculated and
10 published by the United States department of labor, bureau of labor statistics, for
11 the previous calendar year. For taxable production for the twelve months
12 beginning July 1, 2011, the "annual average price of potash" is three hundred
13 fifty-seven dollars and ten cents.

14 2. The tax department shall provide the annual average price of potash for the fiscal
15 year to affected taxpayers by written notice mailed before June first.

16 3. If the potash producer price index is discontinued, a comparable index must be
17 adopted by the department by an administrative rule.

18 **57-65-03. Imposition of tax on byproducts of potash production.** A subsurface
19 mineral tax of four percent is imposed upon the gross value of all subsurface mineral
20 byproducts produced during the processing of potash produced within this state. The tax levied
21 attaches to the whole production of byproducts. Inventory is not taxable until it is sold. The
22 gross value at the processing plant is the price paid for the byproducts under an arm's-length
23 contract between the taxpayer and the purchaser, less, when applicable, transportation costs
24 associated with moving the minerals or byproducts from the point of production to the point of
25 sale under the contract. In the absence of an arm's-length contract, the gross value at the
26 processing plant is established by the price paid under an arm's-length contract, to which the
27 person paying the tax is a party, for the purchase or sale of byproducts of like kind, character,
28 and quality, less, when applicable, transportation costs associated with moving the byproducts
29 to the point of sale.

30 **57-65-04. Type of tax.** For purposes of interpreting section 5 of article X of the
31 Constitution of North Dakota, relating to federal land bank taxation and to the taxation of other

1 governmental entities if their immunity from taxation has been waived, the tax under this
2 chapter is a real property tax on subsurface mineral-producing estates and interests.

3 **57-65-05. Potash and byproducts tax to be in lieu of other taxes.** The payment of
4 the taxes imposed by this chapter is in lieu of all ad valorem taxes upon any processing plant,
5 mining facility, or satellite facility producing potash or byproducts. The land on which the
6 processing plant, mining facility, or satellite facility is located must be assessed and taxed as
7 other property within the taxing district in which the property is situated. The tax under this
8 chapter is not in lieu of income taxes nor excise taxes upon the sale of minerals or byproducts
9 at retail.

10 **57-65-06. Duties of tax commissioner and state treasurer.** The tax commissioner
11 shall deposit promptly with the state treasurer all moneys collected under this chapter and
12 accompany each remittance, when possible, with a certificate showing the county where the
13 potash and byproducts were processed. The state treasurer, no less than monthly, shall pay
14 over to the county treasurer and city auditor of the several counties the money to which they are
15 entitled.

16 **57-65-07. Allocation of revenue - Continuing appropriation.** The tax collected as
17 provided in this chapter is appropriated and must be apportioned as follows:

- 18 1. Eighty percent must be credited to the state general fund.
19 2. Twenty percent must be allocated and distributed among the potash-producing and
20 byproduct-producing counties in the proportion that the taxes under this chapter on
21 potash and byproducts removed in the county bears to the total taxes under this
22 chapter on potash and byproducts removed in the state during the monthly period.

23 **57-65-08. Returns and payment of tax on monthly basis - Due date - When**
24 **delinquent - Extensions.**

- 25 1. Any person engaged in the production, within this state, of potash or byproducts
26 shall before the twenty-sixth day of the next succeeding month after production, file
27 with the tax commissioner a statement upon forms prescribed by the tax
28 commissioner.
29 2. The tax under this chapter must be paid on a monthly basis. The tax is due and
30 payable on the twenty-fifth day of the month succeeding the month of production.

- 1 If the tax is not paid as required by this section, the tax becomes delinquent and
2 must be collected as provided in this chapter.
- 3 3. The tax commissioner, upon request and a proper showing of good cause, may
4 grant an extension of time, not to exceed fifteen days, for paying the tax. When the
5 request is granted, the tax is not delinquent until the extended period has expired.
6 A taxpayer who is granted an extension of time for filing a return shall pay, with the
7 tax, interest at the rate of twelve percent per annum from the date the tax was due
8 to the date the tax is paid.
- 9 4. All calculations of the tax under this chapter, including production, distribution, and
10 claims for credit or refund, are based on the month of production and must be
11 credited to that month.
- 12 5. The tax commissioner may prescribe alternative methods for signing, subscribing,
13 or verifying a return filed by electronic means, including telecommunications, that
14 shall have the same validity and consequence as the actual signature and written
15 declaration for a paper return.

16 **57-65-09. Tax commissioner to audit returns and correct tax.**

- 17 1. The tax commissioner may determine whether a return required to be filed with the
18 tax commissioner under this chapter is a true and correct return of gross
19 production, and of the value, of the potash and byproducts. If a return required by
20 this chapter is not filed, or if a return when filed is incorrect or insufficient, the tax
21 commissioner shall determine the amount of tax due from any information the tax
22 commissioner may be able to obtain, and, if necessary, may estimate the tax on
23 the basis of external indices.
- 24 2. The tax commissioner shall have three years after the due date of the original
25 return or three years after the original return is filed, whichever period expires later,
26 to assess the tax and, if additional tax is due, provide notice of the determination of
27 the additional tax to the taxpayer. If there is a change in tax liability on any return
28 by an amount in excess of twenty-five percent of the amount of tax before any
29 credits, any additional tax determined to be due may be assessed anytime within
30 six years after the due date of the return or six years after the return was filed,
31 whichever period expires later.

- 1 3. If a taxpayer files an amended return, the tax commissioner has two years after the
2 return is filed to audit the return and assess any additional tax attributable to the
3 changes or corrections even though other time periods prescribed in this section
4 for the assessment of tax may have expired. The provisions of this section do not
5 limit or restrict any other time period prescribed in this section for the assessment
6 of tax that has not expired as of the end of the two-year period prescribed in this
7 section.
- 8 4. If false or fraudulent information is given in the return, or if the failure to file a return
9 is due to the fraudulent intent or the willful attempt of the taxpayer in any manner to
10 evade the tax, the time limitations in this section do not apply, and the tax may be
11 assessed at any time.
- 12 5. If before the expiration of the time periods prescribed in subsections 1, 2, and 3 the
13 tax commissioner and a person consent in writing to an extension of time for the
14 assessment of the tax, an assessment of additional tax may be made at any time
15 prior to the expiration of the period agreed upon. The period so agreed upon may
16 be extended by subsequent agreements in writing made before the expiration of
17 the period previously agreed upon. If a person refuses to consent to an extension
18 of time or a renewal thereof, the tax commissioner may make an assessment
19 based on the best information available. The period agreed upon in this
20 subsection, including extensions, expires upon issuance of an assessment by the
21 tax commissioner.
- 22 6. Any person who consents to an extension of time for assessment of tax must be
23 presumed to have consented to a similar extension for refund.

24 **57-65-10. Interest and penalties.**

- 25 1. Reports from the taxpayer are delinquent after the last day fixed for their filing, and
26 every person required to file a report is subject to a penalty of twenty-five dollars
27 per day of delinquency for each property upon which the person fails or refuses to
28 file the reports. The penalties under this subsection are for failure to file reports
29 and are in addition to the penalties imposed by subsection 2 and constitute a lien
30 against the assets of the person failing or refusing to file the reports. The penalties
31 prescribed under this section must be collected in the same manner as potash and

- 1 byproducts taxes and must be apportioned as other potash and byproducts tax
2 penalties.
- 3 2. In addition to the tax and interest prescribed in this chapter, a taxpayer is subject to
4 penalties as follows:
- 5 a. If any taxpayer, without intent to evade any tax imposed by this chapter, fails
6 to pay the amount shown as tax due on any return filed on or before the due
7 date or extended due date prescribed, there must be added to the tax a
8 penalty of five percent of the tax due, or five dollars, whichever is greater.
- 9 b. If any taxpayer, without intent to evade any tax imposed by this chapter, fails
10 to file a return on or before the due date or extended due date prescribed,
11 there must be added a penalty equal to five percent of the tax required to be
12 reported, or five dollars, whichever is greater.
- 13 c. If upon audit of a taxpayer's return additional tax is found to be due, there
14 must be added to the tax the penalty provided in subdivision a or b.
- 15 3. In addition to other increases to tax and penalty provided in this chapter, a
16 taxpayer is subject to interest as follows:
- 17 a. Any taxpayer who requests and is granted an extension of time for filing a
18 return shall pay, with the tax, interest on the tax at the rate of twelve percent
19 per annum from the date the tax would have been due if the extension had
20 not been granted to the date the tax is paid.
- 21 b. If any amount of tax imposed by this chapter is not paid on or before the due
22 date or extended due date for the payment, there must be added to the tax
23 interest at the rate of one percent per month or fraction of a month during
24 which the return was required to be filed or the tax became due.
- 25 c. If upon audit an additional tax is found to be due, there must be added to the
26 additional tax due interest at the rate of one percent of the additional tax for
27 each month or fraction of a month during which the tax remains unpaid,
28 computed from the due date of the return to the date paid, excepting the
29 month in which the return was required to be filed or the tax became due.
- 30 d. If the mathematical verification of a taxpayer's return results in additional tax
31 due, there must be added to the additional tax interest at the rate of one

1 percent of the additional tax due for each month or fraction of a month during
2 which the return was required to be filed or the tax became due.

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

5 **57-65-11. Refund claims.**

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

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

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

25 4. In all cases of overpayment, duplicate payment, or payment made in error, the tax
26 commissioner shall issue a certificate containing the facts and the amount of the
27 refund to which the taxpayer may be entitled. Upon presentation of the certificate
28 to the office of management and budget, a warrant must be issued to the taxpayer
29 for the purpose of refunding any overpayment, duplicate payment, or payment
30 made in error out of the unapportioned potash and byproducts tax in the state
31 treasury and a pro rata share must be charged against the county entitled to share

1 in the tax. Interest arising from refunds of overpayments, duplicate payments, and
2 erroneous payments must be allowed and paid at the rate of ten percent per
3 annum and accrues for payment from sixty days after the due date of the return or
4 after the return was filed or after the tax was fully paid, whichever comes later.

5 **57-65-12. Minimum refunds and collections.**

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

14 **57-65-13. Protest and appeal.**

- 15 1. If upon audit the tax commissioner finds additional tax due or disallows a credit or a
16 claim for refund, the tax commissioner shall notify the person of that finding. The
17 notice must inform the person of the reasons for assessment of additional tax or
18 the change in refund or credit claimed. Notice of deficiency must be sent by
19 first-class mail and must set forth the reasons for the finding.
- 20 2. A person has thirty days, or ninety days if the person is outside the United States,
21 to file a written protest objecting to the tax commissioner's assessment of
22 additional tax due or disallowance of a credit or a claim for refund. The protest
23 must set forth the basis for the protest and any other information which may be
24 required by the tax commissioner. If a person fails to file a written protest within
25 the time provided, the tax commissioner's finding becomes finally and irrevocably
26 fixed. If a person protests only a portion of the tax commissioner's finding, the
27 portion that is not protested becomes finally and irrevocably fixed.
- 28 3. If a protest is filed, the tax commissioner shall reconsider the assessment of
29 additional tax due or disallowance of a credit or claim for refund. The
30 reconsideration may include further examination by the tax commissioner or the tax
31 commissioner's representative of a person's books, papers, records, or

- 1 memoranda. The tax commissioner, upon request, may grant the person an
2 informal conference.
- 3 4. Within a reasonable time after protest, the tax commissioner shall notify the
4 taxpayer of the tax commissioner's reconsideration of assessment of additional tax
5 due or disallowance of a credit or claim for refund. The amount set forth in that
6 notice becomes finally and irrevocably fixed unless the person within thirty days
7 commences formal administrative review as provided for in chapter 28-32 by the
8 filing of a complaint. The complaint must be personally served on the tax
9 commissioner or sent by certified mail.
- 10 5. Upon written request, the tax commissioner may grant an extension of time to file a
11 protest as provided for in subsection 2 or an extension of time to commence formal
12 review as provided for in subsection 4.

13 **57-65-14. Lien for tax - Preservation of lien - Satisfaction of lien.**

- 14 1. The tax, penalty, and interest assessed under this chapter is, at all times, a first
15 and paramount lien against the taxpayer's property, both real and personal. The
16 provisions of this chapter requiring the taxpayer to pay the tax do not release the
17 taxpayer from that liability. If the tax, penalty, and interest are not paid, the tax,
18 penalty, and interest may be recovered at the suit of the state, upon relation to the
19 tax commissioner, in any court of competent jurisdiction of the county where any
20 such property, assets, and effects are located.
- 21 2. Any judgment creditor or lien claimant acquiring any interest in or lien on any
22 property situated in this state, before the tax commissioner files in the central
23 indexing system maintained by the secretary of state a notice of the lien provided
24 for in this section, takes free of or has priority over the lien. The tax commissioner
25 shall index in the central indexing system the following data:
- 26 a. The name of the taxpayer.
- 27 b. The tax identification number or social security number of the taxpayer.
- 28 c. The name "State of North Dakota" as claimant.
- 29 d. The date and time the notice of lien was indexed.
- 30 e. The amount of the lien. The notice of the lien is effective as of eight a.m. of
31 the first day following the indexing of the notice.

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

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

7 **57-65-15. Delinquent taxes - Sale of property.** When any tax provided for in this
8 chapter becomes delinquent, the tax commissioner shall issue warrants directed to the sheriff of
9 any county where the tax is due, or any part of the tax accrued, for the collection of the tax,
10 interest, and penalty. The sheriff to whom the warrant is directed shall proceed to levy upon the
11 property, assets, and effects of the person liable for such tax and shall sell the same and make
12 return upon execution. The state of North Dakota, through the tax commissioner, is authorized
13 to make bids at any such sale to the amount of tax, penalty, and costs accrued.

14 **57-65-16. Bond - Reports - Actions.**

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

21 2. When any reports required have not been filed, or may be insufficient to furnish all
22 the information required by the tax commissioner, the tax commissioner shall
23 institute in the name of the state of North Dakota upon relation of the tax
24 commissioner any necessary action or proceedings in the courts having jurisdiction
25 to enjoin such person from continuing operations until such reports have been filed
26 as required. In all proper cases an injunction must issue without bond from the
27 state of North Dakota. Upon showing that the state is in danger of losing its claims
28 or the property is being mismanaged, dissipated, or concealed, a receiver must be
29 appointed.

30 **57-65-17. Penalty.** Any person intentionally violating this chapter is guilty of a class A
31 misdemeanor.

1 **57-65-18. Powers of tax commissioner.** The tax commissioner is charged with the
2 administration of this chapter and shall enforce the assessment, levy, and collection of taxes
3 imposed under this chapter. The tax commissioner may require any person engaged in the
4 production of subsurface minerals or byproducts to furnish any additional information the tax
5 commissioner determines necessary for the purpose of correctly computing the amount of
6 potash and byproducts tax. The tax commissioner may examine the books, records, and files
7 of such person, and conduct hearings and compel the attendance of witnesses, the production
8 of books, records, and papers of any person, and may make any investigation or hold any
9 inquest determined necessary to a full and complete disclosure of the facts as to the amount of
10 production from any potash mining facility, processing plant, or satellite facility, or of any
11 company or other producer for taxing purposes.

12 **SECTION 4. EFFECTIVE DATE.** This Act is effective for taxable production occurring
13 after June 30, 2011.