

SENATE BILL NO. 439
INTRODUCED BY ELLIOTT

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE MINERAL ROYALTY BACKUP WITHHOLDING ACT; PROVIDING DEFINITIONS; REQUIRING REMITTOES TO WITHHOLD TAXES ON ROYALTY PAYMENTS MADE TO ~~NONRESIDENT~~ ROYALTY OWNERS; PROVIDING EXCEPTIONS TO THE WITHHOLDING TAX; MAKING REMITTOES LIABLE FOR PAYMENT OF WITHHOLDING TAXES; PROVIDING A WITHHOLDING TAX RATE AND REMITTANCE SCHEDULE; PROVIDING FOR PENALTIES AND INTEREST FOR FAILURE TO REMIT TAX; REQUIRING REMITTOES TO PROVIDE ANNUAL STATEMENTS TO ROYALTY OWNERS AND THE DEPARTMENT OF REVENUE; AND PROVIDING A DELAYED EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 12] may be cited as the "Mineral Royalty Backup Withholding Act".

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 12], the following definitions apply:

(1) "Mineral" has the same meaning as provided in 15-38-103.

(2) "PUBLICLY TRADED PARTNERSHIP" MEANS A PUBLICLY TRADED PARTNERSHIP AS DEFINED IN SECTION 7704 OF THE INTERNAL REVENUE CODE, 26 U.S.C. 7704, THAT IS NOT TREATED AS A CORPORATION.

~~(2)~~(3) "Remittor" means an individual, entity, or trust that makes royalty payments to royalty owners.

~~(3)~~(4) "Royalty owner" means a person or entity entitled to receive periodic payments for a nonworking interest in the production of oil or gas or in the severance of other minerals from the mineral estate.

NEW SECTION. **Section 3. Withholding required on mineral royalty payments.** Except as provided in [section 4], each remittor shall withhold from each royalty payment made to a royalty owner an amount equal to 6% of the net amount payable to the royalty owner.

NEW SECTION. **Section 4. Withholding -- no application under certain conditions.** (1) The

provisions of [sections 1 through 12] do not apply to royalty payments made to a royalty owner if the royalty owner is:

~~(a)~~ a Montana resident;

~~(b)~~(A) the United States or an agency of the federal government, this state or a political subdivision of this state, or another state or a political subdivision of another state;

~~(c)~~(B) a federally recognized Indian tribe with respect to on-reservation oil and gas production pursuant to a lease entered into under the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a through 396g;

~~(d)~~(C) the United States as trustee for individual Indians; or

(D) A PUBLICLY TRADED PARTNERSHIP;

(E) AN ORGANIZATION THAT IS EXEMPT FROM TAXATION UNDER 15-31-102; OR

~~(e)~~(D)(F) the same person or entity as the remittor.

(2) (A) THE PROVISIONS OF [SECTIONS 1 THROUGH 12] DO NOT APPLY TO A REMITTOR THAT PRODUCES LESS THAN ~~50,000~~ 100,000 BARRELS OF OIL AND LESS THAN ~~300,000 THOUSAND~~ 500 MILLION CUBIC FEET OF GAS ANNUALLY. THE DEPARTMENT SHALL DETERMINE A REMITTOR'S ANNUAL PRODUCTION OF OIL AND GAS BASED UPON A 3-YEAR ROLLING AVERAGE OF THE REMITTOR'S ANNUAL PRODUCTION AS REPORTED BY THE REMITTOR TO THE MONTANA BOARD OF OIL AND GAS CONSERVATION.

(B) EACH PRODUCER THAT IS EXEMPTED FROM WITHHOLDING UNDER SUBSECTION (2)(A) SHALL MAKE AN ANNUAL RETURN TO REPORT ROYALTY PAYMENTS THAT EXCEED THE DOLLAR AMOUNTS IN SUBSECTION (3). THE RETURN MUST BE MADE UNDER RULES ADOPTED BY THE DEPARTMENT AND BE AS NEARLY IDENTICAL AS POSSIBLE TO FEDERAL RULES FOR INTERNAL REVENUE SERVICE FORM 1099 UNDER SECTION 6041, ET SEQ., OF THE INTERNAL REVENUE CODE, 26 U.S.C. 6041, ET SEQ.

(C) EACH YEAR, A PUBLICLY TRADED PARTNERSHIP THAT IS EXEMPT FROM WITHHOLDING UNDER SUBSECTION (1)(D) SHALL TRANSMIT TO THE DEPARTMENT, IN AN ELECTRONIC FORMAT APPROVED BY THE DEPARTMENT, EACH PARTNER'S U.S. DEPARTMENT OF THE TREASURY SCHEDULE K-1, FORM 1065 OR 1065-B, AS APPLICABLE, FILED ELECTRONICALLY FOR THE YEAR WITH THE INTERNAL REVENUE SERVICE.

(D) A ROYALTY OWNER THAT IS A PUBLICLY TRADED PARTNERSHIP OR AN ORGANIZATION THAT IS EXEMPT FROM TAXATION UNDER 15-31-102 SHALL REPORT TO THE REMITTOR AND DEPARTMENT UNDER OATH, ON A FORM PRESCRIBED BY THE DEPARTMENT, ALL INFORMATION NECESSARY TO ESTABLISH THAT THE REMITTOR IS NOT REQUIRED UNDER [SECTION 3] TO WITHHOLD ROYALTY PAYMENTS MADE TO THE PARTNERSHIP OR ORGANIZATION.

~~(2)~~(3) If the royalty payment made to a royalty owner subject to withholding under the provisions of [sections 1 through 12] is less than \$166 for the current withholding period or is less than \$2,000 if the payment

is annualized, then the department may grant a remittor's request to forego withholding the tax from the royalty payment made to that royalty owner for the current withholding period or, if applicable, the royalty payments for the annual period.

(4) THE DEPARTMENT MAY, BY RULE, ESTABLISH MINIMUM ROYALTY AMOUNTS SUBJECT TO WITHHOLDING UNDER THE PROVISIONS OF [SECTIONS 1 THROUGH 12], OTHER THAN FOR OIL AND GAS PRODUCTION, IF THE DEPARTMENT DETERMINES THAT THE WITHHOLDING AGAINST THE MINIMAL AMOUNT OF ROYALTIES IS INEFFICIENT.

NEW SECTION. Section 5. Remittor liable for withholding taxes and statements -- liability mitigation -- sufficiency of mailing address. (1) Each remittor is liable for the payment required by [section 6], the amount required to be deducted and withheld under [sections 1 through 12], and the annual statements required by [sections 8 and 9]. The payments required by [section 6] and the amounts required to be deducted and withheld, plus penalty and interest due, are a tax. With respect to the tax, the remittor is the taxpayer.

(2) The officer of a corporation whose responsibility it is to collect, truthfully account for, and pay to the state the amounts withheld from mineral royalty payments and who fails to pay the withholdings is liable to the state for the amounts withheld and the penalty and interest due on the amounts.

(3) (a) Subject to subsections (3)(b) and (6), each officer of the corporation is individually liable, along with the corporation, for filing statements, to the extent that the officer has access to the requisite records, and for unpaid taxes, penalties, and interest upon a determination that the officer:

(i) possessed the responsibility to file statements and pay taxes on behalf of the corporation; and
 (ii) possessed the responsibility on behalf of the corporation for directing the filing of tax statements or the payment of other corporate obligations and exercised that responsibility, resulting in the corporation's failure to file statements required by [sections 1 through 12] or to pay taxes due as required by [sections 1 through 12].

(b) If a corporate remittor violates the provisions of [sections 1 through 12], the department shall first apply the provisions of [section 11] against the corporation. If the corporation fails to remedy the violation, then the department shall apply the provisions of [section 11] against each responsible corporate officer as determined in subsections (3)(a) and (3)(c).

(c) In determining which corporate officer is liable, the department is not limited to considering the elements set forth in subsection (3)(a) to establish individual liability and may consider any other available information.

(4) In the case of a corporate bankruptcy, the liability of the individual remains unaffected by the discharge of penalty and interest against the corporation. The individual remains liable for any statements and

the amount of taxes, penalties, and interest unpaid by the corporation.

(5) Subject to subsection (6), for the purpose of determining liability for the filing of statements and the payment of taxes, penalties, and interest owed under [sections 1 through 12]:

(a) each partner of a partnership is jointly and severally liable, along with the partnership, for any statements, taxes, penalties, and interest due while a partner;

(b) each member of a limited liability company that is treated as a partnership or as a corporation for income tax purposes is jointly and severally liable, along with the limited liability company, for any statements, taxes, penalties, and interest due while a member;

(c) the member of a single-member limited liability company that is disregarded for income tax purposes is jointly and severally liable, along with the limited liability company, for any statements, taxes, penalties, and interest due while a member; and

(d) each manager of a manager-managed limited liability company is jointly and severally liable, along with the limited liability company, for any statements, taxes, penalties, and interest due while a manager.

(6) The liability of an individual described in subsection (3) or (5) for taxes, penalties, and interest is released if and to the extent that the amount required to be deducted and withheld under [sections 1 through 12] is deposited in a separate account that is:

(a) established in a bank, as defined in 32-1-102, located in Montana;

(b) designated as a special fund in trust for the state; and

(c) payable to the department.

(7) If the remitter fails to deduct and withhold the amounts specified in [section 3] and the tax, against which the deducted and withheld amounts would have been credited, is paid, the amounts required to be deducted and withheld may not be collected from the remitter.

~~(8) For purposes of [sections 1 through 12], the residency of a royalty owner may be established by the remitter based upon the address to which the remitter mails the royalty owner's payments. A remitter bears no liability for relying upon the royalty owner's address to establish residency.~~

NEW SECTION. Section 6. Royalty withholding tax remittance schedule -- alternative schedules and methods -- records. (1) Except as provided in subsection (2), each remitter is required to file a quarterly return, on a form prescribed by the department, and remit to the department the amount of tax withheld on royalty payments according to the following schedule:

(a) for royalty payments made during January, February, and March of each calendar year, the amount

withheld is due on or before April 30 of the year;

(b) for royalty payments made during April, May, and June of each calendar year, the amount withheld is due on or before July 31 of the year;

(c) for royalty payments made during July, August, and September of each calendar year, the amount withheld is due on or before October 31 of the year; and

(d) for royalty payments made during October, November, and December of each calendar year, the amount withheld is due on or before January 31 of the following year.

(2) A remittor may request an alternative remittance schedule than is required by subsection (1). The department may consider situations such as administrative and taxpayer convenience and frequency of royalty payments in determining whether to approve an alternative remittance schedule.

(3) A remittor may elect to remit and file mineral backup withholding electronically in any format established and approved by the department if the remittor obtains prior approval from the department before remitting the tax by electronic fund transfer.

(4) If a remittor remits withholding taxes electronically, the remittance is considered timely if made within 5 days after the due date of the payment.

(5) If the department has reason to believe that collection of the amount of any tax withheld is in jeopardy, it may proceed as provided under 15-1-703.

(6) Each remittor shall keep accurate royalty payment and withholding records containing the information that the department may prescribe by rule. Those records must be open to inspection and audit and may be copied by the department or its authorized representative at any reasonable time and as often as may be necessary. A remittor that maintains its records outside of Montana shall furnish copies of those records to the department at the remittor's expense.

NEW SECTION. Section 7. Amount of royalty payment withheld considered taxes collected. The amounts deducted and withheld from royalty payments are considered taxes collected under the provisions of [sections 1 through 12]. A royalty owner does not have a right of action against the remittor for any amount deducted and withheld from the royalty owner's royalty and paid to the state in compliance or intended compliance with [sections 1 through 12]. The amounts deducted and withheld and paid to the state in compliance or intended compliance with [sections 1 through 12] are not subject to the provisions of section 82-10-103.

NEW SECTION. Section 8. Annual withholding statement to royalty owner. Before January 31 of

each year, each remitter shall furnish to each royalty owner a statement, on a form prescribed by the department, showing the total royalties paid by the remitter to the royalty owner during the preceding calendar year and showing the amount of the tax deducted and withheld from the royalty payments. The royalty owner shall file a duplicate of the statement with the royalty owner's state income tax return.

NEW SECTION. Section 9. Remitter to furnish annual statement to department. (1) On or before February 28 of each year, each remitter shall file with the department a royalty and tax statement, on a form provided by the department, that shows the total royalties paid to each royalty owner subject to withholding during the preceding calendar year or any portion of the preceding calendar year and the total amount of the tax deducted and withheld from the royalty payments under the provisions of [sections 1 through 12] for the same period.

(2) The annual statement filed by a remitter under this section complies with the requirements of 15-30-301 relating to the duties of information agents. An additional information return is not required with respect to the royalty payments.

(3) The department shall make the forms described in [section 6] and this section available no later than November 15, 2007.

NEW SECTION. Section 10. Withheld taxes held in trust for state. Each remitter that deducts and withholds the amounts under the provisions of [sections 1 through 12] shall hold the amounts in trust for the state.

NEW SECTION. Section 11. Violations by remitter -- penalties -- interest -- remedies. (1) The department shall, as provided in 15-1-216, add penalty and interest to the amount of all delinquent withholding taxes.

(2) A remitter that purposely fails to furnish the royalty and tax statement required by [section 9] is subject to a penalty of \$50 for each failure, with a minimum of \$1,000. The penalties imposed by this subsection are in addition to the penalties imposed by 15-1-216.

(3) All remedies available to the state for the administration, enforcement, and collection of income taxes are available and apply to the tax required to be deducted and withheld under the provisions of [sections 1 through 12] unless otherwise specifically provided for in this part.

NEW SECTION. Section 12. Rulemaking authority. The department shall adopt rules that may be

necessary to administer and enforce the provisions of [sections 1 through 12].

NEW SECTION. **Section 13. Notification to tribal governments.** The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell Chippewa tribe.

NEW SECTION. **Section 14. Codification instruction.** [Sections 1 through 12] are intended to be codified as an integral part of Title 15, chapter 30, part 2, and the provisions of Title 15, chapter 30, part 2, apply to [sections 1 through 12].

NEW SECTION. **Section 15. Effective date.** [This act] is effective January 1, 2008.

NEW SECTION. **Section 16. Applicability.** [This act] applies to royalty payments made after December 31, 2007.

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