

**FORT PECK TRIBES AND STATE OF MONTANA  
OIL AND NATURAL GAS PRODUCTION TAX AGREEMENT**

**PREAMBLE**

Indian Tribes are sovereign nations and a government-to-government relationship exists between the Assiniboine and Sioux Tribes of the Fort Peck Reservation ("Tribes" or "Fort Peck Tribes") and the State of Montana ("State"). The best interests of the Tribes and the State are served by engaging in a government-to-government relationship and respectfully recognizing the rights, duties, and privileges of both tribal and state citizenship.

The Tribal Executive Board is the governing body of the Fort Peck Tribes and is authorized to enter into this Agreement pursuant to Article VII, Section 1, and Article X, Section 8, of the Tribes' Constitution.

The State is authorized pursuant to the State-Tribal Cooperative Agreements Act, §§ 18-11-101, *et seq.*, MCA, to enter into this Agreement with the Tribes with respect to taxes on new oil and natural gas production.

This Agreement is entered into on this 25<sup>th</sup> day of March, 2008, by and between the State and the Tribes, as an exercise of sovereignty on the part of each for the purposes set forth herein.

**I. PARTIES**

This Agreement is entered into between the State of Montana and the Tribes. As used herein, "parties" refers to the Tribes and the State.

## II. PURPOSE AND SCOPE

A. The purposes of this Agreement are (1) to avoid dual taxation of new oil and natural gas production over which both the Tribes and the State assert taxation authority on the Fort Peck Indian Reservation ("Reservation"); (2) to ensure that the same level of taxation is imposed on new production of oil and natural gas both within and outside the boundaries of the Reservation; and (3) to avoid legal controversy regarding the taxation of new oil and natural gas production over which both the Tribes and the State assert taxation authority within the exterior boundaries of the Reservation.

B. This Agreement concerns new oil and natural gas production only, and does not affect the taxation of existing oil and natural gas production on the reservation. This Agreement is limited to the taxation of new oil and natural gas production from producers on the Reservation over whom both the State and the Tribes each assert taxation authority, recognized as follows: (1) nonmember producers on trust land; (2) nonmember producers on tribally-owned fee lands; (3) nonmember producers on member trust allotments; (4) nonmember producers on member-owned fee land; (5) nonmember producers on fee lands of nonmembers, if the mineral estate is owned by the Tribes or by its members; (6) nonmember producers outside the exterior boundaries of the Reservation, if the mineral estate is owned by the Tribe, and when the Mineral Leasing Act of 1938 applies to the minerals, and the minerals are considered a "component of the reservation land itself" under *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9<sup>th</sup> Cir. 1987), *aff'd without opinion*, 484 U.S. 997 (1998) ; and (7) taxes on nonmember producers which fall under *Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767 (9<sup>th</sup> Cir. 2003). In the event of a final adjudication, or federal or state legislation affecting concurrent jurisdiction, the parties will meet to re-evaluate the Agreement and modify it if necessary.

### III. DEFINITIONS

A. New oil and natural gas production. "New oil and natural gas production" means any production from oil or natural gas wells that a producer commenced drilling on or after the effective date of this Agreement.

B. Existing oil and natural gas production. "Existing oil and natural gas production" means any production from oil or natural gas wells that a producer commenced drilling prior to the effective date of this Agreement. Appendix "A" to this Agreement lists those wells which the parties agree comprise existing oil and natural gas production.

C. Nonmember. For the purposes of this Agreement, the term "nonmember" means any Indian or non-Indian who does not have the right to vote in Fort Peck tribal elections, as provided in Article V of the *Constitution and By-Laws with Amendments Incorporated and Enrollment Ordinance No. 1 of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, Approved Effective October 1, 1960.*

D. Nonmember producer. For the purposes of this Agreement, the term "nonmember producer" means any producer, regardless of whether it is registered or incorporated under state or tribal law and regardless of whether organized as a corporation, a sole proprietorship, or organized in some other fashion, that is majority (51% or more) nonmember owned.

### IV. STATE OIL AND NATURAL GAS PRODUCTION TAX

The State, pursuant to its constitutional, legislative, and other authority, imposes a production tax on oil and natural gas produced within the State's jurisdiction under §§ 15-36-301, *et seq.*, MCA. The State shall, within 60 days, notify the Tribes in writing of any changes or amendments to these statutes or regulations.

### V. TRIBAL OIL AND NATURAL GAS PRODUCTION TAX

The Tribes, pursuant to their constitutional and inherent sovereign authorities, agree to enact an ordinance imposing a tax on oil and natural gas producers as listed in Section

II of this Agreement, and that such ordinance shall substantially mirror to the satisfaction of the State the relevant language of the Montana production tax, referenced in Section IV above, and attached to this Agreement as Appendix "B." The Tribes agree to provide the State of Montana with a current copy of this ordinance, and shall, within 60 days, notify the State of any changes or amendments to the ordinance.

## **VI. NO TAX DISADVANTAGE**

The State and the Tribes agree that new oil and natural gas production, as described in Section II of this Agreement, shall not be subject to both the State tax and the Tribal tax, but shall be subject to one tax as provided for herein.

## **VII. COLLECTION AND ADMINISTRATION OF TAXES**

A. The parties agree that the State will collect, for and on behalf of the State and the Tribes, the tax for new oil and natural gas production over which both the Tribes and the State have taxation authority on the Reservation as described in Section II. The State will remit to the Tribes an agreed upon amount of the new oil and natural gas production tax as described in Section VIII.

B. The State shall distribute the monies due to the Tribes under this Agreement as follows:

(1) On or before August 1 of each year, the State shall remit to the Tribes distributions received for the calendar quarter ending March 31 of the current year.

(2) On or before November 1 of each year, the State shall remit to the Tribes distributions received for the calendar quarter ending June 30 of the current year.

(3) On or before February 1 of each year, the State shall remit to the Tribes distributions received for the calendar quarter ending September 30 of the current year.

(4) On or before May 1 of each year, the State shall remit to the Tribes distributions received for the calendar quarter ending December 31 of the prior year.

The State will include with each distribution a statement showing how the distribution was determined for that quarter, in conformity with requirements concerning the confidentiality of producer information as detailed in Section X.

C. Distributions will start hereunder within one hundred twenty (120) days from the end of the first whole calendar quarter after the effective date of this Agreement and continue until the expiration or the termination of this Agreement as provided in Section IX or Section XIX.

D. The monies due under this Agreement shall be distributed to the Tribes unless the Tribes instruct the State otherwise. Said instruction shall be made at least 30 days in advance of the date the change should commence; shall be made in writing; and shall include a written resolution from the Fort Peck Tribal Executive Board authorizing the changed distribution. The instruction shall also include the following information: (1) the name and address of the entity to receive the payment; (2) the date the change should commence; and (3) the routing and account numbers of the entity to receive the payment. Any change in payment procedures requested by the Tribes in no way obligates the State to any party the Tribes have authorized to receive payment. There are no third-party beneficiaries of this Agreement.

#### **VIII. CALCULATION OF TRIBAL TAX REVENUE**

The amount of oil and natural gas production tax monies that the Tribes shall receive each calendar year quarter shall be equivalent to 50% of the total tax on new oil and on new natural gas production on the Reservation, over which both the state and the Tribes have taxation authority as described in Section II, for that calendar quarter.

#### **IX. TERM**

The term of this Agreement shall be from the effective date of the Agreement until June 30, 2017, subject to the renewal provision of Section XX, unless terminated in accordance with the provisions of Section XIX. In the event of a notice of termination by either party prior to the end of the term, the State shall be obligated to remit the amount payable to the Tribes provided for in this Agreement for that period of time up to and including the calendar quarter of termination, as provided in Section XIX.

## **X. CONFIDENTIALITY**

A. The parties recognize that producer proprietary and confidential taxpayer information of oil and natural gas producers must be protected from disclosure in the administration of this Agreement. Each party is responsible for collecting producer information as it desires under its respective law. The parties may share aggregate production and valuation information so long as such information does not disclose, and cannot be disaggregated to disclose, proprietary or confidential producer information. In instances where the parties agree that certain proprietary and confidential producer information must be shared between them, each party shall first obtain a waiver of confidentiality from the producer or producers at issue. The parties agree that if the State is unable to determine whether a producer falls under the Agreement, the State should request assistance from the Tribes in order to determine such eligibility under the Agreement. The parties agree to assist each other in making such determinations. If the State determines validation of producer eligibility is necessary to administer the Agreement, a waiver of confidentiality will be required from producers to the extent necessary to determine whether any such producer falls within the scope of this Agreement.

B. The parties expressly agree that this section is not intended to, either explicitly or implicitly, designate certain producer information as proprietary and confidential, or to expand or reduce the confidentiality protections currently in existence under federal, state, and/or tribal law. Further, this section does not prohibit the parties from sharing producer specific information that is not proprietary and confidential.

## **XI. AUDIT**

Either party has the right to request a third-party audit of the revenue collection and allocation records to determine the accuracy of the statements or representations called for in this Agreement for the five years immediately preceding the date of the request. The right of a third-party audit shall exist during the term of this Agreement and for a period for one (1) year after the date of any termination or expiration of this Agreement. The parties shall mutually agree upon a third-party auditor, and agree to each pay 50%

of the costs of the third-party auditor. The auditor shall be subject to state, federal, and tribal law with regard to the confidentiality of producer information.

## **XII. REFUNDS**

In the event of administrative error with regard to quarterly payments under this Agreement, each party agrees to make timely payment of any refunds necessary under this Agreement, and agrees that, in addition to all other remedies available under this Agreement, an offset against a party's respective share of current oil and gas revenue is allowed. The parties shall make best efforts to take corrective action with regard to administrative error affecting quarterly payments within 90 days of the date both parties become aware of the issue and agree as to the appropriate corrective action.

## **XIII. MEDIATION**

The parties agree that in the event of a dispute with regard to this Agreement, they shall first seek resolution through non-binding mediation. The parties agree to mutually agree upon a mediator, and to each pay 50% of the costs of the mediator. The mediator shall be subject to state, federal, and tribal law with regard to the confidentiality of producer information. If a good faith effort at non-binding mediation does not resolve the dispute within ninety days from receipt of notice of the dispute, the provisions of Section XV below shall apply. The parties may, by written agreement, extend the time for the mediator to resolve the dispute.

## **XIV. SOVEREIGN IMMUNITY**

A. State Liability Under this Agreement. The State's liability under this Agreement is as provided by the Montana Constitution and the Montana Code Annotated, Title 18, Chapter 1, part 4, and Title 2, Chapter 9, part 1. The State does not waive its immunity for actions in tribal court.

B. Tribal Limited Waiver of Immunity. For the purposes of this Agreement, the Tribes expressly grant a limited waiver of sovereign immunity to the State and third parties regarding all claims or suits arising out of this Agreement; provided, however, the Tribes' immunity waiver shall be limited for tort actions to \$750,000 per claim, \$1.5

million per occurrence, and for any claim or suit of any kind shall not include punitive or exemplary damages. In suits that do not involve the State as a party, the Tribes expressly limit their waiver of immunity in this Section to actions brought in Tribal court. In all other respects, the Tribes retain its sovereign immunity from suit.

#### **XV. CHOICE OF LAW, REMEDIES AND VENUE**

A. The parties agree that this Agreement shall be governed and interpreted according to applicable federal laws and regulations, applicable State of Montana laws and regulations, and applicable tribal laws and regulations. Attorney's fees and costs shall be granted to the prevailing party.

B. The parties agree to first engage in non-binding mediation for the purpose of resolving any disputes that may arise under this Agreement, as provided in Section XIII.

C. If a mediated resolution is not possible, the parties agree and stipulate that for all claims in which the State is a party, including claims involving a third party, judicial jurisdiction shall be as provided in §§ 18-1-401 – 414, MCA.

D. With regard to claims involving exclusively third parties, and not involving the State as a party, the Fort Peck Tribal Court shall have exclusive jurisdiction.

E. In the event of a breach by either party that is not resolvable through non-binding mediation, upon written notice to the breaching party of the substance of the alleged breach and the remedies sought, the non-breaching party shall be entitled to suspend any of the non-breaching party's obligations hereunder to the extent of the breach and petition the court for appropriate relief. The failure to pursue a remedy for one or more breaches is not a waiver of any right to enforce a subsequent breach of the same or a different term hereof.

F. The remedies provided by this Agreement are not exclusive and are in addition to other remedies provided by law.



## **XVI. HOLD HARMLESS/INDEMNIFICATION**

A. The State agrees to indemnify, defend and hold harmless the Tribes, their agents and employees, from and against all claims, demands, and causes of action of any kind arising in favor of third parties on account of bodily or personal injury, death, or damage to property or breach of contract, including breaches of confidentiality as described in Section X, arising from willful or negligent acts or omissions of the State with regard to this Agreement.

B. The Tribes agree to indemnify, defend and hold harmless the State, its agents and employees, from and against all claims, demands, and causes of action of any kind arising in favor of third parties on account of bodily or personal injury, death, or damage to property or breach of contract, including breaches of confidentiality as described in Section X, arising from willful or negligent acts or omissions of the Tribes with regard to this Agreement.

C. Each party being defended under this section shall have the right to choose its own counsel and to make all substantive decisions regarding its defense.

## **XVII. INSURANCE COVERAGE**

A. The parties shall maintain for the duration of the Agreement, at their cost and expense, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the Agreement. This insurance shall cover such claims as may be caused by any negligent act or omission by the parties or their officers, agents, employees, representatives or subcontractors.

B. The Tribes shall purchase or maintain general liability insurance (occurrence coverage) from a commercial insurance carrier licensed to do business in Montana or as a qualified self-insurer with combined limits for personal injury and property damage of \$750,000 per claim and \$1,500,000 per occurrence to cover such claims as may be caused by any negligent act or omission of the Tribes or their officers, agents, employees, representatives, or subcontractors.

C. The State shall maintain liability insurance (occurrence coverage) in accordance with state law (§ 2-9-305, MCA) for personal injury and property damage of \$750,000 per claim and \$1,500,000 per occurrence to cover such claims as may be caused by any negligent act or omission of the State or its officers, agents, representatives, employees, or subcontractors.

#### **XVIII. EFFECTIVE DATE AND ORDINANCE APPROVAL**

This Agreement shall become effective on the date that the last party signs this Agreement (the "Effective Date"); however, the collection and administration of oil and natural gas taxes under this Agreement shall commence on the first day of the calendar quarter following the Effective Date. Notwithstanding anything to the contrary, the adoption by the Tribes, and approval by the BIA Fort Peck Agency Superintendent (and whose BIA approval has not been rescinded by the Secretary of Interior under Article XIII of the Tribes' Constitution) of the tribal oil and gas tax ordinance that satisfies the requirements of Section V shall be a condition subsequent to the validity and enforceability of this Agreement. The State may defer distribution of any funds to the Tribes under Section VII until the above-described tribal ordinance is enacted by the Tribes and approved by the BIA, and the 90 day timeframe for the Secretary of the Interior's rescission authority for tribal ordinances has lapsed.

#### **XIX. TERMINATION**

Either party may terminate the whole or any part of this Agreement for the other party's failure to perform the Agreement in accordance with the terms of the Agreement and other governing authorities, or for other good cause. If a party chooses to terminate the Agreement for good cause, the Agreement shall terminate at the end of the calendar quarter during which the termination occurred. If there is no exigency or risk of harm to persons from continued performance, the terminating party may, in its discretion, provide notice to the other party of the reason for termination thirty (30) days prior to the end of the quarter, and allow the other party an opportunity to cure the failure or problem prior to the end of the quarter.

## **XX. AMENDMENTS, RENEGOTIATION AND RENEWAL**

This Agreement may be amended only by written instrument signed by both parties. Prior to the expiration of the initial term of this Agreement the parties shall endeavor to negotiate in good faith a renewal of the Agreement for an additional ten (10) year term, and thereafter may negotiate successive renewals of the Agreement. If the parties do not meet prior to the expiration of a term of this Agreement, the Agreement shall be deemed to be effective for an additional ten (10) year term.

## **XXI. RESERVATION OF RIGHTS AND NEGATIVE DECLARATION**

A. The parties agree that by entering into this Agreement, and except as set forth in Sections XIV, XV, and XVI, neither the State nor the Tribes shall be deemed to have waived any rights, arguments, or defenses available in litigation on any subject. This Agreement is specifically not intended to reflect or be viewed as reflecting in this or any context either party's position with respect to the jurisdictional authority of the other. Nothing in this Agreement or in any conduct undertaken pursuant thereto shall be deemed or advocated by the parties as enlarging or diminishing the jurisdictional authority of either party.

B. During the term of this Agreement, it is the intent of each party to delegate certain responsibilities and to engage in specific conduct necessary to implement and effectuate the Agreement. Neither this Agreement nor conduct pursuant thereto shall be offered as evidence, otherwise referred to in any present or future litigation unrelated to the subject matter of the Agreement, or used to further either parties' equitable or legal position in any litigation unrelated to the subject matter of the Agreement. Except as set forth in Sections XIV, XV, and XVI, each party reserves all rights, arguments, and defenses that are available to it under the law, and nothing in this Agreement shall be interpreted or construed as an express or implicit waiver of any such right, argument, or defense. By entering into this Agreement, neither the State nor the Tribes are forfeiting any legal rights to apply their respective taxes except as specifically set forth in this Agreement.

C. This Agreement does not apply to any state tax collected other than the oil and natural gas production tax as provided in §§ 15-36-301, *et seq.*, MCA. It does not apply to any other taxes or fees of any nature collected by the State, including the privilege and license tax established under § 82-11-131, MCA, and the oil, coal and natural resource account, as specified under § 15-36-304 (7)(b), MCA. This Agreement does not apply to any other tax collected by any other agency or subdivision of the State of Montana.

D. This Agreement does not apply to any Tribal tax collected other than oil and natural gas taxes. It does not apply to any other taxes or fees of any nature collected by the Tribes or entities or departments of the Tribes.

## **XXII. NOTICES**

All notices and other communications required to be given under this Agreement by the Tribes and the State shall be deemed to have been duly given when delivered in person or posted by United States mail, addressed as follows:

If to the Tribes:

Tribal Chairman  
Fort Peck Tribes  
P.O. Box 1027  
Poplar, MT 59255

If to the State:

Governor's Office  
P.O. Box 200801  
State Capitol  
Helena, MT 59620-0801

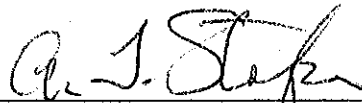
With copies to:

Revenue Director  
Department of Revenue  
Room 455, Mitchell Building  
Helena, MT 59620

Attorney General of the State of Montana  
215 North Sanders  
Helena, MT 59620-1401

DATED this 25<sup>th</sup> day of March, 2008.

**FORT PECK TRIBES:**

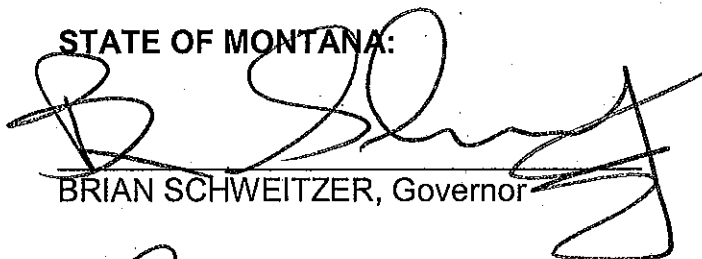


\_\_\_\_\_  
A.T. Stafne, Chairman

APPROVED AS TO FORM:

\_\_\_\_\_  
Tribal Counsel

**STATE OF MONTANA:**



\_\_\_\_\_  
BRIAN SCHWEITZER, Governor



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DAN BUCKS, Revenue Director

Approved pursuant to § 18-11-105, MCA.



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Mike McGrath, Attorney General