

NEVADA TAX COMMISSION MEETING  
MINUTES

February 18, 2022  
10:30 a.m.

Commissioners Present:

James DeVold, Chairman  
Francine Lipman, Commissioner  
Craig Witt, Commissioner  
Sharon Byram, Commissioner  
Tony Wren, Commissioner  
H. Stan Johnson, Commissioner  
Randy Brown, Commissioner

Commissioners Absent:

Ann Bersi, Commissioner

Chairman DeVold called the meeting to order.

I. Public Comment

Paul J. Moradkhan, Senior Vice President of the Vegas Chamber, Government Affairs - The Chamber's opinion is that it would not be retroactive to January 1st. We believe that this is a break from our tax policy that is typically met in Nevada and creates a precedent that the chamber believes would send the wrong message to businesses in our state, expressly those looking to relocate to Nevada. Also, as many of you know, the Chamber has a long history of engagement on tax policy in Carson City and we do not believe, in our opinion, that this was the legislative intent for this to be retroactive to January 1st, expressly since this would diverge from the state's fiscal calendar, which we all know begins on July 1st. A January 1st retroactivity start date is based on the calendar year assumption, and in our opinion, is not the intent of the legislative body. Also, I believe that the budget closings for the '21 legislative session was based on a July 1st effective date, which means collections would occur later in the year, but then that number would be further reviewed and verified by the Legislative Counsel Bureau. Again, we believe the taxes should take effect on July 1st and not January 1st, and we thank you for your time and consideration in allowing for public comment today.

Tyre Gray, President of the Nevada Mining Association (NVMA) - AB495 represents a compromise that is the result of hundreds of hours of discussion between the mining industry, the executive branch, and the Legislature to achieve one thing, to increase funding for our most valuable resource, the children of Nevada. As you know, despite best efforts, there are always minor items that require clarification during the regulatory process. The NVMA supports the regulations unanimously adopted on January 24, 2021, by this Commission. Those amendments serve three purposes: One, to name the tax created by AB495 as the mining education tax. Two, to clarify who the taxpayer is by ensuring that only those who extract and sell gold and silver at the mine operation level are subject to the mining education tax. Three, to clarify that the mining education tax applies to revenues earned on and after July 1, 2021. Though the NVMA appreciates the Commission's clarification that this tax applies at the mine level and the naming of the tax, the most important issue to Nevada's mining industry is whether the mining education tax applies retroactively. In our submitted comments, there is a legal memorandum that describes our position in greater detail, however, I would like to offer a recap of the principal reasons why it has been and continues to be our position that the tax does not apply retroactively. Number one, to discuss intent. All statutes are presumed to operate respective unless there is intent otherwise. As a principal involved in all meetings of consequence, I can

attest that not only was retroactivity not the intent of AB495, but retroactivity was never even discussed. The NVMA agrees that the language of AB495 is plain and unambiguous yet disagrees with the assertions that have been made in contradiction to the Commission's actions that AB495 creates a retroactive effect. Section 62 of AB495 functions to identify the mining education tax applied in the 2021 calendar year. On the other hand, Section 63 functions to opine the date within the 2021 calendar year that the tax becomes effective, stating that this act becomes effective on July 1, 2021. When read together, the plain language of AB495 is clear. AB495 creates a tax, the taxpayer will have an obligation in the 2021 calendar year, and July 1, 2021, is when that obligation begins to accrue. Thus, the Legislature failed to voice a clear intent within the four corners of the bill that AB495 would operate retroactively. Further, Speaker Frierson during his bill presentation never mentioned retroactivity nor Section 62, the sole section that has been relied on to support retroactivity. Rather, in minutes of the speaker's presentation, he only states that Section 63 of this bill makes it effective on July 1, 2021. Thus, the principal negotiator and architect of AB495 did not express an oral representation that AB495 would operate retroactively. Second, I would like to discuss constitutionality. The case law at the federal level and at the state level is very clear that a tax cannot operate retroactively for a due process consideration. A search of Nevada history has yielded no examples of a permissible retroactive tax, but the courts have struck down such intents. AB495 is a new tax. Due process consideration requires that a taxpayer be given notice that a tax can or may attach as a matter of fairness. As such, a retroactive operation of AB495 would clearly violate the spirit of the intent of AB495 and the principles of fairness contained within the due process clause. In closing, today's hearing to reconsider comes as a bit of surprise and begs the question of what is new and/or unknown today that was unknown on January 24th? The NVMA supports the Commission's unanimous actions and appreciates its proper action to amend the Department's proposed regulations on January 24, 2021, when all parties had an opportunity to comment concerning the Department's proposed regulation. The Tax Commission, as a head of the tax department, has unequivocally made its decision known that the Department is to collect the mining education tax beginning July 1, 2021. This decision should not be disturbed. Thank you for the opportunity to make comments. I'm happy to answer any questions that may come up throughout the hearing.

Christine Saunders, Policy Director with the Progressive Leadership Alliance of Nevada - We were very disappointed in the changes made at the request of the mining industry during the last meeting. The name should remain the gold and silver excise tax, which is in line with the naming convention of other taxes being based on what is being taxed, not where the revenue goes. And the legislation makes clear in Section 62 that the taxable year for this piece of legislation began on January 1st and not July 1st. In fact, during this week's Mining Oversight and Accountability Commission meeting, staff from the tax department stated that this would not be considered a retroactive tax because it passed within the calendar year listed and there was precedent even from previous mine taxes that have done this before. AB495 from the past session was a compromised piece of legislation. When this bill was introduced towards the end of session, many conversations were ongoing behind the scenes from months prior and two amendments were made before the bill was signed. We need to preserve what was voted on with bipartisan support in full view of the public, rather than try to manipulate the clear bill language and the regulatory process. We urge you to revert to the initial draft presented by the tax department without the amendments. Thank you.

Bryan Wachter, Senior Vice President of the Retail Association of Nevada – I appreciate the time to come before you this morning and apologized that the Retail Association hasn't been involved in this issue. But what I can tell you is that we would have been involved, both at the legislative level and throughout the regulatory process, had we known that retroactivity was on the table. We have noticed with great concern that this is something that you are considering before you today. We think this is departure from precedent, but also a departure from how taxes should be fairly enforced and then complied with. We think this sends the wrong message to the Nevada's business community and puts them on notice that any potential tax increase could be potentially applied retroactively, which we feel would be a detriment to both how businesses operate in Nevada and how the government collects revenue from those businesses. We strongly urge you to not revisit your actions from your January

meeting and not send the signal that retroactivity taxation in Nevada is something that the tax department, the Tax Commission, and the Legislature thinks that is something should be part of our public policy. Thank you.

Chris Daly, Nevada State Education Association, the voice of Nevada educators for 120 years - NSBA supports the reconsideration of regulations related to implementation of the mining tax passed in the last legislative session. Specifically, we believe the tax should retain the name, the gold and silver excise tax. We also believe that the tax should begin at the earlier start date as outlined in the legislation. I know that the mining industry talks about the benefit of this tax for Nevada schools. NSA has been fighting for federal funding for Nevada schools for the better part of that 120 years of our history. It's important to know that Nevada schools are chronically underfunded, ranking 48 among states and pupil funding. In Nevada, the Commission of School Funding had issued recommendations regarding optimal funding. That indicates the state needs to invest \$2 billion extra per year to reach optimal funding in public education. So, the mining tax passed at the last legislative session is a very small drop in the bucket, which is why educators throughout the state supported an alternate proposal, AJR1, which would have generated significant extra dollars. In terms of the naming, other than the convention talking about what's passed, look at Nevada's cannabis or marijuana taxes, I believe called the retail cannabis tax or wholesale cannabis tax. Nevadans understand that a majority of those tax dollars also go to the education system. While not called the cannabis education tax, there's still controversy about where those dollars go because Nevada schools are so underfunded that those taxes barely make a dent. The same will be for the gold and silver excise tax, which will barely make a dent in what is needed to fully fund Nevada schools. Finally, if the industry is so concerned about this money getting to those who need it, the students in Nevada schools, the industry should support the earlier start date and fund those schools which today are facing unprecedented crisis and surely could use these dollars. Thank you very much.

Director Hughes administered an oath to all meeting participants.

## II. REGULATION(S):

- 1) Review and Reconsideration of the Adoption of Permanent Regulation LCB File No. R130-21 and language included therein, adopted by the Nevada Tax Commission on January 24, 2022. LCB File No. R130-21 is a Regulation relating to taxation; establishing provisions for the administration, calculation and payment of the tax imposed on the Nevada gross revenue of certain entities engaged in the business of extracting gold or silver, or both, in this State; and providing other matters properly relating thereto.

Bryan Fernley, Legislative Counsel for the Legal Division of the Legislature - I am not appearing today as the legal counsel for the Commission or the Department of Taxation. The Commission and the Department each have legal counsel provided by the Attorney General's office. I am here because pursuant to NRS 233B.067, regulations adopted by the Tax Commission must be submitted to the legislative counsel for review by the Legislative Commission to determine whether to approve the regulation. As legal counsel for the Legislative Commission, we review the regulations submitted to us in order to advise the Legislative Commission as to whether the regulation conforms to statutory authority and carries out legislative intent. When we identify a conflict between a regulation adopted by an agency and a statute, it has been our practice to discuss the conflict with the agency involved and attempt to resolve it with the adopting agency before the meeting of the Legislative Commission at which the regulation would be heard. That is why I'm here this morning, to discuss the conflict identified by the legal division between R130-21 and Assembly Bill 495 of the 2021 legislative session. First, I can provide more discussion of the role of the Legislative Commission in the

regulation adoption process. In 1996, the voters approved a constitutional amendment to Article 3 Section 1 of the Nevada Constitution that authorized the Legislature to provide by law for the review of regulations by a legislative agency before their effective date to determine whether the regulation is within the statutory authority of the agency and to also provide for the rejection of such regulations by the legislative body if found to be outside the statutory authority of the agency. The Legislature has exercised its authority to provide further review of regulations by the Legislative Commission. As I mentioned, under NRS 233B.067, the Tax Commission and other agencies that are not exempted from the provisions of 233B and are required to submit regulations to legislative counsel for submission to the Legislative Commission to determine whether to approve the regulation. The Legislative Commission is obligated to review whether the regulation conforms to statutory authority and carries out legislative intent. To assist the Legislative Commission with this role, the legal division reviews the regulations submitted to us to make a determination of whether or not the regulation conforms to statutory authority and carries out legislative intent and to advise the Legislative Commission of our analysis. If the Legislative Commission does not approve a regulation because it does not conform to statutory authority, the regulation cannot be filed with the Secretary of State to become effective. This is the reason that I am here today to discuss the conflicts that the legal division has identified between R130-21 and AB495 ahead of the Legislative Commission meeting. It is the opinion of the legal division of the Legislative Counsel Bureau that R130-21 adopted by the Tax Commission conflicts with AB495 with respect to the timing of the initial taxable period under the bill. There is language in the regulation and as adopted by the Commission in Section 17 of the regulation as amended by the Commission, that refers to the taxable period as beginning on July 1, 2021. However, the language of Section 62 of AB495 states, and I quote, "The provisions of Sections 1 to 44 inclusive of this act apply to the taxable year as defined in Section 17 of this act that began on January 1, 2021, and to each subsequent taxable year." The provisions of Sections 1 to 44 referred to are the provisions that enact and impose and provide for the administration of the tax and the taxable year is defined in Section 17 as the calendar year. Therefore, this language provides that the provisions that enact and impose the tax apply to the calendar year that began on January 1, 2021, to each subsequent year. Again, the tax applies to the calendar year that began on January 1, 2021, and to each subsequent taxable year. Thus, it is our view that the plain language of the bill provides for the tax to apply to the entire 2021 calendar year and not solely to the period beginning July 1, 2021. And as the Nevada Supreme Court has held on numerous occasions, when the language of a statute is plain, it is unnecessary to review legislative history. But I will make a few comments about legislative history in a bit. As support for the clarity of the language of Section 62, I would like to clarify the difference between an effective date section, which is Section 63 and states that the bill became effective on July 1, 2021, and the provisions of Section 62 directing how the bill must be applied when determining the tax payment for calendar year 2021. In the Sand Point Apartments case, the Nevada Supreme Court considered a statute that dealt with deficiency judgments after a foreclosure. The effective date section of that bill stated that the bill became effective upon passage and approval and the issue before the Court was whether the bill applied to all deficiency judgments issued after the effective date of passage and approval even if the foreclosure sale occurred before the effective date of the bill. In deciding this issue, the Court held that the effective date section providing that the bill became effective upon passage and approval was not an indication in either direction that the Legislature intended the bill to have retroactive operation. The effective date, in a sense, provided little support for an argument about whether a statute was retroactive or prospective only. It merely indicated the date on which the statute or on which the bill became effective as a law, a statutory law. Thus, Section 63, making the bill effective on July 1, 2021, is merely a statement of when the bill became effective as a law and is not an indication of intent with respect to whether the bill should or should not operate retroactively. Section 2 is that clear statement of how the Legislature intended the bill to operate for the first taxable period under the bill, and that period stated in the language is the entire calendar year 2021 as evidenced by the statement that the bill applies to the taxable year that began on January 21, 2021. Thus, it is our view that Section 62 is a clear statement of how the bill is

required to be applied for the first tax payment due under the bill on April 1, 2022, and that payment due on that date is measured by the entire calendar year of 2021. Although the language in Section 62 is, in our opinion, plain and courts would not resort, in our opinion, to legislative history to interpret the statute, I do want to address the legislative history briefly. When legislative history is considered, courts consider information only, that only appears in the legislative record. This is because that is the information that would be available to all members of the Legislature when considering a bill. Thus, information, such as committee minutes, discussions on the floor during debate on the bill and other items that are in the official record of the bill are considered to be the legislative history. In reviewing the minutes of the committee meetings and discussions in the legislative record, there is nothing that contradicts the plain meaning of Section 62, that the taxable period for the payment due on April 1, 2022, begins on January 1, 2021. In fact, in the Assembly Committee on Ways and Means and the Senate Committee on Finance meeting on May 30, 2021, a question was asked: How much money will this bill raise? The answer from the sponsor is our fiscal division staff issued projections. The industry prepays taxes currently and projections are used to estimate those taxes. The range that the Nevada Mining Association has provided is between approximately \$150 million on the low end and approximately \$170 million for the 2021-2023 biennium on the high end. After the legislative session, the fiscal division added these estimates of approximately \$83.8 million for fiscal year 2022 and \$81.0 million for fiscal year 2023 to the Economic Forum's May 4, 2021, general fund revenue forecast as an adjustment that was needed based on legislative actions approved by the Legislature during the 2021 session. This document and these adjustments were made to the May 4, 2021, forecast table, as I mentioned, and those updated forecasts were presented to the Economic Forum at their statutorily required meeting occurring on or before December 10, 2021, with the actual meeting date being December 7, 2021. The charts presented with the estimates from the fiscal division noted that AB495 imposes an annual tax, and the estimates provided the 83.8 million for fiscal year 2022 and 81 million for fiscal year 2023 were within the range spoken of by the sponsor during the committee hearing on the bill, and that estimate within that range was included in the Economic Forum tables presented on December 7, 2021, with a note that it is an annual tax. Also, the Economic Forum tables I just referenced are included in the statement of inappropriate general fund balance tables in the appropriations report that is prepared by the fiscal division. Although it is our opinion that legislative history would not be considered because of the plain language, I did want to provide that context from the legislative history of the bill, the official of the record of the legislative history of the bill. Finally, I do want to make one note about the constitutional issues. Statutes are presumed to be constitutional until a court declares them to be unconstitutional and agencies are entitled to rely on that presumption of constitutionality in administering statutes. This statute has not been challenged in court yet and a court has not ruled on its constitutionality yet. As such, the agencies implementing it are entitled to rely on the presumption of constitutionality until a court decides otherwise. And the proper remedy for the constitutional challenge would be to bring a facial challenge in court to address any constitutional issues. So, I just wanted to make that note about the constitutionality of the bill. It is presumed to be constitutional until the court declares otherwise. Finally, in attempting to resolve the conflict between the regulation and the statute, I think that there are a couple of options. Again, the options are up to the Commission, and I am not the legal advisor for the Commission. These are merely suggestions from the entity that drafts the regulations for agencies and presents them to the Legislative Commission. One option is to remove the July 1, 2021, date from Section 17 and restore Section 11 to the way it read in the Department's draft. Alternatively, the Legislative Counsel Bureau in drafting regulations does not, unless there is some compelling need, repeat statutory language in regulations. In our view, if Section 11 regarding the period beginning on January 1, 2021, and ending on December 31, 2021, were removed, the statute would govern and be plain and the tax could be implemented in accordance with the statute. Again, the action of the Commission is up to the members of the Commission and their legal advisors, but I did want to mention those options.

Commissioner Byram commented. We've heard both LCB and the Mining Association state that the language is clear and it's clear on its face, and you can't merge those two without saying there must be some ambiguity there. If two bright minds and legal analysis can say that there are two different interpretations on the same exact language, then that's problematic. That's an ambiguity, which we know must be construed in favor of the taxpayer when the law is ambiguous as to the taxpayer. When we have support of having retroactive taxation in Nevada, the Supreme Court has not allowed us retroactive tax in Nevada. But if they were going to allow a retroactive tax in Nevada, they would have to specifically say this tax is to be retroactive to July 1. That's not what this says. We are not limited to the options that LCB has suggested. We've adopted a regulation. That regulation is now the law. It has the full force and effect of law, and we are down to a time constraint. We have about five weeks before the mining industry needs to pay this tax. The return and the tax are due April 1st. We are down to the wire. And to still be trying to argue that it is ambiguous, we've made a ruling, we've made regulations. I'm offended by the fact that the staff members questioning whether we can pass this regulation in a public hearing to undermine the Tax Commission. The Tax Commission is head of the Department. We don't presume what the Legislative Commission is going to do. There could be questions of constitutionality. We don't know that. We are going with the legislation that was written. We've adopted regulations. I support the regulations. I'd like to see them. I thought when we received this document, it was going to just implement what we requested. It appears to have other changes made to it and language stricken and here we are, and I don't know by what authority we're here to question this. More than 15 days have passed. If the Tax Commission were to want to reconsider regulations that it passed, it would have 15 days to bring that to the attention of the public and it's been three weeks before this was raised in an urgent manner, a three-day notice, and now we're discussing amending a regulation. We haven't even seen the draft that we already adopted in its final version. This is just kind of a hokey process in my opinion. I would like to see the language. What we must do and what our obligation is, is to implement rules and regulations in Nevada Administrative Code that help to define and help to administer the tax, help taxpayers understand what their obligation is, help the Department understand what the revenues that are going to be generated are. We're down to the wire here to get this done. It is very clear to me when you look at Section 17 in Section 63, that the taxpayers' obligation begins July 1. That's what the statute said. It does not say this is effective July 1, but the tax is retroactive to January 1. It defines a calendar year as the taxable year and that is done in almost every tax law. You need to know what the period of time you're reporting for is a calendar year. The effective date July 1. There's no explicit language saying that it's applied to the revenues earned from January 1. And we're talking about a bill that was introduced on May 29th, passed on May 30th. I think that's a holiday weekend, by the way, signed by the Governor on June 2nd. No notice to the taxpayers ahead of time that a brand-new tax is going to be instituted and put into place. There was no notice all through the session, January, February, March, April, May, June, that the money that they were already earning was subject to tax. That's a due process issue and I just find it unbelievable that our unanimous decision is being questioned when we have the full support of the plain language and of the Nevada Supreme Court's ruling on the matter directly to this situation. I apologize, those weren't questions, those are comments. I would like to understand why we are here, rehashing something we've already adopted unanimously. I don't believe there should be any changes, but I would really like to see the Department come up with the language that we adopted without additional strikethroughs or additional changes because we've adopted this regulation. It is the law as of January.

Chairman DeVold asked Mr. Fernley - On May 30th there was legislative record that showed that the tax was to be implemented on January 1st. There's no real date, is there? All you really have is what the calculation is. Is that a good statement? There's no real legislative record that shows that they intended to have it on January 1st or July 1st.

Bryan Fernley - Yes, that is true. In these statements made in the committee hearing, there was no reference to Section 62 of the bill and how the first taxable period should be applied. The statement was to estimates of the revenue that would be generated for the biennium, and then when you go to the Economic Forum sheets and the appropriations report that were prepared after the session, the

estimates of the revenue put into those documents were consistent with the range stated in the committee hearing and the note on the tax referred to it as an annual tax. So, piecing those items together, we believe that statement in the record could be read as referring to an annual tax that would start January 1, 2021, although it does not explicitly make that statement.

Brian Irvine, Esq., Dickinson Wright, was present on behalf of the NVMA - Firstly, Section 61 of AB495 is the only place where retroactivity is expressly mentioned in the entire bill. Section 63 of the bill makes it clear that the rest of that statute is only effective as of July 1, 2021. This includes all the provisions dealing with the imposition, collection and payment of the taxes contemplated under the bill as well as Section 62, which sets the calendar year on which the taxes will be computed. Again, all of these are only effective as of July 1, 2021. In order for a bill to apply retroactively, you have to have clear legislative intent expressed in the four corners of the bill and we don't think that is there. Respectfully, to Mr. Fernley, I don't think that you can piece together retroactivity from legislative history. Nevada law and law from numerous federal courts make it clear that retroactivity has to be expressed through clear legislative intent. But even if Mr. Fernley is correct, then the bill would be unconstitutional and the regulatory amendments that he is suggesting would also be unconstitutional. There's simply no question that this is a new tax and under the due process clauses of both the United States and Nevada constitutions, as interpreted by Nevada courts, and numerous federal courts, retroactive application of new tax statutes violate due process. And the reasoning these courts give for the due process violation is because taxpayers must have notice of a tax so that they can plan to pay the tax. It must be predictable for them or it's not fair and violates due process. I have not found any Nevada cases that have upheld the retroactive application of a new tax. The Sand Point case cited by Mr. Fernley is not a tax case and is not applicable to the due process analysis. This poses a significant problem if the statute or regulation of Mr. Fernley has suggested would be challenged in court, either as facially unconstitutional or unconstitutional as applied, the Court would then be faced with a decision whether the entire law must be stricken as unconstitutional or whether the provisions that offend due process can be severed from the bill and the bill can still be applied. No one knows how a court would consider that issue and resolve that issue, but the problem is, is if the Court decides that they cannot sever out the portions that offend due process, the entire bill could go away. No one wants that. As Mr. Gray testified, this was a bill that was the result of a lengthy compromise designed to assist Nevada school funding and the impact of the bill being stricken is unconstitutional is significant and certainly undesirable, and we would certainly support the Commission not reconsidering what it did back in January unanimously and to stick with the regulation as passed unanimously back in January. And I'm happy to answer any questions you may have.

Commissioner Brown disclosed that Mr. Irvine has done some personal work for him approximately five years ago. Commissioner Brown stated that he was not aware that they were a party to this case until he saw the Mining Association's legal brief. Commissioner Brown had no discussions with them about this. Commissioner Brown also mention that AT&T, his employer, is a member of the Retail Association of Nevada, the Las Vegas Chamber, and a small member of the Mining Association. Prior to their public comment this morning, other than the Mining Association's briefing that was supplied by the Commission, Commissioner Brown stated he has had no conversations or any indication that they were interested in this matter. Commissioner Brown stated that he does not believe he has conflict but did want to make these disclosures.

Chairman DeVold asked if there are any other disclosures.

Commissioner Byram disclosed that she is a member of the NVMA and has been for most of the last 30 years. She stated that she has never personally met Mr. Gray. She is a member that is unable to attend any meetings but does receive their bulletins. She stated that she has not had discussions before today. Commissioner Byram stated that if anyone was concerned about her connection, they

could read her bio on the Tax Commission's page, which clearly states that she is a member of the NVMA and of the Nevada Taxpayer's Association's Board of Directors, neither of which causes her to be influenced either way.

Commissioner Byram moved to confirm the Tax Commission's decision of January 24, 2022, regarding permanent regulation LCB File No. R130-21. Commissioner Wren seconded the motion.

Roll Call Vote: Commissioner Brown – Aye; Commissioner Byram – Aye; Commissioner Johnson – Aye; Commissioner Lipman – Nay; Commissioner Wren – Aye; Commissioner Witt – Aye; Chairman DeVolld – Nay. Motion carries.

Public Comment: There was no public comment.

III. Next Meeting Date: March 7, 2022, at 9:00 a.m.

IV. Public Comment.

There was no public comment.

V. Items for Future Agendas.

No items for future agendas were discussed.

VI. Meeting adjourned.