NVMA
Nevada Mining Association
EST. 1913

NEVADAMINING.ORG

201 W. LIBERTY ST., SUITE 300, RENO, NV 89501 TEL: 775-829-2121

OFFICERS
Amanda Hilton, Chair
KGHM – Robinson Mine
Greg Gibson, Chair Elect
SSR Mining – Marigold
Greg Walker, Vice Chair
Nevada Gold Mines

Tyre L. Gray, President

DIRECTORS
David Anderson
Lhoist North America
Trent Anderson
Graymont Western
Kimon Beckmann
EP Minerals
Carlos Bravo
Sandvik Mining and Rock
Andy Britton
Fiore Gold Pan Mine
Chris Burke
Granite Construction
Tim Crowley
Lithium Americas
MaryKaye Cashman
Cashman Equipment Technology
Alex Deeds
NISS Global
Michael Deal
Jerritt Canyon Gold
Mary Beth Donnelly
Newmont
Alan Driscoll
Forsgren Associates, Inc.
Tim Dyhr
Nevada Copper
Christina Erling
Barrick
Annie Huhta
University of Nevada, Reno
Jeff Jenkins
Franco-Nevada
Neil Jensen
Kinross Gold
Shane Johnson
Alio Gold, Inc.
Michael Lefenfeld
Cyanco
Jack McMahon
Elko Mining Group
Randy Miller
Broadbent & Associates
Colt Nelson
Hecla Mining Company
Christopher Peterson
Fisher & Phillips
Tony Sanchez
NV Energy
Randy Shefman
Royal Gold
Scott Thibodeaux
Albemarle Corporation
Elaina Ware
Coeur Rochester Mine

February 17, 2022

Nevada Tax Commission
Attn: Chairman DeVolld
1550 College Parkway, Suite 115
Carson City, NV 89706

Dear Commissioners,

The Nevada Mining Association ("NVMA") respectfully request that the below comments and attachments be added to the public record and considered along with any oral comments that may be offered at the upcoming hearing scheduled for February 18, 2022, to Review and Reconsideration of the Adoption of Permanent Regulation LCB File No. R130-21. (Regulations pertaining to AB 495)

The Tax Commission ("Commission") is the head of the Department of Taxation ("Department"). NRS 360.120(2). As such, it is within the authority and purview of the Commission to make decisions on how the Department will enforce and administer taxing statutes and regulations. On January 24, 2022, the Commission exercised its authority by reviewing regulations proposed by the Department. Upon review, the Commission saw fit to amend the proposed regulations and adopt the AB 495 regulations as amended.

The amendments made by the Commission served three purposes: 1) To name the tax created by AB 495 as the "Mining Education Tax"; 2) Clarify whom the taxpayer by ensuring that only those who extract and sell gold and silver are subjected to the Mining Education Tax; and 3) Clarify that the Mining Education Tax applies to revenues earned on and after July 1, 2021. The Nevada Mining Association supports the attached amendments, as offered by the NVMA at the Commission hearing, and the regulations that were approved by the Commission on January 24, 2022.

On the morning of February 15, 2022, twenty-two days after the Commission hearing adopting the regulations, the NVMA received word of a proposed Commission hearing was scheduled on February 18, 2022, to reconsider the duly adopted regulations. Coincidentally, February 15, 2022, was the same day as the scheduled Mining Oversight and Accountability Commission ("MOAC") hearing.

During the MOAC hearing, the Department offered testimony about the Commission adopted regulations. Yet, the Department took the "position" that the AB495 should be applied retroactively to January 1, 2021. This "position" is counter to the direction given by the Commission and the plain language of AB 495. The NVMA agrees that the language of AB 495 is plain and unambiguous, as explained in the attached memo.

Yet, NVMA disagrees with the assertion made by the Department, in contradiction of the Commission's actions, that AB 495 creates a retroactive effect.

Section 17 of AB 495 creates a calendar year, rather than a fiscal year, as the reporting period of the tax. Section 25 creates the taxable obligation and defines the date for remittance of the accrued obligation as of April 1. Section 62 identifies the first year an obligation will accrue under AB 495; stating that the tax will "apply" in the 2021 calendar year. Yet, Section 63, unlike the other sections that are more ministerial in nature, defines the date upon with the tax will begin to accrue as July 1, 2021; stating that "this act becomes '***effective***' on July 1, 2021." Thus, the plain language of AB 495 is plain and clear: AB 495 creates a tax, that obligation applies to the 2021 calendar year, and the tax is effective is July 1, 2021.

On January 24, 2022, the Commission recognized the need for amending the Department's proposed AB 495 regulations. Acting unanimously, the Commission provided the Department with instruction on how to administer the tax by amending the Department's proposed regulations to provide clarity, while simultaneously eliminating future confusion, need for deficiency audits/hearings, or worse.

The NVMA supports the Commission's actions and appreciates the effort made by the Commission on January 24, 2022, when all interested parties had the opportunity to comment concerning the Department's proposed regulation. The Nevada Tax Commission, as the head of the Tax Department, has unequivocally made its position known to the Department, and that decision should not be disturbed.

Sincerely,

Tyre L. Gray, Esq., President
Nevada Mining Association

Comments on R130-21 – Gold and Silver Excise Tax Proposed Regulations
Tyre L. Gray, Esq., Nevada Mining Association
January 24, 2022

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) variations of **green bold underlining** is language proposed to be added in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill proposed to be retained in this amendment.

Re-write all Sections referring to the tax created by AB495 as Gold & Silver Excise tax to reflect as follows: **Mining Education Tax**

Page 11, Section 9. Rewrite section as follows: ~~"Gold and silver excise tax"~~ **Mining Education Tax** means the tax imposed by sections 2 to 40, inclusive, of Assembly Bill No. 495, chapter 249, Statutes of Nevada 2021, at pages 1269-79 (NRS 363D.010-363D.310, inclusive).

Page 11, Section 11. Re-write section as follows: For the purposes of the **mining education** ~~gold and silver excise~~ tax, the taxable year is **a calendar year,** ~~the period beginning on January 1, 2021, and ending on December 31, 2021, and~~ the 12-month period beginning on January 1 and ending on December 31 ~~of each subsequent calendar year~~.

Page 14, Section 17(1). Re write section as follows: The **mining education** ~~gold and silver excise~~ tax is a tax imposed on a business entity engaged in the business of extracting **and selling** gold or silver, or both, in this State **occurring on and after July 1, 2021**.

Page 15, Section 18 (1)(a)(b). Re-write section as follows:**(l)** a holder of a **(a) permit to engage in a mining operation pursuant to NRS 519A.210; and (b) files a return pursuant to NRS 362.110.**

MEMORANDUM

To: Nevada Mining Association
From: Dickinson Wright PLLC
Re: Analysis of possible retroactive application of AB 495
Date: February 17, 2022

QUESTION PRESENTED

May the Nevada Department of Taxation apply the new tax imposed pursuant to Assembly Bill ("AB") 495 retroactively to capture gross revenue from periods prior to bill's effective date of July 1, 2021? That is, will the tax returns required to be filed pursuant to AB 495 for 2021 include all twelve months of 2021 or only the months of July – December of 2021 when AB 495 is effective?

SHORT ANSWER

No. Statutes are presumed to apply prospectively absent clear Legislative intent that they be applied retroactively. The sole provision of AB 495 that the Legislature indicated must be applied retroactively is Section 61, which only addresses the interplay between the new tax imposed by AB 495 and Chapter 218D of the NRS with regard to fiscal impact. The remaining Sections of AB 495, including the provisions imposing the new tax, all become effective on July 1, 2021 pursuant to Section 62 of AB 495. And, to the extent AB 495 is at all ambiguous in its potential application to revenue from the first half of 2021, such ambiguity must be resolved in favor of the taxpayer and against the State.

In addition, even if the Legislature had expressed a clear intent to impose the tax retroactively, retroactive application of the tax would violate Due Process under the federal and Nevada Constitutions because AB 495 imposes a wholly new excise tax on the gross revenue of business entities extracting gold and silver in Nevada, and taxpayers had no notice or reason to believe that such tax would be imposed.

///

///

ANALYSIS

A. Relevant Portions of AB 495.

Section 25(1) provides:

> 1. For the privilege of engaging in a business in this State, an excise tax is hereby imposed upon the Nevada gross revenue of each business entity whose Nevada gross revenue in a taxable year exceeds $20,000,000, which shall beat the following rates:
>
> (a) For all Nevada gross revenue in a taxable year in excess of $20,000,000 but not more than $150,000,000, a rate of 0.75 percent.
>
> (b) For all Nevada gross revenue in excess of $150,000,000, a rate of 1.10 percent

Section 27(1)(d) provides: "Gross revenue from the sale of gold or silver is situsedto this State if the gold or silver is extracted in this State." Under Section 4, any "corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust, professional association, joint stock company, holding company and any other person engaged in the business of extracting gold or silver, or both, in this State" is subject to the provisions of AB 495.

Pursuant to Section 62, "[t]he 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." Section 17 defines "Taxable year" as "the 12-month period beginning on January 1 and ending on December 31 of a calendar year." Pursuant to Section 25(2), each business entity that is subject to AB 495 must file a return with the Department of Taxation "on or before April 1 immediately following the end of that taxable year."

Section 63 provides that "This section and sections 1 to 44, inclusive, 46 to 50, inclusive, 52 to 55, inclusive, and 57 to 62, inclusive, of this act become effective on July 1, 2021."

///

///

B. <u>The Nevada Legislature did not express clear intent that AB 495 apply retroactively</u>.

"Substantive statutes are presumed to only operate prospectively," *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 853 (2013), "unless the Legislature clearly manifests an intent to apply the statute retroactively, or it clearly, strongly, and imperatively appears from the act itself that the Legislature's intent cannot be implemented in any other fashion." *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) (internal quotation marks omitted). "Thus, whether the Legislature intended [AB 495] to be applied retroactively is an issue of statutory interpretation." *Hunt v. State*, 487 P.3d 833 (Nev. App. 2021). "The presumption against retroactivity is typically explained by reference to fairness" and "'[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.'" *Sandpointe Apts*., 129 Nev. at 820, 313 P.3d at 853 (quoting *Landgraf v. USI Film Prods*., 511 U.S. 244, 273, 114 S.Ct. 1483 (1994)).

"The goal of statutory interpretation is to give effect to the Legislature's intent." *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). "To ascertain the Legislature's intent, [courts] look to the statute's plain language." *Id*. "When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, [courts] must give effect to that plain meaning as an expression of legislative intent without searching for meaning beyond the statute itself." *Bd. of Parole Comm'rs v. Second Judicial Dist. Court (Thompson)*, 135 Nev. 398, 404, 451 P.3d 73, 78-79 (2019) (internal quotation marks omitted).

A review of AB 495 demonstrates that the Legislature did not clearly manifest an intent for the relevant portions of the bill to apply retroactively. "[W]hen the Legislature intends retroactive application, it is capable of stating so clearly." *Pub. Employees' Benefits Program*, 124 Nev. at 155, 179 P.3d at 553. The Legislature clearly stated that Section 61[1] of AB 495 "applies retroactively from and after March 22, 2021," but no express manifestation of retroactive

[1] Section 61 of AB 495 appears to have been included only to address the interplay between its new tax and Chapter 218D of the NRS with regard to fiscal impact. It is the only Section of AB 495 that uses the word "retroactively" or anything similar.

application exists for the remaining portions of AB 495. Instead, Section 62 makes clear that the relevant sections of AB 495 applies to the remainder of the taxable year (defined as a calendar year under Section 17) "that began on January 1, 2021." And, Section 63 expressly states that the relevant sections of AB 495, including Section 62, "become effective on July 1, 2021." When read together, these sections underscore the Legislature's intent that only Section 61 would apply retroactively and the other sections of AB 495 would only be effective from July 1, 2021 forward. This includes provisions (Sections 1-27) detailing the imposition, payment and collection of the new tax, all of which only become effective on July 1, 2021 pursuant to Section 63. The mere fact that Section 17 of AB 495 sets the taxable year as a calendar year does not make the portions of the statute detailing the imposition, payment and collection of the new tax retroactive to the first half of 2021, as those provisions were simply not effective for that time period.

Certainly, if the Legislature had intended portions of AB 495 other than Section 61 to be retroactive, it was required to make its intent clear with express language establishing retroactive application. *See Cashman Photo Concessions & Labs, Inc. v. Nevada Gaming Comm'n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975) ("A tax statute particularly must say what it means. We will not extend a tax statute by implication.") (citation omitted). And, "the intention [for retroactive application] must be deduced from a view of the whole statute and from the material parts of it. On the whole, it cannot be said that there is anything on the face of the statute putting it beyond doubt that the Legislature meant it to operate retrospectively." *State v. State Bank & Tr. Co*., 43 Nev. 388, 187 P. 1002, 1004 (1920). This comports with the well-settled rule that "[i]f all of the language of a statute can be satisfied by giving it prospective action only, that construction will be given it." *Id*.

It does not appear that the Nevada Supreme Court has ever upheld any retroactive application of a tax under a statute or regulation. But, there several decisions where the Court has rejected the government's attempts to apply a tax or fee retroactively. (*See, e.g., Cnty. of Clark v. LB Props., Inc.*, 129 Nev. 909, 913, 315 P.3d 294, 297 (2013) ("Because NAC 361.61038 was not enacted until 2007 and the valuation at issue occurred prior to that time, application of the

regulation would be impermissibly retroactive."); *Village League to Save Incline Assets, Inc. v. State*, 133 Nev. 1, 11, 388 P.3d 218, 226 (2017) ("We see no basis to apply the 2010 regulation, expressly or impliedly, to the tax years that precede its enactment.").

In addition, to the extent that AB 495 is at all ambiguous in its potential application to revenue from the first half of 2021, "[t]axing statutes when of doubtful validity or effect must be construed in favor of the taxpayers." *Cashman Photo Concessions & Labs, Inc.*, 91 Nev. at 428, 538 P.2d at 160; *see also* Nevada Taxpayers' Bill of Rights, NRS 360.291(1)(o) (each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto construed in favor of the taxpayer if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable.").

C. Retroactive application of AB 495 would violate Due Process.

Even if AB 495 were deemed to apply retroactively to the revenue realized in the first half of 2021, such application would likely violate the Due Process under the United States and Nevada Constitutions because it imposes a wholly new tax. "[A] statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Pub. Employees' Benefits Program*, 124 Nev. at 155 (emphasis added).

While constitutional due process permits "a modest period of retroactivity" when Congress adjusts existing taxes, *United States v. Carlton*, 512 U.S. 26, 32 (1994), the taxes imposed under AB 495 are new, and the Fifth Amendment bars the retroactive application of a "wholly new tax." *United States v. Hemme*, 476 U.S. 558, 568 (1986) (discussing *Untermyer v. Anderson*, 276 U.S. 440 (1928)). A tax is "wholly new," for due process purposes, "when the taxpayer has 'no reason to suppose that any transactions of the sort will be taxed at all."' *Quarty v. United States*, 170 F.3d 961, 967 (9th Cir. 1999) (quoting *United States v. Darusmont*, 449 U.S. 292, 298, 300 (1981)); *NetJets Aviation, Inc. v. Guillory*, 207 Cal. App. 4th 26, 57 (2012) ("No case cited by any party to this appeal has permitted retroactive application of a newly created assessment."). In other words, a new tax triggers the protections of the Fifth Amendment when it "changes the legal consequences

of acts completed before its effective date." *Landgraf v. USI Film Products* 511 U.S. 244, 265 (1994).

Hemme, a 1986 decision, recognized that "absence of notice" dooms retroactive application of a "wholly new tax" under *Untermyer*. 476 U.S. at 567-68. Likewise, *Carlton*, a 1994 decision, recognized that *Untermyer* applies "to situations involving the creation of a wholly new tax." *United States v. Carlton*, 512 U.S. 26, 30, 32 (1994) (quotations omitted); *see also id*. at 38 (O'Connor, J., concurring) (explaining that, under the Supreme Court's precedents, "a 'wholly new tax' cannot be imposed retroactively"); *Quarty v. United States*, 170 F.3d 961, 967 (9th Cir. 1999) (discussing rule applicable to a "new tax"); *Cf. NetJets Aviation, Inc.*, 207 Cal. App. 4th at 57 ("No case cited by any party to this appeal has permitted retroactive application of a newly created assessment.").

Here, those subject to the tax created by AB 495 had no reason to believe that the revenue taxed by AB 495 – the gross revenue of business entities engaged in the business of extracting gold and silver in Nevada - would be taxed at all. Indeed, Article X, Section 5(1) of the Nevada Constitution provides:

> The legislature shall provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state, at a rate not to exceed 5 percent of the net proceeds. No other tax may be imposed upon a mineral or its proceeds until the identity of the proceeds as such is lost.

Moreover, the Nevada Supreme Court has held that "Article X, Section 5(1) of the Nevada Constitution prevents the Department from imposing any additional taxes on minerals that are subject to NRS Chapter 362's net proceeds tax (minerals that are mined in Nevada) until those proceeds lose their identity as proceeds. Accordingly, NRS 372.270 expressly exempts minerals subject to Chapter 362's net proceeds tax from also being taxed under Chapter 372's sales and use tax." *Sierra Pac. Power v. State Dep't of Tax.*, 130 Nev. 940, 946, 338 P.3d 1244, 1247 (2014).

Here, because AB 495 imposes a "wholly new" excise tax on the gross revenue of business entities extracting gold and silver in Nevada, those taxpayers would have had no reason to believe

that such gross revenue would ever be taxed, any retroactive application of the relevant portions of AB 495 would violate the Due Process Clauses of the Nevada and United States constitutions. An examination of the legislative process that resulted in AB 495 supports the conclusion that taxpayers had no meaningful notice of the wholly new tax imposed by that statute and that retroactive application of the tax would violate Due Process. Specifically, AB 495 was not even introduced until May 29, 2021, was not passed by the Legislature until May 30, 2021, was not signed into law by the Governor until June 2, 2021, and did not become effective until July 1, 2021. *See* https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8244/Overview.

D. Remedying the Unconstitutional Application of AB 495

If a court were to find, consistent with Section C, *supra*, that retroactive application of the wholly new tax in AB 495 violates due process, the court "must determine whether the statute is severable, i.e., whether it is possible to strike only the unconstitutional provision[ ]." *State v. Second Jud. Dist. Ct. in & for Cty. of Washoe*, 134 Nev. 783, 788, 432 P.3d 154, 159 (2018). "To resolve that issue, [the Court] analyze[s] whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent." *Id*.

Unless it is evident that the legislature would not have enacted those provisions that are within its power, independently of the part which is not, the invalid part may be dropped if what is left is fully operative as a law. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987); *United States v. Smith*, 945 F.3d 729 (2d Cir. 2019). Pursuant to the Supreme Court's general approach to severability, the Court ordinarily gives effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all. *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014). In conducting the severability analysis when federal statutory provisions in an act are found unconstitutional, the Court asks whether the law remains fully operative without the invalid provisions, but the Court cannot rewrite a statute and give it an effect altogether different from that

sought by the measure viewed as a whole. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 200 L. Ed. 2d 854 (2018).

Severing unconstitutional provisions is permissible unless the court concludes that one of two exceptions applies: first, a statute cannot be severed if the court determines that the valid provisions are so essentially and inseparably connected with, and so dependent upon, the void provisions that the legislature would not have enacted the valid provisions without the voided language, and second, the court is not to sever a statute if the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. *See, e.g., State v. Melchert-Dinkel*, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014); *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012).

Here, in remedying the retroactive application of the new tax in AB 495, a court could take several different approaches. First, a court could hold that retroactive application of the new tax violates due process, and the new tax can only be permissibly be applied prospectively. Second, if a court determined that the Legislature intended for the new tax to apply retroactively, the court would be required to determine whether the new tax could be stricken entirely and whether the remainder of AB 495 could still operate without the stricken provision. Finally, and relatedly, if a court determined that the Legislature intended for the new tax to apply retroactively, a court could determine that the Legislative intent renders the entirety of AB 495 constitutionally suspect. If it is determined that the Legislature intended to pass AB 495 only on the condition that the new tax apply retroactively, a court could strike AB 495 in its entirety.

The most likely outcome would be that a court would hold simply that the new tax only apply prospectively, as there is nothing in the text of AB 495 suggesting that the statute could not pass constitutional muster independent of the new tax's retroactive application.

CONCLUSION

The Legislature did not clearly manifest an intent to apply AB 495 retroactively, and thus the general rule of prospective application should apply. This is especially true given that tax statutes must be strictly construed in favor of the taxpayer. Thus, the new tax should only apply

gross revenue earned after that date of enactment, July 1, 2021. Moreover, AB 495 implemented a wholly new tax on the gross revenue of business entities extracting gold and silver in Nevada that those entities could not have anticipated. Therefore, retroactive application offends due process.

Filename: NVMA Memo Re AB 495 4817-2948-8113 v.2 (003) 4864-0089-1663 v.1[85].docx
Directory: /var/folders/pj/36fjq57n2mz_npwvtdm707b00000gn/T/com.microsoft.Outlook/Outlook Temp
Template: Normal.dotm
Title:
Subject:
Author:
Keywords:
Comments:
Creation Date: 2/17/22 4:59:00 PM
Change Number: 1
Last Saved On: 2/17/22 4:59:00 PM
Last Saved By:
Total Editing Time: 0 Minutes
Last Printed On: 2/17/22 7:38:00 PM
As of Last Complete Printing
Number of Pages: 9
Number of Words: 2,792 (approx.)
Number of Characters: 15,921 (approx.)