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MONTANA FOURTEENTH JUDICIAL DISTRICT COURT, MEAGHER COUNTY

* * * * *

CHARLES B. LUCAS; LUCAS RANCH, INC.; MONTANA FARM BUREAU FEDERATION; and **THE MONTANA TAXPAYERS' ASSOCIATION,**	)	**CAUSE NO. DV-10-02**
Petitioners,	)	**RESPONDENT'S RESPONSE BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR CLASS CERTIFICATION AND APPROVAL OF NOTICE**
vs.	)	
MONTANA DEPARTMENT OF REVENUE	)	
Respondent.	)	

The Montana Department of Revenue ("DOR"), through counsel, respectfully submits the following Response Brief in Opposition to Petitioners' Motion for Class Certification and Approval of Notice ("Motion"). DOR requests that following the briefing and a hearing, this Honorable Court deny Petitioners' Motion. DOR requests an evidentiary hearing and oral

arguments on Petitioners' Motion.

ARGUMENT

A. STANDARD OF REVIEW

Montana district courts have the broadest discretion when deciding whether to certify a class. *McDonald v. Washington*, 261 Mont. 392, 399, 862 P.2de 1150, 1154 (1993). In this regard, a trial court's decision relative to a class certification request is accorded the greatest respect because it is in the best position to consider the most fair and efficient procedure for conducting any given litigation. *McDonald*, 261 Mont. at 399-400, 862 P.2d at 1154. Therefore, an appellate court will not disturb a trial court's ruling on a motion to certify, unless there is an abuse of discretion. *Id.*

B. RELEVANT BACKGROUND

For the most recent Montana cyclical reappraisal, approximately 280,000 agricultural parcels were evaluated. **(Ex. A)** (Reese Affidavit, ¶ 7.) This reappraisal process for agricultural property was the most comprehensive and detailed in almost 45 years. *Id.* In one manner or another, each parcel was analyzed. This would have included either or a combination of a: field review, desktop review by appraisers, aerial photograph parcel review, and soil survey reviews of the parcels. *Id.* In addition, DOR considered any and all owner supplied information. *Id.* For example, from December 10, 2008 through March 1, 2009, DOR conducted a "map" mailing to property owners. *Id.* This process consisted of mailing aerial photographs that depicted DOR's most recent information of the respective parcels' classification and productivity as known by DOR. *Id.* Owners were requested to correct any errant classification and/or productivity information relative to the parcel's classification and production and return the maps to DOR. *Id.* If the maps were not returned, DOR presumed the information was accurate. DOR accepted owner responses to the map mailing into November 2009. Approximately ten (10%) percent of the owners returned the maps with corrected information.

For the 2009 reappraisal, DOR calculated VBR rather than the 2008 full reappraisal; however, since Rule 42.20.502(3) was not administratively amended as done in previous reappraisal cycles (1997 and 2002), DOR, by its own rule, was required to use the prior year VBR for the current year VBR during 2002 or subsequent tax years for Class 3 property that contains a productivity only or grade change. *Id.* at 21. The proposed actions were needed to address three questions associated with the 2009 agricultural land appraisal: (a) the rule change would impact the versions of administrative rules in effect at the time, and needing update for the 2009 appraisal cycle, due to an appearance of conflict between Rules 42.20.501(25) and 42.20.502(3) stating different approaches to the determination of the VBR for properties with a productivity only change; (b) they would resolve the question of whether DOR should consider productivity as a material, physical change to the property characteristics; and (c) it would make the Rules consistent with DOR's understanding of the intent of section 15-7-111-(2) MCA. *Id.* DOR updated its agricultural manual for the 2009 reappraisal cycle based upon the anticipated administrative rule amendment. *Id.* DOR did not, however, timely update ARM 42.20.502(3). *Id.* Therefore, the calculated VBR resulted in an incorrect application of phase-in for properties with productivity only changes. *Id.* By adopting the proposed new rule, DOR will be correcting the phase-in for these properties to comport to the requirements of ARM 42.20.502(3), as amended in 2002.

Under the proposed Rule, DOR will correct the VBR productivity error as follows:

(a) If the taxpayer timely filed an AB-26, County Tax Appeal Board ("CTAB") appeal, State Tax Appeal Board ("STAB") appeal, or District Court action relating to the 2009 assessment DOR will:

(1) replace the calculated VBR with the prior year VBR of the prior grade;

(2) issue a revised assessment notice for 2009 showing the correct VBR; and

///

(3) provide the county the information necessary to allow the county to issue a new tax bill.

(b) If the taxpayer did not timely file an AB-26, CTAB appeal, STAB appeal, or District Court action relating to the 2009 assessment DOR will correct the VBR calculation beginning in tax year 2010.

(c) DOR will correct the VBR and adjust the taxable values each year for the subsequent five years of this reappraisal cycle by one-fifth of the difference in taxable value.

(1) The difference in taxable value is the amount that DOR either under or over assessed in 2009; and

(2) The adjusted taxable value will be used by the counties to apply mill levies to determine taxes owed.

Id. at 22.

There are roughly 90,000 parcels that have "productivity only" changes in the 2009 reappraisal cycle. *Id.* at 23. Each parcel property owner is assigned an assessors code associated with the property in the identified taxing jurisdiction. *Id.* An assessors code is used to consolidate and combine the owner's parcels within that taxing jurisdiction into one assessment notice. *Id.* The assessors codes help local government distribute property tax dollars to the appropriate taxing jurisdiction. *Id.* Therefore, an owner with multiple parcels in multiple taxing jurisdictions can and/or will have multiple different assessors codes assigned to him/her/it. *Id.*

To date, DOR has identified 2,085 unique assessors codes as being affected by technical administrative calculation error "productivity only" changes in 2009. *Id.* at 24. These were the assessors code where the Orion system had a code for a timely AB26/CTAB in 2009. *Id.* The 2,085 figure includes 445 assessors codes with an estimated +/- $5.00 tax impact. *Id.* Under the proposed Rule, these 2,085 assessors codes would receive revised 2009 assessment notices indicating a new 2009 phase in value based on the use of the actual 2008 value as the VBR. *Id.* However, those tax payers with a revised assessment resulting in a +/-

$5.00 impact, no tax would be owed under section 15-16-102(7), MCA. *Id.*

There are an additional 47,291 assessors codes that would be affected in 2010 under the proposed Rule. *Id.* at 25. These assessors codes did not have an indication in the Orion system that a timely AB26/CTAB or other action had been filed. *Id.* This figure includes 14,468 with a +/- $5.00 estimated tax impact. *Id.*

At this time, DOR believes there are 34,423 assessors codes that will be adjusted under the proposed Rule and section 15-16-102)7), MCA. *Id.* at 26 This is not to say there are 34,423 affected tax payers. *Id.* In this regard, DOR believes there are approximately 500-600 taxpayers, who have timely protested, including Mr. Lucas and Lucas Ranch, Inc., whose assessments will be adjusted under the proposed Rule to correct the technical administrative rule calculation error relative to the productivity-only phase-in. *Id.* There is an estimated 10,000 taxpayers whose assessments will be adjusted under the proposed Rule for the 2010 tax year throughout the remainder of the cycle. *Id.*

The respective county treasurers are the only sources of information regarding the amount of protested tax dollars (paid under protest, released for some reason or still in the protest fund). *Id.* at 27. In this regard, some individuals would have paid their taxes under protest but did not submit any other documentation or appeal on file and then the protested amount would have been released to the county after the 90-day statutory time period. *Id.*

C. PETITIONERS' FAILED TO COMMENCE THIS MATTER AS A CLASS ACTION

Here, Petitioners indicate in their Motion that they have elected to proceed under the Montana Rules of Civil Procedure for bringing a class action in this matter. They are incorrect. Petitioners failed to properly bring this action as a class action. Instead, their Petition specifically incorporates the declaratory relief procedures for the named Lucas Petitioners as well as "similarly situated taxpayers" as outlined and specifically provided for in section 15-1-406(2), MCA. (Petition, p.7, ¶ 33.) Nowhere in their Petition do Petitioners assert or seek

class relief as contemplated under the Montana Rules of Civil Procedure or section 15-1-407, MCA. They specifically admit in their Motion that their Petition was filed pursuant to section 15-1-406, MCA. (Motion, p. 3.)

A class action is a representative suit. In order for a Montana district court to even consider whether a class action should even be maintained, the action must have been brought "as a class action." Mont. R. Civ. P. 23(c)(1). This matter was not brought as a class action. None of the required Rule 23(a) or (b) elements are pled by Petitioners in their Petition in order for it to be even considered to be maintained as a class action. *See* Mont. R. Civ. P. 23(b). Even their prayer for relief is silent relative to class certification. Accordingly, this Honorable Court is procedurally unable to determine whether a class action can be maintained as requested in the Motion because Petitioners failed to commence this matter as a class action. Therefore, Petitioners' Motion should be denied since they are procedurally bound, at least at this stage of the litigation, to their section 15-1-406(2), MCA, declaratory relief election. However, in the event the Court deems the Petitioners' Motion ripe for decision, DOR respectfully argues class certification should be denied since Petitioners have failed to satisfy their heavy Rule 23 burden.

D. PETITIONERS' FAILED TO SATISFY THEIR HEAVY RULE 23 BURDEN

1. <u>Rule 23's Controlling Authority and Application.</u>

Certification of a class action is governed by Rule 23 of the Montana Rules of Civil Procedure.

> One or more members of a class may sue or be sued as representative parties on behalf of all members **only if:** (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Mont. R. Civ. P. Rule 23(a) (emphasis added). DOR agrees that Rule 23(a), M.R.Civ.P., is identical to its federal counter-part, Rule 23(a), Fed. R. Civ. P. However, it does not agree that

the 2009 version of Rule 23(b) of the Federal Rules of Civil Procedure provisions are exactly the same as Rule 23(b) of the Montana Rules of Civil Procedure[1] which provides:

> An action may be maintained as a class action if **the prerequisites of subdivision (a) are satisfied**, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Mont. R. Civ. P. Rule 23(b) (emphasis added).

A court must inquire whether the class definition is sufficient to allow the class to proceed. *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987). In this regard, a determination must be made that a precisely defined class exists, and the putative class representatives are members of the class. *Id.* Assuming the definition is precise enough, a court then inquires into whether the putative class satisfies the four elements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *Id.* A court must find that

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[1]DOR agrees that in analyzing the Motion, it would be appropriate for the Court to use timely federal case law interpreting former Federal Rule 23 since, at one time, it was identical to Montana Rule 23. *McDonald*, 261 Mont. at 400, 862 P.2d at 1154.

all four Rule 23(a) elements apply in order to proceed to the Rule 23(b) analysis. *Seiglock v. Burlington N. Santa Fe Ry. Co.*, 2003 MT 355, ¶ 10, 319 Mont. 8, 13, 81 P.3d 495, 498. Here, the Petitioners' bear a heavy burden to establish all of Rule 23's elements necessary to certify the class. *McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993). Petitioners' failure to prove any one element of the requirements for class certification must result in denial of their Motion. *Murer v. Mont. State Comp. Mut. Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036 (1993); *see also*, *Burton v. Mountain West Farm Bureau Mut. Ins. Co., 214 F.R.D. 598 (2003).*

While the particular merits of Petitioners' claims are not issues to be considered by this Honorable Court in ruling on the Motion, *Polich*, 116 F.R.D. at 261; the nature of their claims is directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible in proof in a class action. *Id.* Moreover, a court may consider evidence relating to the underlying merits of the case if they go to the merits of the Rule 23 analysis. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Here, the nature of the identified Lucas Petitioners claims are directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible to proof in a class action. In addition, the Montana Supreme Court has held that a district court must go beyond the "pleadings to make whatever factual and legal inquiries are necessary in determining whether the proposed class and class representatives meet the requirements for certification under Rule 23." *Matteson v. Mont. Power Co.*, 2009 MT 286, ¶ 68, 352 Mont. 212, 215 P.3d 675. Here, the nature of the identified Lucas Petitioners' claims are directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible to proof in a class action.

2. **<u>The putative class lacks sufficient definition</u>.**

Petitioners have failed to sufficiently define the class. In their Motion, Petitioners seek

certification "for all agricultural landowners affected by the DOR's technical error in calculating correct phase-in amounts for agricultural properties." (Motion, pp. 3-4.) Next, they state that "members of the class will be all agricultural landowners for whom DOR erred in calculation of the correct phase-in amounts for the current reappraisal cycle and who have timely paid any portion of their first or second half 2009 property tax payments under protest." *Id.* at p. 4.

Without properly identifying the nature of the assessment, classification, change in classification and whether the taxpayers' properly protested the assessment, this Honorable Court is unable to ascertain the class by reference to objective criteria. *Foster v. City of Oakland*, 2009 LEXIS 1970 (citing *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)). Moreover, Petitioners' proposed class definition is ambiguous because it does not delineate from the class persons who are similarly situated to the proposed class representatives.

Moreover, the unspoken element of Petitioners' proposed class characteristics is equally troublesome and will require legal and factual determinations as to whether a putative member was subjected to DOR's technical error in calculating the VBR on agricultural properties that experienced productivity changes for tax year 2009 which resulted in an incorrect application of phase-in for properties with productivity only changes. Under Petitioners' requested class, a entire field audit would be required for each individual parcel whether it was affected by the error or not. While certainly some determinations may be easily made, in most other instances the determination of who fits this proposed definition will require a "trial within a trial." Petitioners' proposed class definition is so vague, ambiguous and imprecise as to leave it unworkable.

Under Petitioners' proposed class, the issue of whether a calculation was made in error must be addressed. It would require an analysis on the merits of each purported taxpayer protest to determine whether there was a calculation error. The class cannot be defined by subjective criteria or that which requires a determination of ultimate liability. *See DeBremaecker*, 433 F.2d at 734.

Petitioners' provisional class definition is so ambiguous that this Honorable Court will have to hold mini-trials to identify the Class. It is also so imprecise that the class will contain members that will not have a claim as envisioned by the Petition (e.g. because there was no reclassification of land use or change in land use but there is a protest), as well as those putative members who had the correct phase-in calculation applied to their property but protested anyway and thus each require individualized determinations.

3. **Properly defined class may satisfy the numerosity requirement.**

If the defined class consisted of only those taxpayers who timely and properly protested their productivity only phase-in assessment, the numerosity requirement may be satisfied. Since Petitioners failed to properly define the proposed class, their speculative estimate of potential class members is not sufficient. They provided no reason or methodology for determining the numbers of potential members in the vaguely defined and proposed class. *Polich*, 116 F.R.D. at 261. Without some substantive determination of the putative members, Petitioners have failed to satisfy their burden with respect to numerosity. Notwithstanding, however, DOR believes there are approximately 500-600 taxpayers, who have timely protested, including Mr. Lucas and Lucas Ranch, Inc., whose assessments will be adjusted under the proposed Rule to correct the technical calculation error relative to the productivity-only phase-in.

4. **Plaintiffs' putative class lacks commonality.**

Rule 23(a) requires that the class have common issues of fact or law. The *Polich* Court addressed the commonality requirement. It noted that commonality is not present where each putative member brings a unique set of facts to the case. *Polich*, 116 F.R.D. at 261. In that case, the putative class was proposed to be former employees of Burlington Northern who lost their jobs in Livingston when the railroad shut down the locomotive shop. *Id.* The *Polich* Court found that the employees were disparate factually - some lost their jobs, some transferred, some were separated from their families, some were not. *Id.*

Here, the proposed class is disparate. Some putative members may have simply protested their payment (or will in May 2010) absent any reclassification of their agricultural property. Others may have protested, or will, despite an accurate assessment calculation by DOR. Many putative class members will have converted their land's classification, use, boundaries, productivity or some combination thereof several assessment periods ago and will have been paying an incorrect assessment.

In order to achieve the relief sought, individualized determinations must be made with regard to each individual putative class member. That means a mini-trial on the factual and legal issues. These distinct individualized issues completely overwhelm the common issues. Consequently, since there is not a sufficient nexus of common issues of fact or law, Petitioners proposed class lacks the commonality sufficient for certification.

5. **Plaintiffs' putative class lacks typicality.**

A putative class must have a sufficient nexus between the injury suffered by the plaintiffs and the injury suffered by the class. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir. 1982). The typicality requirement is designed to assure the named representatives' interests are aligned with those of the class. *Id.* A named plaintiff's claim is typical if it stems from the same event, practice or course of conduct that forms the basis of the putative class claims and is based upon the same legal or remedial theory. *Id.*

Other courts, including the United States Supreme Court, have concluded that a plaintiff cannot represent a class of whom they are not a part. *Bailey v. Patterson*, 369 U.S. 31 (1962); *see also*, *Easter v. American West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) (holding that debtors who sued banking institutions could not sue those who never loaned named plaintiff's money); *Thompson v. Board of Ed. of Romeo Community Schools*, 709 F.2d 1200, 1204-05 (6th Cir. 1983)(holding a class of teachers may not sue a class of defendants by whom they had not been employed). The Ninth Circuit has ruled that a plaintiff cannot represent a class having no

causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands she suffered no injury. *LaMar v. H. & B Novelty & Loan Co. et al.*, 489 F.2d 461, 466 (9th Cir. 1973). Here, there is no dispute that Montana Farm Bureau Federation and the Montana Taxpayers' Association would not qualify under the proposed class definition because they are not agricultural taxpayers and thus would not have paid taxes on agricultural parcels under protest. This leaves on the individual Lucas Petitioners as the class representatives and since they filed AB-26s on their identified parcels and corrective adjustments are underway, they do not represent the proposed class in any significant respect.

Accordingly, since the Petitioners and the proposed class, primarily Montana Farm Bureau Federation and the Montana Taxpayers' Association, are so unrelated the class lacks the typicality necessary for certification.

6. **Plaintiffs do not adequately represent the putative class.**

Montana Farm Bureau Federation and the Montana Taxpayers' Association cannot possibly adequately represent the proposed class. As a result, the Court should deny the Motion. A named plaintiff's motion for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with claims or defenses unique to it. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Moreover, the adequacy of representation requirement "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003). In this regard, Petitioners have not satisfied this burden. As such, the Motion should be denied.

7. **Plaintiffs failed to satisfy Rule 23(b).**

Assuming *arguendo* that the each element of Rules 23(a) is met, the Petitioners still must carry their Rule 23(b) burden. In this regard, they have failed to submit any rational argument

for any Rule 23(b) analysis. As such, their Motion should be denied. They have waived any right for Rule 23(b)(1) or 23(b)(3) relief.

Moreover, Petitioners' claim that DOR has acted or refused to act on grounds generally applicable to the proposed class is incorrect. There can be no dispute that DOR has initiated the necessary administrative steps to take remedial corrective action relative to the phase-in for productivity only changes to comport to the requirements of ARM 42.20.502, as amended in 2002. DOR is affirmatively taking reasonable actions to avoid over collection of taxes. In this regard, Petitioners' Rule 23(b) certification request should be deemed moot. There is no justiciable controversy and Petitioners' certification request is an intolerable substitute for DOR's administrative mechanism for correcting its error in calculating the VBR on agricultural properties that experienced productivity changes. *See Jepson v. Idaho State Tax Commission*, Idaho Dist. Court, Fourth Judicial District, CVOC 0911660, p. 7 (12/23/09) **(Ex. B)** (Commission's administratively implemented remedy defeats Rule 23(b) contention).

In addition, as the *Burton* Court recognized, where damages are portrayed as injunctive relief, as is the case here since Petitioners are essentially asking for a refund, seeking an order compelling payment of money, is nothing more than a request for money damages. Incidental monetary damages appropriate under Rule 23(b)(2) certification should arise from wrongs to the class as a whole, not from circumstances that require fact finding on individual class members' cases. *Id.* The *Burton* Court found that "an injunctive remedy in the form of an order compelling payments of benefits is nothing more than request for money damages." Additionally, any "declaratory" ruling as envisioned by Petitioners' Motion, as well as their section 15-1-406(2) based Petition, would necessarily require fact finding for each individual putative class member. *Id.*

Indeed, it is clear that individual fact finding will be crucial to establish the putative class claims. As an example, whether each putative member's property was erroneously reclassified

will require the kind of individualized determinations that *Burton* prohibits. For this reason certification under Rule 23(b)(2) is inappropriate.

E. NOTICE AND EXCLUSIONS

Under Rule 23(b), a class member has no right to opt out of the class action. *See Cook v. Rockwell Intern Corp.*, 151 F.R.D. 378, 388 (D. Colo. 1993). As such, this Court should be reluctant to grant 23(b)(2) certification since, in essence, monetary relief in the form of damages are sought. Moreover, class actions maintained under Rule 23(b)(2) do not require individual notice since they are subject Rule 23(d)'s discretionary notice requirements. *See Olenhouse v. Commodity Credit Corp.*, 135 F.R.D. 672, 681 (D. Kan. 1991). Petitioners' proposed notice allows putative members to opt out despite Rule 23(b)(2) prohibition. In this regard, Petitioners misapply section 15-1-407(3), MCA, notice which, by its terms, is limited to section 15-1-406(2), MCA, declaratory relief claims. As such, Petitioners' proposed notice should be rejected.

CONCLUSION

For the foregoing reasons, DOR request that this Honorable Court deny Petitioners' motion for class certification and approval of notice.

Respectfully submitted this 27th day of April 2010.

McMAHON LAW FIRM, PLLC

By _____

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CERTIFICATE OF SERVICE BY MAIL

I **HEREBY CERTIFY** that a copy of the foregoing **RESPONDENT'S RESPONSE BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR CLASS CERTIFICATION AND APPROVAL OF NOTICE** has been served upon the following by mailing a true and correct copy thereof on this 27th day of April 2010, addressed as follows:

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MONTANA FOURTEENTH JUDICIAL DISTRICT COURT, MEAGHER COUNTY

* * * * *

CHARLES B. LUCAS; LUCAS RANCH, INC.; MONTANA FARM BUREAU FEDERATION; and **THE MONTANA TAXPAYERS' ASSOCIATION,**	)	**CAUSE NO. DV-10-02**
Petitioners,	)	**AFFIDAVIT OF DALLAS REESE**
vs.	)	
MONTANA DEPARTMENT OF REVENUE	)	
Respondent.	)	

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

EXHIBIT A

Dallas Reese, being first duly sworn on his oath, states and alleges as follows:

1. I am a Montana Department of Revenue's ("DOR") Management Analyst for the

DOR's Property Assessment Division ("PAD"), and I make this affidavit based upon my personal knowledge and in support of DOR's opposition to the Petitioners' Motion for Class Certification.

2. I have been a DOR PAD Management Analyst since December 2004.

3. My principle duties include, but are not limited to, overseeing the agricultural/forest reappraisal (Class 3 and Class 10 property as defined in sections 15-6-133 and 143, MCA); reviewing requests submitted by taxpayers asking for review of their valuations by AB-26 forms filed or by filing valuation appeals directly with county tax appeal boards; training of PAD staff in the counties regarding these processes; data analysis relative to Class 3 and Class 10 properties; drafting manuals, instructions and proposed Rules related to Class 3 and Class 10 properties; testifying before the Legislature; conducting public hearings or meetings to share information and responding to taxpayer concerns.

4. I was a Tax Policy Analyst with DOR's Tax Policy and Research ("TPR") from August 1999 to December 2004.

5. I was an appraisal specialist with PAD from about May 1990 to August 1999. As an appraisal specialist, my principle duties were virtually the same as the Management Analyst but with less testimony and reappraisal activity.

6. I began my career with PAD in Havre in March 1988 as a residential/agricultural appraiser.

7. For the most recent Montana cyclical reappraisal, approximately 280,000 agricultural parcels were evaluated. This reappraisal process for agricultural property was the most comprehensive and detailed in almost 45 years. In one manner or another, each parcel was analyzed. This would have included either or a combination of a: field review, desktop review by appraisers, aerial photograph parcel review, and soil survey reviews of the parcels. In addition, DOR considered any and all owner supplied information. For example, from

December 10, 2008 through March 1, 2009, DOR conducted a "map" mailing to property owners. This process consisted of mailing aerial photographs that depicted DOR's most recent information of the respective parcels' classification and productivity as known by DOR. Owners were requested to correct any errant classification and/or productivity information relative to the parcel's classification and production and return the maps to DOR. If the maps were not returned, DOR presumed the information was accurate. DOR accepted owner responses to the map mailing into November 2009. Approximately ten (10%) percent of the owners returned the maps with corrected information.

8. In determining the 2009 Class 3 property values multiple steps were undertaken pursuant to the valuation formula and processes set out in Title 15, Chapter 7, Part 2. The process is one of determining an income for the land that is derived from agricultural productivity and then translating that income to a property value through the use of a rate divisor. For agricultural land, the initial administrative steps were to identify the land use (classification).

9. Classification is based on the land's actual use and how that use fits into one of five classification categories used by DOR. The five classifications are: (a) grazing land; (b) non-irrigated summer fallow farm land; (c) irrigated land; (d) non-irrigated continuously cropped hay land; and (e) non-irrigated continuously cropped farmland.

10. After determining the classification, productivity (yield) for each of the classifications is ascertained. For the 2009 valuation, the United States Department of Agriculture Natural Resource Conservation Service (USDA NRCS) soil survey was used as an objective, scientific and statewide source of data. The Governor's Agricultural Land Advisory Committee ("GALAC") recommended that DOR use the NRCS soil survey. Information pertaining to the Committee's recommendation for the use of the NRCS soil survey for agricultural land productivity was presented to various Revenue and Transportation Interim

Committees beginning in 2007 and to the Select Committee on Reappraisal during the 2009 Legislative Session.

11. For each of the five land classification, production information specific to each land classification is captured from the NRCS soil survey and is assigned to each acre of land. Since Montana conducts its property tax appraisals on a statewide basis (as opposed to county by county as is done in most other states) a crop or carrying capacity must be applicable to all landowners across the state. As a result, GALAC have recommended the use of the following crops for determination of crop production or grazing land carrying capacities.

a. For non-irrigated summer fallow farm land and non-irrigated continuously cropped farm land the crop used to determine productivity is the number of bushels of spring wheat that an acre of land can produce. Spring wheat can be grown in all locations of Montana. It may not be grown as a matter of individual economic decisions but it is the only small grain crop that can be grown across the state.

b. For irrigated land and non-irrigated continuously cropped hay land the base crop is the number of tons of alfalfa hay that can be produced per acre. Alfalfa hay is the predominant crop grown on irrigated land in the state and is generally included as either the predominant crop or as a part of the hay production associated with non-irrigated hay production. For irrigated land the base crop is the tons of alfalfa hay that may be grown under irrigation practices. For non-irrigated hay land the base crop is the number of tons of non-irrigated alfalfa hay that can be grown per acre.

c. For grazing land the carrying capacity is expressed as the number of animal unit months per acre (AUM/ac) that the land can support. Carrying capacity should reflect the ability of the land to support grazing activity without injurious effect to the vegetation.

Following the determination of productivity from the NRCS soil survey, adjustments are made to reflect "average management" per 15-7-201(7)(e), MCA. For summer fallow farm land and continuously cropped farm land, the soil survey spring wheat productivity is adjusted by a 12 year countywide average production for spring wheat obtained from Montana Agricultural Statistical Services. This adjustment was a recommendation by GALAC. For irrigated land an adjustment factor is applied to the soil survey estimate of the tons of irrigated alfalfa production per acre. The irrigated adjustment factor is determined through information provided by

producers in each county. While the irrigated adjustment factor is generally a countywide adjustment, there are circumstances where DOR discovered information provided in the landowner responses that indicated the irrigated adjustments should be more localized. In those counties multiple adjustment factors were determined and were applied to the appropriate areas within the county.

For non-irrigated hay land DOR used a "step through" approach as recommended by GALAC. This approach works as follows: The base crop used for productivity on non-irrigated hay land is "alfalfa hay." When alfalfa hay information wasn't available in the soil survey, DOR used "grass hay" production information from the soil survey. If neither alfalfa hay nor grass hay were available, DOR used "grass legume" hay production information from the soil survey. When none of those three were available, DOR used the pounds of air-dry herbage from the soil survey and divided by 2,000 pounds to convert that figure to tons/acre. If none of those were available, DOR defaulted to a state-wide minimum production figure of .07 tons/acre for non-irrigated hay.

The most recent GALAC undertook a study of grazing land carrying capacity in the state and, based on the results of the study suggested an approach to determining the carrying capacity of grazing land. The Committee felt that the carrying capacity of grazing land would not change significantly over time and their recommended approach was an attempt to ensure that significant changes did not occur.

12. Section 15-7-201(3), MCA, requires that the value of agricultural land be based on its "productive capacity" as opposed to actual productivity.

13. Section 15-7-201 (4), MCA, identifies the valuation formula that is to be used in the determination of agricultural land values. In this regard, DOR is required to determine the value on a per-acre basis. Mont. Code Ann. § 15-7-201(4)(a) and 4(b).

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14. Section 15-7-201(5)(a) states that "[N]et income must be determined separately in each land use based on production categories."

15. After determining the classification and productivity, the productivity was multiplied times a seven year Olympic average (2001-07) commodity price determined by Montana agricultural statistical data from sources set out in section 15-7-201(5), MCA. This produces a "gross income" per acre. The data source for all commodity price information is the Montana Agricultural Statistical Service, an office of the USDA National Agricultural Statistical Service. Commodity price information for the 2009 appraisal cycle are the seven (7) year Olympic average (15-7-201-(5)(d) prices for:

a. Price per bushel of spring wheat: $4.58 per bushel. This price includes a $0.59 influence from the Federal Agriculture Improvement and Reform Act of 1996 (1996 Farm Bill) and Farm Security and Rural Investment Act of 2002 (2002 Farm Bill)

b. Price per ton of alfalfa hay: $63.04 per ton. Per 15-7-201(5)(c) the price per ton of alfalfa hay has been reduced to 80% of the average price.

c. Price per animal unit month of grazing: $15.72 per animal unit month ("AUM").

By multiplying the productivity by the commodity price, the result is a "gross income" per acre.

16. After determining gross income per acre, different approaches are used to arrive at "net income" per acre. The approaches DOR uses to determine net income have been recommended to DOR by GALAC and have been in place since 1993. DOR has a proposed administrative rule which covers this determination.

For grazing land, a 25% reduction to the gross income is allowed to reflect landowner costs for maintenance. After the 25% reduction, the remaining income is considered the net income. Once net income is determined, DOR calculates the net income per acre by multiplying the productivity from the NRCS soil survey (expressed on a per-acre basis) times the net income. This calculation yields the net income per acre for grazing land.

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17. For all other classifications, a "crop share approach" is used to determine net income.

For non-irrigated summer fallow farm land, the typical crop share of 25% of gross income received by the landowner is considered the net income. The remaining 75% is the tenants' share of income and includes all farming expenses. For non-irrigated summer fallow farm land as defined by DOR and per the recommendation of GALAC, the crop share used in the determination of per-acre net income is 12.5%. This crop share recognizes that income from non-irrigated summer fallow farm land, as defined by DOR, is being received every other year.

For irrigated land, the crop share used by DOR is 25% of the income to the landowner and 75% to the tenant. The typical crop share arrangement for irrigated land is 33% to the landowner and 67% to the tenant. However, the various Agricultural Land Advisory Committees reduced the typical crop share by an additional 25%, yielding a 25% crop share for irrigated land. The 25% crop share is atypical for irrigated lands but is an attempt by GALAC to recognize unexplained but acknowledged "other expenses" associated with irrigated land production. From the landowners 25% crop share an additional expense allowance for the application of water to the irrigated land is also allowed. The additional water expense includes statutorily defined base costs and labor costs (15-7-201-5(b)(iii) and 5(b)(A), MCA). In addition, an expense allowance is granted for the landowner specific per-acre energy costs needed to apply the water to the lands. After deducting the allowable water costs, the resulting income is considered the net income per acre.

For non-irrigated continuously cropped hay land, the recommended crop share is 25%, with the remaining 75% considered to be the tenants' share which includes the production expenses. The 25% crop share is the net income per acre.

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For non-irrigated continuously cropped farm land the recommended crop share is 25%. DOR's definition of non-irrigated continuously cropped farm land recognizes that income from this farm land is received every year so no further adjustment is included. The 25% crop share is considered the net income per acre.

Once the determination of net income per acre has been determined for each particular classification, the net income per acre is divided by the statutorily established (MCA 15-7-201(4)(c) capitalization rate of 6.4% to determine the per acre value or "assessed value per acre". The number of acres of a particular production category are multiplied by the per acre value to determine the value for the acres in that particular production category. All values from all production categories are added together to get the total value for that particular land classification, i.e. the assessed value for that particular land classification.

18. After determining the total assessed value for any particular land classification, and totaling the assessed values of all land classifications for the parcel, the total assessed value is multiplied by the current taxable percentage to yield the taxable value for the parcel. For Class 3 property the taxable percentage is the same as the Class 4 rate. Mont. Code Ann. §§ 15-6-133 and 134.

19. Once the current appraisal cycle assessed value is determined for the affected classes of property, a phase in process is mandated by statute to mitigate the impact of changes in assessed value that have occurred over the six year assessment cycle. MCA 15-7-111. DOR has rules with respect to how this determination of the phase in value is accomplished. MAC 42.20 part 5. The determination of the phase in value requires judicious application because many valuation changes result from processes other than the simple accretion of price over time. For example, an owner of a large home may convert its use to a bed and breakfast. Other residential property may be modified by significant additions of floor space. A farmer may apply irrigation to a formerly dry parcel. These tangible changes and

their attendant change in value are not the result of periodic reappraisal but occur by action of the owner changing the productive use of the property and should not, in fairness, be subject to the phase in. Changes in dollar values - such as the market value of a house (separate from physical changes) or of the value of agricultural commodities have been phased-in over the length of reappraisal cycles. Both statute and administrative rules acknowledge this procedure and provide a process for this calculation. In contrast, physical changes are not phased-in pursuant to statute and administrative rule. When DOR discovers a change to the physical characteristics of any property that result in a classification change, that change in classification is implemented immediately in the year following discovery. The property is classified as it existed at the time of discovery. A professional appraiser can only value what is actually, physically present in total at the time of discovery. The physical characteristics of the property are either grazing land or irrigated farm land, either a two-bedroom home or a four-bedroom home; the appraiser cannot pretend that the property is some mixture or combination. A reclassification is not subject to phase-in provisions, neither by statute nor by administrative rule. This is how DOR has consistently and historically administered these issues. The manner of this administration and its interpretation affects how the base value is determined for the phase in process. Regardless of the means to its determination, this base value is called a value before reappraisal ("VBR").

Another example germane to this case is as follows: two farmers with neighboring parcels as noted in DOR's files based upon 1967 data. Same size and soils. One is growing 100 acres of sugar beets and one uses his 100 acres for grazing. Since 1967, Farmer One is taxed on sugar beets (classified as irrigated land by DOR); Farmer Two is taxed on grazing (substantially lower per acre value). In 1969, however, Farmer Two decided to plant sugar beets instead of using his land for grazing. Because no comprehensive agricultural reappraisal was done over the ensuing years, Farmer Two continued to be taxed on grazing land instead of

sugar beets.

In 2009, based upon the comprehensive agricultural reappraisal described earlier, DOR determines that Farmer Two is raising sugar beets. Both Farmer One and Farmer Two's property are now taxed as sugar beets. In 2008 sugar beets were taxed at a productive value of $100 per acre. Grazing land was taxed at a value of $10 per acre. In 2009 sugar beets are taxed at $110 per acre. Grazing land is taxed at $20 per acre.

DOR phases in the change in value of Farmer One's land using the 2008 value as the starting point. The amount phased-in is the difference in the value of 100 acres of sugar beets in 2009 and 100 acres of sugar beets in 2008 (($110 x 100 ac = 11,000) – ($100 x 100 = $10,000) = $1,000 x .1666 = $167 each year over the six year cycle).

Petitioners would have DOR phase in the difference in the value of Farmer Two's grazing land as of 2008 ($10 x 100 ac = $1,000) and his land at the value of sugar beets in 2009 ($110 x 100 = $11,000). This means DOR would phase in the change in value of $10,000 over the cycle at $1,667 per year ($10,000 x .1666). This has the effect of "transitioning" Farmer Two's from grazing to sugar beets over the length of the cycle even though it has been sugar beets for years. Under this scenario, Farmer Two benefits from being under assessed from 1969 to 2014, when the change is fully phased-in. During this same 45 years, Farmer One and all other tax payers whose properties have been properly valued and assessed bear the burden of Farmer Two's under assessment.

DOR normal process would be to calculate a 2008 value to use as the starting point for phase-in. The calculated value would be the value of sugar beets in 2008 multiplied by the number of acres ($100 x 100 ac = $10,000). The amount to be phased in would be $1,000 - the difference between the value of 100 acres of sugar beets in 2009 and in 2008 - the same as Farmer One. Under this scenario then: in 2008 Farmer One would be taxed on a value of $10,000. In 2009 he will be taxed on a value of $10,167. Farmer One would see a minimal

increase in taxes in 2009. In 2008 Farmer Two would be taxed on a value of $1,000. In 2009 he will be taxed on a value of $10,167. Farmer Two would see a substantial increase in taxes in 2009, but would be put on equal footing with Farmer One for the remainder of the cycle.

20. If a property is in the same class and subclass of property and no material changes occur to the property that are reflected in the current year taxable value but not in the prior year's taxable value as reflected in the assessment, the prior year's taxable value (which is the fully phased-in value from the prior six year assessment cycle) is the VBR. When changes occur that are reflected in the current year taxable value that are not in the prior year's taxable value the VBR is a calculated taxable value determined on the basis DOR ascertains best isolates the naturally occurring value changes (which should be subject to the phase-in) from the value changes occurring by actions other than natural price changes.

21. For the 2009 reappraisal, DOR calculated VBR rather than the 2008 full reappraisal, however, since Rule 42.20.502 was not administratively amended as done in previous reappraisal cycles (1997 and 2002); DOR, by its own rule, was required to use the prior year VBR for the current year VBR during 2002 or subsequent tax years for Class 3 property that contains a productivity only or grade change. The proposed actions were needed to address three questions associated with the 2009 agricultural land appraisal: (a) the rule change would impact the versions of administrative rules in effect at the time, and needing update for the 2009 appraisal cycle, due to an appearance of conflict between Rules 42.20.501(25) and 42.20.502(3) stating different approaches to the determination of the VBR for properties with a productivity only change; (b) they would resolve the question of whether DOR should consider productivity as a material, physical change to the property characteristics; and (c) it would make the Rules consistent with DOR's understanding of the intent of section 15-7-111-(2) MCA. DOR updated its agricultural manual for the 2009 reappraisal cycle based upon the anticipated administrative rule amendment (**Ex. 1**). DOR did not, however, timely

update ARM 42.20.502. Therefore, the calculated VBR resulted in an incorrect application of phase-in for properties with productivity only changes. By adopting the proposed new rule **(Ex. 2)**, DOR will be correcting the phase-in for these properties to comport to the requirements of ARM 42.20.502(3), as amended in 2002.

22. Under the proposed Rule, DOR will correct the VBR productivity error as follows:

a. If the taxpayer timely filed an AB-26, County Tax Appeal Board (CTAB) appeal, State Tax Appeal Board (STAB) appeal, or District Court action relating to the 2009 assessment DOR will:

(1) replace the calculated VBR with the prior year VBR of the prior grade;

(2) issue a revised assessment notice for 2009 showing the correct VBR; and

(3) provide the county the information necessary to allow the county to issue a new tax bill.

b. If the taxpayer did not timely file an AB-26, CTAB appeal, STAB appeal, or District Court action relating to the 2009 assessment DOR will correct the VBR calculation beginning in tax year 2010.

c. DOR will correct the VBR and adjust the taxable values each year for the subsequent five years of this reappraisal cycle by one-fifth of the difference in taxable value.

(1) The difference in taxable value is the amount that DOR either under or over assessed in 2009.

(2) The adjusted taxable value will be used by the counties to apply mill levies to determine taxes owed.

23. There are roughly 90,000 parcels that have "productivity only" changes in the 2009 reappraisal cycle. Each parcel property owner is assigned an assessors code associated with the property in the identified taxing jurisdiction. An assessors code is used to consolidate and combine the owner's parcels within that taxing jurisdiction into one assessment notice. The assessors codes help local government distribute property tax dollars to the appropriate taxing jurisdiction. Therefore, an owner with multiple parcels in multiple taxing jurisdictions can and/or will have multiple different assessors codes assigned to him/her/it.

24. To date, DOR has identified 2,085 unique assessors codes as being affected by technical administrative calculation error "productivity only" changes in 2009. These were the assessors code where the Orion system had a code for a timely AB26/CTAB in 2009. The 2,085 figure includes 445 assessors codes with an estimated +/- $5.00 tax impact. Under the proposed Rule, these 2,085 assessors codes would receive revised 2009 assessment notices indicating a new 2009 phase in value based on the use of the actual 2008 value as the VBR. However, those tax payers with a revised assessment resulting in a +/-$5.00 impact, no tax would be owed under section 15-16-102(7), MCA.

25. There are an additional 47,291 assessors codes that would be affected in 2010 under the proposed Rule. These assessors codes did not have an indication in the Orion system that a timely AB26/CTAB or other action had been filed. This figure includes 14,468 with a +/- $5.00 estimated tax impact.

26. At this time, there are 34,423 assessors codes that will be adjusted under the proposed Rule and section 15-16-102(7), MCA. This is not to say there are 34,423 affected tax payers. In this regard, DOR believes there are approximately 500-600 taxpayers, who have timely protested, including Mr. Lucas and Lucas Ranch, Inc., whose assessments will be adjusted under the proposed Rule to correct the technical administrative rule calculation error relative to the productivity-only phase-in, and another 10,000 taxpayers whose assessments will be adjusted for the 2010 tax year, throughout the remainder of the cycle.

27. Going back to the previous beet farmers example, under the proposed Rule, Farmer 1 would be one of the properties affected by a "productivity only" change. DOR would use the 2008 actual VBR and the proposed Rule will result in a new 2009 revised assessment to Farmer 1. Farmer 2, however, has property with a classification change and the VBR will continue to be a calculated VBR. There is no impact to Farmer 2 from the proposed Rule change.

28. The respective county treasurers are the only sources of information regarding the amount of protested tax dollars (paid under protest, released for some reason or still in the protest fund). In this regard, some individuals would have paid their taxes under protest but did not submit any other documentation or appeal on file and then the protested amount would have been released to the county after the 90-day statutory time period.

Dated this 26th day of April 2010.

Dallas Reese

SUBSCRIBED AND SWORN to before me this 26th day of April 2010.

Notary Public for the State of Montana
Printed Name: Stephanie A. Powell
Residing at Helena, Montana.
My Commission expires 9-11-2010.

(SEAL)

Department of Revenue
Administrative Rules Notification

Requesting Process: Property Assessment
Contact Person: Debbie Jurcich
Phone No.: 444-0499
Date of Request: 10/14/09
Priority Level: High (High, Medium, Low)

Subject or Title of Rule: **Phase-In Values Chapter 5**

Request for Meeting
Proposed Team Members: _____

Chief Legal Counsel Only:
Staff Attorney Assigned: _____
TPR Process Lead Only:
TPR Staff Member Assigned: _____

Proposed Action

____ Adopt new rules _X__ Amend existing rules _ ___ Repeal rules

Justification for need:. The department is proposing to amend Chapter 5 Phase-In Values to clarify the process used for the reappraisal cycle beginning January 1, 2009.

Legislative Impacts (if applicable):

_____

Requesting Process Approval: _____ Date _____
Administrator

Rule Notification Approved: _____ Date _____
(Policy and Rules Officer)

Rule Notification Rejected: _____ Date _____
(Policy and Rules Officer)

(FOR RULES OFFICE USE ONLY)
Date Received: _____
Tracking Started: _____

Form: Legal RULES 003/02

EXHIBIT 1

42.20.501 DEFINITIONS The following definitions apply to this subchapter:

(1) "~~2002~~ 2009 tax year value" means the market value of a property which appears on the ~~2002~~ 2009 property tax record of that property.

(2) "Annual appraisal trend factor class five" means a factor used to annually reappraise class five qualifying air and water pollution control property, new industrial property, gasohol facilities, qualifying research and development firms, and electrolytic reduction facilities real property by trending their cost values up or down based on accepted cost indices.

(3) "CDU rating" means a composite rating of the overall condition, desirability, and usefulness of a structure, used nationally as a simple, direct, and uniform method of estimating accrued depreciation.

(4) "Comstead exemption" means the percentage of phase-in value of commercial property that is exempt from taxation pursuant to 15-6-222, MCA.

(5) "Current year phase-in value" is the difference between the reappraisal value and the value before reappraisal (VBR) times the phase-in percentage, added to the VBR. The current year phase-in value is the amount subject to tax each year, and is determined by the following formula:

Current year phase-in value =
[(Reappraisal (REAP) value - VBR) x phase-in %] + VBR

(6) "Destruction" means the removal or deletion of improvements, buildings, living areas, garages, and out-buildings caused by burning, razing, or natural disaster.

(7) "Dwelling unit" is defined as a building or portion of a building that contains living facilities with provision for sleeping, eating, cooking, and sanitation for one or more persons.

(8) "Full reappraisal to taxable value conversion factor for class four commercial property" is the total taxable value of class four commercial property divided by the total reappraisal value of the same class four commercial property.

(9) "Full reappraisal to taxable value conversion factor for class four residential" is the total taxable value of class four residential property divided by the total reappraisal value of the same class four residential property.

(10) "Homestead exemption" means the percentage of phase-in value of residential property that is exempt from taxation pursuant to 15-6-222, MCA.

(11) "Improvement grade change" means a change in the quality of construction of an improvement. Each improvement grade signifies a different level of construction quality. Examples of improvement grades include, but are not limited to, the following:

(a) 1F-1 = cheap construction;

(b) 1F-5 = average construction; and

(c) 1F-9 = superior construction.

(12) "Land productivity change ~~(grade change)~~" means a change in the productive capacity or yield of agricultural or forest land. In a land productivity change, the land use does not change; rather, the land as currently used simply becomes more or less productive. For example, a productivity change in grazing land may occur when it is discovered that the productivity potential has decreased due to a new saline seep on the land. Because the land continues to be used as grazing land, the department shall continue to classify the land as agricultural grazing land, but the ~~grade~~ productivity of the grazing land may be changed to reflect its lessened potential to support livestock ~~productivity~~.

(13) "Land reclassification" means changing the use of land from one type of agricultural use to a different type of agricultural use. For example, a land reclassification occurs when agricultural land that was previously used as grazing land is converted to irrigated land. In a land reclassification, the land is dedicated to agricultural purposes both before and after the change in land use. It is this characteristic that distinguishes a land reclassification from the more general land use change.

(14) "Land split" means the division of a single property into two or more properties for the ultimate purpose of conveying one or more of the properties to a new owner or owners.

(15) "Land use change" means the conversion of a current use of land to a different, alternate use. Land splits shall be considered land use changes. Examples of land use changes contained in this definition include, but are not limited to, the following:

(a) agricultural land converted to tract land;

(b) forest land converted to tract land;

(c) forest land converted to agricultural land; or

(d) land that is converted to another use due to a subdivision of real property.

(16) "Living area" means any room or group of rooms designed as the living quarters of one family or household, equipped with cooking and toilet facilities, and having an independent entrance from a public hall or from the outside.

MODEL AREA (17) "~~Neighborhood~~ (NBHD) ~~group~~ percentage" means the percent of change in value from the total ~~2002~~ 2008 tax year value to the total ~~2003~~ 2009 reappraisal value, excluding properties with new construction, for those homogeneous areas within each county or between counties that are a portion of, or all of a defined model area. ~~have been defined as a neighborhood group~~. The neighborhood ~~group~~ percentage is determined by using the following formula:

MODEL AREA
~~Neighborhood Group~~ Percentage =
(Total ~~2003~~ 2009 ~~NBHD~~ Model Area REAP Value - Total ~~2002~~ 2008 ~~NBHD~~ Tax Year Model Area Value)
Total ~~2002~~ 2008 ~~NBHD~~ Tax Year Model AreaValue

(a) Individual ~~neighborhood group~~ model area percentages will be determined for residential land, commercial land, residential improvements, and commercial improvements.

(18) "New construction" means the construction, addition, or substitution of improvements, buildings, living areas, garages, and outbuildings; or the extensive remodeling of existing improvements, buildings, living areas, garages, outbuildings, land reclassification, and land use changes.

(19) "New construction trend factor for industrial property" means a factor used to adjust reappraisal values and VBRs (values before reappraisal) in instances where the property has new construction or destruction. The factor will be derived from nationally accepted cost indices.

(20) "Phase-in percentage" for tax years ~~2003~~ 2009 through ~~2008~~ 2014 is 16.6% per year. The phase-in percentage accumulates annually.

(21) The "previous year tax revenue" means the product of multiplying the previous tax year total taxable value for each taxing jurisdiction by the previous year mill levy for that taxing jurisdiction.

(22) "Reappraisal (REAP) value" means the full ~~2003~~ 2009 value determined for the current reappraisal cycle pursuant to 15-7-111, MCA, adjusted annually for new construction or destruction. The ~~2003~~ 2009 reappraisal value reflects a market

value of the property on ~~January 1, 2002~~ July 1, 2008. A current year REAP value is the same as the ~~2003~~ 2009 reappraisal value of the property if there is no new construction, destruction, land splits, land use changes, land reclassifications, land productivity changes, improvement grade changes, or other changes made to the property during ~~2003~~ 2009 or subsequent tax years.

(23) "Subdivision of real property" means the first sale of a land parcel that results in the land being taxable as class four as described in 15-6-134, MCA, or nonagricultural land as described in 15-6-133(1)(c), MCA.

(24) "Taxable market value" means that portion of the total market value subject to taxation after the total market value has been adjusted, if applicable, for the phase-in of value, and the homestead/comstead exemption.

(25) "Value before reappraisal (VBR)" means the ~~2002~~ 2008 tax year value adjusted for any new construction or destruction that occurred in the prior year. The VBR for the ~~2003~~ 2009 tax year and subsequent years is the same as the ~~2002~~ 2008 tax year value if there is no new construction, destruction, land splits, land use changes, ~~land reclassifications~~, ~~land productivity changes~~, improvement grade changes, or other changes made to the property during ~~2002~~ 2008 or subsequent tax years. ~~For~~ 2009 ~~only,~~ classes three and ten will have the VBR calculated due to changes in the method of determining productivity.

AUTH: 15-1-201, 15-7-111, MCA;
IMP, 15-6-222, 15-7-111, 15-10-420, MCA;

REASONABLE NECESSITY: The department is amending the definitions to clarify the process for the reappraisal cycle beginning January 1, 2009.

42.20.502 DETERMINATION OF VALUE BEFORE REAPPRAISAL (VBR), EXCLUDING INDUSTRIAL PROPERTIES (1) For property that contains no new construction, destruction, land splits, land use changes, ~~land reclassifications~~, ~~land productivity changes~~, improvement grade changes, or other changes made to the property during ~~2002~~ 2008 or subsequent tax years, the current year VBR will be the same as the prior year VBR.

(2) For 2009 for class three property, the VBR will be calculated for all class three land due to the change in method of identifying the productivity of land through the use of NRCS soil survey information.

(a) The VBR will be calculated by taking the current classification and productivity ~~acreage~~ of the class three land and using the 2008 valuation formula information determine the 2008 valuation per acre for that productivity and classification.

~~(2)~~ (3) For tax years 2010 and forward, class three property that contains a land reclassification ~~or~~ a land use change, the current year VBR will be calculated as identified in (2)(a) ~~the prior year VBR of the new classification or land use change~~.

~~(3)~~ ~~(4)~~ For tax years 2010 ~~and forward~~, class three property that contains a productivity ~~or grade~~ change, the current year VBR ~~will be~~ the calculated VBR as determined in (2)(a) ~~prior year VBR of the prior grade~~.

~~(4)~~ (5) For class four property (excluding industrial property) that contains new construction, the current year VBR is determined by dividing the reappraisal value by one plus the percent of ~~neighborhood group~~ MODEL AREA change. The following formula illustrates that calculation:

VBR = Reappraisal value /(1 + ~~NBHD group~~ MODEL AREA percentage)

DECEMBER 31,

~~(5)~~ (6) Land which has been reclassified as residential or commercial land after ~~January 1, 2002~~ ~~January 1~~, 2008, will have the VBR determined by comparing other ~~2002~~ 2008 market values of similar residential or commercial land, and determining a comparable VBR for the new residential or commercial land.

~~(6)~~ (7) For class four property (excluding industrial property) that has been either partially or wholly destroyed, the current year VBR is calculated by first determining what percent of the property has been destroyed. That percent is multiplied by the prior year improvement VBR to determine a value amount that is attributed to the destruction. The current year VBR is then the difference between the prior year VBR and the value attributed to the destruction. The following formula illustrates that calculation:

Current year VBR =
Prior year VBR -
(Percent of property destroyed x prior year improvement VBR)

(8) For 2009 for class ten property, the VBR will be calculated for all class ten land due to the change in method of identifying the productivity of land through the use of the productivity model developed by the University of Montana College of Forestry and Conservation.

(a) The VBR will be calculated by taking the current classification and productivity of the class ten land and using the 2008 valuation formula information to determine the 2008 valuation per acre for that productivity and classification.

~~(7)~~ (9) For tax year 2010 and forward, class ten property that contains a land reclassification ~~or~~ a land use change, the current year VBR will be calculated as identified in (8)(a) ~~the prior year VBR of the new classification or land use change~~.

~~(8)~~ (10) For tax year 2010 and forward, class ten property that contains a productivity ~~or grade~~ change, the current year VBR will be the calculated VBR as determined in (8)(a) ~~prior year VBR of the prior grade~~.

~~(9)~~ (11) ~~The only instances when the current year VBR will be less than the~~ prior year VBR are:

~~(a) in the case of class four improvements that have been~~ partially or wholly destroyed;

~~(b) when the neighborhood group~~ MODEL AREA percentage change is negative and there is new construction; or

(c) when land use changes have occurred.

~~(10)~~ (11) In all other situations, the current year VBR will be the greater of the value determined through application of the formula in (4) or the prior year VBR.

AUTH: 15-1-201, 15-7-111, MCA;
IMP, 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.20.502 to reflect the statutorily required reappraisal beginning January 1, 2009. For class three the change to the VBR calculation is required due to the changes in methodology that the department will be using in valuing agricultural land for property tax purposes for reappraisal cycles beginning January 1, 2009. These amendments were recommended by the 2006 – 2008 Governor's Agricultural Land Valuation Advisory Committee. As a result, there will no longer be valuation schedules as in the past. Rather, each acre of agricultural land will be valued according to the productivity of the specific soil make-up for that acre, for the agricultural land use to which the acre is classified (i.e. grazing, irrigated farm land, non-irrigated summer fallow farm land, nonirrigated continuously cropped farm land or nonirrigated continuously cropped hay land). The formula for determining the

value of each acre of agricultural land is defined in 15-7-201, MCA. For class ten property the VBR calculation is required to comply with the statutes implemented for the 2009 reappraisal of forest land.

42.20.503 DETERMINATION OF CURRENT YEAR PHASE-IN VALUE FOR CLASS THREE, CLASS FOUR, AND CLASS TEN PROPERTY (1) For tax years ~~2003~~ 2009 through ~~2008~~ 2014, the department is required to determine the current year phase-in value for each property in class three, class four, and class ten annually. The current year phase-in value is determined by subtracting the ~~2002~~ 2008 VBR from the ~~2003~~ 2009 reappraisal value multiplied by the applicable phase-in percentage, the product of which is added to the ~~2002~~ 2008 VBR value. The calculations of the phase-in values are represented by the following formula:

phase down by class code by land r bldg separate by class 3,4,10 Dallas - class 10 example

~~2003~~ 2009 Phase-in =
[(~~2003~~ 2009 reappraisal value - ~~2002~~ 2008 VBR value) x 16.66%]
+ ~~2002~~ 2008 VBR

~~2004~~ 2010 Phase-in =
[(~~2003~~ 2009 reappraisal value - ~~2002~~ 2008 VBR value) x 33.32%]
+ ~~2002~~ 2008 VBR

~~2005~~ 2011 Phase-in =
[(~~2003~~ 2009 reappraisal value - ~~2002~~ 2008 VBR value) x 49.98%]
+ ~~2002~~ 2008 VBR

~~2006~~ 2012 Phase-in =
[(~~2003~~ 2009 reappraisal value - ~~2002~~ 2008 VBR value) x 66.64%]
+ ~~2002~~ 2008 VBR value

~~2007~~ 2013 Phase-in =
[(~~2003~~ 2009 reappraisal value - ~~2002~~ 2008 VBR value) x 83.30%]
+ ~~2002~~ 2008 VBR value

~~2008~~ 2014 Phase-in =
~~2003~~ 2009 reappraisal value

AUTH: 15-1-201, 15-7-111, MCA;
IMP, 15-7-111, MCA;

REASONABLE NECESSITY: The department is proposing to amend 42.20.503 to reflect the reappraisal cycle beginning January 1, 2009.

42.20.504 NEW CONSTRUCTION DETERMINATION (1) The following criteria will be used to identify new construction and destruction:

(a) all residential or commercial structures, out-buildings, and mobile homes that were built, remodeled, or destroyed in the preceding year;

(b) properties with new, attached garages built in the preceding year;

(c) properties which had any land reclassification or land use changes; or

(d) properties with out-buildings built in the preceding year.

(2) The following will not be considered new construction or destruction:

(a) properties with square footage changes due to correction of measurements or sketch vectoring, or due to coding corrections for story heights, such as story with full finished attic to 1.5 stories;

(b) properties with improvement grade changes;

(c) properties with condition, desirability, and usefulness (CDU rating) changes;

(d) properties with changes in heat or air conditioning;

~~(e) residential dwelling units with changes in square footage of living area of 100 square feet or less;~~

~~(f) properties with changes in effective year; or~~

~~(g) properties with changes in finished basement areas.~~ (History: 15-1-201, 15-7-111, MCA; IMP, 15-7-111, MCA; TEMP, NEW, 1997 MAR p. 1593, Eff. 9/9/97; AMD, 2002 MAR p. 3424, Eff. 12/13/02.)

REASONABLE NECESSITY: The department is proposing to amend 42.20.503 to reflect the reappraisal cycle beginning January 1, 2009. Because the department has converted all property to the ORION computer system, actual new construction on a property is identified within the system by capturing the year the change was made.

42.20.505 ASSESSMENT NOTICES AND VALUATION REVIEWS (1) As required by 15-7-102, MCA, the assessment notice shall include:

(a) current reappraisal value;

(b) current year taxable value ~~phase-in value~~;

(c) total amount of mills levied against the property in the prior year;

(d) statement that the notice is not a tax bill; and

(e) a notification to taxpayers regarding the Property Tax Assistance Program (PTAP), Disabled American Veterans Exemption (DAV), and Extended Property Tax Assistance Program (EPTAP) ~~amount of appraised value exempt from taxation under 15-6-222, MCA.~~

(2) A taxpayer may seek a department review of any of the required valuation items set forth in (1)(a)~~,~~ and (b)~~, and (e)~~ of this rule. Additionally, a taxpayer may request a review of any of the methods used to determine those values which are shown in (1)(a)~~, (b), and (e)~~.

AUTH: 15-1-201, 15-7-111,
MCA; IMP, 15-6-201, 15-7-102, 15-7-111, 15-6-222, MCA

REASONABLE NECESSITY: The department is proposing to amend 42.20.505 to reflect the changes in 15-6-222, MCA in the 2009 legislative session. The previous assessment notice was confusing to taxpayers. The simplified assessment notice provides the taxpayer with the information that they should be comparing, the previous reappraisal and current reappraisal values along with the previous actual taxable value and current taxable values.

~~42.20.514 DETERMINATION OF TOTAL TAXABLE VALUE OF ELIMINATED PROPERTY (1) The total taxable value of eliminated property is determined by compiling the actual total value of properties that have been eliminated from a particular taxing jurisdiction. In cases where the actual values have not been compiled, the department will use a statewide average rate of 0.12% (.0012) to multiply by the previous year total taxable value in the taxing jurisdiction,~~

~~to calculate an estimated value of eliminated property. (History: 15-1-201, 15-7-111, MCA; IMP, 15-10-420, MCA; NEW, 1999 MAR p. 2905, Eff. 12/17/99.)~~

REASONABLE NECESSITY: The department is proposing to repeal this rule as a housecleaning measure. The statutory requirement for the department to report eliminated property was removed by the 2001 legislature through Senate Bill 504, House Bill 124, and House Bill 37. The administrative rule should have been repealed at that time.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I relating to value before reappraisal for 2009 agricultural land	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On May 10, 2010, at 11:00 a.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of the above-stated rule.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., May 3, 2010, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-3696; or e-mail canderson@mt.gov.

3. The proposed new rule does not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rule provides as follows:

NEW RULE I CORRECTION OF VALUE BEFORE REAPPRAISAL (VBR) FOR 2009 AGRICULTURAL LAND (1) For those properties that experienced productivity only changes for tax year 2009, the department will correct the VBR as follows:

(a) If the taxpayer timely filed an AB-26, County Tax Appeal Board (CTAB) appeal, State Tax Appeal Board (STAB) appeal, or District Court action relating to the 2009 assessment the department will:

(i) replace the calculated VBR with the prior year VBR of the prior grade;

(ii) issue a revised assessment notice for 2009 showing the correct VBR; and

(iii) provide the county the information necessary to allow the county to issue a new tax bill.

(b) If the taxpayer did not timely file an AB-26, CTAB appeal, STAB appeal, or District Court action relating to the 2009 assessment the department will correct the VBR calculation beginning in tax year 2010.

(c) The department will correct the VBR and adjust the taxable values each year for the subsequent five years of this reappraisal cycle by one-fifth of the difference in taxable value.

(i) The difference in taxable value is the amount that the department either under or over assessed in 2009.

EXHIBIT 2

(ii) The adjusted taxable value will be used by the counties to apply mill levies to determine taxes owed.

AUTH: 15-1-201, 15-7-111, MCA
IMP: 15-7-111, 15-7-201, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I because the department adopted ARM 42.20.502 in 1997, and amended it in 2002. ARM 42.20.502 directed the department to use the prior year VBR for the current year VBR during 2002 or subsequent tax years. ARM 42.20.502 specified the VBR for class three property. For class three property that contains a productivity or grade change, the current year VBR will be the prior year VBR of the prior grade.

The new reappraisal cycle began January 1, 2009, pursuant to 15-7-111, MCA. The department updated its agricultural manual for this new reappraisal cycle. The department did not timely update ARM 42.20.502. The updated agricultural manual required a calculated VBR rather than the 2008 full reappraisal value. The calculated VBR resulted in an incorrect application of phase-in for properties with productivity only changes. By adopting New Rule I, the department is correcting the phase-in for these properties to comport to the requirements of ARM 42.20.502, as amended in 2002.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than May 14, 2010.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices

and specifies that the person wishes to receive notices regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ Cleo Anderson	/s/ Dan R. Bucks
CLEO ANDERSON	DAN R. BUCKS
Rule Reviewer	Director of Revenue

Certified to Secretary of State April 5, 2010

NO. _____ FILED
A.M. _____ P.M. 1:00
DEC 23 2009
J. DAVID NAVARRO, Clerk
By _____ INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JACK JEPPSON, an individual, JOHN STOKES, an individual, SCOTT JEPPSON, an individual, ROCKWELL HOMES, INC., an Idaho corporation, and RIVERCREST III, LLC, a Utah limited liability corporation, and all other persons and entities similarly situated, Plaintiffs, vs. IDAHO STATE TAX COMMISSION, a division of the Idaho Department of Revenue and Taxation, and STATE OF IDAHO, Defendants.	Case No. CVOC 0911660 ORDER DENYING MOTION TO CERTIFY CLASS AND ORDER GRANTING MOTION TO DISMISS

This matter came before the Court on Plaintiffs' motion to certify the class, Defendants' motion to dismiss, and Defendants' motion to strike the Affidavit of Richard van Komen. The Court heard oral argument on the motions on November 5, 2009. Steven Young appeared for the Plaintiffs and Brian Nicholas appeared for the Defendants. At the hearing, Mr. Nicholas withdrew the motion to strike. The Court took the remaining matters under advisement at that time.

BACKGROUND

Under Idaho law, people who perform residential repairs, such as carpenters, electricians, and carpet layers, are contractors who improve real property and as such are the consumers of the

EXHIBIT B

materials they install. IDAPA 35.01.02.012.01b. They are not to charge sales tax to their customers on installed materials. *Id.* Plaintiffs are both individuals and businesses who paid sales tax on installed materials to contractors making improvements on real property during the last three years. Plaintiffs assert that there may be thousands of others in Idaho who have also paid such sales tax in error and seek to certify a class action lawsuit in order to process refunds of the overpayments.

STANDARD OF REVIEW

The decision of a trial court to grant or deny class certification is reviewable on appeal under an abuse-of-discretion standard. *Pope v. Intermountain Gas Co.,* 103 Idaho 217, 646 P.2d 988 (1982). When deciding whether a trial court has abused its discretion, the appellate court considers three factors: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Bream v. Benscoter,* 139 Idaho 364, 79 P.3d 723 (2003).

MOTION TO CERTIFY

In order to certify a lawsuit as a class action, the trial court must find that all four factors in Rule 23(a) exist and that at least one factor in Rule 23(b) exists. *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 171–72, 108 P.3d 315, 318–19 (2004). "An intelligent decision on class certification requires 'at least a preliminary exploration of the merits' of the plaintiff's claim. Based on that exploration, the court must make specific findings establishing that the case satisfies the several requirements for certification." *Pope v. Intermountain Gas Co.,* 103 Idaho 217, 237, 646 P.2d 988, 1008 (1982)(*quoting Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312-13 (4th Cir. 1978)).

Idaho Rule of Civil Procedure 23(a) lists the prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Idaho Rule of Civil Procedure 23(b) lists the requirements in order for a class action suit to be maintained:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

At least one Circuit has determined that the burden is on the plaintiff to establish the need for a class action. *See Gilchrist v. Bolger*, 733 F.2d 1551 (11th Cir. 1984).

One requirement of IRCP 23(a) is typicality. Defendants do not dispute that this requirement is met by Plaintiffs. IRCP 23(a) also requires that the representative parties will fairly and adequately

protect the interests of the class. Defendants suggest that because the named Plaintiffs have received their refunds they may no longer have an incentive to vigorously vindicate the rights of the remaining class members. Plaintiffs have represented to the Court that they will fairly and adequately protect the interests of the class. In the absence of anything more than a suggestion to the contrary, the Court will accept the representations made by Plaintiffs and find that this requirement is met.

Another requirement of IRCP 23(a) is numerosity. An allegation of at least thirty potential class members has been held to satisfy the numerosity requirement. *See Lowdermilk v. United States Bank Nat'l Assoc.*, 479 F.3d 994, 997 (9th Cir. 2007). However, a class of only seventeen known members has been found to be small enough that joinder of all plaintiffs was not impracticable. *See BHA Investments*, 141 Idaho at 177, 108 P.3d at 324. Based partially on an audit performed by Sales Tax Experts & Profit Recovery Solutions of forty-six Idaho vendors of convertible property and also on a similar suit brought in Utah, Plaintiffs argue that the numbers of claimants may be in the thousands. Defendants contend that there is insufficient evidence in the record to support a conclusion that thousands of Idaho residents have been overcharged by their contractors in violation of Idaho law. A Tax Audit Manager for the State of Idaho has testified that he has already processed twenty-seven of thirty-one refund requests. (Affidavit of Mark Stones, 2.) At oral argument, Defendants admitted there was no cost-effective process readily available to the State to determine the identities of all potential claimants. The Court finds that because twenty-seven overpayments were found as a result of a preliminary analysis, there are likely enough more unknown claimants to fulfill the numerosity requirement.

The final IRCP 23(a) requirement is commonality of questions of law or fact applicable to the entire class. Plaintiffs assert that the common legal issue in this case concerns the over-collection of

sales tax on furnish and install contracts of convertible property in Idaho. The Defendants contend there is no outstanding question of law or fact for a jury or the Court to determine because it concedes that any person or entity who has overpaid is entitled to a refund.

Idaho Code § 63-3626 provides for refunds for any amount due under the sales tax chapter that has been overpaid. IDAPA 35.01.02.117 provides the procedure by which the purchaser may request a refund of sales tax paid in error to a vendor.

> When a purchaser has paid sales tax to a vendor, and later determines that the sales tax was paid in error, the purchaser shall request the refund from the vendor to whom the excess was paid. If the purchaser can provide evidence that the vendor has refused to refund the tax, he may then file a claim for refund directly with the Tax Commission.

IDAPA 35.01.02.117.02. Plaintiffs assert that under this provision any taxpayer who overpaid sales tax in connection with a furnish and install contract is entitled to a refund of the overpaid tax. Defendants agree that is the state of the law and draw the Court's attention to an administrative procedure under which the taxpayer may process their refund or appeal a denial of a refund. Plaintiffs ask the Court to use its plenary power to replace this administrative procedure with a class action, citing *Bailey v. Idaho State Tax Commission*, CVOC 98-05865D (Fourth Judicial District 2000) and *Monson v. Utah State Tax Commission*, No. 010402468 (Fourth Judicial District Utah 2003).

The Idaho Supreme Court has held that a class action suit may be brought against the Tax Commission to process refunds where appropriate so long as all of the requirements of IRCP 23 are met. *See Ware v. Idaho State Tax Commission*, 98 Idaho 477, 484, 567 P.2d 423, 430 (1977)("It follows, therefore, that the trial court will allow plaintiffs the opportunity to pursue the class action aspect of their complaint. Questions which might arise concerning fulfillment of the other

requirements for a class action, IRCP 23, are not before us, and we offer no comment, as these will be fully considered by the trial court on remand.").

In *Monson*, a Utah District Court found commonality, stating:

> As pointed out by plaintiffs, the primary legal question in this case centers on the Commission's illegal retention of sales tax collected on Furnish and Install Purchases of floor coverings. This single common legal issue between plaintiffs and the class members is sufficient to satisfy the commonality prerequisite that there be questions of law or fact common to the class. The fact that all parties agree as to the application of the law, and, further, that these plaintiffs have now received refunds, does not defeat, as a matter of law, the commonality prerequisite. The Court holds that there are questions of law or fact common to the class.

Monson, *6.

The decision of the Utah District Court is persuasive, but not binding precedent. IRCP 23(a)(2) requires that "there are questions of law or fact common to the class." The mere application of the same law to a group of people in a similar circumstance does not rise to the level of a "question of law" for the Court or a jury to determine in the absence of a dispute as to the application of that law. Because there is no dispute as to the application of Idaho law that taxpayers who paid sales tax in error on convertible property are entitled to a refund, the Court finds there is no common question of law or fact.

The Courts finds that the commonality prerequisite of IRCP 23(a) is not met and therefore the class fails for not having met all four Rule 23(a) requirements. However, in the interest of thoroughness, the Court will perform the Rule 23(b) analysis as well. Only one of three prerequisites must be met to maintain a class action under IRCP 23(b).

Plaintiffs assert that the prosecution of separate actions in the case at hand would create a risk of inconsistent or varying adjudications with respect to individual taxpayers or would impair or impede the ability of other taxpayers to process their refunds because the Commission might not

interpret the refund law equally and with the same force and effect for each claimant. Plaintiffs have provided no evidence for an assertion that the Commission is likely to grant refunds to some claimants, but deny the same refund to other claimants, but instead assert that a class action is "the most efficient and effective way to ensure that compatible standards of conduct are established for the Commission's handling of refunds and future taxation procedures." (Memorandum in Support of Motion to Certify Class, 14.) The Court finds the suggestion of potential future wrongdoing on the part of the Commission to be unfounded. Further, the Court notes that Defendants would be estopped from later asserting that the refund provision applies differently as the Commission has judicially admitted that taxpayers who can show that they have overpaid sales tax on convertible property within the last three years are entitled to a refund. The Court finds that the provisions of Rule 23(b)(1)(A) and (B) have not been met.

Plaintiffs argue that a class action as appropriate under Rule 23(b)(2) because the Commission has acted contrary to a legal duty on grounds generally applicable to the class by wrongfully retaining over-collected sales tax and because Plaintiffs seek declaratory judgments that a class action is the appropriate mechanism to recover illegal sales tax and that the Commission's ruling on the refund requests of the named Plaintiffs apply to all claimants. The Court notes that the Commission does not itself charge tax to individuals who are purchasing convertible property, but instead receives these overpayments from the individual contractors who have misunderstood misapplied the law. Second, the Court notes that according to Plaintiffs estimate there are at least 460 convertible property vendors who do business in Idaho. The Court believes that requiring the Commission to audit and ensure that every transaction of each of those vendors complies with IDAPA 35.01.02.012.01b before accepting the submissions would be a burden on State resources.

Recognizing that over-collection occurs, the Commission has implemented a procedure under which claimants may after seeking a refund from the erring vendor request a refund by filling out and submitting a simple form at no cost to themselves. Additionally, the Commission has distributed a brochure educating vendors on the proper regulations. (*See* Exhibit A to Reply Memorandum in Support of Plaintiffs' Motion to Certify Class.) The Court finds that the Commission has not acted contrary to a legal duty by retaining the over-collected sales tax as it has taken steps to educate vendors and implemented a process for obtaining a refund.

As to Plaintiffs' contention that a class action is the appropriate mechanism to recover illegal sales tax, the Court agrees that in some circumstances a class action to recover improperly collected tax may be appropriate, as in *Ware v. Idaho State Tax Commission* and *Bailey v. Idaho State Tax Commission*. However, the Court notes that in each of those cases there was a legal dispute as to the validity of the collection of the tax. In *Ware*, the Tax Commission essentially argued that its interpretation of Idaho Code as set down in its regulation superseded the plain language of the statute and justified denying refunds of the grocery tax credit. *Ware v. Idaho State Tax Commission*, 98 Idaho 477, 480, 567 P.2d 423, 426 (1977). In *Bailey*, the Commission determined that Costco memberships were subject to sales tax and instructed Costco to begin collection of sales tax on memberships in its Idaho stores. *Bailey v. Idaho State Tax Commission*, CVOC 98-05865D, at *3 (Fourth Judicial District 2000). No such dispute exists here. As the executive branch has established a mechanism to process uncontested refunds of over-collected sales tax, it is not for the Judiciary to substitute its judgment and impose an alternate mechanism. To the extent that the administrative mechanism already in place is not as efficient and inexpensive as Plaintiffs would prefer because it

processes each refund individually, the Plaintiffs might request that the Legislature enact a group refund mechanism.

As to Plaintiffs' request for declaratory judgment that the Commission's ruling on the refund requests of the named Plaintiffs apply to all claimants, the Court would reiterate its above comments on estoppel preventing Defendants from taking a position in a future case which would be incompatible with its position in this case. The Court finds that the conditions of Rule 23(b)(2) are not met.

The final factor of Rule 23(b) allows a class to maintain a class action if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The Court has already determined that there is no common question of law because there is no dispute as to the proper application of the law or that each taxpayer who can show that they have overpaid sales tax on convertible property within the last three years is entitled to a refund. Additionally, the Court would be required to find that a class action is required for a "fair and efficient adjudication of the controversy." There has been no evidence offered to the Court to indicate that the Commission is unlikely to be fair in processing these refunds. In the absence of a class action, the Commission is less likely to be responsible for paying the cost to locate each taxpayer who has overpaid sales tax in this context. Although that is a factor in weighing whether denying certification of the class will provide an efficient resolution to the situation, the Court finds that there is no controversy to be adjudicated.

In summary, the Court finds that Plaintiffs have not met all of the Rule 23(a) requirements, as they are lacking a common question of law, and the Court finds that Plaintiffs have not established

any of the three Rule 23(b) requirements. Therefore, Plaintiffs' motion to certify the class is DENIED.

MOTION TO DISMISS

Defendants seek dismissal of Plaintiffs' claims arguing that Plaintiffs have not exhausted their administrative remedies prior to bringing this suit, that Plaintiffs' claims are not ripe for review because the Commission has not denied any of the named Plaintiffs' requested refunds, and that there is no justiciable controversy in this matter because the parties agree on the applicable legal principle. Defendants also assert that because the named Plaintiffs have each received refunds, the matter is now moot.

On June 22, 2009, Plaintiffs simultaneously filed a class action complaint in this matter and requested refunds from the Idaho State Tax Commission, without first seeking refunds from the overcharging vendors. In Idaho, a person who has in error overpaid sales tax to a vendor is to request a refund from the vendor. IDAPA 35.01.02.117.02. If the vendor refuses to make the refund, the taxpayer may then file a claim for refund directly with the Tax Commission. *Id.* If the Commission denies the claim, the taxpayer may then petition the Commission for a redetermination and seek judicial review of the Commission final decision. Idaho Code § 63-3626(d). Here, Plaintiffs assert that it would be unduly burdensome and unfair to the vendors to first seek refunds from the vendors because the vendors no longer retain the funds and they would be required to disclose their confidential cost information to their customers. The Court disagrees. Such a process would inform the vendor of his mistake and provide the vendor an opportunity to correct the mistake and educate himself as to the applicable law. If the Commission were to receive numerous claims all relating to a specific vendor, the Commission would be alerted that a particular vendor did not understand the

sales tax law. It is undisputed that Plaintiffs did not follow the administrative process established by the Commission, but rather filed suit concurrently with seeking refunds from the Commission. The Court finds that Plaintiffs had not exhausted their administrative remedies at the time of filing.[1] Defendants' motion to dismiss for failure to exhaust administrative remedies is GRANTED.

There are three requirements for ripeness: "1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). Plaintiffs assert that under Idaho law any taxpayer who overpaid sales tax in connection with a furnish and install contract is entitled to a refund of the overpaid tax. Defendants agree that is the state of the law and concede that taxpayers who can show that they have overpaid sales tax on convertible property within the last three years are entitled to a refund. As discussed above, the Court finds that there is no live controversy to be adjudicated. Defendants' motion to dismiss for lack of ripeness is GRANTED.

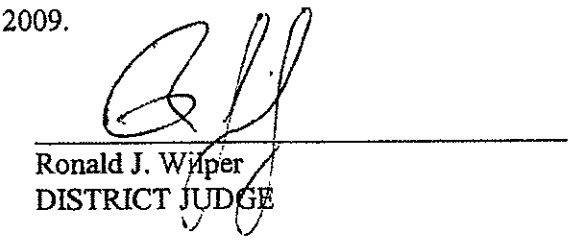
Defendants assert that when the Commission approved the refunds claims of the named Plaintiffs, this matter became moot. The Court cannot agree with this argument. Under circumstances where a controversy remains for the unnamed class members, an action is not moot merely because the defendant agrees to pay the claims of the named plaintiffs. *See* Herbert B. Newberg, Newberg on Class Actions, § 2:17 (3rd ed. & Supp. 2000)("When class members retain a real interest in the case, relation back to the date of the filing of the complaint protects class members from the possibility that the defendants might escape liability by giving benefits only to the named plaintiffs."); *Bacon v. Toia*, 437 F. Supp. 1371, 1382 (S.D.N.Y. 1977)("It could be suggested that the

[1] The Court notes that under certain circumstances, a class action tax case may be brought without the class members each exhausting their administrative remedies. *See Ware v. Idaho State Tax Commission*, 98 Idaho 477, 483, 567 P.2d

named plaintiffs thus no longer have an active controversy with defendants and that consequently the case is moot. However, it is clear that as of the filing of the complaint and the motions to intervene there existed a real and immediate controversy and the request for and grant of class certification extinguishes any possible mootness claim."). Defendants' motion to dismiss for mootness is DENIED.

IT IS SO ORDERED.

Dated this 28th day of December, 2009.



Ronald J. Wilper
DISTRICT JUDGE

423, 429 (1977)(holding that in light of the Commission's denial of all claims that were made for the grocery tax refund, "the requirement of the filing of a claim for the refund was the requirement of a useless and futile act.").

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 28 day of December, 2009, I caused a true and correct copy of the foregoing ORDER DENYING MOTION TO CERTIFY CLASS AND ORDER GRANTING MOTION TO DISMISS to be served by the method indicated below, and addressed to the following:

Steven Young Holme Roberts & Owen, LLP 299 S. Main St., Ste. 1800 Salt Lake City, UT 84111-2263	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Brian Nichols Deputy Attorney General P.O. Box 36 Boise, ID 83722-0410	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk