BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

Michael and Amy Munoz Appellant, -vs- THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	DOCKET NO.: PT-2004-7 FACTUAL BACKGROUND, CONCLUSIONS OF LAW, ORDER and OPPORTUNITY FOR JUDICIAL REVIEW

The above-entitled appeal was heard on August 9, 2005, in Polson, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (Board). The notice of hearing was duly given as required by law. Mr. Michael Munoz (Taxpayer) represented himself for the property held jointly with his wife Amy Munoz. The Taxpayer presented evidence and testimony in support of the appeal. The Department of Revenue (DOR) was represented by Appraiser Don Leuty and was assisted by Appraiser Allen Doney. DOR presented evidence and testimony in opposition to the appeal and in support of its decision to deny agricultural classification to the property in question.

This appeal does not deal with value, but is solely concerned with whether the DOR correctly denied

agricultural classification to the property owned by the Taxpayer.

The duty of this Board is to determine the appropriate classification of the property based on a preponderance of the evidence. By statute (15-2-301, MCA) this Board may affirm, reverse or modify any decision rendered by the county tax appeal board. Testimony was taken from both the Taxpayer and the Department of Revenue, and exhibits from both parties were received.

The Board finds that the decision of the Lake County Tax Appeal Board (CTAB) denying the Taxpayer classification of his property as agricultural land is supported by the evidence and will be affirmed by this Board.

FACTUAL BACKGROUND

1. Due, proper, and sufficient notice was given of this matter, the hearing, and of the time and place of the hearing. All parties were afforded opportunity to present evidence, oral and documentary, and the record was left open for the Taxpayer to submit additional documentary evidence.
2. The subject property is a tract of land in Lake County containing 6.99 acres with 358 feet fronting onto Flathead Lake. Taxpayer has devoted .826 of the acreage for building a residence, and the remainder of

the tract, prior to 2003, had been unimproved land. Taxpayer purchased the tract in August of 2002. The physical address of the property is 127 Montebello Lane, Dayton, Montana.

3. In October of 2003 Taxpayer planted 120 live cherry tree saplings on the unimproved portion of his property. By the time of the inspection of the new orchard by the agricultural inspector of the Department of Revenue in April of 2004 most of the saplings were dead.

4. On December 22, 2003 Taxpayer sent a copy of his "Application for Agricultural Classification of Lands" to the local office of the DOR.(State's Exhibit "E") DOR Appraiser Don Leuty conducted an inspection of the property in April of 2004 and on April 28, 2004 returned the form to Taxpayer indicating that the classification change to "agricultural" was denied. The reason for denial was stated as: "must have 100 live trees under accepted management practices." (underline in the original-State's exhibit "E").

5. Taxpayer then filed an AB-26 form with DOR requesting an informal review of the decision. (State's Exhibit "F") Review Appraiser Dennis Salomon again denied the classification request on July 21, 2004.

6. Taxpayer appealed to the Lake County Tax Appeal Board ("CTAB"). Taxpayer stated the reason for the appeal was that: "despite meeting all legal requirements by having 125 live cherry trees on this property I was denied agricultural status based on an inspection made the following year." (State's Exhibit "G") CTAB conducted a hearing on this matter on December 7th, 2004, and denied the classification request of Taxpayer, stating :

> **after reviewing findings, it appears that the viable orchard was not satisfied---trees did not live long enough. The application of "Tordon" herbicide is not acceptable in or near an orchard. The accepted fruit tree husbandry practices were not used—land should not be considered agricultural.**

7. Taxpayer filed this appeal on December 22, 2004.

QUESTION PRESENTED

Whether Taxpayer, who planted a new cherry tree orchard in the fall of 2003, has established that he meets the requirements of the law and regulations of Montana to qualify his property for agricultural classification.

TAXPAYER'S CONTENTIONS

Taxpayer contends that he has met the provisions of Montana law and regulation in order to qualify his property for agricultural classification. The relevant regulation for determining whether fruit trees qualify for

agricultural classification is found in 42.20.620(15) of the Administrative Rules of Montana:

> **For valuation as agricultural land, the owner of land used as a fruit tree orchard must provide proof that:**
> **(a). there are a minimum of 100 trees;**
> **(b). they are under accepted fruit tree husbandry practices; and**
> **(c). the fruit tree operation continues to produce at least $1,500 in gross annual income once the initial crop of trees begins to produce fruit.**

Taxpayer contends that the third requirement—producing gross annual income of $1500—does not apply to a newly-planted orchard. Apparently the DOR agrees that this monetary requirement is waived until the orchard begins to produce fruit in commercial quantities. This element is not at issue in this appeal.

Taxpayer contends that there are only two requirements that apply to him, and that he has met both. The first is the requirement that there are a minimum of 100 trees. Taxpayer asserts that he planted 120 cherry trees in October of 2003. DOR does not dispute this fact, so, according to Taxpayer, this requirement is fully complied with.

The second and final requirement for Taxpayer to comply with is that the trees were planted “under accepted fruit tree husbandry practices.” Taxpayer contends that he

took appropriate steps to make sure that the plants would thrive such as planting with fertilizer, watering the plants on a regular basis, and placing “tree protectors” around each of the new trees in order to provide protection for them.

Taxpayer asserts that the fact that many of the trees did not survive into the next spring was not due to any negligence on his part. He further asserts that the DOR did not inspect his orchard until the spring of 2004, and that it is improper for DOR to rely on any evidence it acquired in 2004 to determine the condition of his orchard for the tax year in question, namely 2003. Taxpayer states that the failure of DOR to inspect his orchard in 2003 means it has no basis for the denial of his application at a later date.

DOR CONTENTIONS

DOR, through Appraiser Don Leuty, presented testimony, documentary and oral, in support of the finding made by the Lake County Tax Appeal Board when they considered this matter. CTAB stated its conclusion as follows :

> **Disapproved. After reviewing findings, it appears that the viable orchard was not satisfied---trees did not live long enough. The application of “Tordon” is not acceptable in or near an orchard. The accepted fruit tree husbandry practices were not used—land should not be considered agricultural.**(State’s Exhibit “G”)

Appraiser Leuty testified that he inspected the new

orchard in May of 2004 and found that the fruit trees had a very low survival rate through the winter. The first picture shown in State's Exhibit "A" shows the condition of the orchard in May of 2004. Mr. Leuty returned to the orchard in June of 2004 and took the remainder of the pictures in State's Exhibit "A", most of which show that the trees in the orchard were no longer live plants.

Mr. Leuty stated that the reason the trees did not survive the winter is that Taxpayer did not use best husbandry practices in planting his orchard. Probably the biggest failure, according to Mr. Leuty, was planting the trees in the fall (October), rather than in the spring. State's Exhibit "B" presents six pictures of an orchard planted in the spring of 2003, and the pictures appear to show a viable orchard (though the photos were taken in September of 2004, not May/June of Exhibit "A"). Mr. Leuty noted that the orchard shown in State's Exhibit "B", aside from being planted in the spring, had an underground drip irrigation system for watering, and the orchard was enclosed with a fence to keep out deer and other game. In contrast, Taxpayer's orchard was planted in the fall, was manually watered from a cistern behind a truck, and the plastic tubes, were used to protect from game predation instead of fencing.

When Taxpayer filed for an AB-26 review on his classification request, he referred to a cold spell in January that might have been the cause of the trees' demise. In denying his request, Appraiser Dennis Salomon, said:

> **After phone consultation with the Lake County Extension Agent, to inquire about cherry tree losses from last winter, and from info[rmation] contained from the National Weather Service regarding last winter's January temps, we determined the trees should not have died from last winter's cold weather. (State's Exhibit F)**

Mr. Leuty also submitted State's Exhibit "N" which, among other items, refers to the lowest temperatures recorded in Missoula by the National Weather Service for the week of 4-8 January in 2004. The coldest low temperature recordings for the period were those for the 5th and 6th of January where –11 and –14 degrees Fahrenheit were recorded. In the same exhibit ("N") Lake County Extension Agent, Mr. Jack Stivers, indicated that he was not aware of any reports of cherry tree losses during the previous winter.

State's Exhibit "N" also contains notes from a telephone conversation Mr. Leuty had with Mr. Brian Campbell, a field representative of the Monson Fruit Co. and a horticultural representative of the Flathead Cherry Growers Association. Mr. Campbell stressed that in the Flathead Lake area it is imperative for survival that tree

roots be planted in the spring. The only acceptable planting in the fall is where transplanted trees are used. Further evidence along this line is contained in State's Exhibit "K" (plant in spring or else the new trees will freeze) and promotional material found on the internet (State's Exhibit "M").

Finally Mr. Leuty submitted an extract from a publication called "Modern Fruit Science" by Childers, Morris and Sibbett, which contains this statement in regard to the planting of new cherry trees: "In the colder climates, *early* spring planting is recommended to avoid winter damage." (emphasis in the original-State's Exhibit "L").

BOARD'S DISCUSSION

The board sees two main issues on appeal. The first issue is the insistence by the Taxpayer that DOR cannot consider any evidence outside of the calendar tax year in question (2003 in this instance), to resolve any of the factual matters involved in the determination of his eligibility for the requested classification. Specifically, Taxpayer says that DOR cannot use the results of its inspection in the spring of 2004, which showed very few live trees, to determine the condition of the trees that were planted in 2003.

Taxpayer asserts no authority for this proposition and there appears to be none in the relevant statutes and regulations governing the classification of fruit trees. It seems that Taxpayer is trying to put DOR in a very tight box, since the record indicates that he did not file his "Application for Agricultural Classification of Land" until the 22nd of December, 2003 (State's Exhibit "E"). According to the Taxpayer's logic the DOR would have only the remaining 9 days of December to make a determination whether he had 100 live trees for 2003. We do not view the law as being that restrictive, and DOR's determination that very few of the planted tree roots survived the winter, as appeared from the inspection in the spring (testified to by Appraiser Leuty), will be considered as relevant evidence.

The other issue to be considered here is the requirement that, in order to qualify for this substantial tax reduction, Taxpayer is obligated to use "accepted fruit tree husbandry practices." From the testimony and evidence presented by DOR the most questionable husbandry practice undertaken by Taxpayer was his decision to plant the young fruit tree plants in the fall. DOR presented several authorities that state that early spring planting is essential for survival of the trees through the winter. While the Taxpayer said that he would submit evidence on

this issue in a post-hearing submission, he did not do so, and the Board finds on the basis of the evidence submitted that the practice of planting new fruit trees in the fall does not conform with "accepted fruit tree husbandry practices." The Board also finds, on the basis of the evidence submitted, that other deficiencies in accepted husbandry practices, are the lack of an irrigation system for regular watering and fencing to protect the new plants from game predation.

Finally the Board would note that it is not an authority on "best practices" for establishing a cherry tree orchard. We have, however, tried to listen carefully to and evaluate the evidence presented. We find the DOR testimony far more complete and persuasive than that of the Taxpayer, and note that the Taxpayer did not present any documentary evidence at the hearing, and failed to provide any such material after the hearing—even though he was given an opportunity to.

While this is a "de novo" hearing, we would also note that this is an instance where the local knowledge supplied by a county tax appeal board may be particularly helpful. Lake County is one of the few areas of the state where cherries are grown in commercial quantities and where they are recognized as an agricultural product. On factual

matters related to what constitutes good husbandry practices, we are inclined to give a large measure of deference to the local members of the county tax appeal board. In this case we concur in their determination that the Taxpayer did not meet the qualifications for agricultural classification of his land.

CONCLUSIONS OF LAW

1. The State Tax Appeal Board has jurisdiction over this matter. §15-2-301, MCA.
2. §15-7-202 MCA. Eligibility of Land for Valuation as Agricultural. (2) Qualification of parcels of lands less than 20 acres to be considered as agricultural for the purposes of valuation, assessment and taxation.
3. Western Airlines, Inc., v. Catherine Michunovich et al., 149 Mont. 347, 428 P.2d 3, (1967).
4. Administrative Rules of Montana, 42.20.620(15)— Criteria For Agricultural Land Valuation For Land Totaling Less than 20 Acres
5. The decision of the Lake County Tax Appeal Board is hereby affirmed.

ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property shall remain classified as tract land on the tax rolls of Lake County by the local Department of Revenue office. Taxpayer's request to classify the property as agricultural is denied. The decision of the Lake County Tax Appeal Board is accordingly affirmed.

Dated this 16th day of September 2005.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

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GREGORY A. THORNQUIST, Chairman

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JOE R. ROBERTS, Member

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SUE BARTLETT, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of September, 2005, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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