

BEFORE THE MONTANA TAX APPEAL BOARD

State of Montana,
Department of Revenue,

Appellant;

v.

Yeager Family Trust,

Respondent.

CASE No: PT-2015-6

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER,
AND OPPORTUNITY FOR JUDICIAL
REVIEW**

1. Before the Board is Appellant State of Montana, Department of Revenue's (DOR) appeal from the Lake County Tax Appeal Board's (LCTAB) decision to overturn DOR's reclassification from agricultural to residential of Respondent Yeager Family Trust's (Yeagers) property at 31346 N. Finley Point Rd., Polson, identified as geocode 15-3351-18-1-02-01-0000; legal description S18 T23 N, R19 W, C.O.S. 6244, Tract 1.

ISSUE

2. Whether to classify as agricultural a property smaller than two acres, containing both a dwelling and a 1.20 acre orchard of 107 cherry trees that produces more than \$1,500 per year in revenue.
3. DOR argues that the property must be at least 2 acres in size; one acre for the orchard as required by DOR administrative rules, and one for

the dwelling as required by statute. Yeagers counter that the acreage requirement is arbitrary and that they produce more than the statutorily required revenue on fractions of the acre DOR claims is required for agricultural classification.

FINDINGS OF FACT

4. The Board held a hearing on December 15, 2015 at which the following were present:
 - a. Bill Yeager, representative for Yeager Family Trust (by telephone);
 - b. Jane Yeager, representative for Yeager Family Trust (by telephone);
 - c. Nicholas Gochis, attorney for DOR;
 - d. Bonnie Hamilton, DOR management analyst agriculture and forest specialist, as witness for DOR;
 - e. Amanda Bertelson, DOR Lake County residential agriculture appraiser, as witness for DOR.

(MTAB Hrg. Transcr.)

Yeager's Orchard

5. In 2004, Yeagers purchased the property, which contained an old cherry orchard they intended to revitalize. (Ex. 2.)
6. The 2015 property record card and survey state that the property is 1.56 acres (Ex. B, C.) The property includes a single story dwelling of 2,365 square feet. (Ex. B.)

7. An acre is 43,560 square feet, thus the dwelling's 2,365 square feet is approximately 0.05 acres¹, or 3% of the property².
8. In 2004, Yeagers prepared to plant a new cherry orchard, installing fencing and irrigation. (MTAB Hrg. Transcr. 45:11-12.)
9. In April of 2005, Yeagers planted Skeena varietal cherry trees grafted to a dwarf root stock which allows a more compact footprint for each tree. (MTAB Hrg. Transcr. 45:12-16, 43:22-25.)
10. The orchard contains 107 trees, (Ex. 2), on approximately 1.20 acres composed of 0.50 acres of new orchard and 0.70 acres of the original orchard. (LCTAB Hrg. Transcr. 5:4-7.)
11. The dwarf root stock's more compact footprint allows a denser concentration of trees, requiring approximately half the acreage of traditional orchard layouts. (MTAB Hrg. Transcr. 43:19-44:6.; LCTAB Hrg. Transcr. 6:18-20; LCTAB Hrg. Transcr. 6:12-14.)
12. The more compact orchard not only allows a greater density of cherry production, but facilitates increased profitability by reducing fencing, irrigation, mowing, and spraying costs. (LCTAB Hrg. Transcr. 6:20-22.)
13. The new orchard is certified under the Good Agricultural Procedures (GAP) program, which requires water testing, signage, fencing, spraying, and proper management to keep the orchard pest free and the product safe. (Ex. 2.)

¹ $2,365 \div 43,560$

² $0.05 \div 1.56$

14. In 2015, Yeagers became members of the Flathead Cherry Growers Association which requires strict compliance with GAP certification, and conducts random audits. (Ex. 2; LCTAB Hrg. Transcr. 47:15-48:17.)
15. The property record card contains three photos of a thriving, fenced orchard. (Ex B.)
16. Yeagers sell cherries from the new GAP orchard to a distributor, who sells to major retailers such as Costco. They sell cherries from the old orchard to local fruit stands. (LCTAB Hrg. Transcr. 4:24-25, 7:16-19.)
17. In 2009, the orchard began generating revenue. (MTAB Hrg. Transcr. 45:18-25.)
18. Yeagers' 2014 crop brought in approximately \$6,000 in revenue, while the 2015 crop brought in only \$4,500 due to inclement weather forcing a premature harvest. (MTAB Hrg. Transcr. 46:16-23.)
19. Yeagers estimated that a one-quarter acre orchard of 50 dwarf trees planted eight feet apart could generate \$2,500 per year. (MTAB Hrg. Transcr. 47:1-10.) This was not contested by DOR.
20. Based on Yeagers' calculations, an orchard using their techniques and varietal trees could produce \$1,500 in revenue with as few as 30 trees on 0.15 acre.³ This was not contested by DOR.

³ Adjusting Yeagers' estimated \$2,500 revenue from 50 trees on 0.25 acres by 60% (\$1500/\$2500).

Rulemaking

21. One statutory requirement for agricultural land classification is that “the land is an integral part of a bona fide agricultural operation.” Mont. Code Ann. § 15-1-202.
22. DOR management analyst Bonnie Hamilton testified that although Mont. Code Ann. § 15-1-201 requires DOR to classify and assess bona fide agricultural operations, no statute defines bona fide agricultural operation. (MTAB Hrg. Transcr. 18:12-15.)
23. Hamilton testified that DOR has a general legislative grant of authority under Mont. Code Ann. § 15-1-201 to adopt rules to implement statutes. (MTAB Hrg. Transcr. 17:22-18:6.)

Administrative Rule Definition of Bona Fide Agricultural Operation — Mont. Admin. R. 42.20.601

24. In 2003, DOR proposed and adopted Mont. Admin. R. 42.20.601 that defined bona fide agricultural operation as “an agricultural enterprise in which the land actually produces agricultural crops defined in 15-1-101, MCA, that directly contribute agricultural income to a functional agricultural business.” 13 Mont. Admin. Register 1464 (Jul. 7, 2003); 16 Mont. Admin. Register 1888 (Aug. 28, 2003).
25. The reasonable necessity DOR claimed for the 2003 rule in the notice of proposed rule was to “define the terms used in new sub-chapter 6 of chapter 20. The terms being defined are common in the agricultural field.” 13 Mont. Admin. Register 1464 (Jul. 7, 2003).

26. In 2014, DOR proposed and ultimately amended Mont. Admin. R. 42.20.601, adding a requirement that the property total “not less than 1 acre, excluding the 1-acre site beneath a residence.” 20 Mont. Admin. Register 2628 (Oct. 23, 2014); 23 Mont. Admin. Register 2994 (Dec. 11, 2014).
27. The reasonable necessity listed by DOR in the notice of proposed amendment in 2014 was “more clearly defining ‘bona fide agricultural operation’.” 20 Mont. Admin. Register 2628 (Oct. 23, 2014). This description is inaccurate at best. The 2014 amendment does more than clarify the definition, it adds an entirely new requirement: minimum acreage.
28. The notice for both the adoption and amendment of the definition of bona fide agricultural operation state that authority to make the rules is granted by Mont. Code Ann. § 15-7-111, and that the rules implement the following statutes:
- a. Mont. Code Ann. § 15-1-101,
 - b. Mont. Code Ann. § 15-6-133,
 - c. Mont. Code Ann. § 15-7-201,
 - d. Mont. Code Ann. § 15-7-202.

13 Mont. Admin. Register 1466 (Jul. 7, 2003); 20 Mont. Admin. Register 2629 (Oct. 23, 2014).

29. No statute referenced either by DOR's witnesses nor by DOR's rulemaking notices includes a minimum acreage requirement to qualify for agricultural classification as a bona fide agricultural operation.

Administrative Rule on Specialty Crop: Orchard Criteria — Mont. Admin. R. 42.20.683.

30. As part of the above rulemaking in 2014, DOR consolidated several specialty crop rules under a new rule which requires that "the orchard consists of contiguous parcels of land totaling not less than 1 acre." Mont. Admin. R. 42.20.683(12)(a).
31. DOR's notice described the reasonable necessity for this change: "The department proposes adopting New Rule III to reduce confusion regarding the qualifications for agricultural land classification for specialty and unique crops." 20 Mont. Admin. Register 2612 (Oct. 23, 2014). Again, the rule's amendment does more than "reduce confusion regarding the qualifications." It adds a new qualification: minimum acreage.
32. Hamilton testified that the one acre requirement "wasn't something new" and had been a requirement in DOR's agricultural appraisal manual. The rule change simply adopted the manual's requirement into rule. (MTAB Hrg. Transcr. 23:10-18.)
33. The notice for the adoption of the specialty crop rule states that authority to make the rules is granted by Mont. Code Ann. § 15-1-201, and that the rules are implementing the following statutes:

- a. Mont. Code Ann. § 15-7-201,

- b. Mont. Code Ann. § 15-7-202,
- c. Mont. Code Ann. § 15-7-203,
- d. Mont. Code Ann. § 15-7-206,
- e. Mont. Code Ann. § 15-7-207,
- f. Mont. Code Ann. § 15-7-208,
- g. Mont. Code Ann. § 15-7-209,
- h. Mont. Code Ann. § 15-7-210,
- i. Mont. Code Ann. § 15-7-212.

20 Mont. Admin. Register 2612 (Oct. 23, 2014).

- 34. No statute referenced either by DOR's witnesses nor by DOR's rulemaking notices includes a minimum acreage requirement to qualify for agricultural classification.
- 35. Hamilton admitted that there is no acreage requirement in the statute, (MTAB Hrg. Transcr. 30:24-31:6.), or even in DOR's own manual, (Id. 34:2-10.), contrary to prior testimony noted in paragraph 32.

Reclassification

- 36. In June of 2015, DOR mailed Yeagers a letter stating that as of January 1, 2015 the property would be reclassified from agricultural to residential pursuant to the requirements of Mont. Admin. R. 42.20.683, the specialty crop rule. The letter makes no reference to either Mont.

Admin. R. 42.20.601 or Mont. Admin. R. 42.20.655, discussed below.
(Ex. A.)

37. Amanda Bertelson, a residential agriculture appraiser with the DOR, denied Yeagers agricultural classification because the property did not have one acre for an orchard and one acre for the home site, which she testified was required by Mont. Admin. R. 42.20.683(12)(a) and Mont. Code Ann. § 15-7-206. (MTAB Hrg. Transcr. 14:11-15:4.)
38. Hamilton testified that DOR could not grandfather in Yeagers' orchard because Mont. Code Ann. § 15-7-101 requires the department to maintain current all classifications. (MTAB Hrg. Transcr. 17:13-21.)

CONCLUSIONS OF LAW

39. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.
40. DOR supports its reclassification from agricultural to residential on the basis of a series of administrative rules and statutes:
 - a. Mont. Code Ann. § 15-6-134,
 - b. Mont. Code Ann. § 15-7-201,
 - c. Mont. Code Ann. § 15-7-206,
 - d. Mont. Admin. R. 42.20.601(7),
 - e. Mont. Admin. R. 42.20.683(12)(a),
 - f. Mont. Admin. R. 42.30.655.

(MTAB Hrg. Transcr. 7:16-23; LCTAB Hrg. Transcr. 9:16-23.)

41. DOR argues that when read together these statutes and rules require “one acre for bona fide ag activity and one acre for the residence.” (MTAB Hrg. Transcr. 5:23-25.)
42. As a preliminary matter, although DOR now defends the reclassification by reference to the above statutes and rules, DOR’s reclassification letter to Yeagers only notified them of noncompliance with Mont. Admin. R. 42.20.682, the specialty crop rule.
43. Yeagers counter that the one acre requirement for the orchard is arbitrary, (MTAB Hrg. Transcr. 42:15-23, 44:17-24.), that they in fact meet both this criteria and the minimum annual agricultural revenue but were nevertheless wrongly denied agricultural classification based on DOR’s misreading of statute, (Id. 43:16-17.), and that the property should be grandfathered in because of its prior status, (Id. 42:2-8.)
44. The Board has jurisdiction over this case. Mont. Code Ann. § 15-2-301.
45. “The state [tax appeal] board shall give an administrative rule full effect unless the state board finds a rule arbitrary, capricious, or otherwise unlawful.” Mont. Code Ann. § 15-2-301.
46. “The decision of the state board is final and binding upon all interested parties unless reversed or modified by judicial review.” Mont. Code Ann. § 15-2-302.

Grandfathering

47. Yeagers' request to grandfather their prior classification as agricultural is not possible given the statutory mandate that DOR "maintain current the classification of all taxable lands" therefore DOR has no power to retain a lapsed classification. Mont. Code Ann. § 15-7-101.

Classification as Agricultural

48. DOR argues that its rules require a parcel be at least one acre to qualify for agricultural classification. Yeagers counter that such a requirement denies agricultural classification on arbitrary criteria.
49. "The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art III, § 1. "The legislative power is vested in a legislature...." Mont. Const. art V, § 1.
50. "The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by *law*." Mont. Const. art VIII, § 3 (emphasis added).
51. "A valid and enforceable agency rule cannot exceed its enabling statute...." *Glendive Med. Ctr., Inc. v. Montana Dep't of Pub. Health & Human Servs.*, 2002 MT 131, ¶ 29, 310 Mont. 156, 49 P.3d 560.
52. "Administrative agencies enjoy only those powers specifically conferred upon them by the legislature. Administrative rules must be strictly

confined within the applicable legislative guidelines. Indeed, it is axiomatic in Montana law that a statute cannot be changed by administrative regulation. We look to the statutes to determine whether there is a legislative grant of authority.” *Bick v. State, Dep’t of Justice, Div. of Motor Vehicles*, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986).

53. When construing a statute, the reviewing body is to “determine what in terms or substance is contained in it, and not to insert what has been omitted or to omit what has been inserted.” *State v. Minett*, 2014 MT 225, ¶ 12, 376 Mont. 260, 332 P.3d 235; Mont. Code Ann. § 1-2-101.
54. “In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.” Mont. Code Ann. § 1-2-102.
55. “Where a taxing statute is susceptible of two constructions, any reasonable doubt as to persons intended to be within the particular tax should be resolved against the taxing authority.” *Nice v. State*, 161 Mont. 448, 453, 507 P.2d 527, 530 (1973).

Statutes on Agricultural Classification

56. DOR must classify all taxable lands, appraise all taxable city and town lots, appraise all taxable rural and urban improvements, and maintain current such classification and appraisal. Mont. Code Ann. § 15-7-101.

57. The statute DOR relies on for legislative authorization to make the rules in question requires DOR to “administer and supervise a program for the reappraisal of all taxable property within class three under 15-6-133....” Mont. Code Ann. § 15-7-111.
58. Class 3 property includes “agricultural land as defined in 15-7-202.” Mont. Code Ann. § 15-6-133.
59. Statute allows for agricultural classification on land parcels totaling less than 20 acres if they are “actively devoted to agricultural use” and produce “not less than \$1,500 in annual gross income from the raising of agricultural products as defined in 15-1-101.”⁴ Mont. Code Ann. § 15-7-202.
60. Agricultural products include fruit. Mont. Code Ann. § 15-1-101(1)(a)(i).
61. Montana Code Annotated § 15-7-201 states the legislative intent for valuing agricultural property: “Because the market value of many agricultural properties is based upon speculative purchases that do not reflect the *productive capability* of agricultural land, it is the legislative intent that bona fide agricultural properties be classified and assessed at a value that is exclusive of values attributed to urban influences or speculative purposes.” (emphasis added).
62. In *Northwest Airlines, Inc. v. State Tax Appeal Bd.*, 221 Mont. 441, 445, 720 P.2d 676, 678 (1986), the Montana Supreme Court struck down DOR’s decision to tax an airline on miles flown over Montana nonstop. The Court concluded “[t]he language of the statutes expresses no intent

⁴ Mont. Code Ann. § 15-7-202(2)(a) includes an exception for grazing land that is inapplicable here.

to consider activity other than that in Montana. Construing this language in favor of the taxpayer, as we must, we find that DOR had no statutory authority to include nonstop flyover miles in the numerator of the apportionment formula.” *Northwest Airlines*, 221 Mont. at 445, 720 P.2d at 678.

63. As the Court found in *Northwest Airlines*, the plain language of the statute here is clear that for parcels smaller than 20 acres there is one and only one criteria for classification as agricultural land: “\$1,500 in annual gross income from the raising of agricultural products.”
64. Furthermore, the negative-implication cannon (*expressio unius est exclusio alterius*) requires interpreting “the expression of one thing in a statute to imply the exclusion of another.” *Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61. By including annual revenue but not acreage in the statute the legislature excluded acreage from consideration.
65. The Board is unable to find any statutory support for DOR’s minimum acreage requirement. The legislature neither authorized nor directed DOR to make rules requiring a minimum acreage for agricultural classification, specialty crop or otherwise, and the adoption of entirely new criteria for classification is an exercise of power constitutionally reserved to the legislative branch.
66. From the above we conclude that the legislature intended and authorized one criteria for agricultural classification of parcels smaller than 20 acres: \$1,500 in annual gross agricultural income.

Valuation of Improvements on Agricultural Land

67. DOR argues that statute requires one acre of land for the dwelling in addition to the one acre under agricultural cultivation required by the DOR's rules. Yeager counters that this statute is improperly applied, because "if the rule is one acre for an orchard, we would be in compliance." (MTAB Hrg. Transcr. 43:16-17.)

Statutes on Valuation of Improvements on Agricultural Land

68. Although only one was noted on appeal, DOR relies on two statutes to class the land as residential based on the presence of a dwelling: (1) Mont. Code Ann. § 15-7-206, and (2) Mont. Code Ann. § 15-6-134.

Mont. Code Ann. § 15-7-206.

69. "One acre of land beneath agricultural improvements on agricultural land, as described in 15-7-202(1)(c)(ii) [residential use on agricultural land], is valued at the class with the highest productive value and production capacity of agricultural land." Mont. Code Ann. § 15-7-206.
70. DOR misreads the statute.
71. The statute simply changes the *valuation* of a part of land that is otherwise classed agricultural. The statute takes for granted that such land is still classed the same as the orchard: agricultural. The intent of this statute is simply to impute the highest valuation for agricultural land on one acre when there is a dwelling present.
72. The use of the term "one acre of land" in the statute does not create an acreage ownership requirement, but rather delineates the extent to

which the statute's effect (revaluation) applies. The one acre is not a threshold to trigger the statute but is instead a ceiling above which revaluation is not applied.

73. In essence, the statute imputes a uniform revaluation on one acre of agricultural classified land if any residential use exists, regardless of the parcel or dwelling's actual size.
74. For example, a 20 acre agricultural parcel with a sprawling 1 acre villa would see one acre revalued at the highest agricultural value. Similarly, a 20 acre agricultural parcel with a 100 square foot cabin would also see one acre revalued.
75. When questioned by the Board, Hamilton stated that the one acre with a dwelling is classified agricultural, (MTAB Hrg. Transcr. 31:13-32:14.), that nothing in the statute requires the footprint of a dwelling to be treated as other than agricultural, (Id. 32:15-33:3.), and could provide no authority for why the one acre revaluation would not simply overlap the orchard land. (Id. 37:18-38:6.)

Mont. Code Ann. § 15-6-134.

76. Although not raised at the MTAB hearing, at the LCTAB hearing Bertleson briefly referred to Mont. Code Ann. § 15-6-134. This statute was not brought up on appeal to MTAB, and it nevertheless only applies to class four (residential) property.

*Administrative Rule on Valuation of Improvements on Agricultural Land —
Mont. Admin. R. 42.20.655*

77. Finally, the administrative rule on the subject does not support DOR's argument but rather comports with the Board's understanding and interpretation of Mont. Code Ann. § 15-7-206.
78. "An agricultural valuation will be made for each one-acre area beneath each residence(s) located on [the various types of agricultural land].... Each one-acre area beneath the residence(s) on agricultural land as stated in (1) shall be appraised according to the highest productivity value of *agricultural* land." Mont. Admin. R. 42.20.655(1) (emphasis added).
79. This rule explains more clearly what the statute states unartfully: up to one acre of agricultural land with a dwelling is revalued at the highest productive agricultural value. Neither statute nor rule impose a minimum acreage requirement.

* * *

80. The record establishes that Yeagers run a bona fide agricultural operation which more than satisfies the only statutory criteria for agricultural classification: \$1,500 annual agricultural revenue.
81. DOR's promulgation of Mont. Admin. R. 42.20.601(7) and 42.20.683(12)(a) unlawfully exceeded the Legislature's intent and grant of authority by adding an acreage requirement where statute explicitly sets only one qualification: \$1,500 annual agricultural revenue.

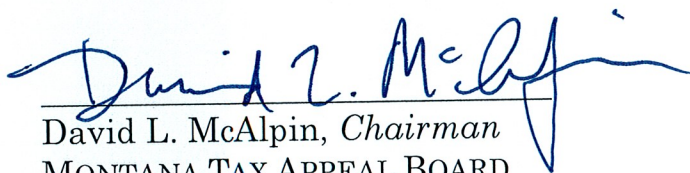
82. The rules arbitrarily deny agricultural status to orchards using modern varietals and growing techniques which despite their small size are capable of producing many times the statutory revenue requirement of \$1,500 annual agricultural revenue. We are unable to give DOR's rules full effect.
83. Neither Mont. Code Ann. § 15-7-206 nor Mont. Admin. R. 42.20.655, impose a minimum acreage requirement for agricultural classification of properties with dwellings, but rather revalue an area up to one acre on such properties, regardless of their acreage.
84. It is not lost on the Board that without agricultural classification the land in question has a much higher tax value as residential property. Until the Montana Legislature passes laws to draw that distinction in land classification, the taxpayers have met the legal requirements under the law as it is written to be classified as agricultural, and their view, and lake frontage cannot be considered.

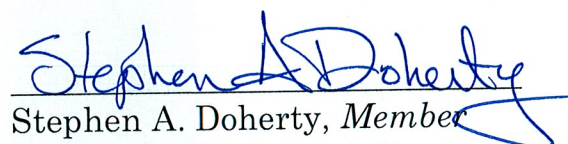
BEFORE THE MONTANA TAX APPEAL BOARD
DEPARTMENT OF REVENUE v. YEAGER FAMILY TRUST

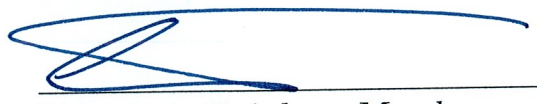
ORDER

85. DOR's appeal and complaint is **denied**.
86. DOR is **ordered** to classify as agricultural the property at 31346 N. Finley Point Rd., Polson; geocode 15-3351-18-1-02-01-0000; legal description S18 T23 N, R19 W, C.O.S. 6244, Tract 1. Because of the dwelling, one acre is to be valued at the highest productive value and production capacity of agricultural land, the remaining 0.56 acre is to be valued according to its use as a bona fide agricultural property.

Ordered March 14, 2016.


David L. McAlpin, *Chairman*
MONTANA TAX APPEAL BOARD


Stephen A. Doherty, *Member*
MONTANA TAX APPEAL BOARD


Valerie A. Balukas, *Member*
MONTANA TAX APPEAL BOARD

Notice: You are entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. Mont. Code Ann. § 15-2-303(2).

BEFORE THE MONTANA TAX APPEAL BOARD
DEPARTMENT OF REVENUE v. YEAGER FAMILY TRUST

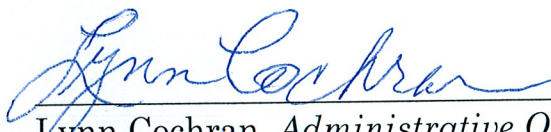
Certificate of Service

I certify that I caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order to be sent by United States Mail via Print and Mail Services Bureau of the State of Montana on 14th

of March 2016 to:

Yeager Family Trust
% Bill & Jane Yeager
6056 Malachite Ave.
Alta Loma, CA 91737

Nicholas Gochis
Montana Department of Revenue
Legal Services Office
125 N. Roberts St.
P.O. Box 7701
Helena, MT 59601-7701


Lynn Cochran, Administrative Officer
MONTANA TAX APPEAL BOARD