

From: Deb Carstensen
To: [Moore, Megan](#); [Greg Hertz](#); [Blasdel, Mark](#)
Subject: Circled proposed amendments to MCA 15-7-202 for orchards and vineyards solution
Date: Thursday, March 29, 2018 12:58:38 PM
Attachments: [Attachments 1,2,3.pdf](#)
[Attachment 4.docx](#)

Dear Ms. Moore,

Please disregard my first email dated 3/28/18. The attachments did not contain handwritten circled numbers which would lead to some confusion.

At the recent RTIC meeting on March 13, Senator Blasdel mentioned that he and Representative Hertz had met with a group of orchard and vineyard operators and discussed some proposed amendments to MCA 15-7-202 that the group presented as a sincere effort to address the issues raised in HJ 22 relating to orchards and vineyards. He also indicated that he would ask our group to forward those proposed amendments and other information to you so that you could disseminate them to the committee for its review and consideration.

To that end, attached are copies of:

1. A one-page sheet, "EXPLANATORY COMMENTS WITH SUPPORTING FACTS FOR PROPOSED CLARIFICATION AMENDMENTS TO MCA 15-7-202 FOR ORCHARDS AND VINEYARDS". The handwritten circled numbers 1. And 2.(a) and (b) on the top half of this sheet correspond to the similar numbers on the typed version of the attached statute, as described below in 2., and explain the rationale for the proposed amendments.

On the bottom half of this same sheet and under the heading "TWO ADDITIONAL COMMENTS", the comments numbered 3. and 4. address the subjects of the gross income requirement and the fact that orchards and vineyards are and will be PRODUCING bona fide ag operations and should not be confused with the 20-160 acre, non-producing ag classified parcels.

2. A typed version of MCA 15-7-202 with proposed amendatory language highlighted. The handwritten circled numbers indicate the few places in the statute that would be amended to accomplish the proposed fix along with the proposed wording to do that. These handwritten circled numbers correspond to the same numbers described above in 1.

3. The Orchard Qualification sheet, which was handed out to members of our group by the Flathead County and Lake County DOR offices at the time many of us inquired of the DOR as to what needed to be done to meet the DOR requirements for ag classification. These were the requirements we all followed as set forth by the DOR. Several of these requirements are still in the DOR rules even after the late 2016 DOR repeal of the 100 trees/120vines minimum and 5 year grace period provisions.

4. A one page sheet describing the significant typical investment costs incurred in setting up a 100 tree or 120 vine vineyard after following the DOR requirements in 3. Above and a description of the typical annual operating and maintenance activities and expenses required to meet proper fruit husbandry practices.

If there is any other information that you may need from us, please contact me. We are and will be available to explain or answer any questions you or the committee may have.

Thank you for your assistance

Kind Regards,

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1.

EXPLANATORY COMMENTS WITH SUPPORTING FACTS FOR PROPOSED CLARIFICATION AMENDMENTS TO MCA 15-7-202---PUTTING INTO LAW 100 TREE/120 VINE MINIMUMS FOR ORCHARDS/VINEYARDS

1. The existing language in the statute "markets.....gross income" makes no sense as written. To correct/clarify this, simple amendments are proposed on page 1 of MCA 15-7-202(1)(b)(i)(A), and on page 2 in MCA 15-7-202(1)(c)(i) and MCA 15-7-202(2)(a). "Receipt" of gross income is the same common and widely accepted concept in federal and state tax law.
2. (a) The proposed amendment on page 2 of MCA 15-7-202 adding a new (3)(a) puts into law the longstanding DOR rule requiring a minimum of 100 fruit trees /120 vines and a 5 year provisional period-- requirements which the DOR unilaterally repealed in late 2016 based on its erroneous interpretation of 3 MTAB cases in 2016-- Yeager, Goodspeed, and Beyer-Ward. In its opinions in the Goodspeed and Beyer-Ward cases the MTAB expressly held that under MCA 15-7-202 an immature orchard/vineyard with at least 100 trees/120 vines is entitled to provisional agricultural classification for 5 years during the startup period before being required to meet the statutory gross income requirement. Putting proposed amendment (3)(a) into statute solves the DOR's odd view of its rulemaking authority on these two issues which were not even at issue in the MTAB cases. The wording here is taken from the DOR's prior rules which were in effect until the DOR repeal in 2016. This language reinstates the substantial investment, planting and production requirements on the part of the landowner. The surviving parts of the partially repealed DOR rule, as they should, continue to set forth additional requirements on proper fruit husbandry practices such as watering, fencing, upkeep, etc. The notion of sticking a couple trees or vines in the ground and getting ag classification is not only misleading, it is false and should come to a well deserved end. This proposed amendment will put the sensible prior rule requirement back in force in black and white legislation and the DOR won't be able to repeal it.
- (b) The proposed amendment adding (3)(b) is and should be just sound public policy and is a concept borrowed from what the state of Washington does.

TWO ADDITIONAL COMMENTS

3. The \$1500 gross income standard in this statute should stay as is, according to the Committee's own research paper mandated by HJR 22 and very thoroughly done by Megan Moore for the September 2017 meeting of the Committee. This research is further supported by the laws in Washington and Oregon, well known orchard/vineyard Northwest neighbors of Montana. When asked at the December RTIC meeting, the invited panelists stated \$1500 was the reasonable number. Anything above \$1500 would be an outlier based on the evidence before the Committee. Not following that research conclusion would mean the Interim Committee and the legislature would choose to disregard and ignore its own research work which was specifically required to be done in HJR 22 itself.
4. As an aside, the "Proposed Clarification to 15-7-202" attached to the most recent Megan Moore March 2018 HJR 22 Study appears to unnecessarily combine the non-producing 20-160 acre parcels with the producing orchard/vineyard parcels under 20 acres. While it is true that both of those subjects are addressed in MCA 15-7-202, it must be noted that there is an important difference between producing parcels like orchards and vineyards with significant minimum planting requirements of 100 trees or 120 vines and the 20-160 acre parcels with no planting or production at all. For this reason, it seems the better course to deal with the orchard/vineyard issue is in a separate bill and to amend MCA 15-7-202 as described above in 1. and 2.

PROPOSED CLARIFICATION TO 15-7-202

Section 15-7-202, MCA, is amended to read:

"15-7-202. Eligibility of land for valuation as agricultural. (1) (a) Contiguous parcels of land totaling 160 acres or more under one ownership are eligible for valuation, assessment, and taxation as agricultural land each year that none of the parcels is devoted to a residential, commercial, or agricultural use.

(b) (i) Contiguous parcels of land of 20 acres or more but less than 160 acres under one ownership that are actively devoted to agricultural use are eligible for valuation, assessment, and taxation as agricultural land if:



(A) the land is used primarily for raising and marketing, as defined in subsection (1)(c), products that meet the definition of agricultural in 15-1-101 and if, except as provided in subsection ~~(3)~~(4), the owner or the owner's immediate family members, agent, employee, or lessee ~~markets~~ receives not less than \$1500 in annual gross income from the raising of agricultural products produced by the land; or

(B) the parcels would have met the qualification set out in subsection (1)(b)(i)(A) were it not for independent, intervening causes of production failure beyond the control of the producer or a marketing delay for economic advantage, in which case proof of qualification in a prior year will suffice.

(ii) Noncontiguous parcels of land that meet the income requirement of subsection (1)(b)(i) are eligible for valuation, assessment, and taxation as agricultural land under subsection (1)(b)(i) if:

(A) the land is an integral part of a bona fide agricultural operation undertaken by the persons set forth in subsection (1)(b)(i) as defined in this section; and

(B) the land is not devoted to a residential, commercial, or industrial use.

(iii) Parcels of land that are a part of a family-operated farm, family corporation, family partnership, sole proprietorship, or family trust that is involved in Montana agricultural production consisting of 20 acres or more but less than 160 acres that do not meet the income requirement of subsection (1)(b)(i) may also be valued, assessed and taxed as agricultural land if the owner:

(A) applies to the department requesting classification of the parcel as agricultural;

(B) verifies that the parcel of land is greater than 20 acres but less than 160 acres and that the parcel is located within 15 air miles of the family-operated farming entity referred to in subsection (1)(b)(iii)(C); and

(C) verifies that:

(I) the owner of the parcel is involved in agricultural production by submitting proof that 51% or more of the owner's Montana annual gross income is derived from agricultural production; and

(II) property taxes on the property are paid by a family corporation, family partnership, sole proprietorship, or family trust that is involved in Montana agricultural production and 51% of the entity's Montana annual gross income is derived from agricultural production; or

(III) the owner is a shareholder, partner, owner, or member of the family corporation, family partnership, sole proprietorship, or family trust that is involved in Montana agricultural production and 51% of the person's or entity's Montana annual gross income is derived from agricultural production.

(c) For the purposes of this subsection (1):

① (i) "marketing" means the selling of or receipt of gross income from agricultural products produced by the land and includes but is not limited to:

(A) rental or lease of the land as long as the land is actively used for grazing livestock or for other agricultural purposes; and

(B) rental payments made under the federal conservation reserve program or a successor to that program;

(ii) land that is devoted to residential use or that is used for agricultural buildings and is included in or is contiguous to land under the same ownership that is classified as agricultural land, other than nonqualified agricultural land described in **15-6-133(1)(c)**, must be classified as agricultural land, and the land must be valued as provided in **15-7-206**.

(2) Contiguous or noncontiguous parcels of land totaling less than 20 acres under one ownership that are actively devoted to agricultural use are eligible for valuation, assessment, and taxation as agricultural each year that the parcels meet any of the following qualifications:

① (a) except as provided in subsections (3) and (4), the parcels produce and the owner or the owner's agent, employee, or lessee ~~markets~~ receives not less than \$1500 in annual gross income from the raising of agricultural products as defined in **15-1-101**:

(b) the parcels would have met the qualification set out in subsection (2)(a) were it not for independent, intervening causes of production failure beyond the control of the producer or marketing delay for economic advantage, in which case proof of qualification in a prior year will suffice; or

(c) in a prior year, the parcels totaled 20 acres or more and qualified as agricultural land under this section, but the number of acres was reduced to less than 20 acres for a public use described in **70-20-102** by the federal government, the state, a county, or a municipality, and since that reduction in acres, the parcels have not been further divided.

(3) For parcels described in (2):

27(a) (a) If those parcels are fruit orchards or vineyards they must contain a minimum of 100 live fruit trees or 120 live vines and they shall be granted a provisional agricultural classification for 5 years during the startup before being required to meet the annual gross income requirement of (2)(a).

27(b) (b) gross income includes the wholesale value of agricultural products donated to nonprofit food banks or feeding programs.

~~(3)–(4)~~ For grazing land to be eligible for classification as agricultural land under subsections (1)(b) and (2), the land must be capable of sustaining a minimum number of animal unit months of carrying capacity. The minimum number of animal unit months of carrying capacity must equate to \$1500 in

annual gross income as determined by the Montana state university -Bozeman department of agriculture economics and economics.

~~(4)~~ (5) The grazing on land by a horse or other animals kept as a hobby and not as a part of a bona fide agricultural enterprise is not considered a bona fide agricultural operation.

~~(5)~~ (6) The department may not classify land less than 160 acres as agricultural unless the owner has applied to have land classified as agricultural land. Land of 20 acres or more but less than 160 acres for which no application for agricultural classification has been made is valued as provided in **15-6-133(1)(c)** and is taxed as provided in **15-6-133(3)**. If land has been valued, assessed, and taxed as agricultural land in any year, it must continue to be valued, assessed, and taxed as agricultural until the department reclassifies the property. A reclassification does not mean revaluation pursuant to **15-7-111**.

~~(6)~~ (7) For the purposes of this part, growing timber is not an agricultural use.”

History: En. Sec. 4, Ch. 512, L. 1973; amd. Sec. 2, Ch. 56, L. 1974; amd. Sec. 1, Ch. 457, L. 1975; R.C.M. 1947, 84-437.2; amd. Sec. 1, Ch. 608, L. 1979; amd. Sec. 16, Ch. 693, L. 1979; amd. Sec. 4, Ch. 681, L. 1985; amd. Sec. 1, Ch. 699, L. 1985; amd. Sec. 1, Ch. 35, Sp. L. June 1986; amd. Sec. 1, Ch. 590, L. 1991; amd. Sec. 2, Ch. 705, L. 1991; amd. Sec. 16, Ch. 773, L. 1991; amd. Sec. 3, Ch. 627, L. 1993; amd. Sec. 1, Ch. 474, L. 1995; amd. Sec. 2, Ch. 485, L. 1995; amd. Sec. 2, Ch. 376, L. 2005; amd. Sec. 1, Ch. 543, L. 2005; amd. Sec. 1, Ch. 478, L. 2007; amd. Sec.1, Ch. 510, L. 2007; amd. Sec. 1, Ch. 9, L. 2016.

4. Expenses incurred to establish and maintain vineyards and orchards



Diving Dog Vineyard Set up and annual operating and maintenance activities and expenses required meeting proper fruit husbandry practices. With guidance from Lake and Flathead County DOR, we moved forward with extensive investment into our vineyard in 2013 (\$34,298), add labor: \$12/hr. We do 98% of the work ourselves.

Sweat Equity: 250 hrs. x \$12.00 = \$3,000 plus \$34,298 = **\$37,298** for installation. We also purchased a tractor from a local dealer, adding \$21,000. **Total: \$58,298.**

Annual upkeep: Pruning, harvesting, marketing, cleaning, repairs and general maintenance: \$6,000/8,000. MT Grape Grower's membership and annual conference fees and travel expenses \$150-300.

Typical costs to establish and maintain a vineyard:

Grapes require trellising, about \$10-15,000/acre; add site prep, installation of an appropriate irrigation system, deer/bear fence, about \$15- 30,000/acre more. Then add annual costs of 750 hours of labor/acre, another \$10-15,000 per year every year plus fertilizer and chemicals. Add a tractor and spraying equipment; another \$20-60,000..

Vineyard costs vary. Experts estimate that installation costs for a small vineyard can be anywhere from \$35,000 to \$45,000 an acre -- and frequently more. <https://www.inc.com/ss/8-steps-to-owning-your-own-vineyard>

Growing Grapes by the Numbers Report details the costs of establishing a vineyard and producing wine grapes. <https://www.winesandvines.com/news/article/105157/Growing-Grapes-by-theNumbers>

Orchard Costs



Establishing an orchard involves logging, soil preparation, purchase and planting trees, fencing, pollinizers, tools, equipment and irrigating. Costs vary according to crop, however \$26,000 to \$32,000 is a fair range.

Yearly Maintenance, harvesting, storage and marketing fruit per orchard: Fertilizing, spraying for disease/insects, pruning, weed management, labor, tree replacement, pest control runs from \$7,000 - \$10,000.

Resources: <http://msuextension.org/publications/AgandNaturalResources/EB0222.pdf>

<http://cru.cahe.wsu.edu/CEPublications/FS141E/FS141E.pdf>

Even small agriculture can have large expenses depending on the operation. Bottom line: Growers that produce income out of the ground, a renewable natural resource, deserve to have a fair agricultural exemption. During a 5-year establishment period have growers document annually: setting up the Ag operation infrastructure, planting, weed and pest control, and progress establishing viable crops for sale. Growers need to use industry acceptable standards of crop production, not just plant it and see if it will grow.

A significant part of the above costs relate to carefully observing “accepted fruit husbandry practices”, which all serious orchard/vineyard owners follow.

And speaking of accepted fruit husbandry practices, there are at least two MTAB cases, the Sheni LLC case in 2016 and the Munoz case in 2005, both of which upheld Lake County Tax Appeal Board denials of ag classifications in part because the landowners failed to follow “accepted fruit husbandry practices” as required by the DOR. The property owner’s failures were detailed in the MTAB opinions and specifically included improper or inappropriate fencing, irrigation, weed or pest control, and improper use of a herbicide. These cases can be found on the MTAB website under Recent Decisions and the Agricultural land tab.

So if our proposed amendments are put into law and we return to the requirement where 100 tree or 120 vine minimums are in place as has been the case for decades, the idea that people can just plant a couple trees and get ag classification without any further ongoing requirements for ag classification clearly will be at an end.