Comments on 2017 HB's 29, 28, 27, and 75 which will be discussed at RTIC May 2018 meeting

In our opinion, as the RTI is in the process of reviewing the four failed bills (HB 29, HB 28, HB 27, and HB 75) from last session, some important background factual information should be kept in mind. The first three of these bills are of particular consequence for us as owners of small bona fide agricultural operations involving vineyards and orchards. In addition, any review should also include a reading of the 3 important MTAB cases---Goodspeed, Beyer-Ward, and Yeager---which were decided just prior to the time when the concepts of these bills were first brought forth to be discussed at the June 2016 RTIC meeting and later at subsequent meetings before the 2017 session.

These cases are found at the MTAB website under "RECENT DECISIONS" and then "AGRICULTURAL LAND". In essence, these cases held that the DOR overstepped its constitutional role as an administrative agency when it revoked the agricultural classification of various small orchards and vineyards based on its newly minted (2014) rule requiring, contrary to Montana law, a minimum acreage for such agricultural classification. None of the cases was appealed by the DOR.

Each of the bills will be discussed below individually.

1. HB 29, imposing an acreage minimum for orchard/vineyard ag classification died in Senate Taxation last session after passing the House. It did so in part because of the proponents' questionable statements in describing the bill as a "straightforward" and "cleanup" bill that would simply put back in place what the DOR had in its rules "for decades". The RTIC back in 2016 prior to the 2017 session was provided this same HB 29 story and most of the present RTIC members now may remember that same story.

As is pointed out below, there was readily available and previously done (2001) research from the 2001 RTIC clearly showing there was no acreage limitation in Montana law and thus, any attempt by the DOR to create a rule on minimum acreage would be unlawful. Even IF it had been "in the DOR rule for decades" it was still illegal as an improper exercise of legislative power by an administrative agency as MTAB clearly pointed out. And further, again even IF it was in the DOR rules, it certainly wasn't enforced or the under the minimum acreage orchard/vineyard properties that received ag classification in Lake and Flathead Counties over the years never would have been granted ag classification by the DOR in the first place. And who gets hurt by these supposed housekeeping like rulemakings and proposed legislation, such as HB 29 imposing an acreage minimum? (Bear in mind that the Fiscal Note to HB 29 said there would be only about 60 parcels in the whole state that would be affected.)

It was on these representations to the 2016 RTIC--- after the MTAB cases were decided in the Spring of 2016---- that the building blocks for the various 2017 bills directed at small orchards/vineyards were put in place. Any discussion or review of these bills should be framed with an understanding of this factual background. All of these facts are supported in the records before the MTAB, last session's Interim proceedings, and testimony of individuals in tax appeals or before the legislative committees---including individuals who were unfairly treated by the DOR when it revoked their ag classification after guiding these very same individuals to obtain that ag classification. That's who gets hurt---small people, Montanans, retirees, military vets, etc. -- as the testimony in this RTIC, at MTAB, and in Senate Taxation

shows. (Because we were unaware of these proposed bills until just days prior to the Senate Taxation hearing, we did not present testimony on these subjects prior to that hearing)

In finding against DOR in each of the above cases, the MTAB ruled that the only lawful requirement for ag qualification for bona fide agricultural orchard/vineyard operations is agricultural revenue. Instead of being a mere "simple" bill complying with the 2016 MTAB decisions, the proponents---explaining it as a "cleanup" bill to return to what was done for decades---sought to use HB 29 to overturn the MTAB decisions. Of interest, these decisions specifically criticized the DOR for stating the "REASONABLE NECESSITY" for the rule in the Administrative Register Notice was to "more clearly define 'bona fide agricultural operation' " relating to ag classification. DOR actually changed the definition. In reality, DOR tried to do what only the legislature can do and it was stopped only because some "small people" stood up in opposition starting at the Lake County Tax Appeal Board and ending at the MTAB.

What is surprising in this discussion related to the 2014 rulemaking and HB 29 is that a November 2001 Legislative Services Division research paper done for the 2001-2002 RTIC by Leanne Kurtz, "Agricultural Land Tax" clearly shows the legislature provided that there was no minimum acreage requirement in Montana law for ag classification. It should be a safe assumption that the DOR was or should have been aware of this research. How the DOR concluded that it could create an acreage requirement after the legislature had set no acreage requirement, and then impose it by revoking ag classification for people it had guided to ag classification in the first place --- is hard to understand and even harder to explain. But that is what happened and is why we are here today still trying to clean up the mess that was created.

An arbitrary minimum acreage requirement such as in the 2014 rulemaking and in HB 29 is both unfair and unnecessary. It is unfair because we have made considerable investments of hard work, time and money to install and maintain our small orchards and vineyards based on the express written and oral representations of the State of Montana through the DOR that would now be reneged upon. Those representations were that our lands would qualify for ag classification if we put in 100 trees or 120 vines with proper fencing, irrigation systems, and ongoing maintenance and if the land produced the required agricultural revenue after allowing 5 years for the crops to biologically mature to a productive state. That is what we needed to have a "bona fide agricultural operation" as defined in Montana law. We were not told there was a minimum acreage requirement. Now, because of another rulemaking in late 2016, DOR also has revoked long-standing rules on 100 tree and 120 vine minimums and a 5 year provisional ag classification to allow trees or vines to mature before reaching production potential. By its own unnecessary actions, DOR created the situation where now someone can claim "all you need is a few trees in your backyard". This needs to be fixed.

It is unnecessary because of our proposal to amend 15-7-202 MCA to reinstate the long-standing rules for bona fide agricultural operation that DOR chose to withdraw after losing the 3 MTAB cases. No one should be allowed to stick a few trees or vines in the ground and claim agricultural classification or not properly maintain their orchard or vineyard. Our proposal which was originally discussed with Senator Blasdel and Representative Hertz on March 9, then discussed by Senator Blasdel at the March 13 RTIC meeting, and then sent to Megan Moore in a March 29 e-mail which she then distributed to the RTIC members cleans up this mess now and for the future.

2. HB 28, the bill to raise the statutory minimum gross income requirement for ag classification to $3500, went nowhere last session after it was approved as a bill draft in last session's RTIC without any supporting factual research. That research into neighboring states'

laws has now been performed as specifically required by HJ 22. Megan Moore's recent research paper presented to the December 2017 RTIC meeting describes the research results which looked at neighboring states and shows that $1500 is in line with our neighboring states. In addition, our research shows $1500 is in accord with the laws of the orchard/ vineyard states of Oregon and Washington. It seems illogical and unreasonable for a legislative committee at the DOR's behest to first put a $3500 number in a bill without any background research, and then, after the bill failed, support passage of a legislative study bill that required research of neighboring states be performed to inform the issue, and then ignore that very research by still supporting the higher number. The $1500 in current law should stay as is.

3. HB 27, a bill seeking to impose non-ag classification on an acre under a farmstead met a Fiscal Note roadblock which should be repeated (or avoided if not brought forth), if attempted again. It would likely be an eye-opening event to large and small agricultural operations across the state. The potential legal and tax appeal challenges to a bill like this seem obvious. Legislators, particularly those in heavy agricultural areas, presumably will see this as a bad bill. Clear constitutional issues are present if just the small ag operations like orchards or vineyards (or even the so-called "rich Californians") are attempted to be punitively singled out for this treatment. This issue is beyond the scope of our group's main issues that we are solely focused on as we discussed and set forth in the 3/29 e-mail to Megan Moore that was distributed to the RTIC.

4. HB 75, the "non-qualified" 20-160 acre bill is not our issue because we are producing bona fide ag operations under the law. This is probably one of the issues that the DOR and the large ag lobbyists indicated is part of the discussions going on between them.

On this latter point, it continues to be troubling that the DOR has never made even the slightest effort, in spite of testifying to the contrary, to involve our group on how to solve the mess it created and for which it was properly criticized by the MTAB and others for its unfair treatment of small orchards and vineyards in our area. Having said this, we reiterate our intention to work with the DOR or anyone else to provide a workable solution that protects, enhances, and develops all agriculture, including small agriculture, in Montana. That is why we have proposed several amendments to 15-7-202 MCA that will be discussed in the HJ 22 RTIC agenda item on May 3.