

County. MFBF is a Montana nonprofit corporation, which is an independent, non-governmental, voluntary organization which provides a voice for agricultural producers at all levels. MFBF's members own agricultural property and pay taxes throughout Montana. Montax is a Montana public benefit corporation, formed by Montana taxpayers, in part, to promote a healthy tax climate for both individuals and businesses, including agricultural business.

The Department is charged with reappraising agricultural property, designated as Class 3 property, on a cyclical basis. *See* § 15-7-111, MCA. The first year of the current six-year appraisal cycle was 2009. Pursuant to § 15-7-111, MCA, increases in value as a result of reappraisal must be phased in over the appraisal cycle at the rate of 16.66% per year. The Department is required to calculate the phase-in amounts by comparing the newly reappraised value to the value established for 2002, or the Value Before Reappraisal ("VBR").

The most recent reappraisal process resulted in reclassification among various classes of agricultural property, as well as changes in productivity values within the various agricultural classes. However, the Department failed to correctly calculate the VBR for many, if not all, agricultural properties. As a result, for 2009, the Department's assessments do not comply with § 15-7-111, MCA.

The Department has acknowledged at least some of the errors at issue in this lawsuit. (MDOR's Answer, p. 6, para. 50) The Department answered that it "will correct for tax year 2009 the VBR for taxpayers that experienced productivity-only changes if those taxpayers filed timely AB-26s, or appeals for tax year 2009. (MDOR's Answer, p. 3, para. 19) The Department also stated it will correct the errors for other taxpayers in 2010. (MDOR's Answer, p. 3, para. 19) The Department has refused to correct its acknowledged error in 2009 for taxpayers who failed to seek an informal review or for phase-in errors related to class changes within the agricultural classification.

On February 12, 2010, pursuant to § 15-1-406, MCA, Petitioners filed their declaratory judgment action seeking a determination that the Department's failure to follow Montana law in calculating correct phase-in amounts for agricultural properties resulted in erroneous taxable values for Lucas, Lucas Ranch, and all similarly situated agricultural landowners in Montana. *See* Petition for Declaratory Judgment and Writ of Mandate, ¶ 31. Petitioners also requested the Court to issue a writ of mandate requiring the Department to correct the errors. Pursuant to § 15-8-601, MCA, the Department is required to correct erroneous assessments it discovers. Unless corrected, the Department's error will result in the perpetuation of erroneous phase-in values and significantly higher tax assessments for taxpayers throughout the remainder of the reappraisal cycle.

The Department's Director has publicly stated that the Department's erroneous phase-in calculations improperly increased the 2009 assessments for at least 27,200 agricultural producers. Of the 27,200 agriculture producers affected, only approximately 2,000 timely filed an AB-26 request for informal review. Petitioners do not have access to the actual number of parcels or owners affected at this time, but believe that discovery in this matter may reveal a higher number of affected taxpayers that previously acknowledged by the Department.

ARGUMENT

Petitioners filed the declaratory judgment action pursuant to § 15-1-406(1), MCA, the exclusive method to obtain a judgment challenging a tax assessment procedures of the Department. § 15-1-406(5), MCA. As a matter of law, the Court's decision on Petitioners' declaratory judgment action "applies to all **similarly situated** taxpayers." § 15-1-406(2), MCA (emphasis added). Accordingly, pursuant to § 15-1-407, MCA, Petitioners seek class certification for all agricultural landowners affected by the Department's error in calculating

correct phase-in amounts for agricultural properties. Petitioners elect to follow the procedures required by Rule 23, M.R.Civ.P., in seeking certification. § 15-1-407(2), MCA. The members of the class will be all agricultural landowners for whom the Department 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. § 15-1-407(2)(a), MCA.

I. THE FOUR PREREQUISITES FOR CLASS CERTIFICATION REQUIRED BY RULE 23(a), M.R.CIV.P. ARE SATISFIED.

In order for the Court to certify a class action, the moving party must demonstrate the four prerequisites of Rule 23(a), M.R.Civ.P., are satisfied. In addition, the moving party must show that one of the requirements of Rule 23(b), M.R.Civ.P., is met. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Because Rule 23(a), M.R.Civ.P., is identical to Rule 23 of the Federal Rules of Civil Procedure, the Montana Supreme Court has determined that federal cases interpreting the Rule are instructive. *McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993). Rule 23(a), M.R.Civ.P., provides:

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.

The moving party must include a statement of basic facts that support the four requirements, not a “mere repetition” of the Rule. *Doninger v. Pacific Northwest Bell, Inc.*, 546 F.2d 1304, 1309 (9th Cir. 1977).

1. Numerosity is satisfied because joinder of all taxpaying Montana agricultural landowners is impracticable based of the sheer number and statewide implication.

Joinder of all members is impracticable because the sheer number of similarly situated taxpayers is large. Although the absolute number of class members is not the sole determining factor, courts often find numerosity exists where classes are clearly very large. *See Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982). In *McDonald*, the Supreme Court upheld the lower court's finding that 12,000 to 13,000 water "hookups" serving 35,360 persons was sufficient to satisfy the numerosity element. *McDonald*, 216 Mont. at 400, 862 P.2d at 1155.

The Department has acknowledged the assessments at issue affect at least 27,200 agricultural producers across the state. The sheer number of putative class members supports a finding that joinder is impracticable.

In addition to considering the potential class size, courts consider other elements, such as the geographical diversity of the class and the ability of the individual claimants to institute separate suits. *See Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (D.C.Cal. 1996). Here, the impact of the errors in the assessment spans the entire State of Montana. Individual taxpayers may be precluded from exercising their legal rights because the potential refund is so small that instituting a separate suit would be too costly. In answering the Petition, the Department admits that "Petitioners' resulting costs of litigation will likely far exceed the limited financial benefit Petitioners will receive if successful." *See Answer to Petition for Declaratory Judgment and Writ of Mandate*, ¶ 44. Therefore, Petitioners respectfully request the Court to find that the numerosity element is satisfied.

2. Commonality is satisfied because the assessment of agriculture land is the same for all agricultural landowners.

The commonality test is less rigorous than the other elements and is met if there is a “common core of salient facts” coupled with different legal theories or if shared legal theories are coupled with different factual predicates. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “Indeed, for the commonality requirement to be met, there must only be one single issue common to the proposed class.” *Haley*, 169 F.R.D. at 648. In this case, the commonality test is satisfied because all the members of the putative class have suffered the same injury in the form of erroneous taxable values. Further, the same statute and rules govern the correct calculations by the Department. As a result, the facts and governing law are common to the claims of all Montana agricultural landowners. Therefore, Petitioners respectfully request the Court to find that the commonality element is satisfied.

3. Typicality is satisfied because the erroneous application of phased-in taxable values for Montana agricultural land are the same claims that would be sought by other class members.

The claims and defenses of the Petitioners are typical of the claims and defenses of the class. The representative’s claims for the class are typical if they are “reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1120.

The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class. In this respect, the typicality prerequisite is closely related to both the 23(a)(2) requirement that there be common questions of law or fact and the 23(a)(4) requirement that the named plaintiff adequately protect the interests of the class.

McDonald, 261 Mont. at 402, 862 P.2d at 1156, quoting *Jordan*, 669 F.2d at 1321. A plaintiff’s claim is typical of the class “if it stems from the same *event, practice, or course of conduct* that

forms the class claim and is based upon the same legal or remedial theory.” *Id.* (emphasis in original). Moreover, even if some class members’ injuries are less or greater than the injuries suffered by the plaintiffs, typicality will not be destroyed. *See Haley*, 169 F.R.D. at 649. The claims brought by Petitioners for the erroneous application of phased-in taxable values for Montana agricultural land are typical of the claims that would be sought by other class members. It is likely that the exact or similar claim has been or will be brought by potential class members. Therefore, Petitioners respectfully request the Court to find that the typicality element is satisfied.

4. Adequacy of representation is satisfied because Petitioners’ attorney is qualified, experienced and there are no known conflicts.

The “adequacy of representation” requirement is met if the named representative’s attorney is “qualified, experienced, and generally capable to conduct the litigation and the named representative’s interests are not antagonistic to the interests of the class.” *McDonald*, 261 Mont. at 403, 862 P.2d at 1156, *quoting Jordan*, 669 F.2d at 1323; *In re Mego Fin. Corp. Sec. Litig. v. Nadler*, 213 F.3d 454, 462 (9th Cir. 2000). Petitioners’ attorney, Michael Green, is qualified and experienced. Mr. Green’s law practice is specialized on Montana tax law. In determining whether any conflicts of interest exist, courts have looked at whether each plaintiff has the same underlying problem and whether variations of laws will result in different remedies. *See Hanlon*, 150 F.3d at 1020. In this case, all agricultural landowners in Montana are adversely affected by the erroneous application of phased-in taxable values. There is no variation of law because only Montana state law applies.

Taken together, Petitioners provide adequate representation of the interests of all class members. Therefore, Petitioners respectfully request the Court to find that the adequacy of representation element is satisfied.

II. THE DEPARTMENT HAS REFUSED TO CORRECT THE ERRORS FOR ALL AGRICULTURAL TAXPAYERS.

In addition to satisfying the Rule 23(a) prerequisites, a party seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Nadler*, 213 F.3d at 462. Rule 23(b)(2) states, “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.”

M.R.Civ.P. 23(b)(2).

The declaratory relief sought in the Petition falls within Rule 26(b)(2), M.R.Civ.P., because the relief sought, if granted, will apply to all similarly situated taxpayers. *See* § 15-1-406(2), MCA. The Department’s acknowledgement of its errors and public statements regarding the scope of affected taxpayers support this action. The Department’s refusal to correct the 2009 Assessments for all affected taxpayers falls squarely within Rule 23(b)(2), M.R.Civ.P. Pursuant to § 15-8-601, MCA, the Department is required to correct erroneous assessments it discovers. Unless corrected, the Department’s error will cause all the members of the class to suffer erroneous and inflated tax assessments for 2009, and possibly future years. Therefore, Petitioners respectfully request the Court to find that Rule 23(b)(2), M.R.Civ.P. has been established.

III. PETITIONERS REQUEST THE COURT APPROVE THEIR PLAN TO NOTIFY POTENTIAL CLASS MEMBERS AS PROVIDED BY § 15-1-407(3), MCA.

Notice to class members is not required under Rule 23(b)(2), M.R.Civ.P. *See* M.R.Civ.P. 23(c)(2); *Pate v. U.S.*, 328 F. Supp. 2d 62 (D.D.C. 2004). However, § 15-1-407(3), MCA, permits a party bringing an action under § 15-1-406, MCA to give notice.

The notice requirements are established by statute. The notice must state that an action has been brought. MCA § 15-1-407(3)(a). The notice must advise each similarly situated taxpayer that:

- (i.) the court will exclude the taxpayer from the class if the taxpayer so requests by a specific date;
- (ii.) the judgment, whether favorable or not, will include all similarly situated taxpayers who do not request to be excluded; and
- (iii.) any similarly situated taxpayer who does not request exclusion may, if the taxpayer desires, enter an appearance.

Id. The notice must also be “published at least once each week for four consecutive weeks in a newspaper of general circulation published in the county where the action is commenced and in other counties within the jurisdiction of the taxing authority.” *Id.* Since the erroneous phase-in for agricultural properties resulted in erroneous taxable values tax for the all agricultural landowners, Petitioners intend to publish the required formal legal notice in all the daily newspapers in Montana. Additionally, Petitioners may also identify appropriate weekly papers serving counties with significant numbers of affected taxpayers as identified through the Department’s discovery responses.

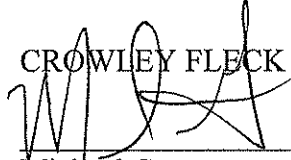
In the event the Court certifies this matter as a class action, Petitioners request the Court approve Petitioners plan to provide notice to potential class members as provided by § 15-1-407(3), MCA, and approve Petitioners’ proposed notice, which is attached as Exhibit A. The Court’s authority to grant Petitioners’ request is found at Rule 23(d), M.R.Civ.P.

CONCLUSION

Petitioners’ respectfully request the Court to certify the pending matter as a class action. As set forth above, Petitioners have demonstrated the pending action meets the four prerequisites of Rule 23(a), M.R.Civ.P., and the class action is maintainable under Rule 23(b)(2), M.R.Civ.P.

In the event the Court certifies this matter as a class action, Petitioners request the Court approve the notice to be provided to potential class members as provided by § 15-1-407(3), MCA.

Dated this 9th day of April, 2010.

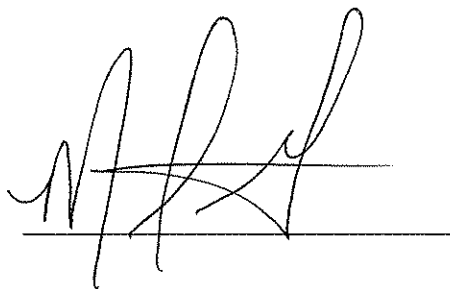
CROWLEY FLECK PLLP


Michael Green
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Michael Green, one of the attorneys for the law firm of Crowley Fleck PLLP hereby certify that on the 9th day of April, 2010, I had hand delivered and electronically mailed, a true and correct copy of the foregoing document to the following:

C.A. Daw
Michele Crepeau
Montana Department of Revenue
Legal Services Office
125 N. Roberts
P.O Box 5805
Helena, MT 59604-5805

A handwritten signature in black ink, appearing to read "M. Green", is written over a horizontal line. The signature is stylized and cursive.

MONTANA FOURTEENTH JUDICIAL DISTRICT COURT, MEAGHER COUNTY

CHARLES B. LUCAS; LUCAS RANCH,)
INC.; MONTANA FARM BUREAU)
FEDERATION; and THE MONTANA) Case No. DV-10-02
TAXPAYERS' ASSOCIATION,)
)
Petitioners,)
)
vs.)
)
MONTANA DEPARTMENT)
OF REVENUE,)
)
Respondent.)

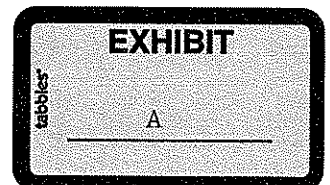
PUBLISHED NOTICE OF CLASS ACTION

**THIS NOTICE MAY AFFECT YOUR RIGHTS.
PLEASE READ CAREFULLY.**

To: Owners of agricultural land designated as Class 3 property pursuant to § 15-6-133, MCA and who paid any portion of their first or second half 2009 property tax payments under protest

Your rights may be affected by a lawsuit pending in this Court, Montana Fourteenth Judicial District Court, Civil Cause No. DV-10-02.

Charles B. Lucas, Lucas Ranch, Inc., Montana Farm Bureau Federation, and The Montana Taxpayers' Association (hereinafter "Class Representatives"), have filed a petition for a declaratory judgment seeking an order from the Court requiring the Montana Department of Revenue ("Department") to correctly calculate the assessments of agricultural lands owned by



Charles B. Lucas, Lucas Ranch, Inc., and all similarly situated agricultural landowners. The agricultural land at issue is Class 3 property. *See* § 15-7-111, MCA. The Class Representatives also seek a writ of mandate from the Court ordering the Department to comply with § 15-8-601, MCA and correct erroneous assessment for tax year 2009 for all agricultural landowners in Montana.

The Class Representatives assert the Department is charged with reappraising agricultural property, designated as Class 3 property, on a cyclical basis. The Department is required to calculate the phase-in amounts by comparing the newly reappraised value to the value established for 2002. The first year of the current six-year appraisal cycle was 2009. Pursuant to § 15-7-111, MCA, increases in value as a result of reappraisal must be phased in over the appraisal cycle at the rate of 16.66% per year. For 2009, the Class Representatives assert the Department failed to appropriately phase in the increased values. The Department's failure resulted in the Department certifying improper taxable values for agricultural lands to Montana's counties for the 2009 tax year.

The Court has not ruled on the merits of the Class Representatives' charges or on the denials and other defenses made by the Department.

Class Action Ruling

The Court has ruled this lawsuit may be maintained as a claim on behalf of a Class consisting of all persons who are a "similarly situated taxpayer" as the Class Representatives. "Similarly situated taxpayer" is defined as an individual, corporation, partnership or other entity who:

1. Owns agricultural land in Montana classified as Class 3 property pursuant to § 15-6-133, MCA;

and

2. Paid any portion of their first or second half 2009 Montana property tax payment under protest as provided in § 15-1-406(3), MCA.

See MCA § 15-1-407(2)(a).

Similarly Situated Taxpayer

This notice is being published because of the vast number of “similarly situated taxpayers” affected by the Class Representatives allegations. If you are (or may be) a “similarly situated taxpayer,” the judgment, whether favorable or not, will include all similarly situated taxpayers who do not request to be excluded. Any “similarly situated taxpayer” who does not request exclusion may, if the taxpayer desires, enter an appearance. You may enter your appearance by filing an appropriate pleading with the Court.

Exclusion of Class Members

The court will exclude the taxpayer from the class if the taxpayer in writing requests to be excluded by _____, 2010. The request for exclusion should be sent to Class Counsel and must be postmarked on or before _____, 2010. A sample “Request for Exclusion (Opt Out)” form can be found on the MFBF (www.mfbf.org) and Montax (www.montax.org) websites, or you may complete a letter to Class Counsel requesting exclusion from the class.

DATED: ____ day of _____, 2010

Donna Morris, Clerk of District Court
Montana Fourteenth Judicial District Court
Meagher County, Montana