BOARD OF ASSESSMENT APPEALS, **STATE OF COLORADO** 1313 Sherman Street, Room 315 Denver, Colorado 80203	
Petitioners: **VISTA PACIFICA LLC, JANET WILSON and RANDALL WILSON,** v. Respondent: **LA PLATA COUNTY BOARD OF EQUALIZATION.**	**Docket Nos.: 76667, 76670**
FINAL AGENCY ORDER	

This classification appeal was heard by the Board of Assessment Appeals ("the Board") on August 18, 2020, Debra Baumbach and Amy J. Williams, presiding. Petitioners were represented by Steven T. Nolan, Esq. Respondent was represented by Kathleen Moore, Esq. Petitioners are protesting the 2019 classification of the subject property as vacant land, and ask the Board to reclassify it as agricultural.

EXHIBITS

Petitioners' Exhibits 2, 15, 16, 17, 18, 19, 20, 23, 24, 25, 32 and 51 were admitted into evidence. Respondent's Exhibits A (excepting the Lease Agreement dated April 26, 2018), D and E were also admitted.

STIPULATED FACTS and PROCEDURAL MATTERS

Given the similarity of facts and issues, the parties agreed to consolidate Docket Nos. 76667 and 76670 into one hearing.

DESCRIPTION OF THE SUBJECT PROPERTY

This appeal concerns two adjacent parcels: an approximately 150-acre property, consisting of 13 lots, owned by Vista Pacifica LLC, which LLC is owned by Janet and Randall Wilson ("the Vista Pacifica Property"). A smaller, adjoining 36-acre parcel is owned by Janet and Randall Wilson, and was sometimes referred to in the hearing as B1R ("the Wilson Parcel"). The Board will refer to the parcels in a combined fashion as the "subject property."

Address: 700 County Road 302, Durango, CO
County Schedule Nos.:

Owner: Wilson, Janet and Randall - R428501

Owner: Vista Pacifica, LLC - R428899; R428901; R428902; R428905; R428906; R428907; R428911; R428891; R428893; R432980; R432981; R432982; R432983; R428900

The subject property consists of fifteen parcel numbers, which total approximately 186 acres. The fifteen parcels are all contiguous, and while legally divided into fifteen separately saleable lots, they are owned and managed collectively. The subject property's actual value, as assigned by the County Board of Equalization ("CBOE"), are:

CBOE's Assigned Values:
R428501 - $283,340

R428899 – $41,590
R428901 – $42,570
R428902 – $37,680
R428905 – $42,080
R428906 – $45,010
R428907 – $59,180
R428911 – $44,520
R428891 – $42,570
R428893 – $44,520
R432980 – $59,910
R432981 – $50,630
R432982 – $40,620
R432983 – $50,630
R428900 – $39,640

BURDEN OF PROOF AND STANDARD OF REVIEW

In a proceeding before this Board, the taxpayer has the burden of proof to establish, by a preponderance of the evidence, that the assessor's valuation or classification is incorrect. *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005). Proof by a preponderance of the evidence means that the evidence of a circumstance or occurrence preponderates over, or outweighs, the evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Comm'n*, 302 P.3d 241, 246 (Colo. 2013). The evaluation of the credibility of the witnesses and the weight, probative value, and sufficiency of all of the evidence are matters solely within the fact-finding province of this Board, whose decisions in such matters may not be displaced on appeal by a reviewing court. *Gyurman v. Weld Cty. Bd. of Equalization*, 851 P.2d 307, 310 (Colo. App. 1993). The determination of the degree of comparability of land sales and the weight to be given to the various physical characteristics of the property are questions of fact for the Board to decide. *Golden Gate Dev. Co. v. Gilpin Cty. Bd. of Equalization*, 856 P.2d 72, 73 (Colo. App. 1993).

The Board reviews every case de novo. *See Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990). In general, the de novo proceeding before the Board "is commonly understood as a new trial of an entire controversy." *Sampson*, 105 P. 3d at 203. Thus, any evidence that was presented or could have been presented in the CBOE proceeding may be presented to this Board for a new and separate determination. *Id*. However, the Board may not impose a valuation on the property in excess of that set by the CBOE. § 39-8-108(5)(a), C.R.S.

APPLICABLE LAW

Statewide, agricultural classification for property tax purposes is governed by section 39-1-102(1.6), C.R.S.[1] In this case, Petitioners argue that the subject property qualifies for agricultural classification under subsection (a)(IV). To succeed in this argument, Petitioners must meet a three-prong test:

1. The land is used as a farm or ranch.

First, the land must be used as a farm or ranch, as defined by statute. A farm is "a parcel of land which is used to produce agricultural products that originate from the land's productivity for the primary purpose of obtaining a monetary profit." § 39-1-102(3.5), C.R.S. A "ranch" is "a parcel of land which is used for grazing livestock for the primary purpose of obtaining a monetary profit." § 39-1-102(13.5), C.R.S. "Livestock" is further defined as "domestic animals which are used for food for human consumption, breeding, draft, or profit." *Id.* The Assessor's Reference Library ("ARL") frames this statutory definition of "ranch" as a dual factor analysis, which Assessors are directed to apply. First, the land must be grazed by livestock. Second, the use of the grazing livestock must be for the primary purpose of obtaining a monetary profit.

2. The owner of the land has a decreed right to appropriated water granted in accordance with article 92 of title 37, C.R.S., for purposes other than residential.

Second, the owner of the land must have a "decreed right to appropriated water granted in accordance with article 92 of title 37, C.R.S., for purposes other than residential purposes." § 39-1-102(1.6)(a)(IV), C.R.S.

3. The appropriated water shall be and is used for the production of agricultural or livestock products on the land.

Third, and last, the appropriated water must be used for the production of agricultural or livestock products on the land.

[1] *See also* Assessor's Reference Library, Vol. 3, Ch. 5, pgs. 5.22 – 5.23 (November 2020 revision).

FINDINGS AND CONCLUSIONS

1. The subject property was used as a farm and a ranch.

Documentary evidence and testimony support that the subject parcels qualify for agricultural classification under both the definition of a "farm" and a "ranch" for tax year 2019.

a. The subject property comprises a single functional agricultural unit.

The Board finds the testimony of Janet Wilson as to the use and characteristics of the subject property to be credible. The Board finds that parcels comprising the subject property –186 acres consisting of the 150-acre Vista Pacifica Property and the 36-acre Wilson Parcel – function as and should be treated as a single, integrated parcel for purposes of reviewing classification. In so finding the Board follows the guidance of the Colorado Supreme Court's decision in *Douglas Cty. Bd. of Equalization v. Clarke*, 921 P.2d 717 (Colo. 1996), and considers the subject property's physical characteristics and use.

The Board finds that the subject property consists of contiguous parcels, all of which are put to agricultural use and act as a single functional unit with respect to either farming, ranching, or support for farming and ranching. The Vista Pacifica Property is characterized by flat pasture, and a center pivot that irrigates portions of both the Wilson Parcel and the Vista Pacifica Property. The pivot is fed by a pipeline that travels across both the Wilson Parcel and the Vista Pacifica Property. The Wilson Parcel contains pasture, shop buildings, fuel tanks and a pond used to water cattle and sheep that graze the Vista Pacifica Property and the Wilson Parcel. The pond on the Wilson Parcel also feeds an irrigation ditch, and open ditch irrigation runs along the Wilson Parcel and the Vista Pacifica Property. Cattle are contained with hot wire in places on both the Wilson Parcel and Vista Pacifica Property, but there is also pasture access between the Wilson Parcel and the Vista Pacifica Property.

In sum, the subject property's physical characteristics and use support its treatment as a single unit.

b. Relevant years for classification analysis.

To assess classification, the Board looks to whether the subject property was used as a farm or ranch on the assessment date – January 1, 2019. *See* ARL Vol. 3, Ch. 5, p. 5.23 (November 2020 revision). The Board finds that it may be necessary to look to prior year activity, and to use in 2019 that occurred after January 1 in order to determine use as of the assessment date, given the seasonal constraints associated with agricultural use in Colorado.

There is no requirement in section 39-1-102(1.6)(a)(IV), C.R.S., that the land have been used as a farm or ranch for the previous two years. The statute lays out five categories of agricultural land, and Petitioners argued the subject property qualifies only under subsection "IV". While subsection "I" contains the requirement to assess a property's use for the two years prior to the tax year at issue, subsection "IV" does not.

c. Use as a farm and as a ranch.

The Board relies primarily on Ms. Wilson's testimony in finding that the subject property was used as a farm and as a ranch in tax year 2019. The photographs in Petitioners' exhibits also support these uses.

As discussed, the physical characteristics of the subject property support its use for farming and ranching. It contains flat pastureland, and hot-wire fencing is installed in places to contain grazing cattle. The property also contains a center pivot fed by a pipeline, irrigation ditches, and a pond used for irrigation and to water sheep and cattle. The property is improved with shop barns and storage barns containing tools and equipment used to maintain farm and ranch equipment and the center pivot, including tractors and bailers.

Relevant to the presence and use of irrigation water and water for livestock on the subject property, the Board also heard the testimony of Justin Catalano, Manager of the Florida Consolidated Ditch Company ("Ditch Company") and John Ey, Superintendent of the Florida Water Conservancy District, who described the use of both project water and decreed water on the subject property. Petitioners have the use of project water owned by the Florida Water Conservancy District by virtue of the classified irrigable acres of the subject property. The Wilsons also apply decreed water onto the land through a center pivot, for use in hay production, grazing, or in preparation for a hemp crop. Water for agricultural use also comes from the pond on the Wilson Parcel, and a flood irrigation system with open ditch irrigation runs along the Wilson Parcel and the Vista Pacifica Property.

The Board finds that the subject property qualifies as a "ranch" for tax year 2019. Relative to the definition of a "ranch," the ARL directs Assessors to use a dual factor analysis for agricultural classification. First, the land must be grazed by livestock. Second, the use of the grazing livestock must be for the primary purpose of obtaining a monetary profit.

As to the first factor of the analysis, uncontroverted evidence and testimony presented before the Board support that the land was grazed by livestock in 2018, in this instance by 1,387 sheep for three days. Documentation of historic and current grazing agreements was persuasive, and while grazing of said sheep only occurred for three days, the quantity of sheep was significant relative to the overall size of the property. The Board finds that any part of the subject property that was not grazed was part of a larger functional unit on which the grazing occurred.

As to the second factor of the analysis, Respondent contends that Petitioners have no profit motive to support agricultural classification of their land, yet it is the use of the livestock which must have as its primary purpose a profit motive. The owner of the land need not have a profit motive for agricultural operations on the land conducted by the owner's lessees, where the lessee has a profit motive. To obtain agricultural classification, a lessee of the land may graze livestock for the primary purpose of obtaining a profit. *Boulder Cty. Bd. of Equalization v. M.D.C. Const. Co.*, 830 P.2d 975 (Colo. 1992).

> "There is no requirement in the statute that the property *owner* be the one who grazes livestock on the parcel for the primary purpose of making a profit or that the

> owner's leasing activity be conducted for profit to the owner. Rather, the statute requires only that the land actually be used for grazing livestock, which, in turn, must be done for the primary purpose of obtaining a profit from the grazing activities."

Estes v. Board of Assessment Appeals, 805 P.2d 1174, 1175 (Colo. App. 1990).

"[T]he permissive use of a parcel of land for grazing activities by a rancher under a legal claim of right can qualify the parcel for agricultural classification based on 'ranching' use." *Besch v. Jefferson Cty. Bd. of Cty. Comm'rs*, 20 P.3d 1195, 1196 (Colo. App. 2000). In this case, Petitioners had a verbal agreement with the owner of the sheep herd, J. Paul Brown, to graze the pasture on the subject property. The Board infers Mr. Brown's profit motive from the evidence, and ascribes typical motivations to the use of the grazing livestock: that of a desire for profit from the use of said livestock by the owner of the livestock. (As the fact finder, the Board is entitled to draw reasonable inferences from the evidence presented. *See Weingarten v. Bd. of Assessment Appeals*, 876 P.2d 118 (Colo. App. 1994)).

Photographic evidence and testimony also support that the subject property was used to produce agricultural products that originate from the land's productivity for the primary purpose of obtaining a monetary profit, meeting the definition of "farm." Specifically, it is uncontroverted that 118 bales of hay were produced and sold in 2018. The Board relies on the testimony of Ms. Wilson to find that in 2019 approximately twelve acres of the subject property was flood-irrigated with the decreed water for hay production. Additionally, approximately 150 acres was plowed and seeded with winter wheat by a tenant farmer, Brandon Brown. Mr. Brown planted the winter wheat crop as a cover crop for a future hemp crop. The Board relies on the statutory interpretation of the Colorado Supreme Court in *Boulder County Bd. of Equalization v. M.D.C. Const. Co.* and the Colorado Court of Appeals in *Estes v. Board of Assessment Appeals* in concluding that Mr. Brown's use, and Mr. Brown's profit motive, satisfy the statutory definition of "farm." *See Boulder Ct.y Bd. of Equalization v. M.D.C. Const. Co.*, 830 P.2d 975, 980 (Colo. 1992) (agricultural classification upheld where lessees' primary purpose was using land for monetary profit from agricultural activities; landowner need not actually profit or intend to profit from a lessee's operations). The Board infers that Mr. Brown's use of land, labor and capital was not altruistic but was capitalistic in nature.

The Board further finds that any land not on the subject property that was not farmed or grazed was part of a larger functional unit on which agricultural practices have been occurring.

1. Petitioners have a decreed right to appropriated water granted in accordance with article 92 of title 37, C.R.S., for purposes other than residential.

It was undisputed that the Florida Consolidated Ditch Company holds court-decreed water rights, and that Petitioners Randall and Janet Wilson own 100 Class C shares in the Ditch Company. The parties disagreed about whether Petitioners' ownership of shares in the Ditch Company satisfy the decreed water right requirement.

Mr. Catalano testified that shares in the Ditch Company represent use rights to a certain volume of cubic feet per second of water. He testified that ownership of Ditch Company stock

represents apportioned ownership of the total water owned by the Ditch Company. Mr. Catalano testified both that the water rights are adjudicated to an individual landowner or user, and that they are adjudicated to the Ditch Company. He described the shares as creating a property right for Petitioners.

Mr. Ey testified that Petitioners' shares "are adjudicated water rights" and a "property right."

The Bylaws of the Florida Consolidated Ditch Company describes the ownership entitlements to water of the shareholders. (*Exhibit D*.) The Rules and Regulations of the Florida Consolidated Ditch Company (*Exhibit E*) were also instructive. Per the Rules and Regulations: "The water represented by your shares in the Florida Consolidated Ditch Company is adjudicated as direct flow water rights which are diverted from the Florida River." (*Exhibit E, pg. 3*.) And, "[i]rrigation water rights are decreed by the Colorado Water Courts to the Ditch Company for use on specific lands." (*Exhibit E, pg. 4*.) Lastly,

> [a]s the waters of the State of Colorado belong to the state, ownership of water rights is only a right to use of the water in priority. The Ditch Company has adjudicated water rights in the amounts set forth in Article 2.1. The Ditch Company then issues shares which represent a right to use an increment of water of the Ditch Company's adjudicated water rights.

(*Exhibit E, pg. 5*.)

The Board concludes that Petitioners' shares represent a pro rata share of ownership of decreed water. *See Left Hand Ditch Co. v. Hill*, 933 P.2d 1, 3 (Colo. 1997); (a mutual ditch company is a vehicle for individual ownership of water rights); *Concerning Application for Water Rights of Midway Ranches Property Owners' Ass'n, Inc. in El Paso & Pueblo Ctys.*, 938 P.2d 515, 525 (Colo. 1997) (a shareholder of such a mutual agricultural ditch company enjoys a *pro rata* ownership of the water rights of that company). The benefit conferred upon Petitioners is the exclusive right to use the Ditch Company water according to the number of shares. The Board finds this satisfies the statutory requirement that Petitioners have a decreed right to appropriated water. To find otherwise would mean that none of the shareholders and agricultural users of the Ditch Company's water would be entitled to agricultural classification of their lands under section 39-1-102(1.6)(a)(IV), C.R.S. by virtue of their use of the Ditch Company's water.

It is acknowledged that Petitioners' stewardship of the land leaves something to be desired. However, the Board rejects Respondent's position that stock ownership in the Florida Consolidated Ditch Company is not a decreed water right.

Further, the Board finds that the decreed right to appropriated water is for purposes other than residential. The Ditch Company imposes requirements and restrictions on use, such that the water must be used for irrigation and agricultural purposes. ("Irrigation waters are decreed by the Colorado Water Courts to the Ditch Company for use on specific lands. Irrigation water in the Florida Consolidated Ditches must be put to beneficial use for the decreed land." *Exhibit E, pg. 4*; "Water shall be furnished continuously as available during the irrigating season…to irrigate or

cultivate the land. Other uses of water incidental to irrigation may be permitted by the rules or regulations of the Company." (*Exhibit D, pg. 5*.)

2. The appropriated water is used for the production of agricultural or livestock products on the land.

Third, and last, the Board finds the appropriated water was used for the production of agricultural and livestock products on the land.

The Board relies on the testimony of Ms. Wilson to find that the appropriated water was used in 2019 to irrigate the property for the growing of hay and winter wheat, which was bailed and sold. The agricultural use of the appropriated water in 2019 was also supported by the testimony of Mr. Ey, who testified that pivot irrigation had occurred at the subject property (on both the Vista Pacifica Parcel and the Wilson Property) for four days in 2019. Mr. Ey testified that although the majority of available irrigation water was leased to others in 2018 and 2019, some irrigation water (including appropriated water) was retained for use on the subject property in both years.

In sum, the subject property meets both the definition of a "farm" and a "ranch" and Petitioners applied a decreed water right to the property for the purpose of crop irrigation. Therefore, it is appropriate that the subject receive agricultural classification for tax year 2019. Petitioners have met their burden of showing that the vacant land classification for tax year 2019 is incorrect.

ORDER

The petition is **GRANTED**. The La Plata County Assessor's Office is ordered to change the classification of the subject property to agricultural, with a corresponding change in value, for tax year 2019.

APPEAL RIGHTS

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty

days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

See § 39-8-108(2), C.R.S. (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (rights to appeal on an abatement petition).

DATED and MAILED this 16th day of December, 2020.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

Amy J. Williams

Concurring Board Member:

Debra Baumbach
Concurring without modification pursuant to § 39-2-127(2), C.R.S.

I hereby certify that this is a true and correct copy of the order of the Board of Assessment Appeals.

Yesenia Araujo