

**BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

Gary D. Fisher Family Trust and Nancy  
Fisher Family Trust, Gary D. and Nancy  
Fisher, Co-trustees,  
Appellant,

v.

Dawes County Board of Equalization,  
Appellee.

Case Nos: 13A-040 & 13A-041

Decision and Order Affirming the Dawes  
County Board of Equalization

**For the Appellant:**

Gary D. and Nancy Fisher, Co-trustees of the  
Gary D. Fisher Family Trust and Nancy Fisher  
Family Trust, Pro Se.

**For the Appellee:**

Joe Stecher,  
Deputy Dawes County Attorney.

The appeals were heard before Commissioners Thomas D. Freimuth and Nancy J. Salmon.

**I. THE SUBJECT PROPERTY**

The Subject Property includes two unimproved agricultural parcels located in Dawes County, Nebraska. The Property Record Card, including legal description, of the 506.61-acre parcel that is the subject of appeal in Case No. 13A-040 is found at Exhibit 20:4. The Property Record Card, including legal description, of the 393.86-acre parcel that is the subject of appeal in Case No. 13A-041 is found at Exhibit 21:4.

**II. PROCEDURAL HISTORY**

The Dawes County Assessor determined that the assessed value of the portion of the Subject Property that is the subject of appeal in Case No. 13A-040 was \$121,325 for tax year 2013. The Gary D. Fisher Family Trust and the Nancy Fisher Family Trust (herein jointly or separately referred to as the “Taxpayer”) protested this assessment to the Dawes County Board of Equalization (herein referred to as the “County Board”) and requested an assessed valuation of \$110,615. The County Board determined that the assessed value for tax year 2013 was \$97,565.<sup>1</sup>

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<sup>1</sup> E20:5.

The Dawes County Assessor determined that the assessed value of the portion of the Subject Property that is the subject of appeal in Case No. 13A-041 was \$91,270 for tax year 2013. The Taxpayer protested this assessment to the County Board and requested an assessed valuation of \$80,350. The County Board determined that the assessed value for tax year 2013 was \$87,750.<sup>2</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (herein referred to as the “Commission”). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on June 19, 2014.

At the hearing, the County Board moved to dismiss the Case No. 13A-040 appeal because the County Board’s final determination of the actual value of the Subject Property parcel in that case (\$97,565) is less than the Taxpayer’s protest value (\$110,615). The Commission hereby denies the County Board’s motion to dismiss.

### **III. STANDARD OF REVIEW**

The Commission’s review of the determination of the County Board of Equalization is de novo.<sup>3</sup> When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”<sup>4</sup>

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>5</sup>

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<sup>2</sup> E21:5.

<sup>3</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>4</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>5</sup> *Id.*

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.<sup>6</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>7</sup>

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>8</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>9</sup>

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”<sup>10</sup> The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”<sup>11</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>12</sup>

## IV. VALUATION

### A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.<sup>13</sup>

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<sup>6</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>7</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>8</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

<sup>9</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

<sup>10</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>12</sup> Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

<sup>13</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”<sup>14</sup> The Courts have held that “[a]ctual value, market value, and fair market value mean exactly the same thing.”<sup>15</sup> Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.<sup>16</sup> All real property in Nebraska subject to taxation shall be assessed as of January 1.<sup>17</sup> All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>18</sup>

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Reissue 2009). Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure.<sup>19</sup>

“Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.”<sup>20</sup>

Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

- (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and
- (b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land.<sup>21</sup>

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<sup>14</sup> Neb. Rev. Stat. §77-112 (Reissue 2009).

<sup>15</sup> *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

<sup>16</sup> Neb. Rev. Stat. §77-131 (Reissue 2009).

<sup>17</sup> See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009)

<sup>18</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>19</sup> Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).

<sup>20</sup> Neb. Rev. Stat. §77-132 (Reissue 2009).

<sup>21</sup> Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

A parcel is primarily used for agricultural purposes when it is mainly used for agricultural and horticultural purposes.<sup>22</sup> Nebraska Statutes section 1359(2) defines the term “agricultural and horticultural purposes” as follows: “[U]sed for the commercial production of any plant or animal produce in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture.”<sup>23</sup>

Nebraska Statutes require that agricultural and horticultural land be divided into classes and subclasses of real property.<sup>24</sup> “Class or subclass of real property means a group of properties that share one or more characteristics typically common to all the properties in the class or subclass, but are not typically found in the properties outside the class or subclass.”<sup>25</sup>

The Nebraska Department of Revenue’s Property Assessment Division (herein referred to as “PAD”) has issued regulations regarding the classification of agricultural and horticultural land for assessment purposes.<sup>26</sup> PAD’s regulations require county assessors to inventory and categorize each parcel of agricultural and horticultural land using the following classes: (1) irrigated cropland; (2) dryland cropland; (3) grassland; (4) wasteland; (5) government programs land (Conservation Reserve Program, Conservation Reserve Enhancement Program, Environmental Quality Incentives Program, Stewardship Incentive Program, Tree Assistance Program, Water Bank Program); (6) intensive use areas; and (7) forestland and shelterbelt areas.<sup>27</sup> The county assessor is then required to use a soil conversion legend created by PAD to assign agricultural and horticultural land to an appropriate Land Capability Group (herein referred to as “LCG”).<sup>28</sup>

LCGs are defined as follows under PAD’s regulations:

[G]roups of soils that are similar in their productivity and their suitability for most kinds of farming. It is a classification based on the capability classification, production, and limitations of the soils, the risk of damage when they are used for ordinary field crops, grassland, and woodlands, and the way they respond to treatment. Land Capability Groups are determined by the Department of Revenue, Property Assessment Division based upon the dryland capability classification.<sup>29</sup>

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<sup>22</sup> 350 Neb. Admin. Code, ch. 14 §002.56 (03/09).

<sup>23</sup> Neb. Rev. Stat. §77-1359 (2) (Cum. Supp. 2012).

<sup>24</sup> See, Neb. Rev. Stat. §77-1353 (Reissue 2009).

<sup>25</sup> Neb. Rev. Stat. §77-103.01 (Reissue 2009).

<sup>26</sup> 350 Neb. Admin. Code, ch. 14 (3/2009).

<sup>27</sup> 350 Neb. Admin. Code, ch. 14, §004.04 (3/2009).

<sup>28</sup> 350 Neb. Admin. Chapter 14Admin. Code, ch. 14, §004.08A - B (3/2009) It is the Commission’s understanding that the conversion legend referenced in this regulation correlates codes contained on Natural Resource Conservation Service (herein sometimes referred to as “NRCS”) soil maps with LCG categories.

<sup>29</sup> 350 Neb. Admin. Code, ch. 14, §002.41 (3/2009).

PAD's regulations recognize the soil suitability system developed by the Natural Resource Conservation Service (herein sometimes referred to as "NRCS") for purposes of assigning agricultural and horticultural land to an appropriate LCG.<sup>30</sup> In this regard, the regulations state as follows: "Land Capability Classification is a system for showing the suitability of soils for most kinds of crops. These are determined by Natural Resources Conservation and Service."<sup>31</sup>

PAD's regulations further state as follows regarding the use of the soil suitability system developed by the NRCS for purposes of assigning agricultural land to an appropriate LCG:

A Land Capability Group (LCG) is a grouping of various soils according to their limitations for field crops, the risk of damage if they are used for crops, and the way they respond to average management. Since the soil conservation service maps major natural bodies of soil in a mapping area, the criteria used for grouping the soils do not include major land reformation that would change slope, depth or other characteristics of the soils, nor do they include unlikely major reclamation projects. When such areas have been mapped and assigned capability units by the Natural Resources Conservation Service, the assigned capability unit is used. A LCG is determined for each kind of soil and its current land use. Nebraska has three primary land uses. The eastern part of the state is principally a dryland farming area. The central and western regions of the state generally require irrigation for the intensive production of common cultivated crops. Approximately one-half of the acreage in the state is in native grassland. Scattered throughout, there is recreational land, timberland and wasteland.<sup>32</sup>

In addition to the soil conversion legend developed by PAD using the NRCS soil classification system, the regulations provide LCG definitions and guidelines for use by county assessors for purposes of assessing agricultural and horticultural land.<sup>33</sup> The regulations also permit county assessors to develop additional LCG sub-classifications if needed to achieve uniform and proportionate valuation.<sup>34</sup>

As indicated above, grassland is a category of agricultural and horticultural land.<sup>35</sup> PAD's regulations define grassland as follows:

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<sup>30</sup> See, 350 Neb. Admin. Code, ch. 14, §002.40 (3/2009); See also, 442 Neb. Admin. Code, ch. 5, §031.02 (6/2011) (the Commission is allowed to take judicial notice of soil surveys for Nebraska's 93 counties published by the NRCS, which is a subdivision of the United States Department of Agriculture).

<sup>31</sup> 350 Neb. Admin. Code, ch. 14, §002.40 (3/2009).

<sup>32</sup> 350 Neb. Admin. Code, ch. 14, §004.08E (3/2009).

<sup>33</sup> 350 Neb. Admin. Code, ch. 14, §004.08C-H (3/2009).

<sup>34</sup> 350 Neb. Admin. Code, ch. 14, §004.09 (3/2009).

<sup>35</sup> 350 Neb. Admin. Code, ch. 14, §004.04C (3/2009).

Grassland is the state and condition of the range based on what it is naturally capable of producing. Grassland includes all types of grasses, permanent brome grass, other introduced grasses, and native grasses used for grazing or mowed for hay. In many instances it is not possible to identify permanent brome grass from temporary brome grass that is grown as part of the crop rotation. For this reason, all of the present brome grass should be classified as grassland until the area is returned to cultivation. There may be situations where an alfalfa and grass mixture is grown in rotation with cropland or is harvested for hay. These areas can be classified as cropland but their market value may be more representative of grassland. Areas of wooded grazing land are classified as grassland not timberland or wasteland. When there are significant areas of trees or timber on a parcel, and it can no longer be grazed, consideration needs to be given to placing the affected acres in the forestland and timberland category.<sup>36</sup>

As also indicated above, wasteland is a class or subclass of agricultural property.<sup>37</sup>

“Wasteland includes land that cannot be used economically and are not suitable for agricultural and horticultural purposes.”<sup>38</sup> Wasteland also includes but is not limited to the following: “blowouts, riverwash (recent and unstabilized alluvial deposits), marshes, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats.”<sup>39</sup> Land may be wasteland even though improvements to the land, including land shaping, revegetation, or drainage, may lead to the economic use of the property.<sup>40</sup> If a property is restored to a recreational use it is no longer wasteland.<sup>41</sup>

“Timberland and Forestland is land which is wooded by nature or humans and consisting of a dense growth of trees and underbrush such that it is not suitable for grazing.”<sup>42</sup> Timbered land where grazing occurs is considered timbered grassland.<sup>43</sup> Stands of trees, whether natural or planted, where grazing is not practiced or possible is included under the definition of “Forestland and Shelterbelt Areas.”<sup>44</sup>

“Badlands are a land type consisting of steep or very steep barren land that has little or no agricultural value.”<sup>45</sup>

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<sup>36</sup> 350 Neb. Admin. Code, ch. 14 §002.31 (03/09).

<sup>37</sup> See, 350 Neb. Admin. Code, ch. 14 §002.54 (03/09); 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>38</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>39</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>40</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>41</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>42</sup> 350 Neb. Admin. Code, ch. 14 §002.29 (03/09).

<sup>43</sup> 350 Neb. Admin. Code, ch. 14 §004.04G (03/09).

<sup>44</sup> 350 Neb. Admin. Code, ch. 14 §004.04G (03/09).

<sup>45</sup> 350 Neb. Admin. Code, ch. 14 §002.28 (03/09).

## B. Evidence Summary

Gary Fisher and Nancy Fisher, Co-trustees of the Gary D. Fisher Family Trust and Nancy Fisher Family Trust, testified on behalf of the Taxpayer. The Taxpayer asserted that the County Assessor misclassified wasteland located on the Subject Property as 4G grassland for tax year 2013. The Taxpayer also asserted that this misclassification resulted in a lack of uniformity and proportionality for tax year 2013.

In support of these assertions, the Taxpayer submitted testimony and exhibit evidence received by the Commission to demonstrate that portions of the Subject Property meet the definition of wasteland based on characteristics that include butte formations, rocky outcropping, and deep gullies. The Taxpayer's evidence in this regard includes soil maps and photographs, together with a topographic map showing lines of elevation that depicts portions of the Subject Property that is the subject of appeal in Case No. 13A-040 (herein referred to as "Parcel 23") that they assert should be classified as wasteland for tax year 2013 (while the Commission received the Taxpayer's evidence in support of its assertions concerning Parcel 23, no evidence in the form of photographs or maps was submitted or received regarding the parcel that is the subject of appeal in Case No. 13A-041, which is sometimes referred to herein as "Parcel 14").<sup>46</sup> The Commission also received in evidence Property Record Cards and photographs of properties that the Taxpayer asserts are comparable with the Subject Property in terms of wasteland characteristics.<sup>47</sup>

The Taxpayer testified that no economic use existed for the portions of the Subject Property's Parcel 23 component that it asserts should be classified as wasteland for tax year 2013.<sup>48</sup> The

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<sup>46</sup> The Taxpayer submitted an evidence summary found at Exhibit 6 page 2, which sets forth the following itemization in pertinent part: (1) Dawes County Soil Survey's definition of the term "Rock outcrop" found at Exhibit 4 pages 2 – 3; (2) Dawes County Soil Survey's definition of the term "Canyon-Bridget-Rock outcrop association" found at Exhibit 4 page 3 (3) Sioux County Soil Survey's definition of the term "Castle-Ponderosa-Rock outcrop association" for Land Capability Grouping purposes (sometimes referred to herein as "LCG") found at Exhibit 4 page 4; (4) topographic map found at Exhibit 5 page 1 showing the areas of the parcel that is the subject of appeal in Case No. 13A-040 (herein referred to as "Parcel 23") that the Taxpayer asserts should be deemed wasteland, together with photographs found at Exhibits 5 pages 2 – 13 that are correlated to these areas on the topographic map; and (5) Natural Resource Conservation District ("NRCS") Ecological Site Map and explanation thereof for Parcel 23 found at Exhibit 5 pages 14 - 16, which depict 358.2 acres of soil type number 6043 that is defined as "Tassel-Ponderosa-Rock outcrop association, 9 to 70 percent slopes."

<sup>47</sup> E7 (Franey); E8 (Clark/Daniels); E9 (Guest); E10 (Guest); E11 (Haynes); and E12 (Richardson). The Commission notes that the Taxpayer's evidence summary found at Exhibit 6 page 2 sets forth pertinent information concerning these properties submitted at least in part for uniformity and proportionality review purposes.

<sup>48</sup> The Taxpayer indicated that bighorn sheep (wildlife) have been confused with commercial sheep (domestic livestock) for purposes of determining economic use potential of buttes on the Subject Property and elsewhere in the area. The Taxpayer

Property Record Card for Parcel 23 also indicates that land the Taxpayer asserts should be reclassified from 4G grassland to wasteland is adjacent to and within the same parcel as land used for agricultural purposes.<sup>49</sup>

The County Assessor classified 249 acres of Parcel 23 as 4G grassland under soil type 6043 and valued it at \$240 per acre for tax year 2013.<sup>50</sup> The Taxpayer asserted that 40 acres of this 4G grassland should be classified as wasteland and valued at \$30 per acre for tax year 2013.<sup>51</sup>

The County Assessor classified 50.03 acres of Parcel 14 as 4G grassland under soil type 6043 and valued it at \$240 per acre for tax year 2013.<sup>52</sup> The Taxpayer asserted that eight acres of this 4G grassland should be classified as wasteland and valued at \$30 per acre for tax year 2013.<sup>53</sup>

In further support of its assertions, the Taxpayer submitted testimony and exhibit evidence received by the Commission indicating that portions of Parcel 23 and the Richardson parcel classified by the County Assessor as grassland for tax years 2011 through 2013 had previously been classified and valued as wasteland in 2010.<sup>54</sup> Taxpayer testimony indicates that this

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testified that bighorn sheep, which are wild animals being reintroduced in the Dawes County area by the state government, have the ability to traverse buttes, but commercial sheep are unable to do so.

<sup>49</sup> See, E20:4.

<sup>50</sup> E20:4.

<sup>51</sup> See, Case File for Case No. 13A-040 (the Taxpayer's attachment to the appeal submitted to the Commission derives this 40 acre amount by multiplying the 249 acres classified on the Property Record Card as 4G grassland under soil type 6043 by 16%, which is the percentage of rock outcrop that is included in soil type 6043 according to the NRCS County Soil Survey information for Sioux County found at Exhibit 4 page 4). The Commission notes that the Taxpayer used this 16% rock outcrop percentage because testimony indicated that the NRCS Soil Survey for Sioux County is approximately 20 years newer than the NRCS Soil Survey information for Dawes County found at Exhibit 4 page 3, which indicates that rock outcrop comprises 10% to 20% of soil type 6043. Further discussion regarding the current and older version of the NRCS Soil Survey for Dawes County is set forth later in this opinion.

<sup>52</sup> E21:4.

<sup>53</sup> See, Case File for Case No. 13A-041 (the Taxpayer's attachment to the appeal submitted to the Commission derives this eight acre amount by multiplying the 50.03 acres classified on the Property Record Card as 4G grassland under soil type 6043 by 16%, which is the percentage of rock outcrop that is included in soil type 6043 according to the Sioux County Soil Survey information found at Exhibit 4 page 4). Portions of the Taxpayer's exhibits are excerpts from previous and current Soil Surveys produced by the NRCS. Previous versions of the soil surveys were published in hardcopy, but current soil survey are only accessible online at: <http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx> (visited 13 Nov. 2014). The Commission has taken statutory notice of "the Soil Survey for of the 93 Counties of the State of Nebraska as published by the United States Department of Agricultural or its subdivisions." 442 Neb. Admin. Code, ch. 5 §031.02 (06/11). The Commission notes that the Taxpayer used this 16% rock outcrop percentage because testimony indicated that the Sioux County Soil Survey is approximately 20 years newer than Dawes County Soil Survey information found at Exhibit 4 page 3, which indicates that rock outcrop comprises 10% to 20% of soil type 6043. A review of the Soil Surveys produced by the NRCS for Dawes County indicates that Exhibit 4 page 3 is contained in Dawes County Soil Survey 1977 page 25 found in pdf version at: <http://www.nrcs.usda.gov/wps/portal/nrcs/surveylist/soils/survey/state/?stateId=NE> (visited 13 Nov. 2014).

<sup>54</sup> See, E12:1 – E12:5 (Richardson Property Record Cards for tax years 2010 – 2013, together with photo of area treated as wasteland in 2010); E18:1 – E18:3 (E18:1 is a map of Parcel 23 indicating areas of Canyon-Bridget-Rock outcrop association labeled "CaG," which E18:3 indicates is the old symbol prior to conversion to the new four-digit NRCS numeric symbol "6043;" the description of soil type 6043 on the conversion table found at E18:3 is "Tassel-Ponderosa-Rock outcrop association, 9 to 70 percent slopes").

classification change may have stemmed from Nebraska's conversion to a four digit soil classification system for tax years 2011 and beyond.

The County Board submitted the Property Record Cards for each parcel under appeal herein, which the Commission received in evidence as Exhibits 20 and 21. The County Board did not offer testimony at the hearing before the Commission.

The Property Record Card for Parcel 23 indicates that the County Assessor assigned a value of \$30 per acre to 113 acres due to 2012 fire damage (this \$30 per acre fire damage valuation equals the County's wasteland per acre value for tax year 2013).<sup>55</sup> The Taxpayer testified that this fire damage classification includes the 40 acres situated on Parcel 23 that they assert should be classified as wasteland.<sup>56</sup>

The Property Record Card for Parcel 14 found at Exhibit 21 indicates that the County Assessor assigned a value of \$30 per acre to 40.46 acres due to 2012 fire damage. The Taxpayer indicated that this fire damage classification includes the eight acres situated on Parcel 14 that they assert should be classified as wasteland.

### **C. Valuation Analysis – Wasteland Classification**

The Taxpayer asserted that the land in dispute on Parcel 23 is comprised of bluffs/buttes, rock outcrop, and deep gullies, and that there was no economic use for this portion of the Subject Property for tax year 2013 purposes. Additionally, with respect to Parcel 23, the Taxpayer provided soil maps,<sup>57</sup> topographical maps,<sup>58</sup> and photographs<sup>59</sup> in support of its assertion that 40 acres of the total 249 acres classified as 4G grassland under soil symbol 6043 should be classified as wasteland (of these 40 acres, the Taxpayer testified that approximately 20 acres

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<sup>55</sup> E20:4, E7:1, E8:1, E9:1, E10:1.

<sup>56</sup> The Commission notes that the NRCS soil map information set forth at Exhibit 5 pages 14 - 15 indicates that 358.2 acres of Parcel 23 is comprised of soil type 6043. According to the Property Record Card for Parcel 23 found at Exhibit 20 page 4, the County classified 249 acres as 4G grassland under soil type 6043. Thus, approximately 109 acres of the total 358.2 acres classified as soil type 6043 on the NRCS soil map are not designated under soil type 6043 on the Property Record Card (358.2 acres - 249 acres = 109 acres, rounded). The Commission notes that this 109 acre area differs slightly in comparison to the 113 acres of Parcel 23 valued at \$30 per acre by the County for tax year 2013 due to fire damage in 2012. The Commission assumes that this discrepancy stems from one or both of the following factors: (1) the NRCS soil map that indicates Parcel 23 is comprised of 358.2 acres of soil type 6043 differs slightly in comparison to the GIS mapping system used by the County Assessor; and/or (2) the County Assessor valued as many as approximately four acres of Parcel 23 at \$30 per acre due to the 2012 fire other than the 358.2 acres designated as soil type 6043 on the NRCS soil map (Parcel 23 contains 506.61 total acres).

<sup>57</sup> See, E5:14, E6:1, E18:1.

<sup>58</sup> See, E5:1, E15, E17.

<sup>59</sup> See, E5:2 – E5:13.

were comprised of bluffs/buttes or rock outcrop, and that 20 acres were comprised of gullies).<sup>60</sup> The Taxpayer did not submit similar exhibit evidence or testimony for Parcel 14.

Nebraska Statutes require that properties within a subclass have similar characteristics that are not typically found outside of that subclass.<sup>61</sup> Thus, for purposes of determining the classification of the disputed 4G grassland areas of real property, Nebraska law requires classification in only one class or subclass. Additionally, Nebraska law requires classification of real property based on the identification of its common characteristics deemed “typical” of the subclass.<sup>62</sup>

The Nebraska Administrative Code defines wasteland as follows:

Wasteland includes land that cannot be used economically and are not suitable for agricultural and horticultural purposes. Such land types include but are not limited to, riverwash (recent unstabilized alluvial deposits), marshes, badlands, large deep gullies (including streambeds and banks), bluffs, rockland, gravel areas, and salt flats. To qualify for wasteland the land must be lying in or adjacent to and in common ownership or management with land used for agricultural or horticultural purposes.<sup>63</sup>

The Nebraska Administrative Code also provides that real property may be wasteland even though improvements to the land, including land shaping, revegetation, or drainage, may lead to the economic use of the property.<sup>64</sup> If a property is restored to a recreational use it is no longer wasteland.<sup>65</sup>

The Taxpayer testified that the disputed 4G grassland areas of real property had no economic use during tax year 2013. Additionally, the County Assessor and County Board determined that the disputed land should be assigned to a category other than recreational.<sup>66</sup> Thus, the Commission finds that the disputed areas of real property should not be designated as recreational land under Nebraska Real Property Regulations section 001.05E.<sup>67</sup>

The Commission further finds that the disputed areas of the Subject Property situated on Parcel 23 do not meet the definition of timberland, which is defined as land that cannot be grazed

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<sup>60</sup> See, Case File (Taxpayer’s attachment to appeal to Commission for Parcel 23, Case No. 13A-040).

<sup>61</sup> See, Neb. Rev. Stat. §77-1353 (Reissue 2009).

<sup>62</sup> See, Neb. Rev. Stat. §77-103.01 (Reissue 2009).

<sup>63</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>64</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>65</sup> 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>66</sup> See, E20:4 (Property Record Card for Parcel 23, Case No. 13A-040).

<sup>67</sup> 350 Neb. Admin. Code, ch. 10 §001.05E (03/09).

because of overgrowth or trees and brush.<sup>68</sup> In this case it is not the overgrowth of trees, if any, but the topography of the disputed acres of Parcel 23 including bluffs/buttes, rockland, and gullies that renders the land unsuitable for cultivation and grazing. The common typical characteristic that defines these areas of Parcel 23 is not trees, rather it is the bluffs/buttes, rockland, steep slopes, and gullies.

The Commission is allowed to take notice of the NRCS Web Soil Survey information for Dawes County.<sup>69</sup> The current NRCS Web Soil Survey for Dawes County indicates that soil type 6043 on Parcel 23 includes 15% rock outcrop.<sup>70</sup> This current NRCS Web Soil Survey for Parcel 23 also states that this 15% rock outcrop has “limitations that preclude commercial plant production and that restrict their use to recreational purposes, wildlife habitat, watershed, or esthetic purposes.”<sup>71</sup>

The Taxpayer submitted NRCS information regarding rock outcrop from the 1977 Soil Survey for Dawes County.<sup>72</sup> This NRCS information describes rock outcrop as follows:

Rock outcrop consists of very steep to nearly vertical outcrops of sandstone of the shoulders of drainageways and on the upper part of side slopes in the Pine Ridge area. Some areas are large scenic sandstone buttes that are considerably higher than the surrounding landscape. Rock outcrop has no value for farming or for range and little value for wildlife habitat. A few areas have potential for recreation. In Dawes County, Rock outcrop is mapped in undifferentiated soil groups with Canyon and Bridget soils.<sup>73</sup> . . .

Rock outcrop, which consists of sandstone, is intermingled with Canyon soils. A few areas of Rock outcrop are more than 10 acres in size. Many are almost vertical exposures of very pale brown to white fine-grained sandstone.<sup>74</sup>

The County Board elected not to present a case in support of its valuations of the Subject Property for tax year 2013. With respect to Parcel 23, the Taxpayer testified that the disputed 4G

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<sup>68</sup> 350 Neb. Admin. Code, ch. 14 §002.29 (03/09).

<sup>69</sup> See, 442 Neb. Admin. Code, ch. 5, §031.02 (6/2011) (the Commission is allowed to take notice of soil surveys for Nebraska’s 93 counties published by the NRCS, which is a subdivision of the United States Department of Agriculture).

<sup>70</sup> See, <http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>.

<sup>71</sup> See, <http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>. Information received in evidence by the Commission at Exhibit 4 page 3 indicates that rock outcrop “has no value for farming or for range and little value for wildlife habitat” and comprises 10% to 20% of soil type 6043. Additionally, the Sioux County Soil Survey information received in evidence by the Commission at Exhibit 4 page 4, which Taxpayer testimony indicated is 20 years newer than the Dawes County Soil Survey, indicates that soil type 6043 includes 16% rock outcrop.

<sup>72</sup> See, E4:2, E4:3. The Commission notes that the NRCS Web Soil Survey contains current information for Dawes County, together with archived information from 1977 and 1917.

<sup>73</sup> E4:2 (1977 NRCS Soil Survey for Dawes County, page 44:

[http://www.nrcs.usda.gov/Internet/FSE\\_MANUSCRIPTS/nebraska/dawesNE1977/dawes.pdf](http://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/nebraska/dawesNE1977/dawes.pdf)).

<sup>74</sup> E4:3 (1977 NRCS Soil Survey for Dawes County, page 25).

grassland areas of real property had no economic use for agricultural or horticultural purposes during tax year 2013, and the evidence also shows that these areas lie adjacent to land used for agricultural purposes as required under the definition of wasteland noted above.<sup>75</sup> The unrefuted testimony and exhibit evidence before the Commission, therefore, is that 15% of the disputed 4G grassland classified under soil type 6043 on the Parcel 23 component of the Subject Property is wasteland. Thus, because the disputed 4G grassland areas of Parcel 23 do not meet the definitions of recreational land or timberland as noted above, the Commission finds that the Taxpayer has adduced clear and convincing evidence that the County Board's determination, if any, to value more than 85% of this property as 4G grassland rather than wasteland was arbitrary or unreasonable for tax year 2013. The Commission further finds that 15% of the area designated as soil type 6043 on Parcel 23 should be classified as wasteland because it has no economical or actual agricultural or horticultural use potential for tax year 2013 purposes, and because it is adjacent to areas of the Subject Property used for agricultural and horticultural purposes.

The Commission's finding regarding reclassification of 4G grassland on Parcel 23 does not impact the valuation of this portion of the Subject Property for tax year 2013. The Property Record Card for Parcel 23 found at Exhibit 20 indicates that the County Assessor assigned a value of \$30 per acre to 113 acres due to 2012 fire damage, and this \$30 per acre fire damage valuation equals the County's wasteland per acre value for tax year 2013. The Taxpayer's testimony indicates that this fire damage classification includes the area of Parcel 23 that they assert should be classified as wasteland. Thus, the Commission finds that the County Board's determination of the actual value of Parcel 23 was not arbitrary or unreasonable for tax year 2013.

With respect to the disputed 4G grassland areas of Parcel 14, the Commission did not receive evidence in the form of testimony, photographs, or maps. Therefore, the Commission finds that the Taxpayer did not adduce clear and convincing evidence to support its assertion that eight acres of Parcel 14 should be designated as wasteland for tax year 2013.<sup>76</sup> The Commission

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<sup>75</sup> See, E20:4 (Property Record Card for Parcel 23, Case No. 13A-040); 350 Neb. Admin. Code, ch. 14 §002.54 (03/09).

<sup>76</sup> With respect to Parcel 14, the current NRCS Web Soil Survey for Dawes County indicates that 15% of the 50.03 acres designated as soil type 6043 on the Property Record Card found at Exhibit 21 page 4 could be rock outcrop or waste, and that 30% of the 11.4 acres designated as soil type 6203 could be badlands or waste. As indicated previously, however, the Taxpayer did not offer testimony or exhibit evidence regarding Parcel 14, particularly with respect to economic use of the disputed areas.

further finds that the County Board's determination of the actual value of Parcel 14 was not arbitrary or unreasonable for tax year 2013.

## V. EQUALIZATION

### A. Law

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”<sup>77</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>78</sup> The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.<sup>79</sup> In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the Subject Property and comparable property is required.<sup>80</sup> Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.<sup>81</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.<sup>82</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>83</sup> If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or their property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgment [sic].”<sup>84</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>85</sup>

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Thus, the Commission is unable to conclude that clear and convincing evidence exists to reclassify the disputed acres from 4G grassland to wasteland.

<sup>77</sup> *Neb. Const.*, Art. VIII, §1.

<sup>78</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>79</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

<sup>80</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>81</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>82</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>83</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

<sup>84</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>85</sup> *Id.* at 673, 94 N.W.2d at 50.

“To set the valuation of similarly situated property, i.e. comparables, at materially different levels, i.e., value per square foot, is by definition, unreasonable and arbitrary, under the Nebraska Constitution.”<sup>86</sup>

“Misclassifying property may result, ... in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief.”<sup>87</sup>

## **B. Summary of the Evidence**

The Taxpayer asserted that the County Board classified areas of comparable properties as wasteland. The Taxpayer further asserted that this misclassification results in unequal valuation treatment because the Property Record Cards for the Subject Property and the properties submitted for uniformity and proportionality review purposes indicate that wasteland is valued significantly lower than 4G grassland for tax year 2013 (\$30 per acre vs. \$240 per acre).<sup>88</sup> In support of its assertions, the Taxpayer submitted Property Record Cards and photographs of several properties near the Subject Property, together with testimony that portions of these properties designated as wasteland by the County for tax year 2013 were similar to the disputed Subject Property areas.<sup>89</sup>

## **C. Equalization Analysis**

Failure to classify similar properties similarly may violate the principles of equalization.<sup>90</sup> The Property Record Cards for the Subject Property and the properties submitted for equalization analysis by the Taxpayer indicate that wasteland is valued significantly lower than 4G grassland.<sup>91</sup>

Based on a review of the Property Record Cards, soil maps, and photographs of the Subject Property's Parcel 23 component in comparison to the evidence for the nearby properties

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<sup>86</sup> *Scribante v. Hitchcock County Board of Equalization*, 8 Neb.App. 25, 39, 588 N.W.2d 190, 199 (1999).

<sup>87</sup> *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

<sup>88</sup> See, E20:4, E21:4, E7:1.

<sup>89</sup> See, E7 (Franey – ownership of a portion of Crow Butte, a prominent butte formation pictured at Exhibit 7 page 2); E8 (Clark/Daniels - ownership of a portion of Crow Butte); E9 (Guest); E10 (Guest); E11 (Haynes); and E12 (Richardson). The Commission notes that the Taxpayer's evidence summary found at Exhibit 6 page 2 sets forth pertinent information concerning these properties submitted at least in part for uniformity and proportionality review purposes.

<sup>90</sup> *Beynon Farm Products Corporation v. Board of Equalization of Gosper County*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983).

<sup>91</sup> See, E20:4, E21:4, E7:1.

submitted for consideration by the Taxpayer, some areas designated as wasteland by the County for tax year 2013 are similar to the disputed areas of Parcel 23.<sup>92</sup> Therefore, consistent with analysis contained in the Valuation Analysis section above, the Commission finds that the County's classification of more than 85% of soil type 6043 on Parcel 23 as 4G grassland is incorrect for tax year 2013. The Commission further finds that 15% of soil type 6043 on Parcel 23 should be classified as wasteland for tax year 2013.

Taxpayers are entitled to uniform and proportionate assessment of property, even though the result may be that it is assessed at less than actual value.<sup>93</sup> The Commission does not possess the authority to increase the value of a property not in dispute, and to do so without notice to the other owner would violate the principle of due process. The only available method to address the equalization problem stemming from the misclassification identified herein is to value the disputed acres of the Subject Property's Parcel 23 component and the wasteland components of the comparable properties in a similar manner.

The Commission finds that the County Board's determination regarding the Parcel 23 component of the Subject Property for tax year 2013 is unreasonable or arbitrary because misclassifying property has resulted in a lack of uniformity and proportionality. Similar to the conclusion contained in the Valuation Analysis set forth above, however, the Commission's equalization finding regarding reclassification of 4G grassland on Parcel 23 does not impact the valuation of this portion of the Subject Property for tax year 2013.<sup>94</sup> Thus, the Commission finds that the County Board's determination of the actual value of the Subject Property was not arbitrary or unreasonable for tax year 2013.

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<sup>92</sup> See, E7:1 (Property Record Card for the Franey parcel, which indicates that .210 acres of land designated as soil type 6043 is valued as "Badland Waste" at \$30 per acre); E8:1 (Property Record Card for the Clark/Daniels parcel, which indicates that 7.11 acres of land designated as soil type 6043 is valued as "Badland Waste" at \$30 per acre for tax year 2013).

<sup>93</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>94</sup> The Property Record Card for Parcel 23 found at Exhibit 20 indicates that the County Assessor assigned a value of \$30 per acre to 113 acres due to 2012 fire damage, and this \$30 per acre fire damage valuation equals the County's wasteland per acre value for tax year 2013 according to the Property Record Card for the Daniels parcel found at Exhibit 7 page 1. The Taxpayer testified that this fire damage classification includes the area of Parcel 23 that they assert should be classified as wasteland.

## VI. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations in Case Nos. 13A-040 and 13A-041.

The Commission also finds that there is clear and convincing evidence that the areas of the Subject Property as described in the order should be classified as wasteland rather than 4G grassland. Due to the County's valuation of 113 acres of the parcel under appeal in Case No. 13A-040 at \$30 per acre due to the 2012 fire, however, the Commission finds that the County Board's determination of the actual value of this component of the Subject Property was not arbitrary or unreasonable for tax year 2013.

The Commission further finds that there is not clear and convincing evidence that the County Board's decision in Case No. 13A-041 was arbitrary or unreasonable.

For all of the reasons set forth above, the determinations of the County Board are affirmed.

## VII. ORDER

IT IS ORDERED THAT:

1. The decisions of the Dawes County Board of Equalization determining the value of the Subject Property for tax year 2013 are affirmed.<sup>95</sup>
2. The assessed value of the Subject Property in Case No. 13A-040 for tax year 2013 is \$97,565.
3. The assessed value of the Subject Property in Case No. 13A-041 for tax year 2013 is \$87,750.
4. This Decision and Order, if no appeal is timely filed, shall be certified to the Dawes County Treasurer and the Dawes County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.

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<sup>95</sup> Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax year 2013.
8. This Decision and Order is effective for purposes of appeal on November 14, 2014.

Signed and Sealed: November 14, 2014.

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Thomas D. Freimuth, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.