Washington's Open Space Taxation Act (Chapter 84.34 RCW)

A Review from the Perspective of Farmland Protection

A Report Prepared for the Office of Farmland Preservation,
Washington Conservation Commission

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NOTE: ***All bold-faced and italicized text are presented by the author of this report to add emphasis***

EXECUTIVE SUMMARY

The Farmland Preservation Task Force has requested a review of the Washington State Open Space Taxation Act (chapter 84.34 RCW) as part of its work plan for 2008. Staff and Task Force members have received numerous communications and inquiries about how the law works, why lands are included or excluded from preferential Current Use tax classification, and how the law could be improved or amended to further the goals of protecting farmland and enhancing the future of farming in our state. This report was produced to address the questions posed to and raised by the Task Force.

A brief background on the intersecting factors that have made this issue ripe for inquiry is followed by a presentation of the historical context for the laws' passage and implementation. The current framework appears to be working reasonably well. Initiated by farm and timber organizations more than 40 years, the law was made possible by passage of a state constitutional amendment in 1968 supported by 68% of the voters. Landowner enrollment in the Open Space/ Current Use law steadily grew over the intervening years. For the past two decades, it has provided a high level of stability for more than 11 million acres of farmland in commercial production. From 1975 to 2007, over 98% of the lands enrolled in the Current-Use program have been in the Farm and Agricultural classification

The purpose of the law is to **"**maintain, preserve, conserve and otherwise continue in existence, adequate open-space lands for the production of food and fiber" by using current use value as the basis for assessment of property taxes by the county Assessor. A summary review and explanation of key portions of the law and how it works is provided. The relationship of the state Department of Revenue and the role of the county assessor is also reviewed.

Statistics about the amount of land enrolled in the Open Space classification on a county by county basis are provided in tabular form as well as a comparison of the valuation of the classified land as "true and fair value" in contrast to "current use value." The ratio of these two values is also displayed. The reduction in value ranges from a low of 48% (Adams County)to a high of 95% (Island County). On average, current use farm and agricultural and land is reduced in value by 72% for taxation purposes.

A series of seven questions identified by Task Force members is posed as "Areas of confusion, ambiguity or opportunity." Each question is followed by a brief narrative based on research, interviews and review of the law. For each question, three policy or process choices are provided for Task Force consideration: retain status quo; address the issue at the agency level; or request legislative action. No specific course of action is recommended so that the Task Force members have full latitude to determine the most appropriate course of action, if they choose to act at all.

For the final question regarding improving incentives in the Open Space Tax law, a proposal that builds upon a similar concept used in California's Williamson Act is elaborated. This incentive-based proposal extends current landowner benefits of lower taxes for a longer–term contractual commitment for continued agricultural use.

BACKGROUND

In 2007, passage of Senate Bill 5108 created the Office of Farmland Preservation (OFP), housed in the Washington Conservation Commission. The bill required the governor to appoint a Farmland Preservation Task Force to guide OFP's work. The Task Force first met in December 2007. During the spring of 2008, Task Force members identified important issues to consider. Based on communications from farm constituents regarding the Open Space Taxation law, the Task Force requested that a review of this law be conducted so they could better understand the background, implementation and current issues regarding this key piece of farmland protection legislation. This report was produced to address the questions raised by the Task Force and to pose some possible policy or process mechanisms to address those questions.

Recent interest in the Open Space Taxation Act, otherwise known as the Current-Use program, and its impact on the future of farmland conservation has been driven by a number of intersecting factors:

- More sophisticated analysis by County Assessors of land use activities, assisted by computer-based Geographical Information Systems (GIS).
- Performance audits by the Department of Revenue (DOR) and by county Assessors to determine consistency in equitably applying the Current-Use program requirements, resulting in notification to landowners of additional tax obligations.
- County governments' need for increased tax dollars for county operations.
- High levels of concern that all exemptions -"tax shifts"- conform tightly to law and regulations.
- An aging generation of a landowners in farm country, many of whom entered their properties in the Current-Use program in the 1970s without a full understanding of the tax consequences upon future sale or transfer.
- Recent and new property owners, including many urban "refugees" with significant financial resources, who desire to pay minimal taxes, but have little or no land management experience. They see the Open Space program as a way to reduce their tax burden without fully understanding the requirements of the law or the obligations associated with the notice of classification continuance affidavit signed upon property acquisition.
- Counsel from some Assessors to new owners to <u>not</u> continue the Current-Use status of their property unless they plan on holding and managing the property in accordance with current use requirements for at least 10 years, since the additional tax consequences could be quite severe and greater than projected tax savings.
- Concern about cost-effective and fair ways to provide incentives for keeping farmland in commercial agricultural production.

This is not to suggest that there is broad-based or widespread concern about the Act's basic mechanisms or functions, either from administrators (DOR and Assessors) or from commercial farm operators. The current framework is working reasonably well. It is hard to argue with a program that has kept more than 11 million acres of farmland in commercial production for the last two decades and that has been popular and supported by a super-majority of the electorate since its inception. But there are clearly areas of confusion, ambiguity, and opportunity.

The focus of this report is on the "farm and agricultural land" classification of the Open Space Tax Law (chapter RCW 84.34 RCW), with some incidental reference to the "open -space classification," which includes the "farm and agricultural conservation land" designation. While not a primary focus of this report, it should be noted that in 1990, the legislature passed the Growth Management Act (GMA). That planning law requires most counties to accommodate projected growth while conserving natural resource land, including agricultural land. The shared policy goal of farmland protection in these two laws provides an opportunity to advance the Task Force's desired outcome of stabilizing the future of our state's agricultural land base and commercial farming.

HISTORICAL CONTEXT

During the 1960s, dramatic population growth and skyrocketing property assessments alarmed our state's leaders. They recognized that unless a concerted effort was made, Washington could lose many of its farms, forests, and open/undeveloped lands. The resulting landscape would be a far less attractive and productive state in the future.

Major state farm and forest organizations, ranging from the Farm Bureau to the Association of Conservation Districts spent two years (1964-1966) "meeting together to study the problem to develop a practical solution on which all could agree." Farmers and foresters saw "sales of acreage to developers in the urban fringes, as well as sales to resort and vacation home site developers deep in the heart of agricultural and timber areas, at price levels far surpassing prices justified by the income producing ability of the property for farm or forestry purposes."[1]

Because tax assessments are based on data from comparable sales, the organizations envisioned "the foreboding prospect that such prices will be used to establish values on the vast acreages of similar [farm and forestry] land." In turn, property taxes would have to reflect those "highest and best use" values rather than the productive use of the land for farms or forest. The proponents were "in complete agreement" that the only solution to the problem of assessing farm and timber lands was a constitutional amendment for "current use" of taxation for resource lands.[2]

Article 7 of the Washington State Constitution requires that "All taxes shall be uniform upon the same class of property." This equity requirement means that all real property must be taxed at its "true and fair" value." "Current-Use" property tax laws that supported retaining green and undeveloped land by taxing the land based on its current or actual use as opposed to its market value had already been adopted in 13 other states, including Hawaii and Oregon.

In 1967 the state Legislative Council, after numerous meetings and public testimony, recommended that a preferential Current-Use tax should be the primary state-level mechanism to preserve and maintain farms and forests for the future.[3]

[1] Joint statement of organizations representing farmers and timber producers before the subcommittee on Revenue and Regulatory Agencies of the Legislative Council, Spokane, WA, May 14, 1966
[2] Ibid.
[3] Legislative Council, Subcommittee on Revenue and Regulatory agencies, Minutes, October 22, 1966

House Joint Resolution No.1 passed the Legislature overwhelmingly (Senate 44-0 and House 84-9) and it was placed on the statewide ballot. The State Farm Bureau, Grange, Dairyman's Federation, numerous forest organizations, and many others enthusiastically supported the measure. Opposition came primarily from the Washington Association of Realtors. The official ballot title was "Taxation based on actual use."

Proponents of the measure spoke of the "alarming rate [at which] the Evergreen State is losing its precious open spaces to urban sprawl" and quoted a Puget Sound Governmental-Conference estimate that "…by 1985 there will be no farmland left in Snohomish, King, Pierce and Kitsap counties…." Opponents argued that the measure did not guarantee long range planning for open-space because land would remain in resource production or open-space only as long as the property owner wished to take advantage of the tax benefit.[4]

Voters were asked: "Shall Article VII of the State Constitution be amended by adding a section authorizing the Legislature to provide that farms, agricultural lands, standing timber and timber lands, and other open-space lands used for recreation or enjoyment of their scenic or natural beauty, shall be valued for purposes of taxation on the basis of the use to which such property currently is being applied, rather than on its highest and best use."

In the General Election, held on November 5, 1968, voters overwhelmingly approved the Current-Use amendment with 68 % in favor (705,978 votes) and 32% against (335,496). The language was added to the State Constitution as Section 11 in Article 7 in 1970.

CHAPTER 84.34 RCW

The Open Space Taxation Act or Current Use law was initially enacted in 1970 and has been revised a number of times since. The most significant rewrite took place in 1992. The Legislature's declared purpose was first placed into statute in Laws of 1970 ex.s., c 87, s 1:

> "It is in the best interest of the state to ***maintain, preserve, conserve and otherwise continue in existence, adequate open-space lands for the production of food and fiber*** and forest crops and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens. The Legislature further declares that assessment practices must be so designed as to permit the ***continued availability of open-space lands*** for these purposes, and it is the intent of this chapter, so to provide. The Legislature further declares its intent that farm and agricultural lands shall be ***valued on the basis of their value for use*** as authorized by section 11 of article 7 of the Constitution of the state of Washington."[5]

Under the act there are three classifications of land: Farm and Agricultural Land; Open Space Land (including farm and agricultural conservation land); and Timber Land. Reports from the Washington Department of Revenue (DOR) indicate that **from 1975 to 2007**, **over 98% of the lands enrolled in the Current-Use program have been in the Farm and Agricultural** classification as opposed to the Timber or Open Space classifications. For the past twenty (20)

[4] 1967 Voter's Pamphlet
[5] (84.34.010 RCW)

years, a stable land base of **more than 11 million acres** of land has been classified as farm and agricultural land.

A sampling (in 5 year increments) from Department of Revenue's Property Tax Statistics indicates the following statewide trend lines for program enrollment and farm parcel size:

Year	Units (applicants)	Acreage	% in Farm/Ag	Average Parcel Size (acres)
1975	8,533	2,179,051	98.5 (1978)	255
1980	31,601	7,459,090	98.5	236
1985	38,641	10,200,390	n/a	264
1990	45,475	11,507,709	n/a	253
1995	48,411	11,203,257	n/a	231
2000	(not available)	12,069,061	98.7	n/a
2005	58,367	11,551,815	98.4	198
2007	58,707	11,484,216	98.2	196

Key amendments to chapter 84.34 RCW after 1973

Chapter 84.34 RCW has been amended a number of times as public policy issues or administrative problems have arisen. Key amendments (from Department of Revenue's annual Property Tax Statistics publications), included:

1979

SHB 617 (Chapter 84, Laws of 1979) Farm and Agricultural Lands – Special Benefit Assessments

This bill incorporated several new statutes into chapter 84.34 RCW [RCW 84.34.300 – 380] to acknowledge that special benefit assessments, for the improvement or construction of sanitary and/or storm sewerage service, or domestic water service, or some road improvements, do not generally benefit land classified as farm and agricultural land. The policy goal was to keep land in agricultural production. The legislative findings in RCW 84.34.300 re-affirm the importance of maintaining farmland:

> The legislature finds that farming and related agricultural industry have historically been and currently are central factors in the economic and social lifeblood of the state; that it is ***a fundamental policy of the state to protect agricultural lands as a major natural resource in order to maintain a source to supply a wide range of agricultural products; and that the public interest in the protection and stimulation of farming and the agricultural industry is a basic element of enhancing the economic viability of this state.*** The legislature further finds that farmland in urbanizing areas is often subjected to high levels of property taxation and benefit assessment, and that such levels of taxation and assessment encourage and even force the premature removal of such lands from agricultural uses. The legislature further finds because of this level of taxation and assessment, such farmland in urbanizing areas is either converted to nonagricultural uses

when significant amounts of nearby nonagricultural area could be suitably used for such nonagricultural uses, or, much of this farmland is left in an unused state. The legislature further finds that with the approval by the voters of the Fifty-third Amendment to the state Constitution and with the enactment of chapter 84.34 RCW, the owners of farmlands were provided with an opportunity to have such land valued on the basis of its current use and not as "highest and best use" and that such current use valuation is one mechanism to protect agricultural lands. The legislature further finds that despite this potential property tax reduction, farmlands in urbanized areas are still subject to high levels of benefit assessments and continue to be removed from farm uses.

It is therefore the purpose of the legislature to establish, with the enactment of [RCW 84.34.300 through 84.34.380], ***another mechanism to protect agricultural land*** which creates an analogous system of relief from certain benefit assessments for farm and agricultural land. It is the intent of the legislature that special benefit assessments not be imposed for the availability of sanitary and/or storm sewerage service, or domestic water service, or for road construction and/or improvement purposes on farm and agricultural lands which have been designated for current use classification as farm and agricultural lands until such lands are withdrawn or removed from such classification."

1992

ESHB 2928 (Chapter 69, Laws of 1992) Open Space Taxation – Administration and Classification Revisions.

The legislation touched many statutes in chapter 84.34 RCW and made some far reaching changes to the Current Use program. It generally created broader incentives for leaving land undeveloped and in some type of classification of open space (chapter 84.34 RCW) or forest land (chapter 84.33 RCW). It created a new category of "farm and agricultural conservation land" within the open space classification. This type of land was formerly classified as farm and agricultural land that no longer produces the required amount of income or it is not currently being farmed ***but has a high potential of returning to farming in the future***.[6] The gross income requirement is increased for farmland of 5 to 20 acres from $100 per acre to $200 per acre and for farmland of less than 5 acres from $1,000 to $1,500 per acre. The higher income requirements are applicable to applications for and continuing classification as farm and agricultural land after January 1, 1993. The House Finance Committee Bill Report stated that land previously classified as farm and agricultural will retain the old income tests. A transfer of classified farm and agricultural land to a new owner will trigger the application of the higher income tests.

For classified parcels of farm and agricultural land, the legislation allowed the residence of the farm operator or owner and housing for farm hands to be included in the farm and agricultural classification if the farm house and/or employee housing is on or contiguous to the classified parcel and the use of the housing is integral to the use of land for agricultural purposes. A provision was added to allow land classified farm and agricultural to be used for incidental uses, as long as the incidental uses are compatible with agricultural purposes and they do not exceed twenty percent of the classified land

Under this legislation an owner of agricultural land whose application for the farm and agricultural classification is denied may appeal this denial the Board of Equalization in the

[6] RCW 84.34.020(8).

county where the property is located. A new statutory provision allows an owner of classified land to seek reclassification of the land to another classification (open space, agricultural land, timber land) without the payment of additional tax. Property classified under chapter 84.34 RCW is required to continue to meet the criteria for classification for the years following initial classification.

Several changes were made regarding the removal of land from classification. The transfer of classified land to a government agency as a result of the failure to make mortgage payments does not automatically cause removal of the land from classification. Likewise, if the intent to use the power of eminent domain to acquire classified land stated in writing or in some other official action the removal is exempt from the payment of additional tax. Nor are additional taxes, etc., charged when farm and agricultural land containing dwellings are removed from classification. If land is removed from current use program by the assessor, additional tax, applicable interest, plus a twenty percent penalty will be imposed unless the removal is exempt from additional tax. Previously, the penalty only applied when the removal was the result of a change in use.

SHB 2330 (Chapter 52, Laws of 1992) Forest Land Base Retention Incentives.
Even though the bill focused on the forest land designation in chapter 84.33, sections 14 through 21 amended the special benefit assessment statutes of chapter 84.34 RCW. These changes imply that the legislature wanted to shield designated forest land and classified current use timber land from these assessments, in the same way it began protecting classified farm and agricultural parcels in 1979 and to acknowledge that both timber and agricultural production were important industries the state wanted to protect. The policy goal was to keep land in agricultural and forest production.

1997

2SHB 1557 (Chapter 295, Laws of 1997) Exemption for habitat improvement.
This legislation created a new property tax exemption for real and personal property devoted to the improvement of fish and wildlife habitat and of water quality and quantity programs. The improvement must be included in a conservation plan adopted by a Conservation District and the exemption is permitted only as long as "best management practices" are followed for the property. Improvements required to mitigate impacts on habitat or water quality/quantity will not qualify for exemption. Further, habitat conservation plans under the federal Endangered Species Act did not qualify. Landowners must annually certify that the improvements are being maintained as specified in the conservation plan.

ESB 6094 (Chapter 429, Laws of 1997) Growth Management and property tax.
This bill amended the Growth Management Act, to recognize the importance of agricultural and forest industries and to encourage retention of the rural character of land outside of urban areas. The bill provides greater discretion to local boards when they are making land-use determinations consistent with Growth Management requirements. Two provisions relate to the assessment of property. Section 31 amends definitions in the open space program to broaden the types of parcels that can qualify as agricultural lands to include certain lands designated as agricultural land that have long-term significance for commercial food production and parcels outside of urban growth areas which are zoned as agricultural. Sections 32 through 35 of the bill create an exception to the highest and best use property assessment criteria. It states that the value of parcels of classified farm and agricultural, timber, and open-space lands that are

included in a county's comprehensive plan may not be based on the sale of similar parcels that have been converted to other uses within five years following the sale of the property.

2001

SHB 1450 (Chapter 305, Laws of 2001) Current use additional tax exemptions for land transfers after the owner's death.

This bill restores an exemption from payment of additional tax that applies to classified or designated forest land and classified open space, farm and agricultural, and timber lands when the property is removed from the Current-Use assessment programs. If the sale or transfer of the land enrolled in one of the current use programs occurs within two years of the death of an owner of at least a 50 percent interest in the property, then no additional tax is due. To qualify, the property must have been continuously enrolled in the Current-Use program(s) since 1993.

SSB 5702 (Chapter 249, Laws of 2001) Simplification of Current Use assessment programs.

This bill relates to lands subject to Current-Use assessment for property tax purposes - either as forest lands under chapter 84.33 RCW or open space, farm and agricultural, and timber lands under chapter 84.34 RCW. Most of the changes are intended to simplify administration of the programs for both counties and property owners and improve consistency between both current use programs.

2005

ESSB 5396 (Chapter 303, Laws of 2005) In-lieu Payments for habitat conservation lands.

This is a comprehensive bill dealing with habitat conservation programs. It establishes a new account for financing specific programs (riparian protection and farmland preservation) and revises distribution formulas for these programs, as well as the formulas for the outdoor recreation and habitat conservation accounts. Sections 6 and 7 require new in-lieu of tax payments to counties by the state to hold local jurisdictions harmless in situations where land is taken for habitat conservation areas, riparian areas, farmland preservation and recreation lands. The payments are to be based as if the land was taxable as open space land under chapter 84.34 RCW except for taxes levied for any state purpose, plus an amount for any weed control assessments that would be due if the land was privately owned.

HOW CHAPTER 84.34 RCW WORKS

Current use classification lowers the taxable value of farm and agricultural lands and other resource lands relative to other land uses. Land that would be assessed at $10,000 an acre for its "highest and best use" would be valued at perhaps $1,000 an acre as farm land. The effect of this lower valuation is to lower the tax assessed on lands classified as "current use." Economists refer to such a transfer of tax burden as a "tax shift." In the case of the Open Space Taxation Act (Current Use), this tax shift achieves the voter-approved public benefits of maintaining land in an undeveloped condition and, in the case of farmland, productive condition. In exchange for a significant tax advantage, a property owner <u>contractually promises</u> the county to manage his/her land for commercial agricultural purposes.

There is, however, a continuing concern by those charged with implementing the law, that these tax shifts reflect the intent of the law and do not become a means to achieve individual benefit at the expense of other land owning taxpayers. For all land classified under chapter 84.34 RCW, the assessor is required to annually note on the assessment roll and tax roll the land's: true and

fair value (market) and current use value.[7] Land classified under chapter 84.34 RCW is taxed on the basis of its Current-Use value.

Farm and Agricultural Lands Defined

The Current Use statutes define two major categories of farm and agricultural land:

1) Farm and agricultural land (RCW84.34.020(2))
2) Open space/farm and agricultural conservation land. (RCW 84.34.020(1)(c) and 84.34.020(8))

FARM AND AGRICULTURAL LAND (3) TYPES)

The primary category of "farm and agricultural land" is defined as any parcel of land that is 20 or more acres or multiple parcels of land that are contiguous and total 20 or more acres.[8] The property must be a devoted primarily to the production of livestock or agricultural commodities ***for commercial purposes.*** Enrollment of farmland in a federal Conservation Reserve Program (CRP) is also considered "farm and agricultural land" under this statute. If they meet certain income criteria, farmed properties smaller than 20 acres can also be considered "farm and agricultural land." These parcels are required to produce income in the form of "cash;" that is, a monetary profit from cash income , not from barter or trade.[9]

The assessor of the county in which the land is located is the designated authority who determines eligibility for classification as "farm and agricultural land" within the current use program.[10] No explicit evaluation of the consequences of the tax shift of classifying land as "farm and agricultural land" is required if a parcel meets the size, intent, and/or income requirements of the law.

Most counties now require a substantial application fee, a showing of proof of income for three of the past five years using the IRS Schedule F (Farm Income), and other relevant information (see Appendix for sample Skagit County application form). Some counties also require owners to submit a farm economic plan to show intent to meet income requirements rather than proposing it as a speculative activity. This raises the confidence level of the assessor when classifying parcels as farm and agricultural land under chapter 84.34 RCW.

Land Parcels 20 acres or larger

Both the statute and the Department of Revenue issued rules emphasize "commercial agricultural purposes" means that the land was used, prior to the date of application for classification as farm and agricultural land and on an going basis, for farming and that the owner or lessee ***intends to make a profit*** from their activities.[11] The rule stipulates that "an owner must engage in commercial agricultural activities on the land to demonstrate a commercial agricultural purpose." Those activities are listed as:
1) raising, harvesting, and selling lawful crops;

[7] RCW 84.34.035
[8] RCW 84.34.020(2)
[9] WAC 458-30-200
[10] RCW 84.34.035
[11] RCW 84.34.020(2) and WAC 458-30-200

2) feeding, breeding, managing, and selling of livestock, poultry, fur bearing; animals or honeybees, or any products thereof;
3) dairying or selling of dairy products;
4) aquaculture;
5) horticulture;
6) participating in a government-funded crop reduction or acreage set-aside program; or
7) cultivating Christmas trees or short rotation hardwoods.

Farm and agricultural land also includes the land on which farm worker housing and the principal residence of the farm operator are located, if the housing is "integral to the use of classified land for agricultural purposes." If the owner or lessee operates the farm on contiguous parcels, the land would also be classified as "farm and agricultural land."[12]

Other types of land uses are also classified as "farm and agricultural land," including areas used for the production, preparation, or sale of agricultural products "in conjunction with the lands producing such products" and other "incidental purposes compatible with agricultural purposes," such as wetland preservation. The incidental uses must not exceed 20% of the classified farm and agricultural land. Additionally, any parcel of land 1 to 5 acres, that is not contiguous but integral to the farming operations may also qualify for classification as farm and agricultural land.[13] The value of buildings and other improvements are valued separately from the land by the assessor based on their true and fair value.

RCW 84.34.020(6) defines the term "contiguous" as "land adjoining other land and touching other property held by the same ownership. Land divided by a public road, but otherwise an integral part of a farming operation, shall be considered contiguous. This term is also defined by rule as land owned "by the same owner" or "held under the same ownership." If the land is an integral part of the farming operations, it is considered contiguous even though it may be separated by a public road, right of way, railroad, or a waterway.[14] "Owner" is statutorily defined to mean "the party or parties having the fee interest in land[15]. It is also defined by rule to mean "any person(s) having a fee interest in a parcel of land."[16]

Land Parcels less than 20 acres but larger than 5 acres

The requirement for properties between 5 and 20 acres to qualify for classification as farm and agricultural is based on two factors: 1) the land must be "devoted primarily to agricultural uses;" and 2) the property must produce a stipulated annual income. The income requirement was in the original law enacted in 1973 and was subsequently revised in 1992 (when other revisions were also made to chapter 84.34.RCW). The income production requirements have remained at the same level since that date.[17] The provision allowing a reduced tax valuation for the owner's or farm operator's house and related farm worker's housing does not apply to parcels of classified farm and agricultural land smaller than 20 acres.

[12] RCW 84.34.020(2)(e)
[13] RCW 84.34.020(2)(d).
[14] WAC 458-30-200 (2)(n)
[15] RCW 84.34.020(5)
[16] WAC 458-30-200(2)(cc)(i)
[17] RCW 84.34.020(2)(b)

Presently, parcels that are less than 20 acres but more than 5 acres are required to produce a gross income of $200 per acre per year for three of the five calendar years preceding the date of application for classification as farm and agricultural land. The same income requirements then apply for on-going classified farm operations.

Land Parcels 5 acres or smaller

Similar income requirements apply to smaller parcels that are less than five acres and devoted primarily to agricultural uses.[18] Any parcel of land of less than 5 acres must have produced a gross income, as of January 1, 1993, of $1,500 per year for three of the five years preceding the date of application for classification as farm and agricultural land.

OPEN SPACE/FARM AND AGRICULTURAL CONSERVATION LAND

In 1992, the Legislature amended chapter 84.34 RCW to include a new category of "farm and agricultural conservation land under the "open space" classification in the current use program."[19] A different set of criteria and application procedures are used for conservation farmland, as discussed above. (RCW 84.34.037) Instead of the Assessor, County Commissioners (the "county legislative authority") review and approve these parcels for classification as open space land in a manner much like a comprehensive plan amendment. The criteria for approval include "benefits to the general welfare of preserving the current-use of the property" and, significantly, "the resulting revenue loss or tax shift."

There are two categories of "farm conservation" lands: a) "land previously classified under farm and agriculture classification that no longer meets the criteria and is reclassified under open-space land;" or b) "traditional farmland" that was never classified, that has ***not been irrevocably devoted to a use inconsistent with agricultural uses, and that has a high potential for returning to commercial agriculture***."[20]

WAC 458-30-242(4) provides an example of each type of farm and agricultural conservation land. "Previously classified" land, for instance, might be a small farm inherited by the wife of the farmer who worked the ground. She cannot farm the land to meet the continuing income requirements and requests that it be re-classified as "open space agricultural conservation land" to retain the reduced current use valuation and tax benefits. Her application must be reviewed and approved by the county legislative authority.

The second example is a 50-acre parcel that was never classified as "farm and agricultural land" under chapter 84.34 RCW though it has historically been used for raising a variety of livestock. It is productive land but, for whatever reason, the property was never classified within the current use program. County Commissioners could choose to classify this land because it has not been "irrevocably dedicated to a use inconsistent with agricultural uses and the land has a high potential for returning to commercial agricultural."

This 1992 amendment is based on the legislative intent to "maintain, preserve and conserve" land for the production of food and fiber. The Legislature recognized the shift from classified

[18] RCW 84.34.020(2)(c)
[19] RCW 84.34.020(1)
[20] RCW 84.34.020(8)

farm and agricultural land to open space by farmers who are no longer farming, but who want to keep the land available for farming in the future. Based on a local legislative determination, these properties could serve as a "land bank" that might be available for future commercial agriculture. But there's not a lot said in statute or in rule regarding this new sub-classification of farm and agricultural conservation land. An agricultural county might view these parcels as providing a buffer for years when markets are good and land is in short supply. Alternatively, in an urbanizing county, the land could be seen as potentially available for open space use with little appreciation of its potential utility for farming.

There are no definitions or standards regarding how long lands can stay in this sub-classification of open space land. Under the current statutes and regulations, there is no requirement that an owner or operator of such land provide a farm plan or meet any income requirements for these lands. In a sense the lands become "a black hole." Some have suggested that before lands can receive this reduced valuation leading to preferential tax treatment, the Assessor should be directed to require a plan of action that would outline when the land should return to agricultural production. Currently, there are no consequences for classifying land in the "open space farm and agricultural conservation land," except a lower current use valuation and reduced tax payments.

Anecdotally, there have been instances where land under this classification has been used as an Off-Road Vehicle (ORV) park or for a paintball course. This would appear to violate the legislative intent to retain these lands for agricultural production.

As an adjunct to this report, the Conservation Commission has contracted with the Rural Technology Initiative (RTI) Program at the University of Washington, College of Forest Resources. The RTI-generated Land Owner Data Base project has assembled assessor's data from across the state. When completed in early September, GIS-based map and tabular data will be available to display the location and scale of lands used for agriculture but not currently classified in the farm and agricultural Current-Use program.

County Assessor's Duties Under Chapter 84.34 RCW When Reviewing and Monitoring Farm and Agricultural Properties

Applications for classification as farm and agricultural land are made to the County Assessor, who may approve or deny it, in whole or in part.[21] The Assessor, "with due regard for all relevant evidence," is the designated authority for approving or disapproving applications for this classification. An application for classification is deemed to have been approved, unless it is denied prior to May 1st of the year after which the application was delivered by the assessor. Denials can be appealed to the county Board of Equalization. That panel can overturn the Assessors determination to deny an application for classification , to remove the land from Current-Use status, and his/her decision about the new assessed value placed on land when it is removed from classification.

[21] RCW 84.34.035

Regulations give the Assessor discretion to require the applicant to provide a broad range of information to assure that land is, in fact, commercially farmed. Failure to provide the requested information "shall be cause to deny an application."[22]

Relevant information may include "data regarding the Current-Use of the land, including the productivity of typical crops, sales receipts, federal income tax returns including schedules documenting farm income, other related income and expense data, and any other information relevant to the application."[23] The IRS Form 1040 Schedule F (Farm Income) and other materials are commonly used as key evaluation materials. The determination is based on historical and current-uses of the land. Generally, ***prospective use of the land may not be relevant evidence*** in acting upon an application. Some County Assessors, given their knowledge of local circumstances, may accept a prospective application conditioned on future performance. If the owner does not demonstrate within a stated period that the land is being commercially farmed, the property will be subject to the withdrawal process described below.

Unlike the case of application for classification as open space land, the Assessor cannot impose conditions or restrictions regarding the approval of an application for farm and agricultural classification. The regulations also require the Assessor to consider relevant zoning ordinances and regulations. If a zoning ordinance prohibits the farm activity, the Assessor shall deny the application. [24]

The income/performance requirements on parcels approved for classification must then be met in succeeding years for the land to remain in the current use program as farm and agricultural land. Annually, the assessor may monitor ongoing compliance for classification. RCW 84.34.035, in pertinent part, states

> "The Assessor shall, as to any such land, make a notation each year on the assessment list and the tax roll of the assessed value of such land for the use for which it is classified in addition to the assessed value of such land were it not so classified.

Most counties have a "Current-Use clerk" to monitor performance. WAC 458-30-225(3)(e) makes it clear that after approval of the application for classification, "the assessor may review the classification at any time." Assessors tend to look much more skeptically at land located in areas where other acreage has already been developed. Some Assessor's offices issue warning notices to property owners if there is some sense that the smaller acres are not meeting the income production requirements. Many landowners are not aware of these requirements and say they have been "blindsided" by the penalties for noncompliance.

Most of the abuses of the current use program appear to be by people on small acreage parcels who want to pay fewer taxes. In counties where there is an appreciation for the economics and dynamics of agriculture, the assessor's office may make more allowances for the land to remain classified as farm and agricultural because of a belief that it is prudent to preserve land for farming and a recognition that the economic consequences of taking land out of Current-Use status can be quite punitive for a landowner.[25]

[22] WAC 458-30-225
[23] WAC 458-30-225(3)(d)
[24] WAC 458-30-225(b), (c)
[25] Wes Hagen, personal communication

However, it is unclear how prevalent this flexible attitude, regarding compliance with the farm and agricultural classification requirements, is among Assessors statewide.

A drive-by inspection by the Assessor, Current-Use clerk, or other personnel could trigger a review of Current-Use status as farm and agricultural land if, for example, the property is clearly not being managed consistent with locally understood notions of "commercial agriculture."

The clearest statement of the Assessor's duty comes from a Board of Tax Appeal's decision (Gehlen v. Cook (BTA Docket Nos. 60196 and 60197) :

> A basic premise of the statute is to tax property on the basis of Current-Use in return for the owner's promise to commercially farm the land. The requirement of farming for commercial purposes with its profit intent requirement is a continuing obligation of the owner, and ***the classification can be removed any time the condition is not met***. Continued and regular use for a commercial farming activity is required and the ***Assessor has a statutory obligation to remove property from classification when it no longer meets the statutory requirement.***

Penalties for removing or withdrawing land from Current Use Classification -"Additional tax"

To receive preferential tax treatment, classified farm and agricultural land must remain under that Current-Use classification and not be applied to any other uses ***for at least 10 years*** from the date of classification, until and unless the land is transferred or reclassified into another Current-Use classification or forest land designation (chapter 84.33 RCW) as allowed under RCW 84.34.070(2). The Current-Use status automatically continues after the first ten-year period, assuming the land remains in farm use, unless a request is made by the owner to withdraw or remove the land from current use classification or the use of the land has changed.[26] When land is withdrawn from classification, additional or back taxes, interest, and possibly a penalty may become due if the removal or withdrawal isn't exempt from these "penalties" as provided in RCW 84.34.108. The valuation of land based on its current use, rather than its market value at highest and best use, shifts the difference between property taxes based on those valuations to other taxpayers residing in the same taxing districts. The taxes are shifted to all taxing districts, including the state and the county, as long as the land remains classified under chapter 84.34 RCW. The change in the value of the land may or may not trigger the collection of "additional tax.[27]

Withdrawal

To withdraw land from Current-Use classification, the owner must give the county Assessor a two-year notice of request for withdrawal. This notice can be filed any year after the 8th assessment year following initial classification of the land. The law stipulates that the Assessor must impose the "additional tax and applicable interest" due. [28] Unless exempt under RCW 84.34.108(6), additional tax and applicable interest are due and payable to the county treasurer within 30 days after the owner is notified of the taxes due.

[26] RCW 84.34.070
[27] RCW 84.34.070
[28] RCW 84.34.108. RCW 84.34.070(1)

When land is withdrawn from current use classification, the assessor will compute the amount of additional tax, which is equal the difference between the property tax paid as "farm and agricultural land" or "farm and agricultural conservation land" and the amount of property tax that would have been otherwise due and payable if the land had not been classified for the past seven years. In addition, applicable interest is due on the amount of additional tax paid at the rate is 1% per month or 12% per year.[29]

Change in Use and Removal

Voluntary - If an owner changes the use of classified land, he must notify the Assessor within 60 days of that change. The assessor will calculate additional tax and applicable interest as if the owner had given two years' notice AND there is an additional 20% penalty on the total amount (7 years back taxes plus simple interest at 1% per month or 12% per year).

Assessor initiated - If the owner has not met the income or intent-to-farm requirements of the current use farm and agricultural classifications, the Assessor, at his or her discretion, can remove the land from classification and assess the additional tax, applicable interest, and a 20% penalty on the total amount.

Property Transfer

When property is sold or transferred, the seller is liable, within 30 days of closing, for the additional tax, interest, and penalty, unless the new owner signs a "Notice of Continuance." The Notice is attached to the real estate excise tax affidavit. The assessor retains discretion to determine if the land will continue to qualify for classification under chapter 84.34 RCW with its preferential tax treatment. Some counties now require a new owner to file a plan demonstrating intent to continue agricultural use.

There are a number of exceptions to the penalties associated with removal. Land removed because of the creation, sale, or transfer of forest riparian easements[30] or for the "creation, sale or transfer of a fee interest or conservation easement for riparian open space program[31] are statutorily exempt from any tax penalties. See RCW 84.34.108(6) for a list of all such exemptions.

Distribution of Additional Tax Revenues

The additional taxes collected upon withdrawal or removal of land from current use classification are distributed by the county treasurer in the same manner and proportion as current taxes applicable to the property. The following Table shows the state aggregated distribution of all property taxes. Each county and taxing district is, however, unique in terms of proportional distribution. Note that funds from property taxes are paid into the state General Fund that is used to support K-12 education. Taxes collected for the state levy goes solely to support schools. (see Table 9, page 25)

[29] RCW 84.34.108(4)(a),(b)
[30] RCW 76.13.120
[31] RCW 76.09.040

Additional tax receipts are sporadic and unpredictable. In a sense, they are an unbudgeted windfall distributed to all taxing districts. Distribution can be complicated because each year levy rates and amounts change and the additional tax looks backwards over a seven year period. From a local government perspective, there may be some encouragement to convert land because of this windfall-revenue consequence. In addition, interest and the 20% penalty, if imposed, go directly to the county current expense fund.[32]

The Department of Revenue does not collect information about the amount of additional tax figures from the counties, so there is no state-wide figure to understand the scale of these windfalls. Anecdotally, in 2007, Skagit County received $800,000 from this source, an amount equal to its tax receipts from new building construction.[33]

However, there is data for withdrawals from the program when the entity is tax exempt. RCW 84.34.108 waives the additional tax when land is removed in a variety of situations, e.g., governmental land exchanges, transfer to a governmental entity or non-profit nature conservancy for conservation purposes. The exemption provides a motivation to the seller since the additional tax would otherwise be paid by them at closing. In 2007, approximately $1.3 million was not paid in additional tax as a result of transfers of classified open space land to non-profit nature conservancies and governmental entities.

Taxpayer Savings ($000)	CY 2004	CY 2005	CY 2006	CY 2007
State levy	$ 249	$ 264	$ 280	$ 297
Local levies	$ 898	$ 951	$ 1,008	$ 1,069

(from "Tax Exemptions 2008," DOR)

2007 PROPERTY TAX STATISTICS

2007 Consolidated Tax distribution

All schools levies collected	= $4,220,376,000.00	= 54.6%
All county levies collected	= $1,321,170,000.00	= 17.1%
All Cities and Towns	= $1,074.363,000.00	= 13.9%
All other districts	= $ 1,110,600.00	= 14.4%
Port District levies	= $ 174,455.00	= 1.9%
Fire protection levies	= $ 421,884.00	= 5.4%
"Others"	= $ 514,261.00	= 7.1%
Total	= $7,726,509,000.00	= 100%

[32] RCW 84.34.100.
[33] Wes Hagen, personal communication

Property Taxes by Fund, According to Tax Year Due
2003-2007

	2006		2007		2006 to 2007 Comparison	
CATEGORY	Amount ($000)	Percent	Amount ($000)	Percent	Difference ($000)	Percent Change
TOTAL	$7,211,990	100.0 %	7,726,509	100.0 %	$514,519	7.1 %
SCHOOLS	3,970,834	55.1	4,220,376	54.6	249,542	6.3
State (Regular)	1,639,899	22.7	1,706,320	22.1	66,421	4.1
Local (Special)	2,330,935	32.3	2,514,057	32.5	183,121	7.9
Maint. & Oper	1,348,755	18.7	1,429,227	18.5	80,472	6.0
Cap./Trans. Project	146,497	2.0	179,084	2.3	32,588	22.2
Bonds	835,684	11.6	905,745	11.7	70,062	8.4
COUNTY	1,247,664	17.3	1,321,170	17.1	73,506	5.9
Current Expense (Regular)	729,846	10.1	750,987	9.7	21,141	2.9
Other County Regular	82,522	1.1	116,687	1.5	34,166	41.4
Road District (Regular)	376,529	5.2	397,316	5.1	20,787	5.5
Diverted Road Funds	9,446	0.1	9,226	0.1	(220)	(2.3)
County Special	49,322	0.7	46,953	0.6	(2,368)	(4.8)
CITIES AND TOWNS	992,966	13.8	1,074,363	13.9	81,397	8.2
Regular Levies	921,726	12.8	1,002,960	13.0	81,234	8.8
Special Levies	71,240	1.0	71,403	0.9	162	0.2
DISTRICTS	1,000,526	13.9	1,110,600	14.4	110,074	11.0
Total Regular	903,663	12.5	1,011,167	13.1	107,503	11.9
Total Special	96,863	1.3	99,434	1.3	2,571	2.7
Port General (Regular)	80,600	1.1	92,903	1.2	12,303	15.3
Port Ind Dev/Bonds(Reg)	49,606	0.7	54,132	0.7	4,526	9.1
Port Special	16	0.0	420	0.0	404	0.0
Fire Protection Reg	331,414	4.6	379,937	4.9	48,523	14.6
Fire Protection Spec	39,973	0.6	41,947	0.5	1,974	4.9
Library Regular	190,242	2.6	210,323	2.7	20,081	10.6
Library Special	12,158	0.2	11,019	0.1	(1,139)	(9.4)
Hospital Regular	54,806	0.8	57,525	0.7	2,719	5.0
Hospital Special	28,919	0.4	28,621	0.4	(298)	(1.0)
Emergency Medical Reg	159,761	2.2	176,760	2.3	16,999	10.6
Emergency Medical Spec	1,415	0.0	2,750	0.0	1,335	94.3
Parks Regular	21,651	0.3	23,629	0.3	1,977	9.1
Parks Special	7,966	0.1	8,016	0.1	50	0.6
Other Regular	15,583	0.2	15,957	0.2	374	2.4
Other Special	6,415	0.1	6,661	0.1	246	3.8

Determining the Productive Value of Farm and Agricultural Land in Current-Use Classification

The County Assessor is required to maintain two values for each parcel of land classified under an open space classification.[34] The first value, the "fair market value" (also called the “true and fair value” or the “highest and best use value”) is the value the Assessor would place on the land if it were not classified under chapter 84.34 RCW. The second value, the "Current-Use value," is based on the land’s current use as classified by the granting authority. Most property tax authorities refer this accounting as “keeping dual rolls.” The process for determining the value of farm and agricultural land is spelled out in RCW 84.34.065.

The statute states that "the true and fair value of farm and agricultural land shall be determined by consideration of the earning or productive capacity of comparable lands from crops grown most typically in the area averaged over not less than five years, capitalized at indicative rates.” The earning or productive capacity of farm and agricultural lands is its "net cash rental," capitalized at a "rate of interest" charged on, “long term loans secured by mortgages on farm or agricultural land, plus a component for property taxes. As required by statute, the Department of Revenue publishes no later than January 1 each year the rate of interest and property tax component to be used in making the value determination.[35] The net cash rental is determined in consultation with a local agricultural advisory committee.[36]

The details about the valuation procedures, information to be considered by the assessor, how to determine the current net cash rentals or earning capacity, how the capitalization or interest rates are set, the process an owner may use to appeal of the rate of interest determinations, and the process an assessor must follow to value the principal residence used by the farm and agricultural owner or operator or farm worker housing are set forth in RCW 84.34.065 and to a greater extent in WAC 458-30-262. The interest rate and property tax components for each county, which is used in valuing classified farm and agricultural land, can be found in WAC 458-30-262. An example of how such values are set by the Skagit County Open Space Advisory Committee can be found in the Appendix.

County Advisory Committees

Direct engagement by local farm owners and operators with the county assessor to assist in determining the Current-Use value of farm and agricultural land is called for in RCW 84.34.145:

> The county legislative authority shall appoint a five member committee representing the active farming community within the county to serve in an advisory capacity to the Assessor in implementing assessment guidelines as established by the Department of Revenue for the assessment of open space, farms and agricultural lands, and timber lands classified under this chapter.

The scope of the advisory committee’s authority is clearly limited to providing information about <u>how</u> Current-Use values of farm land should be determined. The committee’ is specifically prohibited from providing any assistance or judgment regarding <u>specific</u> properties.

[34] RCW 84.34.030
[35] RCW 84.34.065(2)
[36] RCW 84.34.145

> The advisory committee shall not give advice regarding valuation or assessment of specific parcels of land. However, it may supply the Assessor with advice on typical crops, land quality and net cash rental assessments to assist the Assessor in determining appropriate values.[37]

While on its face the law requires the appointment of advisory committees, the regulations give the "county legislative authority" the option *to not appoint* such a committee, if there is "insufficient interest by the farming community in the formation of such a committee." Failure to appoint a committee "shall not invalidate the listing of property on the assessment or the tax rolls."[38]

Advisory committees have been appointed and operate in roughly 50% of the state's counties. In counties where committees have been appointed, about half are actively engaged in assisting the Assessor in setting values and in the other half, they perform a once a year "pro-forma" function of approving staff -created valuation assessment materials. When these committees are actively engaged, they inform the Assessor about local re-planting and irrigation costs, lease rates, and other pertinent information.[39]

Conservation Futures Authority (RCW 84.34.200 - 240)

The Open Space Taxation Act also includes a mechanism for municipalities (counties, cites and towns, etc.) to acquire fee simple or lesser interests in property to protect the land for the stated purposes of the act.[40] In 1971, the Legislative declaration of intent for "Conservation Futures" re-affirmed the reasons for the Current Use program and provided a funding mechanism to acquire resource and open space lands. The inclusion of this mechanism demonstrates that the Legislature understood that ***preferential tax treatment, in and of itself, might not be a sufficient means to preserve and maintain strategic land resources***. Acquisition of property interests assures the stability the Act hoped to achieve.

> The Legislature finds that the ***haphazard growth and spread of urban development is encroaching upon, or eliminating, numerous open areas and spaces of varied size and character, including many devoted to agriculture***, the cultivation of timber, and other productive activities, and many others having significant recreational, social, scenic, or esthetic values. Such areas and spaces, if preserved and maintained in their present open state, would constitute important assets to existing and impending urban and metropolitan development, at the same time that they would continue to contribute to the welfare and well-being of the citizens of the state as a whole. ***The acquisition of interests or rights in real property for the preservation of such open spaces and areas constitutes a public purpose*** for which public funds may properly be expended or advanced.[41]

RCW 84.34.230 gives counties the authority "to levy an amount not to exceed six and one-quarter cents per thousand dollars of assessed valuation against the assessed valuation of all

[37] WAC 458-30-345(3)
[38] WAC 458-30-345 (2)
[39] Laurie Grammer, Washington State Association of County Assessors (WSACA), personal communication
[40] RCW 84.34.200 - 84.34.250
[41] RCW 84.34.200

taxable property within the county." This legislatively defined ceiling has not changed since 1973. To date, Skagit County is the only jurisdiction to focus use of these funds solely on farmland preservation. The "Farmland Legacy Program" was enacted in 1996 and purchased its first agricultural development right in 1998. In the past decade, over 6,000 acres of agriculturally zoned land have been protected with a perpetual conservation easement.

Seeking Consistency - Interaction between of the State Department of Revenue and County Assessors

State law requires county assessors to physically inspect and reappraise the value of taxable real property at least once every six years in accordance with a plan filed with and approved by the Department of Revenue (DOR). All revaluation plans have to be approved by DOR at the beginning of each cycle. The Assessor has the discretion to revalue any property or properties more frequently in order to ease the impact of rapidly inflating real estate values or, conversely, to reduce assessed values when the values of real estate fall. However, any deviation from the established revaluation plan must be approved by DOR. [42]

DOR issues guidelines for the appraisal, inspection, and valuation of real property by county assessors. In the case of land classified within the current use program, DOR has been conducting an audit of the program over the last five years. It has and continues to develop standards to be used in evaluating how counties should review lands in any open space classification. Land in the current use program is inspected and revalued in the same way as other taxable real property in the county, in accordance with the plan approved by DOR.

The Assessor is required to keep other records in addition to maintaining many thousands of appraisal reports. A detailed series of maps showing all properties within the county must be maintained. Aerial survey photos are also a vital part of the mapping system in most counties. Each time a parcel of property is sold or divided, or a new plat filed, the transaction is shown in the Assessor's records. The Assessor maintains the assessment roll of the county, listing ownership, description, tax code area, location, and the assessed valuation for all taxable property within the county. Most Washington counties now have sophisticated Geographic Information Systems (GIS) to assist them with their work. GIS allows a much more intense scrutiny of properties and a better understanding of the spatial relationships between and among uses.[43]

DOR seeks to assure that there is state-wide consistency of application of the law. But an ***inherent reality of our state's governmental structure is that Assessors are independently elected officials with discretion as to the methodology used to fairly assess and value taxable real property in their jurisdiction***. The recent DOR reviews reveal that some counties have never audited their Current-Use program. In other cases, a newly elected Assessor will come into office and "feel like they've walked into a mess." They are re-examining the properties classified as Current Use and finding parcels that do not meet the provisions of the law or the regulations. Other counties have fully functioning programs that are models of implementation.

Each County Assessors office determines the most cost-effective use of its employees. The sophistication and available resources vary dramatically from county to county and from region

[42] RCW 84.41.030 and 84.41.041.

[43] Laurie Grammar, WSACA, personal communication

to region. Inevitably this leads to some inconsistencies. There certainly may have been misinterpretations of the law, but that's why administrative code rules (WACs) are written. When new Assessors are elected, they generally participate in DOR training sessions and meetings of the Washington Association of County Assessors. They talk to other Assessors and find out what adjacent counties are facing in regards to this issue. But they are not required to attend training seminars and this may, in part, be one of the reasons for the perceived inconsistencies in the Current Use program from county to county.

Tax exemptions under the law are to be construed narrowly. Therefore, the Department of Revenue and assessors are required to view exemptions as narrowly as possible. The Current Use program can be viewed as an exemption program because the taxes are shifted to other taxpayers in the taxing district. The Assessor's job, strictly speaking, is not to preserve farmland, but to equitably distribute the burden of paying property taxes throughout the county. Because of economic constraints, as well as voter-passed tax reduction initiatives, local governments are forced to press assessors quite strongly to accurately assess and collect property taxes.

Three to five years ago, some of the state's more urban counties started to remove property from the program, because the Assessor determined that some smaller parcels of farm and agricultural land were not meeting the statute's income requirements. In part, this appears to be driven by the Assessor's concern about equitable taxation and questions of whether people were getting a break on their taxes when they should not.

History also plays into the decision-making. Initially, in the early 1970s, some Assessors "oversold the program." Now, a new generation of Assessors is being elected and "picking up the pieces." Many people who entered the program in the 1970s were told that if they left their property in Current-Use status for 10 years, there would be no additional taxes assessed if the land was removed from the classification in the future. Also it appears that many people were told that even if seven years of back taxes and interest were due, the 20% penalty would not be assessed. There is some sense that the program may have been misrepresented to property owners.[44]

[44] Wes Hagen, personal communication

PROGRAM SCOPE

Historical perspective on value reduction from Current-Use enrollment

Using a 5-year increment sampling, the average value reduction provided by the Current Use classification- and the consequent impact on the tax burden for farm operators is now over 70%. (*HBU and Current-Use figures in million of dollars):

Year	*Highest and Best Use (Acres)	Current-Use (Acres)	Value/acre (Current-Use)	Value Reduction	% Reduction
1975	568.5	300.3	138	268.3	47.2
1980	3,180.6	1,250.6	168	1,930.0	60.7
1985	7,053.6	2,082.6	204	4,971.0	70.5
1990	6,269.9	2,225.9	193	4,044.0	64.5
1995	7,829.3	2,699.0	241	5,130.4	65.6
2000	9,740.0	2,989.1	248	6,750.9	69.3
2005	12,005.4	3,440.7	298	8,564.7	71.3
2007	13,939.6	3,901.4	340	10,038.2	71.7

County-by-County and State-wide “Current-Use” and “Fair and True Use” Values

True and fair value and the Current-Use value and the difference between these values on a county- by-county basis.

2006 Valuation of Current-Use Land by County

Agricultural, Timber and Open Space Lands

Approved for Current-Use Assessment

Adapted from: Property Tax Statistics, 2006; Washington Department of Revenue, Table 19, p.33

County	Applications as of 1/1/06	Acres	Acres / app	True and Fair Value (TFV)	Current-Use value (CUV)	Difference	Ratio CUV/ TFV	% value reduction
Adams	1550	1,075,621	694	$453,256,700	235,236,000	$218,236,000	52%	48%
Asotin	2,175	276,102	127	35,292,383	14,347,332	20,945,051	41%	59%
Benton	1,206	592,642	491	472,389,600	183,327,030	289,062,570	39%	61%
Chelan	430	30,087	70	60,243,937	15,656,871	44,587,066	26%	74%
Clallam	1,907	30,609	16	339,149,029	58,838,993	280,310,036	17%	83%
Clark	4,028	72,560	18	514,331,420	16,479,120	497,852,300	3%	97%
Columbia	553	314,526	569	184,242,489	75,367,499	108,874,990	41%	59%
Cowlitz	758	18,464	24	90,405,300	10,067,755	80,337,545	11%	89%
Douglas	2,088	896,788	429	356,184,700	140,685,000	215,499,700	39%	61%
Ferry	247	48,204	195	55,010,647	2,969,328	52,041,319	5%	95%
Franklin	1,995	595,891	299	620,506,800	301,784,100	318,722,700	49%	51%
Garfield	569	319,215	561	137,577,659	73,832,479	63,745,180	54%	46%
Grant	4,110	1,038,234	253	951,842,510	416,567,200	535,275,310	44%	56%
Grays Harbor	456	24,462	54	51,793,484	15,791,647	36,001,837	30%	70%
Island	562	17,066	30	223,928,523	12,985,646	210,942,877	6%	94%
Jefferson	187	8,220	44	37,090,185	5,528,015	31,562,170	15%	85%
King	1,879	40,806	22	812,838,821	196,404,769	616,434,052	24%	76%
Kitsap	415	6,740	16	185,140,230	64,131,090	121,009,140	35%	65%
Kittitas	988	199,850	202	500,902,698	64,769,488	436,133,210	13%	87%
Klickitat	707	536,837	759	317,838,180	53,896,115	263,942,065	17%	83%

County	Applications as of 1/1/06	Acres	Acres / app	True and Fair Value (TFV)	Current-Use value (CUV)	Difference	Ratio CUV/ TFV	% value reduction
Lewis	2,538	85,921	34	268,725,886	31,070,448	237,655,438	12%	88%
Lincoln	2,703	1,244,496	460	465,276,300	228,744,590	236,520,710	49%	51%
Mason	618	15,304	25	78,296,220.0 0	7,552,215	70,744,005	10%	90%
Okanogan	2,662	568,639	214	595,282,200	49,501,686	545,780,514	8%	92%
Pacific	515	40,271	78	62,655,500	11,26,395	51,429,105	18%	82%
Pend Oreille	2,133	28,202	13	44,663,254	2,619,977	42,043,277	6%	94%
Pierce	1,484	43,760	29	639,132,300	98,004,244	541,128,056	15%	85%
San Juan	435	17,309	17	315,721,090	74,949,800	240,771,290	24%	76%
Skagit	2,589	106,143	41	645,772,300	164,892,225	480,880,075	26%	74%
Skamania	247	4,860	20	31,949,440	4,214,467	27,734,973	13%	87%
Snohomish	1,488	62,545	42	678,051,100	118,399,800	559,651,300	17%	83%
Spokane	2,800	559,779	200	688,879,190	69,015,680	619,863,510	10%	90%
Stevens	929	80,748	87	72,721,814	14,818,904	57,902,910	20%	80%
Thurston	785	40,554	52	238,445,900	20,930,241	217,515,659	9%	91%
Wahkiakum	211	10,048	48	38,187,970	7,862,600	30,325,370	21%	79%
Walla Walla	1,318	708,726	538	477,864,956	240,544,300	237,320,656	50%	50%
Whatcom	2,905	111,446	38	894,755,780	158,462,285	736,293,495	18%	82%
Whitman	2,374	1,247,422	525	741,589,540	398,408,600	343,180,940	54%	46%
Yakima	3,678	396,077	108	561,636,248	241,487,324	320,148,924	43%	57%
TOTAL	59,212	11,515,175	194	$13, 939,572,283 $3,901,382,258		$10,038,190, 025	72 %	28%

Counties with Greatest Amount of Current-Use Farm Land (> 1/2 million acres)

Whitman	1,247,422
Lincoln	1,244,496
Adams	1,076,621
Grant	1,038,234
Douglas	896,788
Franklin	595,891
Benton	592,642
Okanogan	568,639
Spokane	559,779
Klickitat	536,837

10 counties = 8,357,349 acres

Counties with the Least Amount of Current-Use Farmland (< 30,000 acres)

Skamania	4,860
Kitsap	6,740
Jefferson	8,220
Wahkiakum	10,048
Mason	15,304
Island	17,066
San Juan	17,309
Cowlitz	18,464
Grays Harbor	24,462
Pend Oreille	28,202
Chelan	30,087
Clallam	30,609

12 counties = 211,371 acres

Counties in Which the Value Reduction is Greatest (> 85%)

Clark	97%
Ferry	95%
Island	94%
Pend Oreille	94%
Okanogan	92%
Thurston	91%
Spokane	90%

Mason	90%
Cowlitz	89%
Lewis	88%
Kittitas	87%
Skamania	87%
Pierce	85%
Jefferson	85%

IDENTIFIED AREAS OF CONFUSION, AMBIGUITY OR OPPORTUNITY

The following questions are posed to help generate an informed conversation regarding the Open Space Taxation law. They are based on the issues raised by the Farmland Preservation Task Force, from discussions with personnel from the Department of Revenue (DOR), Community Trade and Economic Development (CTED) and with other interested parties.

Some of the issues discussed below may be resolved through changes in regulations (WACs) or policies. Others, depending on the perceived problem (and/or opportunity) may require direct engagement by the Legislature. Re-opening a law for legislative action always carries the risk of productive changes as well as potentially negative (and positive) unintended consequences.

1) What is farmland and what is commercial agriculture??

The above review of chapter RCW 84.34 RCW relies on the definition of agriculture included in that law as well as the definitions provided by the Department of Revenue in WAC 438-30-200. Other Washington laws incorporate alternative definitions of agriculture: the Growth Management Act (GMA), the Right to Farm Act, and the Critical Areas/ Ruckelshaus Center GMA amendment law passed in 2007. Different laws are designed to address different objectives. However, the differences among these competing definitions, which will be discussed below, create some potential confusion for farmers as well as regulators. More importantly, as some of these newer laws reflect the evolving nature of farming, previous definitions may limit or constrain opportunities that may now considered as "commercial agriculture." The intent of both the Open Space law and the Growth Management Act is to maintain farmland for commercial agricultural purposes. One law stresses the activity of farming and the other stresses "land of long-term significance" for farming. From a state policy perspective, reducing ambiguity and finding a resolution to these two goals may be important to assure both the activity of farming and the maintenance of the land base necessary to support that activity. Emphasis is added to those sections of the laws below that may create confusion or conflict.

Open Space/ Current-Use (chapter 84.34 RCW)

Farm and agricultural land" means: (a) Any parcel of land that is twenty or more acres or multiple parcels of land that are contiguous and total twenty or more acres devoted primarily to the ***production of livestock or agricultural commodities for commercial purposes;***

(ii) enrolled in the federal conservation reserve program or its successor administered by the United States department of agriculture; (RCW 84.34.020(2)(a)(i) and (ii).

Open Space Taxation Act Rules (WAC 458-30-200)

(m) "Commercial agricultural purposes" means the use of land on a continuous and regular basis, prior to and subsequent to application for classification, that demonstrates the owner or lessee is engaged in and intends to obtain through lawful means, a monetary profit from cash income received by engaging in the following commercial agricultural activities:
(i) ***Raising, harvesting, and selling lawful crops***
(ii) ***Feeding, breeding, managing, and selling of livestock***, poultry, fur-bearing animals, or honey bees, or any products thereof
(iii) **Dairying or selling of dairy products**
(iv) Animal husbandry
(v) Aquaculture
vi) Horticulture
(vii) Participating in a government-funded crop reduction or acreage set-aside program; or
(viii) Cultivating Christmas trees or short-rotation hardwoods on land that has been prepared by intensive cultivation and tilling, such as by plowing or turning over the soil, and on which all unwanted plant growth is controlled continuously for the exclusive purpose of growing such trees.

An owner must engage in commercial agricultural activities on the land to demonstrate a commercial agricultural purpose.

Chapter 84.34 RCW simply states that farmland is "…primarily devoted to production of livestock or agricultural commodities for commercial purposes…." DOR regulations stipulate that commercial livestock income is generated from "Feeding, breeding, managing, and selling of livestock, poultry…" DOR has consistently interpreted this rule to mean that all four (4) activities must take place in order for a parcel to receive favorable Current-Use tax treatment as a result of the production of livestock.

Growth Management Act (RCW 36.70A.030)

The Growth Management Act (GMA) requires all 39 counties to designate natural resource land of long-term commercial significance, including agricultural land (RCW 36.70A.170). The 29 counties that are fully planning under the GMA must also adopt development regulations that conserve designated agricultural lands and assure the use of adjacent land does not interfere with the continued use of agricultural land for the production of food or agricultural products (RCW 36.70A.060).

RCW 36.70A.030(2) defines "Agricultural land" to mean "…***land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees …. or livestock, and that has long-term commercial significance for agricultural production…."***

In contrast to the DOR regulations noted above, this section of the GMA only stipulates that there is “commercial production” of “animal products.”

Right to Farm Act (RCW 7.48.310)

(1) ***"Agricultural activity"*** means a condition or activity which occurs on a farm ***in connection with the commercial production of farm products*** and includes, but is not limited to, marketed produce at roadside stands or farm markets; noise; odors; dust; fumes; operation of machinery and irrigation pumps; movement, including, but not limited to, use of current county road ditches, streams, rivers, canals, and drains, and use of water for agricultural activities; ground and aerial application of seed, fertilizers, conditioners, and plant protection products; keeping of bees for production of agricultural or apicultural products; employment and use of labor; roadway movement of equipment and livestock; protection from damage by wildlife; prevention of trespass; construction and maintenance of buildings, fences, roads, bridges, ponds, drains, waterways, and similar features and maintenance of stream banks and watercourses; and ***conversion from one agricultural activity to another, including a change in the type of plant-related farm product being produced. The term includes use of new practices and equipment consistent with technological development within the agricultural industry***.

(2) "Farm" means the land, buildings, freshwater ponds, freshwater culturing and growing facilities, and machinery used in the commercial production of farm products.

(3) "*Farmland" means land or freshwater ponds devoted primarily to the production, for commercial purposes, of livestock, freshwater aquacultural, or other farm products.*

(4***) "Farm product" means those plants and animals useful to humans and includes, but is not limited to, forages and sod crops, dairy and dairy products, poultry and poultry products, livestock, including breeding, grazing, and recreational equine use, fruits, vegetables, flowers, seeds, grasses, trees, freshwater fish and fish products, apiaries and apiary products, equine and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur.”***

The Right to Farm law recognizes that commercial agricultural activity involves production of farm products (“livestock, including breeding, grazing, and recreational equine uses”) and that farm operations are dynamic and adaptive to changing conditions. Conversion from one type of operation and use of new technologies are an inherent part of farming. Such transitions may mean that all or a part of a farm could be “fallow” or non-income producing for certain periods of time.

Viability of agricultural lands [Critical Areas Ordinances on Ag Land] (RCW 36.70A.560)

(3) For purposes of this section and RCW 36.70A.5601, "agricultural activities" means agricultural uses and practices currently existing or legally allowed on rural land or agricultural land designated under RCW 36.70A.170 including, but not limited to: ***Producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural***

market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, when the replacement facility is no closer to a critical area than the original facility; ***and maintaining agricultural lands under production or cultivation."***

Under this most recent statutory definition (2007), there is a recognition that agricultural activities means" producing, breeding or increasing agricultural products," crop rotations, as well as allowing ground to lie fallow or dormant "as a result of adverse agricultural market conditions."

The most significant differences revealed by examining these definitions are whether the production of livestock for commercial purposes requires all phases of that activity to revive preferential tax treatment under RCW 84.34 (see Question 3, below) and whether allowing ground to lie fallow or dormant is a "commercial "activity as defined by Department of Revenue regulations and BTA case law (also discussed below).

Policy Choices

1) Retain current definitions spread among four different RCW statutes, as well as the DOR rule WAC 458-30-200.
2) Review DOR rules to bring them in line with farm and agricultural definitions of other statutes.
3) Resolve the differences in the definitions of commercial agriculture across all RCWs and WACs for consistency and clarity.

2) What is the relationship of the Growth Management Act (chapter RCW 36.70A) and the Open Space Taxation Act (chapter RCW 84.34 RCW)?

The Open Space Taxation Act is nearly 40 years old. Major revisions were enacted in 1992. The Growth Management Act (GMA), passed two years earlier in 1990 and amended almost every year since then, was designed to address some of the same issues of natural resource land conservation. The intent of both laws implies the outcome of successful implementation will be long-term resource land protection: "…maintain, preserve, conserve and otherwise continue in existence, adequate open-space lands for the production of food and fiber…." (RCW 84.34). "Adopt regulations that assure the conservation of agricultural, forest and mineral lands designated under (RCW 36.70A.170). "…Agricultural land means land … that has long-term commercial significance for agricultural production…." (RCW 36.70A.030).

The intent of both laws is to assure a long-term land base for farming and to diminish the impacts of urbanization on the productivity and availability of those lands.
However, the Current-Use tax mechanism, as noted by the opponents to the original constitutional amendment, is not permanent because property can be withdrawn if the owner

decides they are willing to pay the back taxes and penalty. Preferential tax treatment was "no substitute for long-range planning."[45]

In 2008, both mechanisms are in place: preferential Current-Use taxation AND long-range planning. Herein lies the contradiction within the Open Space law. It has served as a great stabilizer for the working farmland of the state, because it serves as a clear incentive for landowners to maintain their land in commercial agricultural production. Despite the intent to "maintain, preserve, conserve and otherwise continue in existence adequate open-space lands for the production of food and fiber," it is also clear that proponents of development and urban expansion will always be willing to pay the additional tax penalties or negotiate to have the seller retain that responsibility. In any case, it does not seem to have diminished the conversion of farmland, when those economic pressures exist and planning laws allow the conversion to take place.

The requirement of GMA that local governments designate "agricultural lands of long-term significance" provides the regulatory stability that was not present when the Open Space Taxation law was passed. In spite of this requirement, these designations can also be changed with Comprehensive Plan amendments and revision of Urban Growth Area (UGA) boundaries or changes in zoning definitions for allowable uses of agricultural land. The complementary nature of these two keys laws needs to be more fully recognized and integrated to reach the desired outcome of stability for the land base for farming. *The interaction of zoning and comprehensive plan designations, coupled with Current-Use tax status for commercially viable farmland, is a key policy intersection that will have significant consequences in attempts to stabilize the agricultural land base, particularly in areas of urban growth.*

In order to achieve the Legislature's policy goals of retaining and conserving a commercially significant land base for ongoing agriculture in our state, those administering the Growth Management Act (planners) and those administering the Current-Use tax law (Assessors) require a mutual understanding of the common purposes of each law. It is as if each law is a train on its own track and every once in a while the tracks converge but there really isn't a defined framework to reach the desired "end state" of a secure agricultural land-base. ***The regulatory framework of GMA, with its recognition of incentives and non-regulatory approaches, and the incentive framework of the current use tax law need to be integrated and resolved with the future of farming and its required land base in mind.***

Policy Choices

1) No action. Allow both laws to function as currently set up.
2) Recommend that CTED (administrator of the GMA) and the Department of Revenue set up agency level discussions to resolve policies and mechanisms for agricultural land protection.
3) Recommend a legislatively designated "blue-ribbon" commission to address the opportunities inherent in integrating these two laws with Conservation Commission, CTED, Department of Agriculture and Department of Revenue support.

[45] 1967 Voter's Pamphlet

3) Should the exemption for "feeding, raising, breeding and selling of livestock" require that all four activities be carried on to qualify as "livestock production" and "farming" for Current-Use consideration?

Over the past 40 years, farm operations have significantly changed. There are a number of concerns have been raised about the DOR regulations that require all four phases of livestock production be present in order to receive current use classification. Aside from dairy (which is already stated as a separate use) many cattlemen now do not choose to carry on year-round feeder operations so they will not be subject to the regulatory requirements of Controlled Animal Feeding Operations (CAFO). They may "raise and sell" but not "breed" or they may "feed and raise" but not breed, etc. Alternatively, a concern that had been raised that a feedlot and associated farm might be considered a Current-Use agricultural activity or a breeding facility or a sale barn could receive Current-Use taxation benefits. Is the DOR definition too restrictive?

Horses are another point of concern. Since they are not "food or fiber," are they livestock under the commonly used definition of farming? "Equine and other similar products" and "recreational equine use" are listed as "farm products" in the Right to Farm Act. Unless there is a serious breeding component, it is highly unlikely that they can meet the income requirements for animal production. Should horse boarding and riding lessons be considered a commercial agricultural product? On some properties that were initially classified as commercial farming, there has been a shift to a new, horse-related use. Thus, there is some concern that revenues generated from horseback lessons, arenas and tack sales, are reported as "farm income" and that these property owners receive perhaps unintended and unauthorized tax benefits. Just because animals are involved, does that make it "commercial farming?" What about rodeo bulls and pack animals? Is there a clear line and/or should there be?

The State Board of Tax Appeals (BTA), which reviews decisions made by local Boards of Equalization involving current use program disputes, grappled with this issue in the case of Nagel V. Gelman, (BTA Docket No. 43167 (1993)). The case involved a nominal horse breeding farm. BTA found that the owner's use of the land did not "demonstrate an intention to make a cash profit by devoting the property primarily to the production of livestock or agricultural commodities for commercial purposes." The board used the test of whether a "prudent, experienced, and successful farmer would use the same practices" in a commercial operation. The board found that the horse raising operation (two horses with rundown fences) did not meet that test.

Policy Choices

1) Allow current regulations to remain and let sleeping horses lie.
2) Clarify DOR WAC definitions to be consistent with the 2007 definitions in RCW 36.70A.560 of "producing, breeding or increasing agricultural products."
3) Review and amend laws and regulations to include clearer criteria regarding livestock production and clarify whether horses constitute "an agricultural product."

4) What is the definition of "ownership" for a commercial farming operation?

The definition of "ownership" and the difficulties that have arisen when one farm operation consists of multiple properties that are not registered on the county records under exactly the same name is another apparent area of tension. The definition of “owner” under current law is “...the party or parties having the fee interest in land….” (RCW 84.34.020(2)(5) and in regulation as, “…any person having a fee interest in a parcel of land….” WAC 458-30-200(2)(cc)(i). Direction from the DOR is that ownership documentation requires the recorded name on the title of property be exactly the same for the parcel to be considered a contiguous part of an agricultural operation.

If a husband owns a 20-acre property and his daughter owns a contiguous 20 acre parcel under her married name, the properties are considered separate parcels, even though they are part of the same agricultural operation. Because each property is 20 acres, the farm and agricultural classification is available for each property. This does, however, increase the amount of paperwork and other hassles for the farm family.

Generally the ownership issue seems to be a problem on farms of less than 20 acres. For instance, a 60 acre farm made up of a number parcels of less than 20 acres each that is held by family members with the parcels recorded under different names would not be considered a farm of over 20 acres for current use farm and agricultural classification. The Assessor's office lists them as separate parcels. Some farms have lost their open- space tax status because the county took the position that neither the acreage nor the income could be aggregated.

It would appear that this very narrow definition of ownership works against the concept of aggregating properties to form a more manageable working unit for commercial farming purposes, independent of underlying ownership. This issue is evidently “on the screen” of the Department of Revenue because it has been approached about applications or inquiries from farm operators who want to qualify for the current use farm and agricultural classification regardless of who owns acreage. If the law and the regulations were changed, a higher level of scrutiny might be required from the respective Assessor's offices.

Like Washington, California has a similar 10 year enrollment Current-Use farmland program known as the Williamson Act. (see Appendix for Fact Sheets) It requires an “agricultural preserve” zone of 100 acres or more to receive preferential tax treatment. However, if they are judged strategic by the local government, units smaller than 100 aces can be approved for enrollment. The 100 acres can be the result of combining two or more parcels “if they are contiguous or in common ownership.” Specifically, “property owners with less than 100 acres may combine with neighbors to form preserves provided the properties are contiguous.” (www.conservation.ca.gov/dlrp/lca)

Policy Choices

1) Continue to use current statutes in chapter 84.34 RCW and DOR definition of “owner.”
2) Recommend a DOR agency level review of ownership requirements and the consequences of changing the operating definition for farm operations with recommendations for changes in the rule (WAC).

3) Change relevant statutes (e.g. RCW 84.34.020) to allow the aggregation of contiguous properties to qualify as commercial farming for farm and agricultural land classification to simplify, clarify and achieve legislative intent.

5) With 20 or more acres, what is considered commercial agriculture?

For properties larger than 20 acres, the fundamental question is what is a commercial operation? This question has to be viewed in the context of the viability of farming itself. In counties where farming is not a major activity it is perhaps harder for an Assessor to understand the value of keeping land in a farm condition or available for future farming when the only visible activity may be haying or grazing. In any given year, dependent on economics, land may not generate the income stream or profit that the law assumes. Throughout most of the past decade, the economic realities of farming have become increasingly problematic. When the economics shift, as they appear to have recently, these judgments about maintaining availability of operable ground for future farming operations become even more critical.

The Board of Tax Appeals in Peak v. Dossett (BTA Docket No. 58738) dealt with the question of income and intent. The pasture ground in question had been infested with Scotch broom and no grazing lease or haying income had been generated from the property for the three year period during which the broom was eradicated. The assessor had withdrawn the land from Current Use classification because there was no income. The board observed that "because the statute does not provide an income requirement for parcels over 20 acres, the regulations also do not provide an income requirement for parcels over 20 acres." Therefore, the Legislature did not intend a specific income requirement to apply to parcels over 20 acres. The requirement is not for income, but that the land is "devoted primarily to the production of livestock or agricultural commodities for commercial purposes."

To qualify, the owner must demonstrate use "on a continuous and regular basis, prior to and subsequent to application for classification, that demonstrates that the owner or lessee ***intends*** to obtain through lawful means, a monetary profit from cash income received..." In other words, the owner must demonstrate a continuous and regular use of the property that demonstrates his intent to obtain cash profit from the farm and the agricultural property. The BTA opinion stated that for a farmer to allow his land to lie fallow every other year may be normal farming practice, and therefore it did not read the requirement for "continuous and regular" to mean that the land had to be farmed each year. The BTA indicated that "***this interpretation leads to conservation of farmland, which was the intent of the Legislature***," and that "each case must rest on its own facts."

Policy Choices

1) Continue to use existing statutes and regulations (with consideration for definition change for livestock production).
2) Clarify DOR regulations to reflect the language of the BTA decision cited above re: "continuous and regular."
3) Seek changes in law to clarify "commercial agriculture" and definition of "continuous and regular."

6) On properties of less than 20 acres, are the criteria specific enough for commercial agriculture?

Most of the reported problems center on lands of less than 20 acres and their removal by the Assessor from Current-Use status. As noted above, some of these situations may be the result of new owners not understanding the associated income requirements of his/her property and fact that the property must be "devoted primarily to agriculture." Alternatively, an older owner may have reached a point at which it is not possible for him/her to produce the revenue he did when he was younger.

Particularly in urbanizing areas, off-farm income is an important component of the viability of smaller farms, in conjunction with low land taxes, as a means to keep land in agricultural production. The lower level of taxes keeps the operating overhead low. One example was presented in the Tacoma area of a 16- acre farm with a house on 4.8 acres with a tax burden of about $7,000 a year. The remaining 11 acres are taxed at about $200 a year. The intent of the law is being met by keeping the land available as an integral part of the farming operation.

Questions about meeting the intent to show income are especially acute in quickly urbanizing counties where the tax advantage for farming a "rural estate" is quite significant given the differential between market value and Current-Use value. Context, performance, intent and forthrightness all form a complex political stew with landowners who have the capacity to hire lawyers, accountants and other professionals to help them achieve attractive tax breaks. The recent wire service story regarding the governor of Nevada receiving a significant Current Use tax break presents some instructive lessons. (see Appendix)

Some speculators seek out classified Current-Use property, purchase the property after signing a "Notice of Continuance" and then do the least they must to continue to qualify. It is difficult to prevent the scenario of neighbors selling each other lambs or cattle to meet income requirements. What is bona fide commercial farming activity? As one commentator put it, "in some jurisdictions, it may prove to be political suicide to pull speculative property out of Current-Use."

Various Assessors believe that the modest income requirements, though set in 1973 and revised upward in 1993, are still "about right." From their perspective, raising the income requirement would probably force people out of the program. The fundamental question, however, is how to assure that the income production requirements are met and met in a way that supports commercial farming on that property and in the surrounding community. Abuses of the program, intentional or not, further raise the Assessors concerns that a property is used, in fact, for farming and not just as a "hobby." This is particularly difficult judgment as some "hobby farms" find a niche product or process (such as goat cheese or lavender) that can become a commercial enterprise and form the basis for an expanding interest in farming.

Some counties are now charging an up-front application fee and require a showing of three years' previous farm income plus an action plan for the succeeding three to five year period. They are also making it clear at the time of application that there is on-going review to assure compliance. One major concern is how to minimize the monitoring and enforcement costs for

local Assessors. Another is how to assess the consequence of properties of less than 20 acres in size receiving a special tax advantage when the surrounding zoning may not be supportive of farming in the future. The relationship of the GMA and the Open Space Tax Act on properties of less than 20 acres requires serious focus and attention.

Policy Choices

1) Retain current income standards and review procedures.
2) Pursue inter-agency review of criteria for reviewing and monitoring small farm performance and check income standards for feasibility.
3) Incorporate review of farm viability for properties of less than 20 acre into the proposed analysis of the interrelationship of the GMA and Open Space Act.

7) What else could Farm Advisory Committees do to assist in farmland conservation?

Under current law and regulations, the appointed Farm Advisory Committee, made up of five local farmers, is limited to giving advice regarding the determination of current agricultural use values. As discussed above, little or no criteria exist for determining the inclusion of "open space/ farm conservation land" in a county's open space classification. The Farm Advisory Committee could potentially serve in a support role to Assessors when they make recommendations to the county legislative body on whether to include certain properties in this farmland conservation classification.

The Committee could also help develop screening criteria for acceptance or rejection of such applications for farm and agricultural conservation classification. In light of the recent rejection or removal of some agricultural lands from the Current-Use program by County Assessor's offices, the advisory committee could also play a more substantive role regarding the overall enrollment polices. It could provide advice about judging the intent and performance of landowners to keep their land in agricultural production, as well as evaluating the consequences of removing such land from the Current-Use program. It could also advise about the impacts on neighboring lands if certain properties or areas were removed from Current-Use status and allowed to potentially convert to "higher and better" uses.

Some Assessors might view this type of counsel as infringing upon their discretion as stated under RCW 84.34.035. RCW 84.34.035 and 84.34.141 give the assessor the authority to "approve or deny the application" (for farm and agricultural classification and to "review the classification at any time". (See also WAC 458-30-225(."(3)(a) and (e))

Policy Choices

1) Retain current role of Farm Advisory Committee.
2) Develop a strategy with Washington State Association of County Assessors (WSACA) to increase engagement with local farm representatives in reviewing farm and agricultural properties of 20 acres or smaller.
3) Seek legislative direction to enlarge the role of Farm Advisory Committees.

8) Could the incentives for Open Space taxation be improved? An initial proposal

One way to view the current system of achieving protection for farmland through Current-Use taxes is to envision a bundle of carrots and sticks. The obvious carrot is a tax rate based on Current-Use for farming. The stick is the payment of 7 years back taxes with simple interest (1% per month or 12% per year) and a potential 20% penalty. (For reference, California charges a flat tax penalty of 12.5% on the difference between Current-Use and fair market value.) There appears to be some sympathy for claims that the additional tax payment may be too high, particularly when it is imposed on the "mom and pop" farm where the greatest amount of accumulated wealth from a lifetime of farming has not come from agriculture but from land appreciation. On the other hand, there is little sympathy for speculators who are buying land and refusing to continue "farm and agricultural" status in preparation for development or those who agree to continue farming then do the minimum amount necessary in hopes of future land division profits.

One of the anomalies of the law is that its purpose is to "preserve, maintain and conserve" farmland. The tax deferral accomplishes this outcome as long as the land remains classified under chapter 84.34 RCW. Removal triggers a substantial penalty, which includes interest and a 20% penalty without 2-year prior notice. But it does not address the loss or diminution of the farmland base. In theory, at least a portion of the removal penalties should be used to secure the future of other farmland in the community because the interest and penalty collected are paid into the county's current expense fund. These are in fact, deferred revenues to the county. Re-directing penalty funds that are distributed in the same manner as property taxes for schools, local government and to junior taxing districts is not politically feasible.

However, it may be possible to achieve longer- term stability for the land base by extending the term of initial current use commitment in exchange for other tangible benefits to the landowner, namely a significant reduction or elimination of overhead/holding costs (taxes). This would essentially be a "term easement" that could be renewed to extend the tax benefits.

Could the Current-Use tax system be structured so that the longer the current use commitment for which the property is contractually dedicated to agriculture the lower the tax rate? In California, land enrolled in Williamson Act ag districts of 100 acres or more, if dedicated to farming for a 20-year period (instead of the standard 10- year commitment), is taxed at 65% of Current-Use value. The State of California reimburses counties for lost income from this increased tax deferment. Might this concept be extended so that a long-term commitment of land to farming would result in a low or even "0" rate of taxation? On a sliding scale, what if a 50-year commitment of the land to farming resulted in an elimination of property taxes in exchange for the stability such a commitment would provide? Article VII, section 1, of our state's constitution allows the Legislature to set up such a system of partial or full exemption. "Such property as the Legislature may by general laws provide shall be exempt from taxation." Article VII, section 11, the Current use amendment, may allow the legislature to be more creative in respect to land taxed based on its actual/current use.

As a further incentive, the removal penalty could be re-structured so that the longer land stayed in the current use program, the lower the amount of additional tax and penalty would have to be

paid. Alternatively, if a land was removed or withdrawn prematurely from the current use program, there would have to be fairly stiff penalties.

An additional change to consider would be to make a buyer, who is converting the land to a "higher and better use," liable to pay the additional tax, interest, and/or penalty. Right now, the farm operator or/seller has to pay these charges at the time of transfer or sale. Often these costs are not made apparent or known until after a sale price has been struck. If the buyer had to pay, they would make their offer to the seller knowing that cost. This could result in a fairer price to the seller and a more appropriate allocation of the costs for conversion.

One additional way to ensure the future of the land for farming when it becomes available for transfer or sale could be for the contract to include a right of first refusal to the county or state. These governmental entities could purchase the property to keep it as a working farm and/or to exercise an option to purchase a conservation easement when the farm owner wished to dispose of the land.

To be effective in achieving the original intent of the law, this current use program could possibly be limited to the GMA designated counties and be focused in those areas where the value differential between Current-Use and highest and best use is greater than the current state average of 72%. In those counties, the relative value of farm land is so low that the impact of long-term deferral of tax shifts would be minimal on taxpayers and nearly invisible to taxing districts. The current income stream from current use properties is relatively small; in some counties, as little as 10% of the fair market value of the land is currently paid in property taxes.

The state's precedent for paying counties an "in lieu" tax in exchange for environmental services was confirmed in 2005 with the passage of ESSB 5396 **(***Payment of in lieu taxes to local government for lost revenue).* This language was contained in the same bill that added farmland to the acquisition priorities of the Washington Wildlife and Recreation Program (WWRP) legislation. RCW 79.70.130. It requires that lands acquired by the Department of Natural Resources (DNR) and the Department of Fish and Wildlife (DFW) using funds from the habitat conservation account are subject to payments in lieu of property taxes and weed control. Lands acquired by state agencies using funds from the riparian protection account are also subject to payments in lieu of property taxes and for weed control. "…The county shall distribute the amount received under this section in lieu of real property taxes to all property taxing districts except the state in appropriate tax code areas the same way it would distribute local property taxes from private property…."

The net result would be a significant financial incentive for landowners in urbanizing counties or regions to retain their land in commercial agriculture. Taxes would be stable or diminishing over time. The longer commitment a farmer made to keep the land in agricultural production, the less confiscatory would be the consequence upon sale or transfer. Local governments would be kept whole and the public would be assured that the land remained as farmland for an extended period.