IN THE OREGON TAX COURT
REGULAR DIVISION
Tax

BOARDMAN TREE FARM, LLC.,	)	
	)	
Plaintiff,	)	**TC 4990**
v.	)	
	)	
MORROW COUNY ASSESSOR,	)	
and DEPARTMENT OF REVENUE,	)	**ORDER GRANTING DEFENDANT'S**
State of Oregon,	)	**MOTION FOR SUMMARY JUDGMENT**
	)	**AND DENYING PLAINTIFF'S MOTION**
Defendants.	)	**FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This case comes before the court on cross-motions for summary judgment. Plaintiff Boardman Tree Farm, LLC (taxpayer) argues that Defendant Morrow County Assessor (the assessor) improperly disqualified from Exclusive Farm Use (EFU) special assessment certain real property owned by taxpayer and used for the intensive cultivation of hybrid poplar trees. Specifically, taxpayer argues that the assessor did not comply with all of the requirements of OAR 150-308A.113, the administrative rule implementing ORS 308A.113.[1] Co-defendant Department of Revenue (the department), in turn, argues that the assessor did satisfy all of the relevant requirements of OAR 150-308A.113. In the alternative, the department argues that the

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[1] ORS 308A.113 requires, among other things, the disqualification of land from EFU special assessment "upon discovery that the land is no longer being used as farmland." All references to the Oregon Administrative Rules (OAR) and the Oregon Revised Statutes (ORS) are to the 2009 editions thereof.

deviations from the OAR 150.308A.113 disqualification process alleged by taxpayer amount to mere "technical violations[s]" that the court should disregard under the doctrine of "substantial compliance."

II. FACTS

The parties do not appear to disagree regarding the factual background to this case. The record consists of the pleadings of the parties, the declaration of taxpayer's counsel, the declaration of the department's counsel, and the declaration of the assessor. The record also contains exhibits and deposition transcripts submitted as attachments to taxpayer's motion for summary judgment and the declaration of the department's counsel.

Taxpayer owns three contiguous parcels in Morrow County, identified in the county records as account numbers R01985, 3N26-100; R01996, 3N26-510; and R09902, 4N26-3414 (Boardman Tree Farm). (Compl at ¶ 1; Answer at ¶ 1.) Boardman Tree Farm is adjacent to Interstate Highway 84, and several paved county highways also pass near or through the tree farm. These include "Bombing Range Road," the main north-to-south highway in that part of Morrow County. (Ptf's Mot for Summ J at Ex 3.) Taxpayer uses the properties comprising Boardman Tree Farm for the intensive cultivation of hybrid poplar trees.[2] (Compl at ¶ 1; Answer at ¶ 1.)

Taxpayer acquired the properties comprising Boardman Tree Farm in 2007. (Dep Ex 8 at 4.) The history of these properties prior to 2007 is of particular relevance to this case, however, and is therefore laid out below. In the early 1990s the properties that now make up

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[2] According to Don Rice, GreenWood's Managing Director of Resource Management, the trees are an "intraspecific hybrid" of Eastern Cottonwood with either European Cottonwood or Northwest Black Cottonwood. (Rice Dep at 8-9.)

Boardman Tree Farm were owned separately by Boise Corporation and Potlatch Corporation. (*Id.*) At that time, both owners planned to use the hybrid poplar trees planted on their respective properties to supply wood chips to paper mills. (*Id.*)

Over time production on what became the Boardman Tree Farm shifted from trees for wood chips to trees for saw logs. That change entailed, among other things, thinning existing stands of trees to permit the remaining trees to grow to an acceptable size for commercial harvest. (*Id.*) Hybrid poplars of the type grown on the subject property typically take 12 to 15 years to reach a suitable diameter for use as saw logs. (Dep Ex 8 at 12.)

In 2005, acting on behalf of an investment fund, GreenWood Resources (GreenWood) acquired the property that had been owned by Boise. (Dep Ex 8 at 4.) In May 2007, GreenWood and its partners in the GreenWood Tree Farm Fund acquired the property previously owned by Potlatch Corporation. (*Id.*) During the tax year at issue in these motions, title to the subject properties was held by taxpayer, a limited liability company managed by GreenWood. (Dep Ex 8 at 2.) GreenWood tracks the age of trees on the subject properties by "field" and "block." (Rice Dep at 30.) Because taxpayer's profits (and consequently, the profits of GreenWood) depend in large part on careful management of resources on the subject property, Greenwood keeps highly accurate planting and harvesting records. (*Id.*) GreenWood normally seeks to harvest trees on the Boardman Tree Farm on a 12-year rotation. (Deposition Ex 8 at 12.)

The subject properties are located in an EFU zone and, during the tax years 2007-08 and 2008-09, were subject to EFU special assessment under ORS 308A.050. (Compl at ¶ 1; Answer at ¶ 1.) At some point in time prior to December 2008, GreenWood concluded that due to deteriorating market conditions some of the trees on certain acreage (the subject property) within

Boardman Tree Farm would not be harvested before the start of their twelfth year. (Rice Dep at 10.) As a result, the subject property would lose its eligibility for EFU special assessment. To avoid that outcome, GreenWood and the assessor launched a cooperative effort to have the Legislative Assembly enact amendments to ORS chapters 308A and 321 during the 2009 legislative session.[3] (Rice Dep at 10-11.) These amendments would have increased the rotation cycle allowable for "intensively managed hardwood timber" under the statutes governing EFU special assessment from 12 years to 20 years. *See* HB 2646 (2009). However, this legislative effort by GreenWood and the assessor did not bear fruit.

When it became clear that a legislative solution would not be forthcoming, the assessor began the process of disqualifying the subject properties from EFU special assessment. As part of that process, the assessor sent a letter to GreenWood soliciting precise information regarding the acreage that would no longer be eligible for special assessment. (Dep Ex 6.) GreenWood provided the assessor with a map of the subject properties showing the acreage that was planted with trees 12 years or older. (Dep Ex 7.)

On August 7, 2009, the assessor sent to taxpayer notices of disqualification from EFU special assessment for the subject property. (Ptf's Mot for Summ J at Exs 1, 2.) The notices identified the basis of the disqualifications as "discovery that the land is no longer being used as farmland per ORS 308A.113." (*Id.*)

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[3] ORS 308.056(2) states, among other things, "'Farm use' does not include the use of land subject to timber and forestland taxation under ORS chapter 321, except * * * land described in ORS 321.267 (3) or 321.824 (3) (relating to land used to grow certain hardwood timber, including hybrid cottonwood.)" The descriptions contained at ORS 321.267 (3) and 321.824 (3) each contain the following: "The timber is harvested on a rotation cycle within 12 years of planting." ORS 321.267 (3)(c) (relating to land in Western Oregon); ORS 321.824 (3)(c) (relating to land in Eastern Oregon.).

The parties agree that the assessor issued the notices of disqualification without making any visit to the subject properties specifically to verify the information provided by taxpayer. (Ptf's Mot for Summ J at 6; Def's Mot for Summ J at 5-6.) However, because of the placement of several important roadways in the vicinity of the Boardman Tree Farm, the assessor passed by or through portions of the subject property on a regular basis. The assessor has provided the court with 26 dates in the months leading up to the disqualifications that business in various parts of the county required him to pass through the subject property. (Def's Mot for Summ J, Ex A.) At his deposition the assessor further testified that in addition to the 26 dates provided, he drove by the subject property roughly twice every month. (Sweek Dep at 2.) On some of these occasions the assessor stopped on the subject property to observe features like the size of the leaves on the trees, planting patterns, and the drip irrigation system used to water the trees on the subject property. (Sweek Dep at 6-7.) The assessor testified that his observations of the subject property were initially motivated solely by curiosity. (*Id.* at 7-8.) Between May and July of 2009, however, the assessor began to regard his observations of the subject property as preliminary to the disqualifications. (*Id.*)

Taxpayer appealed the notices of disqualification to the Magistrate Division of the Oregon Tax Court. In an order dated February 7, 2011, the Judge of the Tax Court specially designated this case for hearing in the Regular Division. The parties now come before the court having each moved for summary judgment.

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III. ISSUE

Did the assessor satisfy the "inspection" requirements imposed by OAR 150-308A.113 for disqualification from EFU special assessment on the grounds that the land is no longer being used as farm land?

IV. ANALYSIS

ORS 308A.113 requires an assessor to disqualify land in an EFU zone from EFU special assessment "upon the discovery that the land is no longer being used as farmland." ORS 308A.113(1)(a). The department, in turn, has adopted OAR 150-308A.113--a rule instructing assessors as to the steps they must follow in "discovering" that land is no longer being used as farmland. The text of OAR 150-308A.113 relevant to the disposition of these motions reads as follows:

> "(1)(a) Before Exclusive Farm Use (EFU) land is disqualified from farm use assessment due to discovery by the assessor that the land is no longer being devoted to a farm use, the assessor must:
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> "(A) Make a reasonable effort to contact the owner, owner's agent or person using the land;
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> "(B) Make a site inspection of the property; and
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> "(C) Request the recent history of the property's use.
>
> "(b) The assessor must make a record of the inspection that includes when the inspection was made, who made the inspection, copy of contact letter(s) or record of other means of contact, information from the person contacted, and notations of the conditions found. * * * * . The record of inspection must be retained in the assessor's office for at least three years."

Taxpayer primarily argues that the assessor never conducted a "site inspection" of the subject property, as required by OAR 150-308A.113(1)(a)(B). (Ptf's Mot for Summ J at 2-3.) As a derivative argument, taxpayer further argues that the assessor also failed to comply with the

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record making and record retention requirements of OAR 150-308A.113(1)(b). (*Id.*) Taxpayer argues that those deficiencies in the disqualification process undertaken by the assessor render the disqualifications of the subject property from EFU special assessment invalid. (*Id.*)

The department, on the other hand, argues that the assessor's numerous observations of the subject property in the weeks and months leading up to the disqualification satisfy the "site inspection" requirements of OAR 150-308A.113(1)(a)(B), especially in the context of the other information made available to the assessor by taxpayer. (Def's Mot for Summ J at 4-7.) The department further argues that documents assembled by the assessor in the course of the disqualification process and retained at the assessor's office after the disqualification of the subject properties satisfy the record-making and record-keeping requirements of OAR 150-308A.113(1)(b). (Def's Resp Br at 4-5.) In the alternative, the department argues that the disqualification of the subject property should be upheld under the doctrine of "substantial compliance" because, even if the disqualification process undertaken by the assessor had certain technical flaws, the assessor still succeeded in fulfilling the department's purpose in adopting OAR 150-308A.113. (Def's Mot for Summ J at 6-7.)

A. *Whether the Inspector's Observations of the Subject Properties Constitute a "Site Inspection."*

The parties agree that in construing OAR 150-308A.113, the court may rely on the same methods Oregon courts use in statutory interpretation. Namely, the court must "determine the meaning of words used, giving effect to the intent" expressed by the department in adopting the rule. *Abu Adas v. Employment Dept.*, 325 Or 480, 485, 940 P2d 1219 (1997) (adopting the approach used in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)). In so doing, the court first considers the text and context of the rule, giving words of common usage their "plain, natural and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606,

610-11, 859 P2d 1143 (1993). If that analysis fails to answer the question, the court will look at the record of the rulemaking process used by the department in adopting OAR 150-308A.113. *Id.* at 611.

In addition to the analytical steps laid out above, the court must give some degree of deference to the department's interpretation of its own administrative rule. Oregon courts will uphold an agency's "plausible interpretation" of that agency's own administrative rule so long as the agency's interpretation is not "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law." *Don't Waste Oregon Com. v. Energy Facility Citing Council*, 320 OR 132, 142, 881 P2d 119 (1994).

Taxpayer correctly argues that the text and context of OAR 150-308A.113 (1)(a)(B) clearly requires that a "site inspection" occur before land can be disqualified from EFU special assessment. (Ptf's Mot for Summ J at 8.) Taxpayer argues that the assessor did not undertake that required site inspection because, among other things, the assessor did not "visit" the subject property with the specific intent of inspecting the subject property for the purpose of determining whether the subject property qualified for EFU special assessment. (*Id.* at 6.) That, however, raises a question as to what exactly the department meant by the term "site inspection."

In the context of the OAR 150-308A.113 (1)(a)(B), the meaning of the word "site" is clear: it refers to the physical location of the property to be "inspected." The meaning of "inspection" in this context is somewhat less clear. Oregon courts often make reference to dictionaries to determine the "plain, natural, and ordinary meaning" of a word or term. *See*, *e.g.*, *Douglas County v. Ohlsen*, ___ OTR ___ (Feb 7, 2011) (slip op at 5). In this case, however, recourse to dictionary definitions of the word "inspection" is not especially helpful. The parties appear to agree that an inspection involves observation of an object--land in this case--to

determine whether certain factual circumstances prevail. The parties differ primarily as to what differentiates an "inspection" from less formal intervals of observation. The definitions of "inspection" found in the dictionaries usually consulted by this court do little to resolve the conflict between the parties on this point.[4]

The rulemaking record for the relevant portions of OAR 150-308A.113 sheds some light on the question. The department added the site inspection and record-keeping requirements of OAR 150-308A.113 through a rule making process in the year 2000. The record of the rulemaking process contains the following staff response to a comment submitted by a county assessor concerning the record-keeping requirements of OAR 150-308A.113(1)(b):

> "* * * *. The information that is required in the rule is the minimum information necessary to [e]nsure a proper disqualification as well as to be successful in a hearing if contested by the taxpayer. * * * [I]nspection details or notations about the conditions found "may include," and are therefore at the discretion of the assessor. Keep in mind, however, that past court cases show that without the information required by the rule, the potential of success in a hearing are slim."

(Ptf's Mot for Summ J, Ex 4 at 18.) That response by the department indicates that the department had two purposes in adopting the inspection and record-keeping requirements of OAR 150-308A.113: (1) to ensure that a given property is, in fact, no longer entitled to EFU special assessment and (2) to ensure that a disqualification will be upheld should a taxpayer choose to challenge it. This is in keeping with the requirement of ORS 308A.113(1)(a) that an assessor disqualify land from EFU special assessment when the assessor "discovers" that the

[4] The dictionaries most often relied upon by Oregon Courts variously define "inspection" as "the act or process of inspecting; a strict or close examination." *Webster's Third New Int'l Dictionary* 1170 (unabridged ed 2002); or "A careful examination of something, such as goods (to determine their fitness for purchase) or items produced in response to a discovery request (to determine their relevance to a lawsuit.)." *Black's Law Dictionary* 799 (7th ed 1999). The dictionaries agree that an inspection involves an "examination," but the adjectives "strict," "close," and "careful" offer no specific guidance as to the form that the examination must take.

land is no longer used as farm land. By requiring the assessor to inspect land prior to disqualification, OAR 150-308A.113(1)(a)(B) ensures that any such "discoveries" will be based at least in part upon the reasonable observations of an assessor or an employee of the assessor. OAR 150-308A.113 provides further assurances by requiring the assessor to create and maintain a paper trial for any given disqualification.

That, in turn, brings us to what kind of "inspection" OAR 150-308A.113(1)(a)(B) requires an assessor to undertake prior to disqualifying land from EFU special assessment. Nowhere in its briefing or oral arguments on these motions does taxpayer explain what exactly differentiates a "site inspection" from more informal intervals of observation. Taxpayer does, however, place great emphasis on the absence of formal notice to taxpayer of any inspection, the assessor's state of mind during his observations of the subject property, his purpose in travelling to the subject property, and his personal ability--or lack thereof--to ascertain whether the trees on the subject property were, in fact, of a particular age without reliance on information provided by taxpayer or taxpayer's agents. (Ptf's Mot for Summ J at 6-7.) In essence, taxpayer appears to argue that for any given interval of observation to rise to the level of a "site inspection," an assessor must come on to the land for the specific purpose of determining whether conditions prevail on that land meriting disqualification from EFU special assessment. Moreover, the assessor must also be able to make that determination from whole cloth, without relying on information provided by the owner of the land.

Taxpayer's argument is not well taken. OAR 150-308A.113(1)(a)(B) does not prescribe any specific form of inspection. Taxpayer's insistence upon such things as formal notice, the assessor's state of mind when observing the subject property, or the specific actions taken by the assessor in the course of the inspection violates the statutory directive that courts not "insert what

has been omitted" in construing an agency administrative rule. ORS 174.010; *City of Klamath Falls v. Environ. Quality Comm.*, 318 OR 532, 543, 870 P2d 825 (1994) (applying ORS 174.010 in construing a rule of the Environmental Quality Commission).

Moreover, taxpayer's evident insistence that the assessor determine whether land is qualified for EFU special assessment purely through the required site inspection ignores the context of OAR 150-308A.113(1)(a)(B). OAR 150-308A.113(1)(a) lays out three steps that the assessor must undertake to determine whether to go forward with a disqualification from EFU special assessment:

> "(A) Make a reasonable effort to contact the owner, owner's agent or person using the land;
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> "(B) Make a site inspection of the property; and
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> "(C) Request the recent history of the property's use."

At each of these steps the assessor may uncover information that will inform the assessor's decision. To insist that the assessor decide whether the subject properties qualify for EFU special assessment based solely on the site inspection renders OAR 105-308A.113(1)(a)(A) and OAR 150-308A.113(1)(a)(C) superfluous.

In the present case, GreenWood and the assessor engaged in a collaborative effort to preserve the EFU special assessment eligibility of the subject property. That effort was motivated in large part by GreenWood's own knowledge that, in the absence of a legislative remedy, the subject property would be disqualified from EFU special assessment. (Rice Dep at 11-14.) The assessor succeeded in contacting the owner of the subject property and from that owner's agents received detailed information concerning the past use of the property and the acreage to be disqualified. (Rice Dep at 26-27.) Taxpayer does not dispute the accuracy of the information provided to the assessor by its agents, nor proffer any reason why the assessor

should have doubted that information. In short, taxpayer gives no sensible reason why the assessor was not entitled to rely on the information provided by taxpayer, at least to the extent that such information did not clearly conflict with information the assessor could discern through his own observation of the subject property.

Given the detailed information provided to the assessor by taxpayer's agents and the prior collaboration between taxpayer and the assessor, the assessor had no reason to doubt the veracity of the information provided by GreenWood. The assessor could therefore reasonably limit the scope of his inspection to discerning whether the information contained in taxpayer's records clearly conflicted with the observed circumstances of the subject property. If, for instance, the assessor had driven past the subject property and had observed that land marked in the records provided by taxpayer as containing trees older than 12 years had been cleared and replanted with saplings, the assessor might reasonably have concluded that the information contained in the records provided by taxpayer was either inaccurate or materially out of date. That, in turn, may have merited a more in-depth inspection before proceeding with disqualification. Where, as here, however, the assessor's observations of the subject property substantially bore out the information provided to the assessor by taxpayer, no purpose is served by requiring the assessor to count the whorls on tree branches or the rings in core samplings.[5] Under the circumstances present in this case, the assessor's frequent observations of the subject property, or of portions thereof, from adjacent roadways satisfies the "site inspection" requirement of OAR 150-308A.113(1)(a)(B).

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[5] These methods of determining the age of a tree were proffered by Donald Rice during his deposition on January 4, 2011. (Rice Deposition at 16.)

B. *Whether the Inspector Satisfied the Record-Making and Record-Keeping Requirements of OAR 150-308A.113(1)(b).*

Taxpayer further argues that the assessor failed to comply with the record-making and record-keeping requirements of OAR 150-308A.113(1)(b). Taxpayer primarily makes this argument as a necessary follow-on to his argument that the assessor failed to carry out a site inspection--in short, if there was no inspection, there logically cannot be a satisfactory record of an inspection. Inasmuch as the court has concluded that the assessor's actions in this case did satisfy the "site inspection" requirement of OAR 150-308A.113(1)(a)(B), the court now must now determine whether the assessor's inspection record satisfies the requirements of OAR 150-308A.113(1)(b).

The inspection record required by OAR 150-308A.113(1)(b) must contain:

> (1) "when the inspection was made,"
>
> (2) "who made the inspection,"
>
> (3) a "copy of contact letter(s) or record of other means of contact,"
>
> (4) "information from the person contacted," and
>
> (5) "notations of the conditions found."

The rule also requires the assessor to retain the record of the inspection at the assessor's office for three years. OAR 150-308A.113(1)(b). The department asserts that various records kept by the assessor satisfy the requirements of OAR 150-308A.113(1)(b). (Def's Resp Brf at 4-5.) Those records include the assessor's calendar, which documents numerous occasions on which the assessor observed the subject property and shows that it was the assessor that "made the inspections" of the subject property; a copy of the contact letter sent to taxpayer by the assessor on July 24, 2009; and a copy of the map provided to the assessor by taxpayer showing the ages of the various blocks of trees at Boardman Tree Farm.

The documents retained by the assessor clearly satisfy the requirements of items (1) through (4) of the list above. However, it is somewhat less clear whether item (5) is satisfied. The map, of course, is roughly contemporaneous with the disqualifications and contains significant information about conditions on the subject property. [6] Indeed, in addition to documenting the recent use history of the subject property, the map is essentially taxpayer's own representation as to the only "condition" relevant to the EFU special assessment eligibility of the subject property at the time of the disqualification. Nowhere in the record before the court, however, are there any "notations" made by the assessor stating "conditions found" on the subject property at the time the assessor inspected it.

Here, however, the court recalls the department's two purposes in adopting the record-making and record-keeping requirements of OAR 150-308A.113: first, to ensure that a given property is, in fact, no longer entitled to EFU special assessment; and second, to ensure success before this court should a taxpayer choose to challenge a disqualification. Here there is no dispute that at the time of the disqualification, the subject properties were no longer eligible for EFU special assessment. The documents retained by the assessor, including the documents provided to the assessor by taxpayer, fully support that conclusion. Furthermore, inasmuch as this case concerns the department's application of an administrative rule of the department, the department itself is sufficiently satisfied with the record compiled by the assessor to put it forward in these proceedings as evidence that the assessor did, indeed, "discover" that the subject property was no longer being used as farmland. The court is satisfied that even in the absence of

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[6] The contact letter sent to GreenWood by the assessor also suggests that the assessor had access to a document titled "GreenWood Resources Incorporated Boardman Tree Farm Forest Stewardship Council Management Plan Public Summary" that was posted on GreenWood's website at the time of the disqualification. (Dep Ex 6). That document was entered in the record in these proceedings as Deposition Ex 8, but it does not appear to have been retained by the assessor as part of the record of the disqualification process.

the notations required under OAR 150-308A.113(1)(b), the department's purposes in adopting that rule have been satisfied. Therefore, the court holds that the assessor's actions substantially complied with the record-making and record-keeping requirements of OAR 308A.113(1)(b).

V. CONCLUSION

Under the circumstances present in this case, the assessor's frequent observations of the subject property from adjacent roadways satisfies the "site inspection" requirement of OAR 150-308A.113(1)(a)(B). In addition, although the record of the inspection retained by the assessor did not contain notations by the assessor as to the conditions found on the subject properties during his observations, the assessor's actions substantially complied with the record-making and record-keeping requirements of OAR 150-308A.113(1)(b). Now, therefore,

IT IS ORDERED that the motion of the department for summary judgment is granted, and the motion of taxpayer for summary judgment is denied.

Dated this ___ day of September, 2011.

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Henry C. Breithaupt
Judge

THIS DOCUMENT WAS SIGNED BY JUDGE HENRY C. BREITHAUPT ON SEPTEMBER 20, 2011, AND FILE STAMPED ON THE SAME DAY. THIS IS A PUBLISHED DOCUMENT.