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REAL PROPERTY TAX ASSESSMENT IN MONTANA

John F. Sullivan

INTRODUCTION

Although during the last sixty years the significance of the property tax as a revenue source for state government has declined markedly,¹ the property tax still provides about ninety per cent of the tax revenue for Montana's local units of government.² More significantly, of all the tax revenues collected in Montana in 1970, approximately sixty per cent were derived from the property tax.³ Furthermore, in 1970 about one-half of the property taxes collected were derived from real estate and improvements thereon.⁴ The statistics indicate that the real estate property tax is substantial enough that Montana taxpayers ought to be concerned about the manner of its administration.

The main deficiencies in the administration of the property tax are in the assessment process, the determination of the value of property for tax purposes. Of all the steps necessary to determine property tax liability, assessment is the most crucial, but also the most difficult to control. It is crucial because it is the first step in the taxing process. Consequently, if the assessment is improper, no step which follows can lay claim to validity or propriety. It is the most difficult to control because the determination of value is a complex process, involving a high degree of discretion, judgment, and opinion.⁵

The two major defects in the assessment system in Montana are underassessment and the absence of uniform assessments.⁶ Underassessment (or fractional assessment) occurs when property is assessed at less than the level required by law. Non-uniform assessment exists when different classes of property within a taxing jurisdiction are assessed at different levels of value, or when property of the same class is

¹"In 1913 property taxes amounted to approximately 50% of the state's tax revenue; by 1959 the percentage had fallen to 11.29%." MONTANA LEGISLATIVE COUNCIL, PROPERTY TAXATION IN MONTANA, Report No. 6 (1960) at 1.

²"In 1913 property taxes supplies almost 88% of all local tax income, more than 95% in 1932, and in excess of 93% in 1957." *Id.* at 2. See also, MONTANA LEGISLATIVE COUNCIL, MONTANA TAXATION, Report No. 23 (1966) at 4.

³The exact figure was 59.48%. MONTANA STATE BOARD OF EQUALIZATION, TWENTY-FOURTH BIENNIAL REPORT (1968-1970) at 12.

⁴*Id.* at 10.

⁵The Montana supreme court has consistently recognized the highly discretionary nature of the assessment process. So broad is the assessor's discretion that

[C]ourt will ordinarily not interfere with the action of . . . [assessors] to correct mere errors of judgment. It is only where they act fraudulently or maliciously, or the error or mistake is so gross as to be inconsistent with any exercise of honest judgment, that courts will grant relief. *Danforth v. Livingston*, 23 Mont. 558, 59 P. 916, 917 (1900).

See also, *Johnson v. Johnson*, 92 Mont. 512, 15 P.2d 842, 844-845 (1932); and *State ex rel. Schoonover v. Stewart*, 89 Mont. 257, 297 P. 476, 481 (1931).

⁶PROPERTY TAXATION IN MONTANA, *supra* note 1 at 29.

assessed at varying levels of value.⁷ The perennial and universal nature of fractional and non-uniform assessments is well documented.⁸

In Montana, the problems of fractional and non-uniform assessment have been given a unique character by the State Board of Equalization. In most states, where these problems are as serious as in Montana, one of two courses of action is followed. First, the state may enact legislation legalizing current assessment levels and variations. Second, the agencies responsible for assessment may make fractional and non-uniform assessments as a matter of informal administrative policy. In Montana, however, fractional and non-uniform assessment of realty and its improvements is (1) expressly prohibited by statute, but (2) expressly commanded by the rules and directives of the State Board of Equalization. Thus, fractional and non-uniform assessment in Montana are not only practical administrative problems, but also involve questions as to the legal extent and nature of the power of the State Board of Equalization.

The power of the State Board of Equalization to compel fractional and non-uniform assessments of land and improvements is the subject of this comment.⁹ Using an historical and legal approach, three general topics will be considered: (1) the present statutory real property tax system; (2) the assessment of land and improvements according to the present constitution, the State Board of Equalization, and the Montana supreme court; and (3) the assessment of land and improvements under the new constitution and recently enacted legislation implementing the new constitution.

In Montana it is imperative that state-wide uniformity be achieved. In other words, assessment uniformity must exist not only within the several counties, which are the usual "taxing jurisdictions," but also among the several counties. The main reason for this is that the multi-million dollar school foundation program distributes state revenue to the counties on the basis of need. Need is determined by the number of pupils in each county and the amount of money that a uniform levy will raise in each county. If there is not uniform assessment among counties, the amount raised by a uniform levy is not an accurate measure of relative need. The counties with lower levels of assessment receive an inequitably large share of the state aid for schools.

⁸See, for example: PROPERTY TAXATION IN MONTANA, *supra* note 1 at 29; REPORT OF THE TAX AND LICENSE COMMISSION TO THE STATE BOARD OF EQUALIZATION (1917-1918) at 10-11; SPECIAL COMMITTEE ON CLASSIFICATION AND APPRAISAL, REPORT TO THE MONTANA HOUSE OF REPRESENTATIVES (Feb. 5, 1963) at 7; STAFF OF SENATE COMM. ON GOVERNMENT OPERATION, 92D CONG., 2D SESS., PROPERTY TAX ADMINISTRATION AND ASSESSMENT PRACTICES IN MONTANA at 41 (1972); and COMMENT, *Property Tax Equalization and Assessment: A Proposal for Reform*, 50 NEB. L. REV. 103, 105-107 (1971).

⁹This paper considers only the assessment of realty and improvements which are initially assessed by the counties. Generally, this includes farm and grazing land; urban vacant lots; suburban tracts; and commercial, industrial, and residential land and buildings. It does not include railroad or utility property which, under § 84-708(3), R.C.M. 1947, is initially assessed by the State Board of Equalization. Also, the assessment of timber land, though made initially by the counties, will not be considered.

THE PRESENT STATUTORY REAL PROPERTY TAX SYSTEM

The determination of real property tax under the applicable Montana statutes is a three-step process involving: (1) assessment of value; (2) determination of taxable value; and (3) computation of tax by applying the appropriate mill levy to taxable value.

With respect to the initial assessment of value, § 84-401, R.C.M. 1947 provides that: "All taxable property must be assessed at its full cash value." The term "full cash value" is defined in § 84-101, R.C.M. 1947 as "the amount at which the property would be taken in payment of a just debt from a solvent debtor." In the vernacular, full cash value means market value.

The determination of taxable value is made by applying Montana's property classification laws, §§ 84-301 and 84-302, R.C.M. 1947.¹⁰ Under these statutes various percentages are applied to the assessed values of the different classes of taxable property. The taxable value of land and improvements thereon is thirty per cent of full and true value.¹¹ Tax liability is then computed by simply applying the set mill levy to taxable value.

The present statutory real property tax system may be illustrated by the following example. Grazing land, a dwelling house, a vacant lot, and an office building, all of which have a market value of \$10,000, should all be assessed at \$10,000. The taxable value of each of these, under the classification laws, should be \$3,000.¹² If the same millage rate is levied against each kind of property, the tax liability for each of them should be identical. However, under directives of the State Board of Equalization, the house, vacant lot, and office building are to be initially assessed at about thirty-eight per cent of market value, or, in the example above, \$3,800. When the classification law is applied, taxable value is about \$1,200.¹³ The grazing land, on the other hand, is

¹⁰The purpose of these sections, enacted in 1919, was

. . . to shift the burden of taxes from property, as such, to productivity, or, in other words, to impose the burdens of government upon property in proportion to its use, its productivity, its utility, its general setting in the economic organization of society, so that every one will be called upon to bear the burdens, or as nearly so as may be, and to relieve administrative officers from the apparent necessity of continuing the legal fiction of full valuation in the face of contrary facts. *Hilger v. Moore*, 56 Mont. 146, 82 P. 477, 483 (1919).

¹¹There are a few exceptions to this rule. For example, the taxable value of a dwelling house (and its lot) owned by a totally disabled veteran is only seven per cent of full and true value; the land and improvements thereon of "new industries" have a taxable value of only seven per cent of their true and full value; and the homes of the needy elderly and needy widows with children have a taxable value of only fifteen per cent of their true and full value. See, §§ 84-301 and 84-302, R.C.M. 1947.

¹²This is assuming none of the exceptions set forth in note 11 are applicable.

¹³In 1966 the state-wide ratio of taxable value to appraised value of single-family dwellings was, in fact, 10.3 per cent, fourteen per cent below the twelve per cent target set by the State Board of Equalization. BUREAU OF BUSINESS AND ECONOMIC RESEARCH OF THE UNIVERSITY OF MONTANA, MONTANA FISCAL AFFAIRS STUDY (1969-

to be initially assessed at only about twenty per cent of its market value, \$2,000 in the example above. When the classification law is applied, the taxable value of the grazing land is about \$600.¹⁴ If equal mill levies are applied against all of these properties, the house, vacant lot, and office building will pay double the tax of grazing land worth the same amount.¹⁵

ASSESSMENT OF LAND AND IMPROVEMENTS UNDER THE PRESENT CONSTITUTION

THE FORTY PER CENT RULE; FRACTIONAL ASSESSMENT OF LAND AND IMPROVEMENTS

A. *Administrative History*

On November 13, 1963, the State Board of Equalization issued a directive to the county assessors and county commissioners of all Montana counties, ordering them to assess city and town lots and rural and urban improvements at forty per cent of their appraised value. The appraised values were those established under a statewide reappraisal program instituted in 1957 and completed, in most counties, in 1962.¹⁶ The appraised values represented ninety-five per cent of full cash or market value,¹⁷ and were based primarily on the sales prices of the appraised property or comparable property.¹⁸ The intended effect of the directive was to compel assessment of city and town lots and rural and urban improvements at about thirty-eight per cent of their full cash or market value.

B. *The Effect of the Forty Per Cent Rule on Legislative Tax and Spending Policy*

Fractional assessment as a matter of sound tax administration and economic policy has been consistently condemned by property tax

¹⁴In 1966 the state-wide ratio of taxable value to market value of farm and grazing land was, in fact, 6.6 per cent, ten per cent above the six per cent standard set by the State Board of Equalization. *Id.*

¹⁵In fact, due to the variances indicated in notes 13 and 14, the house, vacant lot, and apartment building will pay only about 1.6 times the tax on the grazing land. *Id.*

¹⁶The reappraisal program was authorized by §§ 84-429.7 *et. seq.*, R.C.M. 1947.

¹⁷The ninety-five percent figure is used to insure that if there is some error in the appraisal, it will, in the majority of cases, not be to the disadvantage of the taxpayer.

¹⁸The MONTANA APPRAISAL MANUAL, published May 4, 1966, by the State Board of Equalization, authorizes, at 3-6, three methods for determining the market value of city and town lots and rural and urban improvements. These are: (1) the cost approach for valuing improvements, under which value is reproduction cost new less functional and structural depreciation; (2) the market approach, under which value is the actual sale price of the appraised property or comparable property; and (3) the income approach, under which value is the present value of future net income. The market approach is said to be the only means by which the true market value of residential, commercial, and industrial land can be determined. Moreover, it is said to be the best approach to the value of residential improvements, when used in conjunction with the cost approach. Presumably, commercial and industrial improvements require use of all three approaches for a proper appraisal.

experts.¹⁹ It is not the purpose of this comment to summarize the already well-publicized economic and practical defects of fractional assessments.²⁰ Rather, this comment seeks only to analyze the power of the State Board of Equalization to compel fractional assessments. Relevant

¹⁹See, for example, PROPERTY TAXATION IN MONTANA, *supra* note 1 at 31-32; Tideman, *Fractional Assessments—Do Our Courts Sanction Inequality?*, 16 HASTINGS L.J. 573 (1965); Lewis, *Equality in Property Assessments*, 9 MARYLAND L. REV. 246 (1948).

²⁰The author cannot, however, resist the temptation to refute the only argument that can be made in favor of fractional assessment. The contention is that fractional assessment is of no consequence so long as assessments are made at a reasonably uniform fraction of market value. The argument is perhaps logically sound, but factually fallacious. For there is evidence indicating that there is a correlation between fractional assessments and non-uniform assessments. PROPERTY TAXATION IN MONTANA, *supra* note 1 at 31. Common sense supports this theory, since: (1) fractional assessment muzzles the taxpayer, quieting potential complaints of non-uniformity, by leading him to believe that he has been favored by low assessment levels; and (2) the taxpayer is less likely to be aware of deviations from the established assessment level, where assessed values are stated in fractions of market value. Moreover, current empirical evidence supports the hypothesis that fractional assessments are related to non-uniform assessments. A forty-nine county sales-assessment ratio study conducted during the past seven years by the State Board of Equalization indicates that non-uniform assessment is a serious problem in Montana. The following tables, compiled from information furnished by the State Board of Equalization in 1972 to U. S. Senate Committee on Government Operation, indicate the high degree of non-uniformity which exists in the assessment of home building sites and residential housing. The tables were taken from PROPERTY TAX ADMINISTRATION AND ASSESSMENT PRACTICES IN MONTANA, *supra* note 8 at 30-31.

Table I—Single Family Residential In County Seats
[Average of data is 2 years old.]

By population of county seat	Average COD-AM*	COD-38 per cent*
Population 1,000 and under— 11 county seats	20.2	26.1
Population 1,000 to 10,000— 31 county seats	18.0	22.4
Population 10,000 and over— 7 county seats	15.1	19.8
Average for 49 counties	18.1	22.9

Table II—All Vacant Residential Lots, Suburban Tracts, and Rural Building Sites
(Excluding Building Sites on Agricultural Lands)
[Average of data is 2 years old.]

By population of county seat	Average COD-AM*	COD-38 per cent*
Population 1,000 and under— 11 counties	30.6	39.0
Population 1,000 to 10,000— 31 counties	47.1	52.1
Population 10,000 and over— 7 counties	54.6	52.7
Average for 49 counties	44.5	49.2

*"COD" means coefficient of dispersion, which is a measure of assessment uniformity in relation to market value. "COD-AM" is a coefficient of dispersion based on deviations from the average level of assessment. It indicates the degree of assessment uniformity in fact. "COD-38 per cent" is a coefficient of dispersion based on deviations from the level of assessment commanded by the State Board of Equalization. It measures the degree of compliance with the Board's forty per cent rule. The larger the coefficient, the greater the lack of uniformity. According to the Board, a coefficient of ten or less indicates a very high degree of uniformity, while 20 or higher is an indication that an entire reappraisal of the surveyed class of property is necessary.

to this limited purpose is a consideration of the legal effect of the Board's forty per cent rule on the legislature's tax and spending policies.

The forty per cent level of assessment was set on the basis of an *ad hoc* agreement between the county commissioners, assessors, and the State Board of Equalization.²¹ The rationale was that a forty per cent assessment of city and town lots and rural and urban improvements was the minimum level at which, using maximum mill levy rates set by statute, local governments could generate enough tax revenue to function.²² The express purpose of the forty per cent rule was, therefore, to

. . . alter existing statutory taxing and bonding limitations by making them more restrictive than contemplated by law. This misrepresents the fiscal capacities of local governments and leaves some of them with little or no financial elbow room.²³

In addition, the forty per cent rule is a blatant disregard of the clear legislative mandate of § 84-401, R.C.M. 1947, which commands that all property be assessed at full cash value. Finally, the Board's rule effectively emasculates Montana's property classification laws. As noted previously, taxable value is determined under the classification laws by applying different percentages to the appraised values of the several classes of property. The classification laws expressly presume that the appraised values before application of the classification scheme are at "true and full value."²⁴ Since urban and rural improvements and city and town lots comprise but one of the several classes of property, the forty per cent rule grants to these kinds of property "tax windfalls at the expense of others"²⁵—windfalls in no way authorized by the legislature. "[T]he result is a serious distortion of the intended effect of the classification law."²⁶

The overall legal consequence of the forty per cent rule is that it is an odd species of administrative rule-making. The State Board of Equalization, by its alteration and disregard of the legislature's statutory tax and spending policy, considers its legislative rule-making power to be superior to that of the legislative branch of government. Through the forty per cent rule the State Board has denominated itself a "fourth branch" of state government. It remains to be seen whether, under the present constitution, this usurpation of legislative power is permissible.

C. *The Legality of the Forty Per Cent Rule Under the Present Constitution*

Article 12, § 15 of the present constitution defines the duties of the State Board of Equalization. It provides that:

²¹Testimony of J. Morley Cooper, then Chairman of the State Board of Equalization, PROPERTY TAX ADMINISTRATION AND ASSESSMENT PRACTICES IN MONTANA, *supra* note 8 at 3.

²²*Id.* at 3-4.

²³PROPERTY TAXATION IN MONTANA, *supra* note 1 at 31.

²⁴§ 84-302, R.C.M. 1947.

²⁵PROPERTY TAXATION IN MONTANA, *supra* note 1 at 32.

²⁶*Id.*

The state board of equalization shall adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of the county assessors and county boards of equalization; change, increase, or decrease valuations made by county assessors or equalized by county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, between the different classes of property, and between individual taxpayers.

[Originally, § 15 had simply made it the duty of the State Board "to adjust and equalize the valuation of the taxable property among the several counties of the state." In 1896, in *State ex rel. Wallace v. State Board of Equalization*,²⁷ it was held that, under § 15, the State Board did not have the power to increase the assessed valuations made by county assessors and equalized by county commissioners (the county boards of equalization).²⁸ Section 15 was amended in 1916²⁹ to abrogate the rule of *Wallace* and greatly expand the State Board's powers. Six years later § 15 was amended to its present form.³⁰ The 1922 amendment simply transformed the discretionary powers granted to the State Board under the 1916 amendment into affirmative duties.

It is clear from a reading of the present § 15 that the constitutional powers and duties of the State Board of Equalization are extensive. In 1931, *State ex rel. Schoonover v. Stewart*³¹ described § 15 as follows:

More comprehensive words could hardly have been chosen to express the intention of the people to confer upon the state broad and far-reaching powers in matters relating to taxation.³²

Schoonover, however, was careful to point out that the § 15 powers and duties of the State Board did not include the power or duty to compel fractional assessments. The court stated that: "Section 2001 (Rev. Codes 1921) [later codified as § 84-401, R.C.M. 1947] provides that all taxable property must be assessed at its full cash value. This section has not been changed since its enactment . . .; and its mandate is the law to-day."³³ Thus, "Whatever the character of the land it must . . . be assessed on a uniform basis, namely: its full cash value."³⁴

The rule of *Schoonover*—that even under § 15 all land must be assessed at full cash value—was first altered in 1960 in *Yellowstone*

²⁷*State ex rel. Wallace v. State Board of Equalization*, 18 Mont. 473, 46 P. 266 (1896).

²⁸*Id.* at 268.

²⁹Chapter 47, Montana Session Laws of 1915. The proposed amendment was approved by the people in November, 1916, and became effective December 4, 1916, by proclamation of the governor.

³⁰Chapter 11, Montana Extraordinary Session Laws of 1921. The amendment was approved by the people in November, 1922, and became effective December 14, 1922, by proclamation of the governor.

³¹*State ex rel. Schoonover v. Stewart*, *supra* note 5.

³²*Id.* at 479.

³³*Id.*

Pipe Line Co. v. State Board of Equalization.³⁵ In this case it was held that the duties to (1) adjust and equalize the valuation of taxable property among the different classes of taxable property, and (2) secure a fair, just and equitable valuation of all taxable property between the different classes of property, enabled the State Board to assess the realty of pipe line companies at about seventy per cent of full cash value, while at the same time permitting city and town lots to be assessed at a lesser percentage of full cash value. The rule of *Yellowstone Pipe Line* is that § 15 empowers the State Board to classify property and assess different classes at different percentages of market value, without violating the uniformity rules of the Montana constitution or the federal equal protection clause.³⁶ The case does not expressly state that the State Board may compel fractional assessments of selected classes of property. However, implicit in the holding that all land need not be assessed on a uniform basis is the proposition that land need not be assessed at full cash value.

Five years later, in *State Board of Equalization v. Vanderwood*,³⁷ the implied rule of *Yellowstone Pipe Line* was made express. It was held that § 15 empowered the State Board to compel assessment of city and town lots and rural and urban improvements at forty per cent of their full cash value. The *Schoonover* rule—that, even under § 15, all land must be assessed at full cash value—was dead.

In arriving at the decision in *Vanderwood*, the Montana supreme court placed heavy reliance on two recent California decisions: *Michels v. Watson*³⁸ and *Hanks v. State Board of Equalization*.³⁹ In *Michels* the issue was whether property could be fractionally assessed under Article 11, § 12 of the California constitution, which provides that all property must be assessed at full cash value. It was held that fractional assessment was permissible, and that the constitution merely required that full cash value be the standard of assessment. In reaching its conclusion the California court relied exclusively on the concurrence of three factors: (1) those who administer the California property tax had consistently engaged in fractional assessment; (2) for over seventy-five years the California courts, in uniformity cases like *Yellowstone Pipe Line*, had recognized, recited, indicated, referred to, permitted, accepted, approved, acknowledged, described, relied upon, were aware of, and did not question the practice of fractional assessment; and (3) the Cali-

³⁵*Yellowstone Pipe Line Co. v. State Board of Equalization*, 138 Mont. 603, 358 P.2d 55 (1960).

³⁶The impact of these uniformity provisions on the forty per cent rule will be discussed later.

³⁷*State Board of Equalization v. Vanderwood*, 146 Mont. 276, 405 P.2d 652 (1965).

³⁸*Michels v. Watson*, 40 Cal.Rptr. 464 (1964) (hearing denied by California supreme court, October 28, 1964).

³⁹*Hanks v. State Board of Equalization*, 40 Cal. Rptr. 478 (1964) (hearing denied by California supreme court, October 28, 1964).

ifornia legislature had been aware of the practice of fractional assessment for over forty years, but had done nothing to correct it.

The losers in *Michels* attempted a different route to victory in *Hanks*. The court was asked to hold that Article 13, § 9 of the California constitution, which requires the State Board of Equalization to equalize the valuations of taxable property, compels the State Board to raise or lower assessments to conform to full cash value. In rejecting this request, and holding that the State Board had the power to equalize valuations on the basis of fractional assessments, the California court relied on two points: (1) the administrative, legislative, and judicial approval that fractional assessment and equalization had received in California for decades; and (2) the reasoning that, if property had to be assessed at full cash value in the first place, the power of the State Board to equalize valuations would be superfluous and meaningless, surely not what the constitutional draftsmen had intended.

The heavy reliance placed on *Michels* and *Hanks* by the Montana supreme court in *Vanderwood* is misplaced and misguided. The Montana court quoted extensively from both decisions, then simply concluded:

We adopt the reasoning of the California court and hold that R.C.M. 1947, §84-401, [which requires assessment at full cash value] is complied with so long as the same type of property bears the same proportion of the tax base.⁴⁰

One problem with this kind of reliance is that both *Michels* and *Hanks* depended heavily on a uniquely long and uninterrupted history of legislative and judicial approval of the practice of fractional assessment. Indeed, the court said in *Hanks* that:

[N]o other state has a history and development of constitutional and statutory tax provisions comparable to California . . . ; in none is found the clear-cut administrative, legislative and judicial recognition of the practice of applying a uniform [fractional] ratio to market value existing in this state. . . .⁴¹

Certainly, the Montana court could not "adopt" the California history of fractional assessment. Moreover, even if the Montana court had attempted to develop a history of fractional assessment in Montana, similar to that in California, it would have failed. In California the uninterrupted history of judicial approval of fractional assessment in uniformity cases spanned seventy-five years, and the cases were legion. In Montana the "history" of such judicial approval was a scanty five years, supported by only one decision, *Yellowstone Pipe Line*. Also, for thirty-two years, under the *Schoonover* rule, fractional assessments were expressly forbidden by the judiciary. For over forty years the California legislature had been aware of the practice of fractional assessment, but had done nothing to correct it. On the other hand, in Mon-

⁴⁰State Board of Equalization v. Vandergood, *supra* note 37 at 657.

⁴¹*Hanks v. State Board of Equalization*, *supra* note 39 at 484.

tana, in every legislative attempt to effect a comprehensive reform of the property tax, the practice of fractional assessment has been attacked. The first attempt at comprehensive reform occurred in 1919, and resulted in the property classification laws. One of the purposes of these laws was "to relieve administrative officers from the apparent necessity of continuing the legal fiction of full valuation in the face of contrary facts."⁴² Of course, as was recognized in *Schoonover*, in order for the classification laws to operate properly, all property must "be assessed on a uniform basis, namely: its full cash value."⁴³ In 1957 the legislature again attempted to alleviate the practice of fractional assessment, by enacting the Reclassification and Reappraisal Act of 1957,⁴⁴ which required the counties, under the direction of the State Board, to accomplish within five years an appraisal of all city and town lots and rural and urban improvements, and thereafter to maintain current these appraisals. The point here is that Montana's history of legislative and judicial acceptance of fractional assessment is in no way comparable to that of California. To the extent that *Vanderwood's* reliance on *Michels* and *Hanks* flows from some sort of assumed similarity of legislative and judicial history, the reliance is woefully misplaced.

The second problem with *Vanderwood's* reliance on *Michels* and *Hanks* is that, absent the extended history of legislative and judicial approval of fractional assessment, the legal reasoning of the California court is patently absurd. Only *Hanks* relied on "reasoning," as opposed to legislative and judicial history; and the "reasoning" was that the State Board had the power to equalize valuations on a fractional basis, since, if property had to be initially assessed at full cash value, this power to equalize would be meaningless and unnecessary. A much more realistic holding would have been that the State Board's power to equalize valuations was an insurance provision, designed to force assessment at full cash value in those cases where the local assessors had initially failed to do so.

The third and final problem with the Montana court's reliance on *Hanks* and *Michels* is that, even with the aid of many decades of legislative and judicial approval, the California court's holding that fractional assessment and equalization are permissible is tenuous and dangerous legal reasoning. This defect in reasoning was eloquently explained in a dissent by Judge Fourt, which covered both *Michels* and *Hanks*:

⁴²*Hilger v. Moore*, *supra* note 10 at 483. See also, REPORT OF THE TAX AND LICENCE COMMISSION TO THE STATE BOARD OF EQUALIZATION, *supra* note 8 at 10-11, where it is contended that the classification laws were necessary to put legislative controls on the then existing practice of fractional assessment. It was primarily on the basis of this report that the classification laws were enacted.

⁴³*State ex rel. Schoonover v. Stewart*, *supra* note 5 at 480. See also, MONTANA STATE BOARD OF EQUALIZATION, SIXTEENTH BIENNIAL REPORT (1952-1954) at 15. There is evidence that for about fifteen years the classification laws were effective in forcing assessments to be made at or near full cash value. See, PROPERTY TAXATION IN MONTANA, *supra* note 1 at 21-23, graphs 3-5.

⁴⁴Chapter 191, Montana Session Laws of 1957; §§ 84-429.7 *et seq.*, R.C.M. 1947.

The majority . . . in effect hold that the long, continued, systematic and intentional violation of the law somehow constitutes or has developed into a right in the assessor to violate the specific provisions of the law. . . .

The Iowa Supreme Court in deciding a case where substantially the same arguments were made as are asserted by the respondent in this case said: "These duties which they have knowingly and deliberately refused to perform are imperative duties. They are commands of the legislature. The defendants have no discretion in the matter, with respect to obeying those commands. Since the statute requires that all property shall be assessed and taxed at its actual value, they have no right to disregard this legislative injunction, because they deem it unwise or inexpedient, or because others in their position in the past have so violated the law." (Pierce v. Green (1940) 229 Iowa 22, 294 N.W. 237, 248, 131 A.L.R. 335.) The above quoted sentence from the Iowa case was quoted with approval in Switz v. Township of Middleton, 40 N.J. Super. 217, 122 A.2d 649, 655, where the court declared improper and illegal a century old practice of using fractional assessments.

No amount of juggling, subterfuge, circumvention, evasion, deception, maneuvering, legalistic legerdemain or sorcery can change the plain and specific provision of the Constitution [which requires assessment at full value].⁴⁵

The practical legal effect of *Vanderwood* is that legislative control over the assessment policies of the State Board of Equalization is non-existent. The only two limitations on the Board's policies are the uniformity provisions of the Montana constitution⁴⁶ and the equal protection clause of the federal constitution. Under the established rules, neither of these is violated by the fractional assessment of any given class of property, here city and town lots and rural and urban improvements. In the leading case of *Hilger v. Moore*, it was held that Montana's uniformity provisions require only that taxes be uniform upon property of the same class.⁴⁷ That is, the uniformity rules forbid unequal assessment only as between properties of the same class. The fact that one class of property is assessed at full market value while another at merely a fraction thereof is of no consequence. The rule is the same under the federal equal protection clause.⁴⁸

Rightly or wrongly, the State Board of Equalization has the power, under the present constitution, to compel the fractional assessment of city and town lots and rural and urban improvements.

⁴⁵*Michels v. Watson*, *supra* note 38 at 473 (dissenting opinion).

⁴⁶The uniformity provisions are contained in Article 12, §§ 1 and 11. Section 1 provides, in pertinent part:

The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specifically provided for in this article.

Section 11 provides:

Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

⁴⁷*Hilger v. Moore*, *supra* note 10 at 481-482.

⁴⁸*See* *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 366-369 (1939).

THE ASSESSMENT OF FARM AND GRAZING LAND ON THE BASIS OF PRODUCTIVE VALUE RATHER THAN MARKET VALUE

A. *Administrative History*

On September 24, 1962, the State Board of Equalization promulgated a schedule of assessed values for the various grades of non-irrigated farm lands, grazing lands, and wild hay lands. The scheduled directed that all county assessors fix the assessed values of such lands for 1963 and thereafter at the values assigned by the State Board. Twenty-six counties defied the State Board's directive, and instead insisted on using values assigned by a committee of the county commissioners' and county assessors' associations. This defiance was tested by the State Board in an original proceeding brought in the supreme court against one of the twenty-six recalcitrant counties, Lewis and Clark.⁴⁹ The State Board lost the dispute on a technicality of administrative law. The court held that: (1) § 84-710, R.C.M. 1947 requires that evidential hearings be held prior to ordering changes in assessment values; and (2) since such hearings were not held, the September 24, 1963 schedule of assessed values was invalidly promulgated.⁵⁰

Following this decision, on September 9, 1963, the State Board announced a schedule of public hearings to be held for the purpose of hearing interested persons on the subject of assessed values for farm and grazing lands. After the hearings were held a new schedule of assessed values for these lands was issued on November 14, 1963. Under this revised schedule assessed values of non-irrigated farm lands and grazing lands were raised by about \$1.25 per acre per grade. Values of wild hay lands were lowered by about \$6.50 per acre per grade. In addition, schedules of assessed values for non-irrigated continuously cropped farm land and tillable irrigated lands were promulgated. Since 1963 the schedule has been revised only twice. On August 15, 1967, a new schedule was issued, in which the two lowest grades of non-irrigated continuously cropped farm land were eliminated, and four new intermediate sub-grades were added to each of the three classes of tillable irrigated lands. Two years later, on June 18, 1969, two new higher grades were added to non-irrigated farm lands, and the assessed value of one previous grade of such land was lowered by \$0.01. Though there have been additions and subtractions of grades in classes, the assessed values set in the 1963 directives are currently in use.

The assessed values for farm and grazing land, as set by the State Board of Equalization, are at about twenty per cent of their market value.⁵¹ Consequently, under the classification laws, the taxable value

⁴⁹State *ex rel.* State Board of Equalization v. Kovich, 142 Mont. 201, 383 P.2d 818 (1963).

⁵⁰*Id.* at 820-822.

⁵¹Montana Fiscal Affairs Study, *supra* note 13 at 386.

of such lands is six per cent of their market value.⁵² However, this twenty per cent ratio of assessed to market value "was due more to accident than to any specific design."⁵³ The reason is that assessed values of farm and grazing lands, unlike those of city and town lots and rural and urban improvements, are not set on the basis of market value. Rather, these lands are assessed according to what is called their productivity value.⁵⁴ It is purely accidental that productivity value is about twenty per cent of market value.

The method used to determine productivity value is complex, so only a basic outline of the steps involved will be set forth. First, the lands are classified into economic classes and grades on the basis of their expected average productivity of given indicator crops (*e.g.*, wheat, barley, hay, alfalfa) in the case of farm lands and animal unit carrying capacity in the case of grazing lands.⁵⁵ The next step is to assign values per acre to the established classes and grades. This is a two-step process involving: (1) the determination of net income; and (2) capitalization of net income into land values.⁵⁶ Gross income is computed by multiplying average expected annual productivity in terms of indicator crops or carrying capacity by average expected crop or animal selling prices. From gross income is subtracted annual estimated operating costs, taxes, and interest to arrive at annual net income. The annual net income is then capitalized to find the sum which will, in accordance with the prevailing rate of earning for farm and grazing land, produce annually a sum equivalent to the annual net income. This sum arrived at through capitalization of the net income is the assessed value.

B. *The Effect of the Productivity Assessment System on Legislative Tax and Spending Policy*

Insofar as the assessments of farm and grazing land constitute *de facto* fractional assessments, the productivity assessment system has

⁵²Section 84-301, R.C.M. 1947 places farm and grazing lands in Class Four, and § 84-302, R.C.M. 1947 provides that the taxable value of properties in Class Four is thirty per cent of assessed value.

⁵³MONTANA FISCAL AFFAIRS STUDY, *supra* note 13 at 386.

⁵⁴As will be explained, productivity value is determined by a capitalization of net income. The income approach is a valid method of determining market value. However, where, as here, the income approach yields a value substantially different from actual market value, then it is clear that the income approach is not being used to determine market value. Presumably, this is the reason for the use of the term "productivity value." As used by the State Board to value agricultural and grazing land the income approach is not at all an attempt to determine market value. Productivity value and market value are two entirely different standards, even though in some instances the method (an income approach) used to determine productivity value may also be used to arrive at market value.

⁵⁵See, MONTANA AGRICULTURAL EXPERIMENT STATION BULLETIN No. 348, R. R. Renne and H. H. Lord, ASSESSMENT OF MONTANA FARM LANDS, October 1937 at 43-44.

⁵⁶The valuation process is described in detail in MONTANA AGRICULTURAL EXPERIMENT STATION BULLETIN No. 404, H. H. Lord, S. W. Voelker, and L. F. Giesecker, STANDARDS AND PROCEDURES FOR CLASSIFICATION AND VALUATION OF LAND FOR ASSESSMENT PURPOSES IN MONTANA, June 1942 at 15-19. The description given above in the text is

the same qualitative effect on legislative tax and spending policy as does the forty per cent rule. In addition, the productivity assessment system is a more blatant disregard of § 84-401, R.C.M. 1947, which requires assessment at full cash or market value, since market value is completely ignored in favor of productivity value. At least under the forty per cent rule market value is the ultimate standard of value. Finally, the productivity assessment system is a more serious alteration of the property classification laws, since it has the effect of setting different taxable values on different kinds of property in the same legislative class.⁵⁷

The productivity assessment system's inherent disregard and alteration of the legislature's tax and spending policy is justified by its proponents on the grounds that: (1) property should be taxed according to its ability to pay;⁵⁸ and (2) the income producing potential of land is a better indication of ability to pay than is market value.⁵⁹ The problem with this justification is not that farm and grazing land is assessed on the basis of productivity value, but that all other land is assessed according to market value. If property taxes should be based on ability to pay, and income potential is the best indicator of ability to pay, then all land should be valued on the basis of its income potential. If followed to its logical and equitable conclusion, some types of property—notably owner-occupied single family dwellings—should pay

⁵⁷As noted previously, city and town lots, urban and rural improvements, and farm and grazing lands are all in Class Four under § 84-301, R.C.M. 1947. Section 84-302, R.C.M. 1947 provides that the taxable value of Class Four property is to be set at thirty per cent of its assessed value. Since city and town lots and rural and urban improvements are assessed at thirty-eight per cent of market value, whereas agricultural and grazing land are assessed at only twenty per cent, the productivity assessment system has the effect of setting the taxable value of agricultural and grazing lands at about half of that used for city and town lots and rural and urban improvements.

⁵⁸MONTANA AGRICULTURAL EXPERIMENT STATION BULLETIN No. 348, *supra* note 55 at 5.

⁵⁹*Id.* at 22. One of the strongest arguments in favor of the productivity assessment system is that, if it is assumed that income is the best indication of ability to pay, valuation should be based on income, since there is no correlation between income value and market value. There is current empirical evidence which strongly supports the contention that the market value of farm and grazing land is not at all related to its income producing potential. The recent MONTANA FISCAL AFFAIRS STUDY, *supra* note 13 found at 391-393 that:

Comparison of the annual growth rates in land market values and in realized net farm income shows that the annual growth in farmland market values [from 1950 to 1967] exceeded the annual growth in total net income per farm by about 3.2 percentage points. The annual growth in the market value of farmland is 2.8 times higher than the annual growth in net farm income per year.

A number of factors have caused this accelerated rise in market value of land relative to income potential: (1) the farmer himself is buying additional land at high prices to expand operations and make efficient use of expensive modern equipment and methods; (2) farm land is being purchased at high prices by nonfarmers for hobby farming and to obtain tax advantages; (3) farm land is being purchased at high prices for nonfarm uses such as residential, commercial, and industrial sites; and (4) the fact that farm and grazing land have low tax rates itself increases its market value by approximately four to six per cent. See, MONTANA FISCAL AFFAIRS STUDY, *supra* note 13 at 389-391 and 393-394; and MONTANA AGRICULTURAL EXPERIMENT STUDY BULLETIN No. 583, Layton S. Thompson, SALE PRICES OF MONTANA AGRICULTURAL LAND BY CLASS AND GRADE, December 1963 at 5.

no property tax at all, since they do not produce income and are not available for the production of income. Yet, the outrageous fact is that owner-occupied single family dwellings pay relatively twice as much tax as farm and grazing land,⁶⁰ a fact which is totally inconsistent with the productivity assessment system's seemingly equitable principle that taxes should be based on ability to pay.⁶¹ Elimination of the property tax's false test of ability to pay (market value) for one type of property, while retaining it for all others, has clearly not yet been sufficiently justified by the proponents of the productivity assessment system.

C. *The Legality of the Productivity Assessment System Under The Present Constitution*

The current legality of the productivity assessment system may be analyzed in two ways: (1) legality as a *de facto* fractional assessment; and (2) legality as a difference in treatment of two kinds of property in the same legislative class, both with respect to the level of assessment (twenty per cent of market value versus forty per cent) and the method of assessment (productivity value versus market value).

According to the Montana supreme court in *State Board of Equalization v. Vanderwood* the fact that agricultural and grazing land is assessed at merely a fraction of its market value is of no consequence. As previously discussed in conjunction with the forty per cent rule, *Vanderwood* held that: "[T]he State Board has the power and the duty to equalize the assessment of properties at a percentage of their market value."⁶²

The second legal problem with the productivity assessment system is that it treats property of the same legislative classification differently with respect to both the level of assessment and the manner of assessment. As previously noted, the Montana court in *Yellowstone Pipe Line Co. v. State Board of Equalization* held that the Board's constitutional duties⁶³ to "adjust and equalize the valuation of taxable property among . . . the different classes of taxable property" and to "do all things necessary to secure a fair, just and equitable valuation of taxable

⁶⁰See, discussion in note 57.

⁶¹This flaw in the reasoning of the productivity assessment system's proponents has been justified by its proponents on the ground that "the economic rental value of these properties [land and improvements other than farm and grazing land] capitalized in the same manner as income-producing property indicates an earning capacity value at least equal to forty per cent of the 'market value.'" MONTANA TAX STUDY, Appendix 1 to Part 6, MONTANA PROPERTY TAX ASSESSMENT PROBLEMS, Howard H. Lord, Member, State Board of Equalization (1966) at 9. In other words, the argument is that the State Board's forty per cent rule eliminates the apparent inequity and inconsistency. The fault of this specious reasoning is that it totally ignores the fact that some properties, like owner-occupied single family dwellings, do not produce income and are not available to produce income. Something that cannot be rented, because occupied, simply cannot have an "economic rental value."

⁶²State Board of Equalization v. Vandergood, *supra* note 37 at 657-658.

property . . . between the different classes of property" give the Board the power to classify property irrespective of the classification of the legislature.⁶⁴ Apparently, inherent in its power to classify is the power to discriminate against other types of property in the same legislative classification, both as to level and method of assessment.⁶⁵ The consequence is that the legislative commands of full market value assessment and classification are not binding on the State Board of Equalization, but are "directory"⁶⁶ only.

The only limitations on the State Board's constitutional power to decide what level and manner of assessment is "fair, just, and equitable" are the uniformity provisions of the Montana constitution⁶⁷ and the federal equal protection clause. Neither of these prohibit the assessment of farm and grazing land alone at twenty per cent of market value and on the basis of productivity. The uniformity provisions have been interpreted to mean that taxes need only be uniform on the same class of property,⁶⁸ and that the method of assessment need only be the same on all property within the same class.⁶⁹ The requirements of the equal protection clause are identical.⁷⁰

An argument frequently made by members of the State Board on behalf of the productivity assessment system is that it is authorized under § 84-429.12, R.C.M. 1947.⁷¹ The argument has never received the approval of the Montana court, and for good reason. Section 84-429.12, R.C.M. 1947 provides that the State Board must provide:

1. For a general and uniform method of classifying lands in the state of Montana for the purpose of securing an equitable and uniform basis of assessment of said lands for taxation purposes. All lands shall be classified according to their use or uses and graded within each class according to soil and productive capacity. In such classification work, use shall be made of soil surveys and maps and all other pertinent available information. All lands must be classified by forty (40) acre tracts or fractional lots.
2. For a general and uniform method of appraising city and town lots.
3. For a general and uniform method of appraising rural and urban improvements.
4. For a general and uniform method of appraising timberlands.

⁶⁴Yellowstone Pipe Line Co. v. State Board of Equalization, *supra* note 35 at 66-67.

⁶⁵Yellowstone Pipe Line specifically held that the State Board could treat realty of utilities and pipe line companies differently than city and town lots and rural and urban improvements. *Vandergood* specifically held, on the basis of *Yellowstone Pipe Line*, that farm and grazing land could be treated differently than city and town lots and urban and rural improvements.

⁶⁶This is the term used in *Vanderwood*, *supra* note 37 at 658 to describe the quality of legislative control over the State Board's assessment practices.

⁶⁷See, *supra* at note 46.

⁶⁸Hilger v. Moore, *supra* note 10 at 481-482.

⁶⁹Fruit Growers Express Co. v. Brett, 94 Mont. 281, 22 P.2d 171, 175 (1933).

⁷⁰See, Nashville, C. & St. L. Ry. v. Browning, *supra* note 48 at 366-369.

⁷¹Speech made by Howard H. Lord, then Chairman of the State Board of Equalization, entitled, "*Farm Land Assessment in Montana*," presented at the 1967 Conference of the Western States Association of Tax Administrators, Salt Lake City, Utah, September 7, 1967, at 34.

Manifestly, this statute authorizes only two things: (1) appraisal of city and town lots, rural and urban improvements, and timberlands; and (2) classification by soil and productivity of all other lands, namely, farm and grazing lands. It clearly does not authorize appraisal or assessment of farm and grazing lands on the basis of productivity value. "Classification," "appraisal," and "assessment" are terms with different meanings.⁷² "Classification" means simply the placing of lands of similar use and productivity in the same class or grade. "Appraisal" is the determination of market value. "Assessment" is the determination of market value. "Assessment" is the determination of value for property tax purposes. Since classification is neither appraisal nor assessment, the contention that the legislature authorized the productivity assessment system, when all that is authorized is classification, is without merit. The argument is, of course, unnecessary, since the Montana supreme court has held that, no matter what the legislature has said, the State Board, under the present constitution, may make assessments at fractions of market value, and may assess at different levels and in accordance with different standards of value property of different types within the same legislative classification. It remains to be seen whether the power of the State Board to override the legislature remains in Montana's new constitution, which becomes effective on July 1, 1973.

THE LEGALITY OF PRESENT ASSESSMENT PRACTICES UNDER THE NEW CONSTITUTION AND IMPLEMENTING LEGISLATION

The broad constitutional powers of the State Board of Equalization, contained in Article 12, § 15 of the present constitution, do not appear in the new constitution. These were the powers relied on by the Montana court in *Vanderwood* and *Yellowstone Pipe Line* to hold that the State Board, contrary to legislative mandates on assessment, has the power to order fractional assessment, and assessment at different levels and by different methods of property of different types within the same legislative classification. In place of the present Article 12, § 15 is Article 8, § 3 of the new constitution. Section 3 provides that: "The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law."

The clear intent of § 3 is to bring control of the property tax assessment process back into the hands of the legislature. In its formal report to the Constitutional Convention, the Convention's Committee on Revenue and Finance stated:

The details of any tax administration system should be left to the legislature, which is best qualified to develop the most efficient, modern and fair system necessary for the needs of the day. Tax

⁷²See, MONTANA AGRICULTURAL EXPERIMENT STATION BULLETIN No. 459, Harold G. Halerow and H. R. Stucky, PROCEDURES FOR LAND RECLASSIFICATION IN MONTANA, February 1949 at 15.

administration should be established by the legislature and administered by the executive branch of government, not by a constitutional board which is immune to control by all three branches of government and immune from control by the people. A constitutionally enshrined board is less answerable for its activities and is freer to ignore the mandates and directives of the legislative assembly.⁷³

What disturbed the Convention's Revenue and Finance Committee was that the present § 15, as interpreted in *Vanderwood* and *Yellowstone Pipe Line*, had "removed the assessment process too far from the people."⁷⁴ The intent of § 3—that appraisal, assessment, and equalization shall be in the manner provided by law—is "that the people through the legislature should have the right to set out guidelines as to what was fair, just, and equitable subject only to constitutional equal protection clauses and that those powers should not be delegated to an appointed board."⁷⁵

Section 3 does not compel assessment, appraisal, or equalization at any particular level or by any given method. It simply requires that these tax functions be performed "in the manner provided by law." At the time of the Constitutional Convention the "manner provided by law" was that: (1) all taxable property shall be assessed at its full cash value;⁷⁶ and (2) the taxable value of city and town lots, rural and urban improvements, and farm and grazing land shall be thirty per cent of its full and true value.⁷⁷ Prior to the 1973 legislature the forty per cent rule and the productivity assessment system seemed headed for extinction on July 1, 1973, the effective date of the new constitution.

Section 84-708(5), R.C.M. 1947, which defines the powers and duties of the State Board, provides that the State Board shall:

[A]djust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of county assessors and county boards of equalization; change, increase or decrease valuations made by county assessors or equalized by county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, between the different classes of property and between individual taxpayers.

This language is substantially identical to that which appears in Article 12, § 15 of the present constitution. The 1973 legislative assembly, in

⁷³MONTANA CONSTITUTIONAL CONVENTION, REVENUE AND FINANCE COMMITTEE ON CONSTITUTIONAL REVISION, Report No. 8 (Feb. 18, 1972) at 17-18.

⁷⁴Testimony of Russell C. McDonough, member of the Constitutional Convention's Committee on Revenue and Finance, PROPERTY TAX ADMINISTRATION AND ASSESSMENT PRACTICES IN MONTANA, *supra* note 8 at 5.

⁷⁵*Id.* See also, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 4252-4253 (1972). That the new constitution is clearly intended to divest the State Board of its uncontrollable power over assessment practices is further buttressed by the fact that during the debates on § 3 an amendment to it was offered embodying the powers contained in the present § 15. This amendment was rejected by the Convention. See, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 4253-5332 (1972).

⁷⁶§ 84-401, R.C.M. 1947.

⁷⁷§§ 84-301 and 84-302, R.C.M. 1947.

§§ 52-53 of House Bill No. 16, repealed this provision, and re-enacted it as § 84-708.1(3), R.C.M. 1947. Section 84-708.1(3), R.C.M. 1947 is identical to the above quoted § 84-708(5), R.C.M. 1947, except that the duties are transferred from the State Board of Equalization to the State Department of Revenue. The effective date of House Bill No. 16 is July 1, 1973.

In effect, what the legislature did in House Bill No. 16 was to give to the Department of Revenue the powers which the State Board of Equalization has under the present constitution. Consequently, the Department of Revenue may continue the forty per-cent rule and the productivity assessment system, even under the new constitution, since the "manner provided by law" is, by virtue of House Bill No. 16, substantially identical to the system which exists under the present constitution.

Moreover, the 1973 legislature specifically approved the productivity assessment system. House Bill No. 15, in § 257, amended § 84-401, R.C.M. 1947 to provide:

All taxable property must be assessed at its full cash value **except the assessment of agricultural lands shall be based upon the productive capacity of the lands when valued for agricultural purposes and shall be so valued unless a different use is demonstrated.** (Emphasis indicates the amendment.)

An identical amendment to § 84-401, R.C.M. 1947 appears in § 2 of Senate Bill No. 72; however, this legislation places a number of conditions on the use of the productivity assessment system. Section 4 of Senate Bill No. 72 requires that the land be actively devoted to agriculture, be five or more contiguous acres in size or agriculturally produce at least fifteen per cent of the owner's annual gross income, and that the landowner apply to assessing officials for an assessment in accordance with productive capacity. Interestingly enough, both House Bill No. 15 and Senate Bill No. 72 were enacted into law.

The forty per cent rule has not yet received specific legislative sanction.⁷⁸ However, as previously noted, the Department of Revenue has been given the power, under House Bill No. 16, to make fractional assessments at different levels for different types of property.

CONCLUSION

Article 8, § 3 of the new constitution, which requires that property tax assessment be in the manner provided by law, is a great improvement over the assessment system of Article 12, § 15 of the present con-

⁷⁸A legislative decision one way or the other may occur in 1974. House Bill No. 398, which was introduced in the 1973 legislature, but held over for consideration by the 1974 session, proposes the following amendment to § 84-401, R.C.M. 1947: "All taxable property must be assessed at its full cash value *and not at any percentage* **except the assessment of agricultural lands shall be based upon the productive capacity of the lands when valued for agricultural purposes and shall be so valued unless a different use is demonstrated.** (Emphasis indicates the proposed amendment.)

stitution, under which the State Board of Equalization could disregard legislative assessment mandates, and, with the help of the Montana supreme court, make tax assessment policy subject to the control of virtually no one. Under the new constitution, the state tax authority, the Department of Revenue, assumes its proper role as a tax law administrator, rather than a tax legislature.

Whether the productivity assessment system and the forty per cent rule are "fair, just, and equitable" as a matter of sound tax administration and economic policy is an issue beyond the scope of this comment. It is sufficient here to simply point out that under the new constitution these practices are subject to the democratic processes of open debate and legislative judgment. Though the 1973 legislature sustained the continuance of the present assessment system for the time being,⁷⁹ it is much too early to tell whether the productivity assessment system and forty per cent rule are sufficiently sound to withstand what it is hoped will be a strenuous test of public scrutiny.

⁷⁹It is submitted that the judgment of the 1973 legislature in continuing the current assessment system under the new constitution was more influenced by considerations of changing too much too fast than by considerations of sound tax administration and economic policy.