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Property Tax Assessment: A Century-Long Struggle For Structured Discretion

by
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"Broad discretion and judgment
lie at the very core of the property tax."

For the past 100 years, the history of property tax assessment in Montana has been a series of legislative and administrative efforts to limit and structure county assessors' discretion. The history of these efforts, which included legislation, constitutional amendments, court decisions, and administrative rule-making, is instructive since it provides a well-documented case study of how a vital state function involving great discretion can be made predictable and open to citizens.

Property tax assessment is an excellent subject for studying discretion, since it requires assessors to make complex decisions on the characteristics and comparability of widely varying types of property. The Montana Supreme Court has consistently recognized the need for judgment and expertise in assessment and has been hesitant to substitute its judgment for that of an assessor:

> (the) court will ordinarily not interfere with the action of . . . (assessors) to correct mere errors of judgment. It is only when 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, 59P.916,917 (1900)

The legislature must rely on the expertise and judgment of assessors since the procedure for assessing every type of property in the state can hardly be written into statute, even if legislators or their draftsmen had the expertise to do so: new varieties of property appear, values rise, and complex formulas for depreciation must be developed. Moreover, assessors can determine the best method of assessing property on a case-by-case basis, which the legislature cannot do through statute. Clearly, assessors must have some degree of discretion in order to perform their duties.

However, far too much discretion can be delegated to or seized by assessors. If clear legislative standards and administrative procedures guide assessors' work, then their discretion may be limited to a ministerial or non-policy level designed to implement legislative policies. In Montana, however, clear standards and procedures were absent or ignored for most of the last century and assessors exercised discretionary authority of the highest order, making policy decisions of a most sensitive nature. Their discretionary authority at times surpassed that wielded by the legislature.

The importance of structuring such discretion is obvious. Assessors determine the appraised or assessed value to which the statutory tax rates and the locally determined mill levies are applied. Their decisions touch all property-owning citizens and have a direct economic effect on their lives. If their decisions are based on unwritten standards that are in direct conflict with state law and, further, their assessments are often lowered on a case-by-case basis by individual taxpayers' pressure, citizens are unprotected by U.S. constitutional requirements of due process and equal protection and Montana constitutional requirements for uniform assessment of property. Moreover, assessors could and did for decades exercise political power far exceeding their scope of authority. Since local governments are financed largely through property taxation and the assessor controls the base from which this revenue is raised, he can exercise budgetary power statutorily given to county, city, and school district officers:

> After a unit of government has reached its maximum levy limitation, its future budgetary policy is largely in the hands of the assessor. The decision made in his office as to the percentage of market value that will be used for assessment purposes is almost controlling. Moreover, decisions made by the assessor are more apt to be influenced by consideration of his political future than by the legitimate revenue needs of local government. Thus we have the spectacle of the county assessor, whose sole function is to find and value property at its full value, charting the fiscal policy of most local governments. (Montana Legislative Council, *Property Taxation in Montana,* 1960, p. 31)

The legislature's struggles to limit and structure assessors' discretion are not over, but its efforts over the past seventy years have insured that 1) detailed procedures for assessment are published in the Montana Administrative Code; 2) that these procedures comply with legislative standards; and 3) formalized procedures for citizens' participation in rule-making and opportunities for appeals against assessments exist. This paper will discuss the steps–and mis-steps–in the process of obtaining the right mixture of statute, rule, and discretion.

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Between 1891 and 1977, Montana statute required that "all taxable property must be assessed at its full cash value," which was defined as "the amount at which the property would be taken in payment of a just debt due from a solvent debtor" (84-401 and 84-101, R.C.M. 1947). This statute was never, in its 74 year tenure, adhered to. County assessors and, later, the State Board of Equalization evolved a system of fractional assessment under which all property in the state was assessed at some *fraction* of full cash value. As recently as 1977, MAC rules required assessors to value business inventories at 60% of dealer's cost, oil field machinery at 40% of current market value, and airplanes at 66 2/3% of wholesale value. This system of fractional assessment totally disrupted legislative tax rates, drastically reduced local governments' tax bases, and caused massive shifts in tax burden.

This system of fractional assessment did *not,* in my opinion, arise because the statutes were unnecessarily vague, delegating authority without meaningful standards. The legislature provided a standard for assessing ("full cash value") and a definition of that standard. Statutes did not specify methods for assessment but left that to assessors, who would use their expertise and discretion to establish the best methods of determining full cash value. Most state legislatures and courts have concurred that such judgements are an appropriate area for assessors' discretion. The continued violation of the statute requiring assessment at full cash value resulted not from careless delegation of authority but from the structure of tax administration established by the 1889 constitution.

Article XVI, section 5 created the office of assessor in each county and provided for his local election. Statutes implementing the section required him to find and assess all taxable property in his county at "full cash value" (84-401 and 84-406). However, the necessity of getting elected every four years provided a strong temptation for assessors to ignore this statute, particularly in view of the history of county independence and the travelling distance from Helena in the early days of statehood. The rewards for underassessment were many: 1) taxpayers receiving an individual "break" on an assessment would be grateful; 2) keeping assessments low would insure that statewide mills raised the least possible revenue in that county and shifted the tax burden to some other county; and 3) by lowering assessments assessors would force city and county commissioners to raise mill levies in order to raise the same amount of revenue, thus pushing the political liability of taxes into their laps. Assessors would have been less than human if they had not yielded to these pressures, since taxpayers' hostility toward taxes usually settles, unfairly and illogically, on assessors.

The legislature discovered how strong the temptation had been when it appointed a Tax and License Commission in 1917 to determine why property assessments varied so markedly from county to county. The Commission found that the following *average* rates of assessment were prevailing in the counties: land–30% of full value; cattle–45% of full value; sheep–40% of full value; horses and mules–52% of full value; and hogs–18% of full value. The only property assessed at the statutory level was the money belonging to widows and orphans, which was revealed by court records. Further, the Commission learned that these rates were set in an annual meeting of county assessors who "resolved themselves into a sort of legislative assembly and proceeded to fix the values at which different species of property shall be assessed."

Needless to say, these fractional assessments were in direct conflict with statute and assessors were far exceeding their statutory authority in setting such rates. What's more, this extralegal "legislature" did not have much more success in controlling its members than the legitimate legislature. During the year between meetings, the assessors vied among themselves for the most "competitive" assessments. The Commission found in 1918 that assessments in different counties for first class grain land ranged from $5.21 ro $47.29 per acre, first class hay land from $10 to $26.62 per acre, work horses from $49 to $75.65, and dairy cows from $33.92 to $100.

After reviewing the gap between statute and practice, the Commission concluded "that the present system . . . is a failure and results in unjust discrimination and is utterly inadequate." Believing that legislative control over assessment must be reasserted, the Commission recommended a bill to the 1919 legislature that continued the assessment of property at full cash value but dropped the tax rate to the value county assessors were actually using for the various types of property. To illustrate, the tax on a $1000 parcel of land is calculated below according to the statutory method, the method actually used by assessors in 1917, and the proposed method:

Statutory method	Actual practice, 1917	Proposed method
1. Valued at 100%	1. Valued at 30%	1. Valued at 100%
2. Taxed at 100%	2. Taxed at 100%	2. Taxed at 30%
3. Multiplied by mills	3. Multiplied by mills	3. Multiplied by mills
4. Tax due = $200 ($1000x100%x 100%x200m)	4. Tax due = $60 ($1000x30%x 100%x200m)	4. Tax due = $60 ($1000x100%x 30%x200m)

The bill passed, creating seven classes of property taxed at rates varying from 7% to 100% of the assessed value, which was 100% of full cash value. The legislature, thus, in 1919 clearly recognized the dangers of allowing assessors the discretion to set effective tax rates through extralegal fractional assessments. It hoped to end this practice by setting in statute both the standard of assessment and the tax rate. In upholding the constitutionality of the new law, the Montana Supreme Court noted that the chief purpose of the bill was "to relieve administrative officers from the apparent necessity of continuing the legal fiction of full valuation in the face of contrary facts." The court also affirmed in this case that it was the legislature's duty to provide a uniform system of assessment throughout the state. (*Hilger v. Moore,* 56 Mont. 146, 82 P. 477, 483 (1919)).

This was the first of several times in which the legislature sought to control assessors by enacting their practice into law. One could argue that the legislature, in having

legislation follow practice, was benefitting from the "creative nibbling" theory of administrative law: the legislature had given assessors sufficient discretion to investigate and chart a new course, allowing them to create a solution to a large problem by nibbling at individual cases. However, this was not true in Montana's history of property tax assessment. Assessors were not experimenting with the best way to assess; rather, they were substituting their judgment for legislators' on what the state's tax policies should be. The legislature modelled statute on existing practice in this instance only as an attempt to control future practice.

The legislature also took another step toward controlling assessors at this time. The 1889 constitution created a three-member State Board of Equalization to "adjust and equalize the valuation of the taxable property among the several counties of the state." However, when the Board attempted to raise assessments in one county to nearer the statutory full cash value, the Supreme Court ruled that the Board had the power to decrease assessments but not to increase them. The 1916 legislature placed a constitutional amendment on the ballot to give the Board much broader power:

> 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 the 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 classes of property, and between individual taxpayers. (Article XII, section 15)

The electorate approved the amendment, which became effective in 1917. In 1923, the legislature passed a bill detailing and further broadening the Board's powers. Notably, the Board was empowered "to prescribe rules and regulations, not in conflict with the constitution and laws of Montana, to govern county boards of equalization and the assessors of the different counties in the performance of their duties." Further, it could require the county attorney to start proceedings against any assessor who violated statutory assessment laws. The bill also established hearing procedures for taxpayers' appeals against assessments and for Board changes in assessment rules. (84-708)

Seemingly, the legislature in 1923 had gained control over assessment by requiring assessors to exercise ministerial level discretion within standards set by the legislature and reviewed by the State Board of Equalization, which exercised broad delegated quasi-legislative and quasi-judicial authority within its area of expertise. However, neither the statutory changes embodied in the 1919 classification law nor the 1917 constitutional amendment touched the fundamental problem of tax assessment: county assessors were still elected by local citizens and in direct contact with them. The three-member Board and its small staff were totally inadequate–and probably quite unwilling–to police 56 county assessors. The Board limited itself to hearing individual taxpayers' appeals from county equalization boards and lowering the assessment of whole classes of property when one county varied too markedly from others.

U.S. census data showed that assessors continued to drift away from full cash value throughout the next decade, despite admonitions from the Attorney General and the Montana Supreme Court. In 1931, the court in *State ex. rel. Schoonover v. Stewart* reiterated that statute requires that "all taxable property must be assessed at its full cash value. The section has not been changed since its enactment . . .; and its mandate is the law today." Neither assessors nor the Board had the power, the court said, to establish fractional assessment.

The 1930's were, however, not a politic time to raise assessments, particularly on farm land. As the Depression deepened and more property taxes became delinquent, assessments fell further and further from full cash value. By 1950, the average market value of an acre of irrigated farm land in Montana was $99, but its average assessed value was $32, less than it had been in 1921.

The State Board of Equalization expressed great concern over these falling assessments and county assessors' neglect of statute. In 1954, they informed the legislature that the classification law

> is necessarily anchored to the full cash value provisions of section 84-401, and when we deliberately cut loose from that anchor we begin to drift. The administration of the law has so deteriorated over the years that we now have . . . a classification law within a classification law. (*Sixteenth Biennial Report*)

However, the Board did not use its statutory authority to correct the situation. Although the legislature had given it power to adopt all necessary rules to govern assessors, the Board issued no body of rules to guide assessors between 1923 and 1962. The Board did, with the assistance of the assessors' professional association, compile assessment guides and valuation schedules for various property and distribute them to assessors, but it did not make their use mandatory. Nor did the Board ever during these 40 years use its power to begin proceedings against a county assessor who violated state law by assessing at less than full cash value. In fact, the Board itself violated this law by lowering assessments to bring them down to the statewide average. Even when the legislature passed a Reclassification and Reappraisal Act in 1957 to bring residential property assessments to full value, the Board and assessors determined what fraction of this new value would be used. A legislative committee called this action "entirely unacceptable" and "beyond the power of the legislature to give the State Board of Equalization the arbitrary power to require (fractional assessment)," but it was uncertain how to correct the situation. The committee finally decided that the only way to control assessment was to establish fractional assessment by statute. Members argued that legislators would at least be aware of and consider what fraction of full value was to be used under this system. However, the subcommittee's proposed bill did not pass.

By 1960, the county assessors and the State Board of Equalization had totally usurped legislative control over assessment. The Board's annual meeting with assessors—established by statute as a training session the Board held for

assessors—continued as a "legislature" in which tax policy was set. The Board and assessors became local government "budget watchers," who felt it was their duty to limit the amount of tax cities and counties could raise under the statutory maximum mill levies. A Board member later testified before a Congressional committee investigating Montana's assessment procedures that the Board's and assessors' purpose was to alter existing statutory taxing and bonding limitations by making them more restrictive than contemplated by law. (Subcommittee on Intergovernmental Relations hearing, Billings, 22 August 1972)

Even the Montana Supreme Court came to disregard the legislature as the proper body to set standards for assessment and taxation. In a 1965 decision, which extended and made explicit a decision issued in 1960, the court held that the State Board of Equalization had the constitutional authority to compel fractional assessment of property and that legislative control over the Board and assessment procedures was "directory" only. The court based its decision on the belief that the legislature and court had left the fractional assessment rates used by the county assessors and the Board unchallenged for so long that the practice had become acceptable.

This decision was puzzling to many in light of the legislature's past attempts to end fractional assessment and the court's 1931 ruling (which stood until 1960) that fractional assessment was illegal. However, the legal profession's puzzlement over this decision was small compared to citizen bewilderment when their tax assessment notices arrived. Statute said that houses were assessed at 100% of full value and taxed at 30%, but the assessors and the Board had arrived at an agreement that 40% of 95% of the house's market value determined the house's assessed value, to which was applied the statutory tax rate of 30% and the mill levy. By law, a house valued at $10,000 should pay $600 if the local mill levy was 200 ($10,000 x 30% x 200 mills), but it actually paid only $228 ($10,000 x 95% x 40% x 30% x 200 mills). Most taxpayers assumed they had received a "tax break" and left well enough alone, not realizing that everyone was getting the same "break" and higher mills were being levied to compensate. Had the taxpayer wished to pursue the matter, he would have had difficulty. The rules of assessment were not printed in any public document and assessors were often reluctant to tell citizens the formula that was used. One legislator reported that the State Board of Equalization refused to tell even him what fractional assessments were used!

Clearly, administrative discretion was almost unbounded at this point. Citizens had superficial safeguards: they could appeal their assessments through a procedure established by statute. But they were not allowed to know the standards and procedure used to determine the assessments. Such safeguards were not, in fact, any safeguard at all.

Prodded by legislative outcry over this secrecy and assured of judicial sanction for fractional assessment, the Board did begin to publish its rules in the early 1960's *and* to require that assessors follow them. While this was in one sense a step toward structuring assessors' discretion, the rules were in direct conflict with statute. Section 84-401 still required all property to be assessed at 100% of full cash value, while a Board rule published in 1962 directed assessors to value agricultural land on its productive capacity rather than its full cash value and a 1963 rule ordered assessors to value all residential property at 40% of full value. The 1962 rule lowered the taxable value of agricultural land to 6% of market value, since productive capacity averaged 20% of market value. Residential property's taxable value under the Board's rule was 12% (40% x 30%). The legislature had established the same tax for both types of property, but the Board's rules had effectively doubled the burden on residential property compared to agricultural land.

When 26 assessors refused to follow the 1962 rule, the Board brought an original proceeding in the Supreme Court to force its use. The court held the rule invalid because the Board had not held public hearings prior to its issue as section 84-710 required, but the court did *not* question the Board's authority to make such a rule directly conflicting with statute. It is noteworthy that the Board's legislative grant of authority to make substantive rules read: the Board "may prescribe rules and regulations, *not in conflict with the constitution and laws of Montana . . .*" (emphasis added). (84-708)

One observer commented forcefully on this "odd species of administrative rule-making" in 1973:

> 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 40% rule the State Board has denominated itself a "fourth branch" of state government.
> (*Sullivan, "Real Property Assessment in Montana," 34 Montana Law Review* 305)

So the matter stood in 1972 when the Constitutional Convention met. The assessed value of agricultural land had dropped 27% between 1925 and 1970, although real estate sales showed a 300% increase. Residential property was valued as low as 12% of market value in some counties and as high as 32% in others. The Convention's Committee on Revenue and Finance was, however, determined that this situation should not continue. Its report asserted that:

> 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 administration should be established by the legislature and administered by the executive branch of government, not by a constitutional board which is 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.

The Convention concurred. The new constitution omitted any mention of the State Board of Equalization. Instead, article VIII, section 3 provides "The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law." Section 4 reinforces the state's control by requiring that "All taxing jurisdictions shall use the assessed valuation of property

established by the state." The next legislature implemented these provisions by designating the assessors as "agents of the department of revenue" and stating that "The department of revenue shall have full charge of assessing all property subject to taxation and equalizing values . . ." (84-402)

The new constitution at last resolved the basic problem of property tax assessment administration: assessors, while still elected, are now agents of the state and must follow assessment procedures set by the Department of Revenue. Instead of a three-member Board with a small staff overseeing assessors' decisions, the Department of Revenue can use its large trained staff to assist and supervise local assessors.

The legislature was finally in a position to control the standard of assessment as well as the tax rate. The 1973 legislature did not, however, rise to the challenge. Fearing to do "too much too fast," the legislature gave the Department of Revenue the power in statute which the former State Board of Equalization had by constitutional amendment (Article XII, Section 15). This was the section upon which the Supreme Court based its argument that the Board had the power to establish fractional assessments. A bill to require that "all taxable property must be assessed at its full cash value *and not at any percentage thereof*" did not get out of committee.

The Department of Revenue was, understandably, reluctant to take the giant step of raising all assessments to full cash value without a clear legislative mandate. The passage of the 1973 act seemed to be a mandate for quite the opposite—continued fractional assessment. In late 1972 and early 1973, the Department promulgated over 50 pages of rules in the newly-established Montana Administrative Code, containing the written and unwritten rules the Board of Equalization had used. These rules were all based on a fractional assessment of full cash value.

The legislature itself adopted some of the Board's rules of fractional assessment, enacting them into statute. The 1973 session amended 84-401 to read "All taxable property must be assessed at its full cash value *except the assessment of agricultural land shall be based upon the productive capacity of the land when valued for agricultural purposes . . .*" Supporters argued that the reduced tax rate the Board had granted agricultural land might help conserve it. Two years later, the legislature further amended the section by enacting the Board's 40% rule: "All taxable real property must be assessed at *20% of its full cash value* . . ." The Department of Revenue had requested the amendment because one large county refused to recognize the Department's rule that real property must be assessed at 40% of its full cash value and taxed at 30%, which was to its taxpayers' definite advantage in school equalization funding.

By passing these amendments, the legislature at last formally recognized in statute fractional assessment. The amendments increased legislative control in that both the standard of assessment and the tax rate were set in statute. However, personal property continued in its legal limbo. No standard for its assessment was set in statute, but Department rules required assessment at various fractional rates.

A legislative subcommittee, appointed in 1975 to consider the equity of the various tax rates contained in the property tax classification system, discovered that the recent amendments had done little to end the confusion surrounding property tax assessment. After studying the Department's rules for several months, the subcommittee found that 23 different tax rates were being applied to property, instead of the 11 established by law. Members concluded that the question of equity could not even be approached until 1) the legislature knew what the effective rate of tax (as modified by Department rules) was for each type of property and 2) the legislature controlled both the assessment rate and the tax rate. Members further concluded that the standards of assessment and the procedures for taxation must be simplified so that both legislators and citizens would easily understand the basis of taxation when they began discussing the difficult question of equity among the classes.

With these objectives in mind, the subcommittee recommended changes in both the standard of assessment and the tax rates. It substituted "market value" for "full cash value" as the standard for assessing since market value "is one of the few concepts of value with a concrete meaning, understood by all persons who buy and sell goods." The subcommittee's bill removed property that is rarely sold from this requirement and provided an alternate, well-defined standard of assessment for each case. Hoping to end the days of fractional assessment forever, the subcommittee clearly defined market value and included in its bill the provision that "the Department of Revenue or its agents may not adopt a lower or different standard of value from market value (except as expressly exempted) in making the official assessment and appraisal of the value of property . . ." (84-401). The bill then dropped the tax rates for property to the effective rates the Department was setting through its rules. Thus, a car, which under the existing system was assessed (by rule) at 66 2/3% of market value and taxed at 20% (statute), had an effective tax rate of 13.3%. The subcommittee's bill raised the assessment level to 100% of market value and set the tax rate at 13.3%. The bill's intent was to keep the tax rate the same for all types of property as it had been under the then-existing rules.

The Department of Revenue firmly supported the bill during the session, seeking law that would end its anomalous position by giving legislative mandate to raise assessments to full value. The bill passed the House 94 to 1 and the Senate 47 to 0. The Department is revising its administrative rules and valuation schedules to comply with this new law. The legislature's Revenue Oversight Committee has reviewed most of these rules to determine whether they are consistent with legislative intent. Committee members are currently studying the equity of the tax rates set in the property tax classification system, confident that they understand the effective rates of taxation and control them.

Thus, for the third time, the legislature has changed statute to reflect administrative practice. As a study of

"realities about the administration of government programs," the history of property tax assessment may be rare in having statute flow from administrative policy-making rather than legislative policy-making direct administrative procedures. However, all government programs involve a mixture of statute, rule, and discretion. If programs are to meet changing conditions, statutes must be changed as administrator's find new circumstances and legislators formulate new policy. Citizens' needs for open, predictable, and useful law can be met when legislators exercise control over agencies by carefully structuring administrative responsibility and by reviewing agency rules and agencies, in their turn, inform legislators of changing circumstances and gaps between theory and practice.

In the case of property tax assessment, legislators—frustrated by trying to change tax policy when they didn't have control over the most basic element (assessment), but mindful of the profound economic effect of requiring assessors to meet the letter of the law after nearly a century of fractional assessment—had to recognize that two steps were necessary before the situation could be resolved. The structure of tax administration had to be changed so that assessors and the Department were obligated to follow legislative decision and, secondly, the legislature had to enact into law what assessors were actually doing. This gave the legislature control over property tax assessment and procedure without risking citizens' need for continuing, predictable tax policy. In essence, the legislature had to compromise with the existing practice before it could gain the control necessary to structure assessors' discretion.

Now, it appears that the correct mixture of statute, rule, and discretion exists in the property tax assessment program. The legislature has established clear standards of assessment. The Department of Revenue has the authority to adopt substantive rules, detailing the best methods of assessment. Assessors may use their judgement within these standards and rules to value individual property. If the rules are inadequate to value certain property, assessors can report this to the Department. The Department can request legislation if a gap between statute and reality develops. The legislature, in its turn, can review the Department's rules, evaluate its administration of the statutes, and seek its advice. This system seems to incorporate the necessary checks on power while offering a chance for growth in the law to meet changing circumstances.

However, active cooperation and vigilance by each branch of government is still necessary. Montana has a century-long history of conflict between statute and administrative practice in property tax assessment. Whether the recent changes, designed to structure the discretion exercised by the Department of Revenue and the county assessors, are sufficient to prolong the past year's harmony between statute and rule into a new century remains to be seen.

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