

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

SELECT COMMITTEE ON REDISTRICTING AND APPORTIONMENT

Call to Order: By **CHAIRMAN GREGORY D. BARKUS**, on February 25, 2003 at 3:00 P.M., in Room 335 Capitol.

ROLL CALL

Members Present:

Sen. Gregory D. Barkus, Chairman (R)
Sen. Gerald Pease (D)
Sen. Fred Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: Prudence Gildroy, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 428, 2/22/2003; SB 429,
2/22/2003
Executive Action: SB 428; SB 429

HEARING ON SB 428 AND SB 429

CHAIRMAN GREG BARKUS asked if would be okay if **SEN. JOHN ESP** presented both bills together.

Greg Petesch, Legislative Services Division, advised yes, absent objection.

Sponsor: **SEN. JOHN ESP, SD 13, Big Timber**

Proponents: **None**

Opponents: **Scott Crichton, American Civil Liberties Union
Don Judge, representing himself
Bob Ream, Chairman Montana Democratic Party**

Bruce Plummer, representing himself

Opening Statement by Sponsor:

SEN. JOHN ESP, SD 13, Big Timber, advised the reason for the bills was to arrive at and refine a fair and nonpartisan way of redistricting for congressional and legislative districts. He distributed a copy of a page from the 1972 Constitutional Convention that talks about why they chose the commission process and the possibility of gerrymandering. **EXHIBIT(sds42a01) Delegate Cate** said, "gerrymandering can be done either way with multi-member districts...single member districts do create more opportunity for it but we feel that the commission would protect the people against that." **SEN. ESP** favored a process similar to Iowa as outlined in *The Legislative Lawyer*. **EXHIBIT(sds42a02)** He quoted from page four of the article entitled "A Nonpartisan Approach to Redistricting". Iowa was the first state to complete their redistricting process after the census came out, he stated. Iowa's code related to redistricting was part of the handout. **EXHIBIT(sds42a03)** He explained Iowa has a system of criteria that are weighted and the first criteria are more important than later criteria. The first criteria is districts should be as equal as possible. In Iowa that is within 1% or less. In Iowa, the **Legislative Services Division** develops the plan and then the commission holds three public hearings. With that input, the division can adjust the plan and then the commission presents it to the legislature. SB 428 will constitutionally require a nonpartisan plan. It changes the way the fifth commission member is selected; if the four members can't agree on a fifth member, then they are the commission and any action will require consensus. If they can agree on a fifth member, it means they had some consensus up front. The commission will instruct the **Legislative Services Division** to gather information and develop some alternative plans for each region. Constitutionally, there has to be four regions at a minimum. The Legislative Services Commission will present those plans to the Commission and the Commission will hold at least four hearings on that plan around the state. At the end of the regional process, they combine the regional plans into one plan and hold at least one public hearing on that plan in Helena before presenting the plan to the legislature. The plan is submitted to the legislature by the 10th day and the legislature must consider the plan within 15 days. The legislature says yes or no and, if no, gives specific reasons. The **Legislative Services Division** is instructed to present another plan that will allow the legislature to look at it and act on it within 21 legislative days. When the division brings back the second plan, they will tell the legislature how they did or did not address the legislature's concerns and the reasons why or why not under the criteria. At that point the

legislature can agree or disagree. If they say yes, it is filed with the Secretary of State and becomes law. If they say no, it goes through the process again. If after a third plan the legislature says no, the Supreme Court appoints a three judge panel of district court judges who can adopt plan number 1, plan number 2, plan number 3 or instruct the **Legislative Services Division** to develop another plan. They can adopt it within 45 days. On the third try, the legislature can, at their discretion, amend the plan. In Iowa, it has never gone that far. The legislative staff tries to meet the criteria that are fairly clearly spelled out in Iowa's code. Page 2, line 25 of SB 428 says, "The legislature or judicial panel if necessary can assign holdover senators." In Iowa there are no holdover senators and they could have two or three sitting senators in the same district. It is a blind process and doesn't consider addresses of incumbents or any political information. On page 2, line 26, "a redistricting plan revised by court order must go back through the process again at the next regular session." The next regular session in Montana would have to be a regular session or a protracted special session. SB 429 describes the criteria in new Section 1. It says "Subject to federal law" which he interpreted as the Voting Rights Act and other federal law. They must be as equal as practicable, plus or minus 1% if at all possible. The relative deviation may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act. The districts must be contiguous and compact. The compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act. District boundaries must coincide with the boundaries of political subdivisions to the greatest extent possible. A district may not be drawn for purposes of favoring a political party, an incumbent legislator or member of congress. They may not consider addresses of incumbent legislators or members of congress, political affiliations of voters, partisan political voter lists, or previous election results. He advised in Iowa there are 10% or 11% minorities. Iowa forbids the use of racial information or demographics but in Montana, he didn't think that would be appropriate given recent discussions. The rest of the bill further defines the process and criteria. He advised the bills aren't perfect and hoped for cooperation from both sides of the aisle. He asked proponents and opponents to suggest how to make it work and reflect Montana values.

Proponents' Testimony: None.

Opponents' Testimony:

Scott Crichton, American Civil Liberties Union, advised they have been involved in voting rights litigation and case work since the mid-eighties. He found out about the bill an hour previously and apologized for not being better prepared in responding to the elements of the bill. He was concerned with a contradiction with the oath legislators swear to defend and uphold the Constitution of the state. A constitutional provision that has worked well through three censuses is turned on its ear. He understood how the committee feels the commission has been unduly partisan. He sat through the hearings where the chair of the commission was criticized for her work as a Democratic chair person when she was active in local politics in Crow country. When she was a plaintiff in the 1980s in *Windy Boy v. Big Horn County*, the reason the ACLU took on representing her was because she had tried to access the political process. In going into the county government and trying to get voter registration forms she was told by the county clerk they were out or was given five that were numbered and told when those are brought back they could have five more. That is what she and her allies were facing in the political environment. People from another party could come in for voter registration cards and the question was "how many." Her involvement in the political process in trying to enfranchise Crow people in Anglo politics was a long, strident, and persistent effort.

CHAIRMAN BARKUS asked him to address the bill.

Mr. Crichton thought what he was saying was relevant and **CHAIRMAN BARKUS** advised him to proceed if it was relevant. When the last reapportionment commission had their last meeting after submitting their plan to the body he went to their last hearing. They handed out t-shirts to each other saying "all male, all white and all old", a criticism that had been voiced by Crow **REP. ANGELA RUSSELL**. He understood the relief the commission must have felt after all the hearings and input but it was a charged process and wasn't politically benign or impartial. Even though there were Democrats and Republicans it was clear when they talked to **Commissioner Jim Pasma**, he said "we're very good to our Indians, we don't want this new district because it might break up our Democratic interests in Hill County." There are inevitably partisan interests in redistricting. The notion is to try to make it fair. The ACLU is a non-partisan organization that relies on people of both parties to defend the constitution. This is throwing the constitutional provisions out and starting over with a model from a state that is square and half the size of Montana with none of the geographical barriers Montana has and with many more people. He defied the committee to draw square districts in Montana that will work. A wholesale re-writing of a reapportionment process is not the kind of thing to submit for

discussion three days before transmittal hoping that the process and the product are going to be deliberative and drawing upon the best model. He thought it was deceptive language for a constitutional amendment to say that something calls for more meetings when this plan calls for four meetings on the overall plan but makes no provision for local input carried on so professionally by **Susan Fox Byorth** and the Commission in the last redistricting process. He strongly opposed the bill.

Don Judge, representing himself, commented he wished he'd had more time to look at the bill. He understood the committee has a three day hearing notice for the public except within seven days of transmittal deadline and at that point there is supposed to be every effort to notify the public. He found out the morning of the hearing and did not have time to fully study the bills. SB 428 on lines 28 and 29 indicates "The **Legislative Services Division** shall gather information to develop alternative plans that may not be based on partisan information..." He wondered if that had restrictive qualities as to whether or not political parties can even have input into development of such a plan. On page 2 on lines 12-14 it says "if the plan is not approved, then the legislature shall direct the **Legislative Services Division** to prepare a second nonpartisan plan based on information transmitted by both houses for consideration without amendment within 21 legislative days." He wondered how a nonpartisan plan is developed and if it meant districts have to be equally Democratic and Republican. *{Tape: 1; Side: B}* Any plan will be partisan, he contended, whether or not it is agreed with how many districts are considered Republican, Democratic, Libertarian, Constitution or whatever. He didn't know how to prepare for a nonpartisan plan. In several instances, both bills require a nonpartisan legislative districting plan by statute and by Constitution. He didn't think that is possible. The input in itself may provide for partisan input. On page 2, lines 12-14 "the legislature shall direct the **Legislative Services Division** to prepare a second nonpartisan plan based on information transmitted by both houses..." Both houses are partisan, he contended, whether they're controlled by one party or another. The bill doesn't provide for minority input by either party in control of either house. There will be partisan information coming automatically from the house of transmission into the **Legislative Services Division**. The severability language clause that's contained in SB 429 does not apply to Section 1 of the bill. The severability language is on page 6, and Sections 2-9 of the act are void. It means that new Section 1 remains if SB 428 doesn't pass. He thought that provides for a problem in constitutionality. On page 2 of SB 429, on line 16 and 17, it says "a redistricting plan may not be submitted to the **Legislative Services Division** by a member of the commission or by

an outside third party. He asked if that tells the members of the public that they cannot even submit a proposal to the **Legislative Services Division**. He wondered what the penalty is if they do submit one. He thought that would also be unconstitutional. He said he is a fourth generation Montanan, which means he has hardly been here long enough to get to understand the state. Districts will be created in which a river may require going around the district in order to get on the other side of the district. A geographic, contingent-looking district may not be able to be traveled without a natural barrier being in the way. He appreciated the efforts of **SEN. ESP** but thought the bills were premature and unconstitutional.

Bob Ream, Chairman Montana Democratic Party, advised he agreed with the intent of **SEN. ESP** in his closing words. He didn't think the bills get to that ideal. The Constitutional Convention struggled with the issue and came up with the current system for a four member commission with the fifth appointed by the **Supreme Court** if the commissioners can't agree on picking a chair. The process in the bill is cumbersome, he held. He agreed with the previous speaker regarding the partisanship of the legislature's involvement in the process. He wondered about the process if one house agrees with a plan and the other doesn't. In round four, the **Supreme Court** appoints a three judge panel. Many of the concerns or objections with redistricting were with the **Supreme Court's** selection of the chair and the person they selected. He thought it highly likely the same kind of arguments could be made about the three district court judges selected by the **Supreme Court**. They have 45 days to come up with a plan. Any plan that's taken to court and changed by court order after that has to go back to the next legislative session and the whole process starts all over again with rounds one through four. He thought it is more complicated than it needs to be. He contended that very few states use the 1% criteria; almost all states use the 5% criteria because it gives more flexibility in working with communities of interest and not splitting up small communities. The nonpartisan language is confusing. In SB 429, page 2(3), "a district may not be drawn for the purposes of favoring a political party or an incumbent legislator. The following data may not be considered in the development of a nonpartisan plan: addresses of incumbent legislators; political affiliations of registered voters;..." In Montana, voters do not register by party so there is no political affiliation that goes along with the voter file that's maintained by the **Secretary of State** or by county clerks and recorders. Regarding "partisan political voter lists," he assumed the bill is talking about those maintained by the political parties. Those lists change greatly from year to year as people move in and out of the state or are deceased. Some change their political ideologies with time so what may be

listed one year may be different the following year. Erroneous assumptions can be made. He didn't think that jibes with the use of the term "nonpartisan" throughout the rest of the bill. He didn't know how to not use partisan data to determine if data is partisan or nonpartisan. He questioned the use of the ballot language on the constitutional amendment, "FOR revising the legislative redistricting process to require more public hearings." There were many public hearings held in the state in the last go-round. In SB 429, four regional public hearings and one final public hearing are required. He didn't know if the language "prohibit use of partisan data" should be in the language on the amendment because there is no such data that exists at the state level to allow adoption of a nonpartisan plan. He thought the language is misleading and better language is "FOR taking the redistricting powers from the citizen commission and giving those powers to the legislature and a three judge panel."

Bruce Plummer, representing himself, testified he is Native American and very concerned about the whole process with the redistricting issue this session. Montana is not Iowa, and he felt the 1972 plan took into account Montana is a very large state. That is relevant when talking about meetings and how far people would have to travel to get to meetings. When the original plan was put together, they took into consideration the state of Montana is composed of seven reservations and those reservations do have a significant population. **SEN. ESP'S** plan disregards that. He felt the issue of 1% or 5% should be addressed and not left ambiguous. He thought the bill was a set-up for failure. On line 22, SB 428 says "four commissioners shall be selected and those commissioners may select a fifth member." Those commissioners may decide not to even attempt selecting a fifth member. Line 25, says "who may alternate as presiding officer". He was uncomfortable with the whole bill and felt it needs some serious amendments and work. Iowa may be able to get away with four regional meetings because Iowa is a small state. That needs some serious consideration.

Questions from Committee Members and Responses:

SEN. FRED THOMAS asked for clarification of the selection of the fifth commission member.

SEN. ESP stated the permissive language on alternating to chair the meetings could say "shall". If there are only four commissioners, they must have consensus to move anything. They can pick a fifth person and that will also force consensus. He thought it would make folks look at it in a whole different way than they did this time. He said it is his first look at this

process. From the perspective of a "country-boy" carpenter, it wasn't a very pretty process. He said this may not be the answer, but he was looking for answers.

SEN. THOMAS said, in describing this process, four members of the commission either have to agree on a chairperson or not; if they don't, they rotate amongst themselves.

SEN. ESP said yes, that was correct.

SEN. THOMAS asked about the round five issue brought up by **Mr. Ream**.

SEN. ESP thought **Mr. Ream** referred to the court throwing out a plan and then a new plan being developed by the legislature. He said that idea came from the **Legislative Services Division** to address a concern about what to do if a court threw out a plan. To do it in the way that had been done before, the process would have to be started over again.

SEN. THOMAS asked about the 1% criteria language.

SEN. ESP said that would be in SB 429, on 2(a), line 21-24. It was meant to give some discretion to either the Commission or the Legislative Services Division to take into consideration some of the voting rights questions dealing with minorities and Native Americans, and to take into consideration if 50 or 100 votes are needed to keep a county intact. The whole basis of the nonpartisan way of doing it is to have the criteria so rigid that there are few ways to do the process and still comply with the criteria. It says "District boundaries must coincide with boundaries of political subdivisions...The number of counties and cities divided among more than one district must be as small as possible." If somebody can figure out a way to get one less division of a county and still comply with the 1% criteria, contiguous and compact, then that's a better plan under this language. In Iowa, the criteria is so rigid, a plan can only be done in a few ways and can be adjusted only to comply with the criteria. There are very few alternatives that can be done and meet the criteria.

SEN. THOMAS said the 1% deviation high and low would be used but the deviation could be gone beyond in order to keep political subdivisions intact or to comply with the Voting Rights Act. He asked if that is the intent of the language.

SEN. ESP said to go beyond in order to keep a minority/majority district intact would be allowed. The staff would know of any other considerations there are in the Voting Rights Act.

SEN. THOMAS asked about political input and the partisan element and third parties submitting plans and amendments.

SEN. ESP said a nonpartisan plan is developed by the criteria. If the criteria are fair, impartial, and can't be strayed from, then its nonpartisan. Partisan information can't be considered even if its erroneous. The staff will not look at it. The plan will be drawn based on whatever criteria meets the needs and is in the best interests of the people of Montana. It is a function of population, geography and political subdivisions.

SEN. THOMAS asked him to address the concern the legislation came in late. It seemed to him **SEN. ESP** had been working on it for quite some time.

SEN. ESP said it was more his fault than anyone else's. He tried to think it through and get it clear in his mind how it might work in Montana. He went over it with the drafter for many drafts. He said if he had it to do over, he would have gotten it out three weeks previously.

SEN. THOMAS asked if he thought he'd brought the best product forward he could.

SEN. ESP said given the limits of his ability and time, he thought he did.

SEN. GERALD PEASE asked about SB 428, page 1, lines 21-22.

SEN. ESP said most of that is constitutional language, "Four commissioners may select a fifth member, who, if selected, shall serve as presiding officer of the commission."

SEN. PEASE advised the title of the bill on line 6 is to "create a non partisan process to adopt a nonpartisan plan." He wondered if it would create partisanship with two members from each side of the House.

SEN. ESP responded with two folks on each side, in order to do something they have to work together; it will create a less partisan effort than it would if that wasn't true.

SEN. PEASE asked about SB 429 and the intentions of line 16 and 17, page 2. He asked about the process.

SEN. ESP advised in Iowa nobody can submit a plan to the commission for consideration; they can give input. When the legislature gives input to the **Legislative Services Division**, there should be some methodology for majority/minority reports.

He assumed they'd all be working together. He appreciated the questions and the comments from the audience. That is the value of the legislative process--to have good people thinking about something and trying to make it better or show why it won't work.
{Tape: 2; Side: A}

SEN. PEASE asked about the ballot issue language on SB 428, page 3. He deferred to **CHAIRMAN BARKUS**.

CHAIRMAN BARKUS had concerns relative to the geography in Montana and trying to put Montana into an Iowa box.

SEN. ESP responded the legislature and the people of Montana have a responsibility to look at the criteria and decide what works in Montana and what doesn't. The criteria in the bill came from Iowa, Idaho, and Washington and different mandatory criteria used around the nation. He used what he thought was most appropriate for Montana. He thought there could be a consensus on something that would be fair and take into consideration how Montanans look at their geography, communities, and areas of trade.

CHAIRMAN BARKUS said one of the issues in the 1972 Constitutional Convention was the involvement of the legislature. **SEN. ESP'S** plan involves the legislature extensively. He was concerned about creating a nonpartisan process, but having a partisan legislature making so many decisions.

SEN. ESP advised the crux of the plan is that redistricting is done through criteria by a nonpartisan staff. He had never gotten an inkling from a staff member of having one political bent or another. They had always treated him fairly and got the information he asked for. In Iowa there is a similar situation. They trust their staff to work on this based on the criteria in a nonpartisan way. It has much less to do with the legislature than it has to do with the staff hired by the legislature.

CHAIRMAN BARKUS said he understood that but is concerned that the staff comes forward with a nonpartisan plan, but it is presented to a partisan legislature and they have to vote up or down.

SEN. ESP asked if he was concerned with the legislature saying yes or no to the plan that is brought forward.

CHAIRMAN BARKUS answered yes.

SEN. ESP responded other states use the legislative process and it works. The legislature is locked into saying yes or no and then sending back specific reasons why those that voted no said so. Then the legislative staff says this is how it was addressed

or why it couldn't be under the criteria. That creates a less partisan process. It never went beyond the third round in Iowa.

CHAIRMAN BARKUS said one of the issues in the current plan that created the polarity in the process has been the judicial involvement. Round five in **SEN. ESP'S** plan exclusively uses the judiciary--district court judges.

SEN. ESP said it is in round four. It gives the legislators a good reason to settle it before it gets that far. There is some evidence in Iowa that has been a factor.

CHAIRMAN BARKUS advised the legislature passed a bill that took four districts down to two and **SEN. ESP** moved it back to four.

SEN. ESP said his bill could dovetail with that bill if it has passed and has been signed. Four people could be appointed from two districts.

CHAIRMAN BARKUS, as a former member of the commission, felt comfortable with everything the commission did leading up to the actual activity of the commission. He referred to SB 428, lines 21-25. It seemed to him that if only that change to the constitution is implemented, and the existing process is left the way it is, there would be somewhat of a nonpartisan program that would be pretty seamless.

SEN. ESP said there would be a less partisan process. He was not sure that until mandatory criteria is defined that is fair, that the process would be the way he envisions it. It would certainly improve on the current process. He acknowledged changes brought up by opponents requiring four hearings. Theoretically, under current law and constitutionally, the commission could convene, come up with a plan, hold one public hearing in Helena right before handing the plan to the legislature. His bill, in that regard, does require more hearings. The legislature can require any number of hearings but he didn't want to leave it at one hearing.

SEN. THOMAS said he was delighted, even though people spoke against the bills, there was no concern expressed about the 1% deviation SB 429 specifies as criteria. A chart in the handout applied the 1% calculation to current districts in Montana. He asked **SEN. ESP** to explain it. **EXHIBIT (sds42a04)**

SEN. ESP said the handout was prepared by the majority party aides. It shows that in the Native American districts in Montana, a 1% deviation could be used and still keep Native American majority districts. Under his bill, it could be done

that way or there would be a little wiggle room to make it work even better. Whether set at 1%, 2% or 5%, if the criteria are rigid enough in the other areas, there is not a lot of room for gerrymandering by one side or the other for political purposes. He claimed **Mr. Joe Lamson** told him, on one occasion, that he thought the courts construed he could gerrymander for political purposes and he felt he was within legal bounds to do so. That could be done with the 1% deviation if one is sneaky enough. He felt the other criteria ought to be developed to prevent that.

Closing by Sponsor:

SEN. ESP encouraged sending the bill to the floor of the Senate. He hoped to get it to the House for a full hearing. Maybe there is a better way to do it or maybe it will be decided that the way it's done now with a few changes is the way to go. He felt they needed to have the debate and encouraged passing the bill.

EXECUTIVE ACTION ON SB 428

Motion: **SEN. THOMAS** moved that **SB 428 DO PASS.**

SEN. THOMAS thought **SEN. ESP** worked hard and well and was extremely open to input and dialogue in his effort. He thought the bill should move to the floor to allow the discussion of the constitutional aspect on the floor and let the whole committee of the Senate examine it, review it, give thought for improvement, amend it if they so desire and pass it to the House for further consideration as **SEN. ESP** desired.

SEN. PEASE advised he thought about amending it in committee, but thought it was a good idea to amend it on the floor. With plans like this, the public needs to be aware of it.

CHAIRMAN BARKUS said he appreciated the work of **SEN. ESP**. He didn't see this as the final answer, but knew they needed to fix a problem.

Vote: **Motion carried 2-1 with PEASE voting no.**

EXECUTIVE ACTION ON SB 429

Motion: **SEN. THOMAS** moved that **SB 429 DO PASS.**

SEN. THOMAS said it is important to secure statutory language in law. The criteria outlined accomplishes nonpartisan and far more constitutional plans for apportionment of the districts of Montana's legislature in the future. Trying to draw the 1% deviation to as close as possible certainly complies with the

constitution far more than 5%. The compact and contiguous language outlined allows additional deviation when necessary to keep political subdivisions intact and to comply with any Voting Rights Act issues. This is good legislation that in the future will help resolve issues that arose this time with this commission and their plan.

CHAIRMAN BARKUS hoped they could pass the bills out with unanimous consent because he thought they all recognized the flaws in the system.

Vote: Motion carried 2-1 with PEASE voting no.

ADJOURNMENT

Adjournment: 4:17 P.M.

SEN. GREGORY D. BARKUS, Chairman

PRUDENCE GILDROY, Secretary

GB/PG

EXHIBIT (sds42aad)