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# MANDATORY AND DISCRETIONARY CRITERIA FOR REDISTRICTING

Prepared for the Montana Districting and Apportionment Commission

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## I. GENERAL CONSIDERATIONS

This memo was written to inform the Montana Districting and Apportionment Commission of the requirements imposed by law for redistricting the congressional and legislative districts and of the criteria that are within the Commission's discretion.

The Commission should adopt separate sets of criteria for congressional and legislative districts. The Commission should apply the same mandatory and discretionary criteria to each district. There are two basic purposes for selection of discretionary criteria: (1) deciding where lines should be drawn; and (2) defending a district's lines or population, or the characteristics of its residents, in possible future legal proceedings. For example, it may be necessary to defend a district from an attack grounded on race-based factors or to defend a district's population variance from the population of an ideal district. (The population of an ideal district is the state's total population divided by the total number of districts.)

In Brown v. Thomson, 462 U.S. 835 (1983), Justice Powell, in the majority opinion, stated that:

> The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.

This statement was made in the context of defending population variances between districts. However, the court cases contain numerous instances, in the context of different types of attacks against districts, in which the courts state that the discretionary criteria must be considered and uniformly applied with respect to each district and that there must be one or more good reasons for not applying a criterion, preferably with ample evidence in the record showing why a criterion was not applied. For example, following county or other political subdivision lines is one of the top-ranked discretionary criterion in most states and has been upheld by the court. See Reynolds v. Sims, 377 U.S. 533 (1964), and Mahan v. Howell, 410 U.S. 315 (1973). If the Commission were to follow county lines when possible, but not do so with respect to one district although it was possible to do so, a court may for that reason invalidate a district in the absence of adequate grounds, well stated in the Commission's records, for not following the county lines. In each district, if a given criterion can be followed, it should be. There will be some districts in which certain criteria will not be a factor or will not be as big a factor as in other districts. Whether each criterion can and should be applied to a given district must be determined by the Commission.

Many court challenges to redistricting plans have been based wholly or partly on the process by which the redistricting was carried out. Similarly, many challenges have been successfully defended on the basis of the fairness and validity of the process and how open it was to public input. Therefore, the Commission should guard itself and the plan against lawsuits by striving to protect the validity and fairness of the redistricting process by informing the public of its decisions and the basis of those decisions and by seeking public input. With these factors in mind, it would be advisable for the Commission to discuss and choose redistricting criteria at a public meeting, give ample public notice of the meeting, and inform the public that it is invited to attend and participate. The Commission members should also guard against making derogatory statements of any type and for any reason about any person or group of people. Even statements that were not meant to be derogatory or to negatively reflect on a person or group, made in an improper manner in the heat of a Commission meeting, can come back to haunt the Commission.

The criteria adopted by the Commission should be stated for the record at each Commission meeting held after adoption of the criteria.

For an expanded general discussion of criteria and an explanation of the redistricting process, see A Report of the Montana Districting and Apportionment Commission, Montana Legislative Council, December 1992; and Redistricting Law 2000, National Conference of State Legislatures, February 1999.

## II. CRITERIA FOR CONGRESSIONAL DISTRICTS

**Population equality.** The primary criterion is equality of population (one person, one vote). This mandatory criterion is based upon Article I, section 2, of the United States Constitution.

United States Supreme Court cases interpret that section to mandate congressional districts that are as nearly equal in population as is "practicable", which means that the populations must be as mathematically equal as is possible. See Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and Karcher v. Daggett, 462 U.S. 725 (1983). This requirement is a much stricter test than the federal equal protection clause population equality test for legislative districts. Practicable means "that [which] can be done". Webster's New World Dictionary of the American Language, Second College Edition, 1980. It is not the same as "practical", for a thing may be practicable, but not practical. In view of the census data and computer programming capabilities that will be available, the Commission should be able to draw two congressional districts (if Montana gains a second district) that are virtually identical in population.

Since the state will have a maximum of two congressional districts, the discretionary criteria discussed below with respect to legislative districts will not be much of a factor. Although the discretionary criteria may be used to decide where to draw the line between the two districts, they should not be so used if the line results in population variances because it is almost impossible, under the Supreme Court opinions, to successfully use discretionary criteria to justify a population variance of even less than 1%. If, using the same discretionary criteria as those used for a challenged plan, districts with a smaller population variance could have been drawn, the cases indicate that the court will invalidate the plan. Even if districts resulting in a smaller population variance cannot be drawn using the same discretionary criteria as those used for a challenged plan, the state has the burden of proving why the

discretionary criteria should override the "as nearly equal in population as is practicable" mathematical equality standard.

## III. MANDATORY CRITERIA FOR LEGISLATIVE DISTRICTS

**Population equality under the federal equal protection clause.** Under the equal protection clause of the 14th amendment to the United States Constitution, districts for state legislatures must adhere to the one person, one vote principle of equality. The United States Supreme Court has adopted a more lenient population equality test for districts for state legislatures than the test for congressional districts. The test, adopted by the court in a line of cases beginning in the mid-1970s, is that if the difference in population between the districts with the highest and lowest populations is less than 10%, the plan is assumed to meet federal equal protection standards and one challenging the plan must prove that the difference is not based on legitimate considerations incident to the effectuation of other redistricting criteria and a rational state policy. If the difference in population between the districts with the highest and lowest populations is 10% or greater, the equal protection standard is assumed to be violated and the state has the burden of proving that the difference is based on legitimate considerations incident to the effectuation of other redistricting criteria and a rational state policy. This is a difficult burden to prove. If it can be shown that by using the other redistricting criteria a plan with a smaller population disparity between districts could have been drawn without negative effects on the rational state policy sought to be advanced, the plan is likely to be invalidated. Therefore, the Commission should at a minimum adopt a standard of 10% overall deviation. It should also adopt the standard of allowing a maximum deviation of no more than plus or minus 5% from the ideal district population.

Now that computerization of the redistricting process in the 1990 redistricting has made it easy to quickly draw districts of equal population and at the same time follow discretionary criteria, it has become more difficult for a state to meet its burden of proof when the 10% standard is exceeded. It is possible that the precision possible from computerization will soon generate attempts to convince the Supreme Court to lower the 10% standard.

**Population equality of legislative districts under the Montana "as nearly equal in population as is practicable" clause.** Article V, section 14(1), of the Montana Constitution provides that "All [legislative] districts shall be as nearly equal in population as is practicable." (Emphasis added.) This language may mean that under the Montana Constitution, the same population equality standard (as nearly equal in population as is mathematically possible) applies to legislative districts as applies, through the United States Constitution as interpreted by the United States Supreme Court, to congressional districts. This issue has not been litigated in Montana. The ultimate forum for interpretation of this provision is the Montana Supreme Court, which may follow the normal dictionary meaning of "practicable" and United States Supreme Court opinions as to what is meant by "as nearly equal in population as is practicable".

**Protection of racial minorities.** Both section 2 of the federal Voting Rights Act of 1965 and the equal protection clause of the United States Constitution prohibit the drawing of district lines in a manner that dilutes the vote of a citizen on the basis of race or color. Section 2 provides that the political processes leading to nomination or election in the state must be equally open to participation by members of a class of citizens protected by the section in that the members of the class have the same opportunity as other members of the electorate to participate in the political process and to elect representatives of their choice. This applies to Indians in Montana. The court cases make it clear that a racial minority cannot be "districted in" (also known as "packing"), which is the drawing of lines so as to keep the minority in as few districts as possible in order to minimize the number of legislators whom the minority can elect. Moreover, a minority cannot be "districted out" (also known as "fracturing"), which is the drawing of lines to ensure that the racial minority is a voting minority in any given district and thus will be unlikely to elect any legislators.

In Thornburg v. Gingles, 478 U.S. 30 (1986), the U.S. Supreme Court held that a plaintiff alleging a section 2 violation must first prove that: (1) the minority is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority is politically cohesive; and (3) in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate. If the plaintiff meets this threshold Gingles test, the plaintiff must then show that section 2 was violated because, as stated in section 2, based on

the totality of circumstances the political processes leading to nomination or election in the state or political subdivision are not equally open to the plaintiff's class of citizens in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The court stated that the factors to be considered in determining the totality of circumstances include (but are not limited to) the extent to which members of the minority group have been elected; the extent of the history of official discrimination touching on the minority group participation in the democratic process; racially polarized voting; the extent to which the state or political subdivision has used unusually large election districts; majority vote requirements; voting practices that enhance the opportunity for discrimination; denial of access to the candidate slating process for members of the minority group; the extent to which members of the minority group bear the effects of discrimination in areas such as education, employment, and health that hinder effective participation by the minority group; whether political campaigns have been characterized by racial appeals; whether there is significant lack of responsiveness by elected officials to the particular needs of the minority group; and whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

The answer is to find a happy medium. In the past, the Montana Commission has drawn districts in which Indians were a majority of the population (or voting age population) in the districts in those geographical areas where there were enough Indians to make them a majority. Those districts also followed all other mandatory redistricting criteria and all or most of the discretionary criteria. This policy implements the mandate of the equal protection clause and section 2 referred to above, yet does not run afoul of the rule, developed in a 1990s line of U.S. Supreme Court cases and discussed below, that if making a racial minority a majority of the population of a district was the predominant criteria and the other redistricting criteria were subordinated to that predominant criteria, the courts will invalidate the district.

**Race cannot be the predominant factor to which the traditional discretionary criteria are subordinated.** In a series of opinions beginning with Shaw v. Reno, 509 U.S. 630 (1993), the United States Supreme Court has held that race cannot be the predominant reason for a district's lines, with the other redistricting criteria, particularly traditional discretionary criteria, being subordinated to race. This does not

mean that the Commission cannot intentionally create a district in which Indians are a majority. The Commission may do so if that race-based reason is not the predominant criteria and the Commission follows its other criteria, especially its traditional discretionary criteria, in drawing the district lines. The court has recognized that race will obviously be a factor in the redistricting process, if for no other reason than the fact that the rights of a racial minority are protected by section 2 of the Voting Rights Act of 1965 and an entity drawing district lines must thus take race into account. For each district created by the Commission in which Indians are a majority, it is crucial that the Commission establish a record showing that the discretionary criteria were considered and followed with respect to the district.

**Compact and contiguous districts.** Under Article V, section 14(1), of the Montana Constitution, "Each district shall consist of compact and contiguous territory." Compactness is largely determined by looking at the district and using a general appearance test. Compactness also takes into account such things as ease of travel and communication within a district, or what can be called functional compactness. A district may look compact on a map but may not be functionally compact--for example, if the Bob Marshall Wilderness divides the district into two pieces so that you cannot travel by road from one part of the district to the other without leaving the district. Similarly, a district may violate the compactness requirement if one part of the district is connected to the rest only by dirt roads that are not plowed in the winter or if the district is bisected by the Missouri River and there is no bridge in that stretch of the river. As the Commission draws proposed district lines, it should attempt to ensure physical and functional compactness by monitoring the shapes of the districts and the geography, road systems, and other physical aspects of the districts.

"Contiguity" means that the district must be all in one piece; that is, it is one contiguous mass.

## IV. DISCRETIONARY CRITERIA FOR LEGISLATIVE DISTRICTS

Discretionary criteria are those not mandated by the state or federal constitution or any other law. Such criteria may be adopted at the discretion of the Commission.

The following criteria are often used in the various states. All of them have been used in the past in Montana and were sanctioned by the federal District Court for the State of Montana in McBride v. Mahoney, 573 F. Supp. 913 (D.C. Mont. 1983).

**Following the lines of political units.** Districts are often drawn to follow, to the extent possible, the boundary lines of counties, cities, towns, school districts, Indian reservations, voting precincts, and other political units. Such lines may not follow geographic boundaries and may be difficult to follow with the geographic information system, but the lines of political units can provide guidance in drawing the lines of legislative districts.

**Following geographic boundaries.** District lines are drawn along geographic boundaries, such as mountain divides and ridge lines, rivers and creeks, and highways and roads. The geographic information system used in redistricting uses as its base the TIGER/Line files from the U.S. Bureau of the Census. These are geographically based lines used in the conduct of the decennial census and relate to predominantly visible features. Technically, this is an easy criterion to follow, but practically, local government officials may find this a less satisfactory criterion.

**Keeping communities of interest intact.** Communities of interest can be based on such things as trade areas; geographic location; communication and transportation networks; media markets; Indian reservations; urban/rural splits; similarity in social, cultural, and economic interests; and prevalent occupations and lifestyles.

**Preserving the lines of existing legislative districts -- protection of incumbent legislators -- political fairness.** Generally, voters and politicians do not like changes in their district lines; they like continuity of their district boundaries. Continuity also advances the interests of those involved in the election process because they do not have to deal with district line changes that in turn affect precinct lines, which must then be changed pursuant to section 13-3-102, MCA. Existing districts provide a valuable starting point from which to determine any variance in population from the ideal population and its compliance with the criteria for equal population within a certain deviation. An existing district may no longer comply with some of the redistricting criteria because of the new population data, which would require a redrawing of the district lines. Also, the ripple effect from changes in other parts of

the state may require that an existing district, although within population or other requirements, may not continue to persist in its current form.

In addition, this criterion may help protect incumbents, which, nationally, is often a goal of the redistricting process. Protection of incumbents may encompass such things as helping ensure the current distribution of seats between the parties, providing for continuity in the Legislature, and ensuring that accumulated legislative expertise is not lost. However, in order to avoid a claim of gerrymandering, the goal must be protection of all or no incumbents of both parties, and this redistricting criterion must be considered with respect to each proposed district. The 1990 Commission adopted a criterion of political fairness, rather than protection of incumbents, which stated that a district may not be drawn for the purpose of favoring a political party or to protect or defeat an incumbent legislator.

## V. SUMMARY

The Montana Redistricting and Reapportionment Commission should adopt the mandatory criteria for redistricting congressional and legislative districts at a public meeting held prior to the time that the Commission begins the process of creating congressional or legislative districts. At that meeting, the Commission should discuss and take public testimony on discretionary criteria and adopt the criteria that it believes are most suitable for Montana. The mandatory criteria should be strictly applied. The discretionary criteria should be applied in a consistent manner to each district to the extent that they can be applied. All discretionary criteria may not always be exactly followed, since sometimes they are at odds with each other, but if the Commission makes a good faith effort to consider and balance the criteria, the plan should be upheld as was found in McBride v. Mahoney (previously cited).

The meeting at which criteria are adopted can also be used to establish the content of the record of the Commission's meetings and the method for maintaining that record. A well-kept, carefully documented record that clearly states the grounds for the Commission's decisions is essential for, among other things, historical research into the proceedings of the Commission and a successful defense against lawsuits.