Brown v. Montana Districting and Apportionment Commission
Decided July 2, 2003
Judge McCarter
First Judicial District
Docket No. ADV 2003-72
2003 ML 1896 (1st Jud. Dist.)

NOTE: This case has the following related cases (same docket number):
04 Apr 2003 - Brown v. Montana Districting and Apportionment Comm. [2003 ML 1050 (1st Jud. Dist.)]
29 Apr 2003 - Brown v. Montana Districting and Apportionment Comm. [2003 ML 1233 (1st Jud. Dist.)]
19 May 2003 - Brown v. Montana Districting and Apportionment Commission [2003 ML 1448 (1st Jud. Dist.)]

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

BOB BROWN, in his official capacity as the Montana Secretary of State,
Plaintiff,
v.
MONTANA DISTRICTING AND APPORTIONMENT COMMISSION,
Defendant,

and

JOE MACDONALD, JEANNINE PADILLA, CAROL JUNEAU, JONATHAN WINDY BOY, GERALD PEASE, FRANK SMITH, NORMA BIXBY, VERONICA SMALL EASTMAN, JOEY JAYNE, MONTANA WYOMING TRIBAL LEADERS COUNCIL, JAY ST. GODDARD, GERRI SMALL, D. FRED MATT, ALVIN WINDY BOY, RAY EDER, BEN SPEAKTHUNDER and CARL VENNE,
Intervenors.

Cause No. ADV 2003-72
DECISION AND ORDER

¶1 Several motions are currently before the Court. Plaintiff and Defendant have filed cross motions for summary judgment. Intervenors have filed a motion to dismiss or for summary judgment. A hearing on the motions was held May 15, 2003. Plaintiff Bob Brown, Secretary of State was represented by Robert Cameron; Defendant Montana Districting and Apportionment Commission (Commission) was represented by Brian Morris; and Intervenors were represented by Beth Brennaman. The motions have been fully briefed and are submitted for decision.

BACKGROUND AND UNDISPUTED FACTS

¶2 This case arises out of recent legislation pertaining to legislative districting. On January 6, 2003, the Commission submitted its plan for legislative districts to the 2003 legislature. The legislature appointed the Joint Select Committee on Districting and Apportionment to receive and consider testimony on the Commission's plan. After testimony, House Resolution No. 3 and Senate Resolution No. 2 were passed on February 4, 2003, which requested the Commission to reconvene and adopt a new plan. On that same day, Governor Martz signed HB 309, which was the basis for the legislative resolutions. The Commission met on February 5, 2003, where it considered the resolutions and ultimately adopted its original plan. The Commission tendered its plan to the Secretary of State for filing, but the Secretary refused to file it.

¶3 The Secretary of State filed a complaint for declaratory judgment, asking the Court to rule: (1) whether the Commission's plan is unconstitutional under Article V, Section 14, of the Montana Constitution; (2) whether the Commission's plan is unenforceable under HB 309; and (3) whether the Secretary of State's refusal to file the Commission's plan is valid under Montana law. All parties filed motions for summary judgment, and Intervenors also filed a motion to dismiss.

LEGAL STANDARD

¶4 Summary judgment will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), M.R.Civ.P.; ***Dillard v. Doe***, 251 Mont. 379, 382, 824 P.2d 1016, 1018 (1992). The moving party must establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. ***Hadford v. Credit Bureau of Havre, Inc.***, 1998 MT 179, ¶ 14, 289 Mont. 529,¶14, 962 P.2d 1198, ¶14. Once the moving party has met its burden, the opposing party must present material and substantive evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact. ***Id.***

¶5 With respect to a motion to dismiss, the allegations of the complaint must be viewed in a light most favorable to plaintiffs, admitting and accepting as true all facts well-pleaded. ***United States Nat'l Bank of Red Lodge v. Montana Dep't of Rev.***, 175 Mont. 205, 207, 573 P.2d 188, 190 (1977), citing ***Bd. of Equalization v. Farmers Union Grain Terminal Ass'n***, 140 Mont. 523, 531, 374 P.2d 231, 236 (1962). A complaint will not be

dismissed for failure to state a claim unless it appears beyond any doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

DISCUSSION

¶6 The motions raise several legal issues, none of which involve disputed issues of material fact.

1. **Whether HB 309 constitutes an impermissible conflict with Article V Section 14 of the Montana Constitution.**

¶7 Article V Section 14 of the Montana Constitution provides:

> **Districting and apportionment.** (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.
>
> (2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative districts and a plan for redistricting the state into congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time prescribed, a majority of the supreme court shall select him.
>
> (3) Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.
>
> (4) The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.
>
> (5) Upon filing both plans, the commission is then dissolved.

¶8 House Bill 309 included new sections, and amended Section 5-1111, MCA. The pertinent portions of the bill read as follows:

> **Section 1. Redistricting criteria.** (1) In the drawing of legislative districts, the districting and apportionment commission shall comply with the following criteria:
>
> (a) the districts must be compact and contiguous; and
>
> (b) the districts must be as equal as practicable.
>
> (2) For the purposes of this section, "as equal as practicable" means within a plus or minus 1 % relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census.

¶9 Section 5-1-111, MCA, as amended, reads in pertinent part:

> **Final plan - dissolution of commission**. (1) Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.
>
> (2) Within 30 days after receiving the legislative redistricting plan and the legislature's recommendations, the commission shall file its final legislative redistricting plan with the secretary of state. The secretary of state may not accept any plan that does not comply with the criteria in section 1. Upon acceptance of a plan by the secretary of state, the plan is considered filed and becomes law.
>
> (3) Upon the acceptance and filing of both plans, the commission is dissolved.

¶10 The bill also contained a provision making it retroactive "to any legislative redistricting plan of the districting and apportionment commission that was not filed with the secretary of state on [the effective date of this act]."

¶11 In addressing this issue, the Court is mindful of well settled rules of law. One pertinent rule provides that in addressing a constitutional challenge to any statute, the statute is presumed constitutional, and the challenging party has the burden of establishing the statute's unconstitutionality. ***Harper v. Greely***, 234 Mont. 259, 269, 763 P.2d 650, 656 (1988). If a doubt exists with respect to a finding of unconstitutionality, it must be resolved in favor of the legislation. ***Id.*** Another rule provides that the legislature can expand, but may not restrict rights guaranteed by the state or federal constitution. See***Marbury v. Madison***, 1 Cranch 137 (1803); ***Noll v. City of Bozeman***, 166 Mont 504, 506, 534 P.2d 880, 881 (1975); ***Shroyer v. Sokol***, 550 P.2d 309, 311 (Colo. 1976).

Finally, in interpreting provisions of the constitution, the Court is constrained and guided by various rules of construction applicable to interpreting legislation. ***Great Falls Tribune Co. v. Great Falls Public Sch.Bd. of Trustees***, 255 Mont. 125, 129, 841 P.2d 502, 504 (1992). Accordingly, the Court must construe Article V, Section 14, of the Montana Constitution according to the plain meaning of the language therein. ***State ex rel. Woodahl v. Dist. Ct.***, 162 Mont. 283, 511 P.2d 318 (1973). When the language of the provision is plain, unambiguous, direct and certain, the provision speaks for itself and there is nothing left for the court to construe. ***Hammill v. Young***, 168 Mont. 81, 85-86, 540 P.2d 971, 974 (1975).

¶12 Article V, Section 14, of the Montana Constitution requires the Commission to create legislative districts that are "as nearly equal in population as is practicable." This section lacks any more specific language. The Secretary of State argues that the legislature, using its "plenary power," can "implement" this provision by enacting specifics, such as Section 1(2) of HB 309, which defines "as equal as practicable" as "a plus or minus 1% relative deviation from the ideal population of a district . . . ."

¶13 The Court finds no ambiguity in the language of Article V, Section 14, in this respect, and is therefore constrained from looking beyond the constitutional provision to interpret it.

¶14 The Secretary of State contends that this constitutional provision is intended to be implemented by the legislature. The Court disagrees, finding the provision to be self-executing, and needing no implementation by the legislature. A provision is self-executing if it supplies a sufficient rule by which the right given may be enjoyed and protected, or the duty imposed enforced; and is not when it merely indicates principles without laying down rules by which they may be given force of law. ***State ex rel. Bennett v. State Bd. of Examiners***, 40 Mont. 59, 64, 104 P. 1055, 1057 (1909). Put another way, a constitutional provision is self-executing when it can be given effect without the aid of the legislature and there is nothing to indicate that the legislation is contemplated in order to render it operative. ***State ex re. Stafford v. Fox-Great Falls Theatre Corp.***, 114 Mont. 52, 73, 132 P.2d 689, 700 (1942).

¶15 A reasonable and logical reading of the constitutional provision reveals that the Commission created pursuant to that provision is charged with the responsibility to designate the legislative districts, and in doing so, to exercise its own discretion and expertise in determining the equal as practicable factor. The language of Article V, Section 14, does not indicate an intent to involve the legislature in this process, other than its selection of four commissioners pursuant to subsection (2), and its recommendations to the Commission pursuant to subsection (4). Counsel cited no authority that validates the legislature seizing discretionary authority from a constitutional body such as the districting and apportionment commission. To the extent that HB 309 authorizes the legislature to preempt the Commission in determining the equal as practicable factor, the bill is void.

2. Whether HB 309 is a Valid Implementation of Article IV, Section 3, of the Montana Constitution

¶16 Article IV, Section 3, of the Montana Constitution provides:

> **Elections.** The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.

¶17 The Secretary of State argues that HB 309 is valid because its purpose is to insure the purity of the elections and guard against abuses of the electoral process. In making this argument, the Secretary of State asserts that the legislation removes partisan influence from the Commission, thereby protecting the redistricting process.

¶18 Again, in interpreting this provision, the Court is guided by the pertinent rules of statutory construction. ***Great Falls Tribune Co.***, 255 Mont. at 129, 841 P.2d at 504. A fundamental rule of construction requires the words of a statute to be read in their context and with a view to their place in the overall statutory scheme. ***Davis v. Mich. Dep't of Treasury***, 489 U.S.803 (1989), citing ***United States v. Morton***, 467 U.S. 822, 828 (1984). Each statute should be read as a whole. ***Dover Ranch v. Yellowstone County***, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980). Applying these rules of construction, the Court concludes that Article IV, Section 3, of the Montana Constitution pertains to the mechanics of elections and not to the legislative redistricting process.

¶19 With respect to the Secretary of State's contention that legislative interference is needed to protect the redistricting process from political influence, the legislature is already substantially involved: Article V, Section 14(2), of the Montana Constitution provides that the majority and minority leaders of the legislature appoint four of the five members of the Districting and Apportionment Commission, who then select the fifth member. At the hearing on the motions for summary judgment, it became apparent that the members of the Commission constituted a good representation of the state population. The language of this constitutional provision indicates that the drafters of the constitution intended to protect the integrity of the redistricting process by requiring equal participation of both political parties in appointing the commissioners, and by prohibiting the commissioners from being public officials.

¶20 The argument that HB 309 is needed to protect the redistricting process is without merit.

3. Whether the Secretary of State's Refusal to File the Commission's Plan was Legal

¶21 The Secretary of State refused to file the Commission's plan when he determined that it did not comply with HB 309. That legislation requires the Secretary of State to determine whether the Commission's plan provides for districts that are (1) compact and

contiguous, and (2) are as equal as practicable. Article V, Section 14(3) and (4), of the Montana Constitution require the Commission to file its plan with the Secretary of State " and it shall become law." This constitutional provision does not give the Secretary of State discretion to refuse to file the Commission's plan. Thus, the statute and the constitution are in conflict.

¶22 If a constitutional provision and statute are in conflict, the constitutional provision prevails. ***State ex rel. Nagle v. Stafford***, 97 Mont. 275, 289, 34 P.2d 372, 378 (1934).

¶23 The Montana Supreme Court has long recognized the limited office of the Secretary of State as primarily a ministerial one. ***State ex rel. Lloyd v. Rotwitt***, 15 Mont. 29, 37, 37 P. 847, 847-48 (1894). Indeed, the duties of the office, which are set forth in Section 2-15-401, MCA, appear to be purely ministerial ones. The responsibility of the Secretary of State with respect to filing the Commission's plan is clearly a ministerial one. The ministerial character of the Secretary of State's role in the redistricting process is further illustrated by, and is consistent with, the rigid time lines for filing the plan as set forth in Article V, Section 14 (3) and (4). On the other hand, HB 309 charges the Secretary of State with the responsibility of determining whether the Commission's plan complies with the bill's substantive requirements, thus converting the Secretary of State's responsibilities from ministerial to discretionary.

¶24 Since the constitution does not contemplate discretionary involvement of the Secretary of State, the legislature's attempt to do so is in conflict with the constitution and is void.

4. Whether the Secretary of State Has Standing to Seek a Declaratory Judgment on the Constitutionality of the Plan Adopted by the Commission

¶25 Intervenors assert that the Secretary of State lacks standing to seek a declaratory judgment on the constitutionality of the plan adopted by the Commission and have moved to dismiss that portion of the complaint. The Commission raises the same issue in its answer to the complaint. As discussed above, the Secretary of State's role with respect to filing the commission's plan pursuant to Article V, Section 14, of the Montana Constitution is ministerial, and he therefore has no basis to exercise discretion in the process of filing the plan. In other words, when the Commission presents the plan to the Secretary of State, he must file it, and he has no authority to refuse to do so. The language of the constitutional provision is clear in this respect.

¶26 Intervenors assert that the Secretary of State's legal rights are not affected by the enactment of HB 309. However, the Court acknowledges that the enactment of HB 309 placed the Secretary of State between a rock and a hard place. On one hand, the constitution required him to file the plan upon presentation by the Commission, while on the other hand, HB 309 required him to refuse to file the plan if it did not comply with the terms of the bill. On this basis, a controversy clearly exists for the Secretary of State, but only to the extent that the Court should determine which provision the Secretary of State

must follow. Upon such determination by the Court, the Secretary of State is bound by law to follow that provision as a ministerial officer, and he has no legal interest in further legal challenges to the Commission's plan.

¶27 The test for the existence of a judicial controversy is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them. ***Gryczan v. State***, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997). The Secretary of State as a ministerial officer has neither a legal right nor interest in a declaratory judgment as to the constitutionality of the Commission's plan. On this basis, the Secretary of State has no standing to seek a judgment as to the constitutionality of the plan.

¶28 The Secretary of State argues that his duty as the chief election officer to obtain and maintain uniformity in the application, operation and interpretation of the election laws provides sufficient basis to give him standing to request a declaratory ruling on the constitutionality of the Commission's redistricting plan. He asserts that his standing arises from his interest in the effective discharge of his official duties and points to ***Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review***, 282 Mont. 255, 937 P.2d 463 (1997), in support of this assertion. However, the Court finds that case distinguishable for two reasons. First, as noted above, the Secretary of State's duty with regard to the redistricting process is strictly ministerial, and he has no regulatory authority over this constitutionally mandated process, nor does it impact the manner in which he performs his duties to oversee the election laws. Second, although this issue is undoubtedly one of importance to the general public of Montana, the interest of the Secretary of State is not distinguishable from or greater than the interest of the public generally.

¶29 The Secretary of State also argues that his standing arises from his sworn duty to support, protect and defend the Montana Constitution. He asserts that this position is supported by ***Judge v. Legislative Fin. Comm.***, 168 Mont. 470, 543 P.2d 1317 (1975). Again, the Court finds that case distinguishable. ***Judge*** did not involve a general challenge to a statute based on an executive officer's duty to protect the constitution; the governor in that case was arguing that the statute at issue was an infringement on the separation of powers doctrine by allowing the legislature to exercise discretion exclusively reserved to the executive branch, thus directly impacting the manner in which he fulfilled his discretionary duties. Here, as already discussed, the Secretary of State's role is ministerial only and the redistricting plan does not affect the discharge of his discretionary duties. Furthermore, there was no discussion at all of standing in that case. The only discussion of the governor's duty to uphold the Constitution arose in the context

of whether the governor was estopped from challenging the acts because he had signed them.

SUMMARY

¶30 HB 309 impermissibly conflicts with Article V, Section 14, of the Montana Constitution, and is void on that basis. HB 309 is not a valid implementation of Article V, Section 14, because that constitutional provision is self-executing, and because Article IV, Section 3, of the Montana Constitution does not authorize the legislature to interfere with the redistricting process beyond the express authority given to it in Article V, Section 14. The Secretary of State was required to file the Commission's plan, and his refusal to do so was therefore in violation of the Montana Constitution. Finally, the Secretary of State does not have standing to seek a declaratory judgment on the constitutionality of the Commission's plan.

ORDER

¶31 Intervenors' motion to dismiss the Secretary of State's request for declaratory judgment on the constitutionality of the Commission's plan is GRANTED. The motions for summary judgment are GRANTED and DENIED in accordance with this decision.

DATED this 2nd day of July, 2003.

Dorothy McCarter
DISTRICT COURT JUDGE

pc. Ward A. Shanahan/Robert Cameron
Mike McGrath/Brian M. Morris
Beth Brenneman
Laughlin McDonald
