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Jon Bennion
89 Whitetail
Clancy, MT
(406) 697-0568

Linda Vaughey
2505 Southridge Drive
Helena, MT 59601
(406) 457-9171

Montana Supreme Court
Justice Building
215 N. Sanders
P.O. Box 203001
Helena, Montana 59620-3001

**RE: THE SELECTION OF A FIFTH MEMBER TO THE MONTANA
DISTRICTING AND APPORTIONMENT COMMISSION**

To the Honorable Members of the Montana Supreme Court:

In keeping with the spirit of Montana's open meeting laws, we send you this letter as an open communication as you start your deliberations in the appointment of the fifth member on the Montana Districting and Apportionment Commission (hereinafter "commission").

In this letter, we first set out a brief history of reapportionment and redistricting in Montana since 1972, in order to provide context for the rest of the letter. We commend the Court for opening the deliberations and involving the public in the Court's selection of commission chair. We respectfully ask the Court to clarify the appointment process and stress the need for a non-partisan, neutral commission chair who will involve all parties, insist on openness, and facilitate compromise.

A. Brief History of Reapportionment and Redistricting in Montana since 1972

When the framers of the state Constitution addressed the problems associated with redistricting in Montana, they knew they had to create a framework to take the process out of the hands of the Legislature, where partisanship and rural-urban scuffles had made it impossible to properly reapportion the state. The new constitution created an

autonomous, five-member commission of private citizens to reapportion the state every 10 years in conjunction with the federal census:

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. Article V, Section 14.

In the transcripts of the Montana Constitutional Convention, delegate comments clearly show the manner of selecting the commission chair was a conscious effort to take the partisanship out of the process:

“The committee considers reapportionment and redistricting to be a troublesome and time consuming matter for a legislative body because of the legislature’s difficulty in being objective....The committee recognized that redistricting and reapportionment had political repercussions, so the proposed section provides for bipartisanship in the method of selection of the first four members. The fifth member of the commission becomes the key vote and his selection by the other four commission members is to insure *impartiality*.” (Emphasis added)

As Justice Leaphart outlined in his specially concurring opinion to the Order appointing Dr. Janine Pease Pretty On Top in 1999, the Court was chosen to appoint the fifth

member if the other commission members are unable to agree due to the need for impartiality and nonpartisanship:

“...the Constitutional Convention framers’ comments make clear that in the event that legislative appointees cannot agree on a fifth member for the commission, our Constitution’s framers intended that an apolitical, independent entity make the appointment: Montana’s Supreme Court.”

The first commission met from 1973-74, and developed districts that became effective for the 1976 elections. The four appointed members were unable to agree on a fifth member, so the Court appointed Joseph Marra, a Great Falls attorney who happened to be a Democrat. *See Ellis Waldron’s Redistricting Memo to the Montana Legislative Council*, March 2, 1981, p. 6 & 7. The commission voted on a generally nonpartisan basis, and was unanimous in practically all of its decisions. *See The Report of the Montana Districting & Apportionment Commission to the 1974 Montana Legislature*. The overall average population deviation for the state was 3.34%.

The second commission met from 1979-1983, and developed districts that became effective for the 1984 elections. The four appointed members were unable to agree on a fifth member, so once again the Court made the appointment. The Court appointed Eugene Mahoney, a former Democratic state senator from Sanders County.

The third commission met from 1989-1993, and developed districts that became effective for the 1994 elections. The four appointed members were able to agree on a fifth member on three separate occasions without the need for an appointment from the Court. In May of 1989, former Supreme Court Chief Justice Frank Haswell was appointed chair. When he passed away in 1990, commission members selected former Montana Supreme Court Justice L.C. Gulbrandson as chair. When he later resigned, the commission selected Jean Fallan Barrett as chair.

Eleven of thirteen substantive votes on the various plans were unanimous. One vote was three to one and the other vote required the vote of the chair to break a tie. *See The Report of the Montana Districting & Apportionment Commission to the 1993 Montana Legislature*. The overall average population deviation for the state was 2.62%.

The fourth commission met from 1999-2003, and developed districts that became effective for the 2004 elections. The four appointed members were unable to agree on a fifth member, so the Court was once again asked to select the chair. The Court appointed Dr. Janine Pease-Pretty On Top, a Democratic activist and precinctwoman from Big Horn County. *See “Demos Head Redistricting Panel”* from June 24, 2002 in the Billings Gazette.

All major votes on redistricting plans were 3-2 along partisan lines with the Democratic majority overriding the Republican minority. Despite the use of the most advanced computer technology for redistricting, the 3-2 partisan majority adopted a plan that used a record 3.45% statewide overall population deviation average. *See The Report of the Montana Districting & Apportionment Commission to the 2003 Montana Legislature*.

The population deviation from district to district (plus or minus 5%) was used in such a way where many Republican-leaning districts were overpopulated, and many Democratic-leaning districts were underpopulated, thereby ignoring the “one person, one vote” principle. *See Redistricting Study by Dr. Craig Wilson, 2007.* In addition, the plan that was ultimately adopted was developed privately by a commission member using political data and election results as opposed to a non-partisan plan developed by Legislative Services.

In the current redistricting cycle, we were appointed by Senator Jim Peterson and Representative Scott Sales. Joe Lamson and Pat Smith, were appointed by Senator Carol Williams and Representative Margaret Campbell. During the first 20 days, the commission considered six candidates for the position of chair.

The Democratic commissioners nominated only a single person, Holly Kaleczyc, a director of a domestic violence center in Helena. While Mrs. Kaleczyc has certainly achieved many commendable accomplishments in her community, she does have a clear record as a partisan Democrat and has never worked collaboratively in a political setting. During her career, she has given large amounts exclusively to Democratic candidates, served in Democratic party positions, and managed or volunteered in the campaigns of Democratic candidates. We believe she would have been a good choice as one of the Democratic leadership’s appointments, but not as chair of this commission. We rejected Mrs. Kaleczyc’s nomination because she did not meet the criteria the two of us developed before the appointment process began (see discussion of our criteria in section C).

On the other hand, we nominated five individuals to chair the commission, each respected professionals with records of non-partisanship: Dr. Jeffrey Greene and Dr. Jim Lopach, professors of political science at the University of Montana; Joe Roberts, an attorney and M.P.A. graduate of Harvard; Dr. Craig Wilson, a professor of political science at MSU-Billings; and Scott Wyckman, a former justice of the peace from Bozeman (who later had to withdraw his nomination). The Democratic commissioners had many great things to say about our nominees, but they rejected all of them. They said our nominees had many great qualities, but they would not consent to any nominee besides their single partisan choice.

In addition, Robert Person, the former executive director of the non-partisan Legislative Services Division, independently submitted his name for consideration. We made a motion to select Mr. Person, but the two other commissioners rejected him as well.

B. We Commend the Court for Holding Open Deliberations and Involving the Public

It is our understanding, based on a conversation with Supreme Court Clerk Ed Smith and statements to the press from Chief Justice Mike McGrath, that the Court will open the appointment process, including the Court's deliberations, to the public. We strongly

commend the Court for making this decision. We look forward to participating in this process and encouraging public involvement.

We believe this move towards openness is a positive step for this important appointment. In addition to following the spirit of Montana's open meeting laws and the public's right to know, we believe an open and transparent appointment process is good government policy that allows for a more active citizenry. Open deliberations will also dispel a great deal of confusion surrounding this process. Justice Nelson said it best in his specially concurring and dissenting opinion in 1999, when he lamented the consequences of an appointment process that was not open:

“And, unfortunately, since we did not open our deliberations and discussions to the public, those who will now speculate and criticize our choice will find ample fodder in the ignorance which is always bred of secrecy.”

Indeed, since the appointment of Dr. Pease-Pretty On Top in 1999, we have heard many speculating about all of the Court's reasons for that particular choice. Most notably, this appointment was the third time the Court has chosen a Democrat to chair the commission, thereby giving Democrats a majority. *See Ellis Waldron's Redistricting Memo to the Montana Legislative Council*, March 2, 1981, p. 6 & 7, and “*Demos Head Redistricting Panel*” from June 24, 2002 in the Billings Gazette.

We have no doubt that there were numerous reasons, qualifications and other criteria used in the selection of those three prior chairs the Court selected in 1974, 1979, and 1999. Those reasons remain, however, a mystery to the public. After the last redistricting cycle, which was rife with partisanship, the need for a different approach is clearly required in the appointment of the fifth person if the vision of the framers of the state constitution is to be realized.

The Court could not have foreseen how partisan the last commission would conduct itself, including the record use of population deviation for partisan purposes, a lack of openness in drawing up the plan that was ultimately adopted, and the intentional use of political data and election results. A new, more open approach to this important process is badly needed, and we appreciate the Court's efforts to open the appointment process up for public review and involvement.

Additionally, we have asked our other commission members to keep all communications with members of the Court public and open. At our final meeting on May 7, one commission member, who served on the last commission, stated that private, closed door communications between commission members and individual members of the Court were an accepted practice in the past. We believe this is inappropriate for commissioners to engage in these practices, and we have asked the other commissioners to disclose any private conversations that have taken place up to this point. We pledge that any communications we have with the Court will be open to the public and in writing.

C. We Respectfully Ask the Court to Clarify the Appointment Process and Stress the Need for a Non-partisan, Neutral Chair Who Will Involve All Parties, Insist on Openness, and Facilitate Compromise

In addition to opening the appointment process up to the public, we respectfully ask the Court to clarify the Court's appointment process for chair at its first meeting and review the criteria and qualifications we established in evaluating our nominees. More clarity in these areas will lead to the appointment of a non-partisan chair who will work collaboratively with both parties and insist on openness throughout the process.

There is a great deal of confusion over the Court's appointment process for the chair of the commission. More specifically, there are questions about how names of potential chairs are brought to the Court. Do members of the public submit names? Does the Court come up with its own list of nominees? Also, what criteria are used to evaluate nominees? Are possible appointees interviewed by the Court? And finally, are members of the public able to provide comments on the Court's short list of nominees if those nominees' names are made public?

In order to apply a consistent standard to all potential commission chairs and to find a person capable of leading the commission down a non-partisan path, the two of us developed five main criteria at the outset of the commission's efforts to find a non-partisan chair. The two of us evaluated all nominees for chair, whether submitted by us or other commission members, using these criteria. The criteria are as follows:

- 1) The Chair should be knowledgeable or prepared to become knowledgeable about the redistricting process;
- 2) The Chair should be respected by people in both political parties;
- 3) The Chair must be ready to facilitate compromise between parties (more 5-0 votes on commission) and act as a mediator when necessary, ensuring that all members of the commission are able to participate;
- 4) The Chair must insist on openness and transparency of the process, most particularly in the formulation of proposed plans, determining the genesis of proposed plans, and disallowing plans that utilize to any degree political data and election results; and
- 5) The Chair can best facilitate compromise if they have a reputation as a non-partisan, neutral person uninvolved in partisan politics; and this would preclude an individual who regularly attends partisan political meetings, donates significantly to candidates of one party, or serves in some capacity in a political party.

We respectfully suggest that adoption of similar criteria in the Court's selection process will help prevent a redistricting cycle like last time (1999-2003) when the chair acted as a partisan, tie-breaking vote on all major votes. In addition, the chair did not insist on openness and transparency of the process since a commission member was able to privately develop a redistricting plan with a heavy reliance on political data and election results.

D. We Respectfully Submit Names to be Considered in the Court's Deliberations for Chair Who Fit the Criteria

Using the five criteria, we nominated five possible non-partisan fifth members for the commission including:

1. Dr. Jeffrey Greene, a professor of political science at the University of Montana;
2. Dr. Jim Lopach, a professor of political science at the University of Montana;
3. Joe Roberts, a former Democratic legislator and attorney who also holds a Masters in Public Administration from Harvard University;
4. Dr. Craig Wilson, a professor of political science at Montana State University – Billings; and
5. Scott Wyckman, a former Justice of the Peace in Bozeman (who later had to withdraw his name).

The Democratic commissioners rejected all of these non-partisan nominees. In fact, the two Democratic commissioners would not agree to anyone other than their one partisan nominee. Additionally they would not submit more than one name nor any non-partisan individuals from which to make a selection.

Although our four nominees, along with Mr. Person, did not garner consensus among commission members, we respectfully submit their names for your consideration as candidates for Chair of the commission. This is a reputable list of professionals, each of whom meet the criteria necessary to serve as chair - especially when it comes to non-partisanship. Neither of the Democratic commissioners expressed substantive objections to these individuals - they simply insisted their one partisan nominee was better qualified.

It would be unfortunate if these five individuals were eliminated from consideration because of the commission being unable to reach consensus. That would, in effect, be penalizing our nominees because we offered more names early in the process, while the other commission members insisted on only one partisan choice. Our nominations, coupled with our motion to accept Mr. Person, demonstrate our desire to find a reasonable, non-partisan chair for the commission, and we respectfully request you take this into consideration.

E. Conclusion

We commend the Court for opening the deliberations and involving the public in the Court's selection of commission chair. We respectfully ask the Court to clarify the appointment process at the first meeting, and we stress the need for a non-partisan, neutral commission chair who will involve all parties, insist on openness, and facilitate compromise.

Redistricting is a process that has been abused by both Republicans and Democrats all around the country. We do not want that for Montana.

We seek no advantage in this process, only a level playing field. If the redistricting process happens as intended by framers of the state constitution, the partisanship that exists in so many other states and in the last Montana commission will not be a factor in Montana. We sincerely hope that Montana can set the example for the rest of the nation when it comes to non-partisan and open redistricting that follows the state constitution's requirements of districts that are nearly equal in population as is practicable, compact and contiguous districts, and protection of minority voting rights.

Thank you for your consideration of our concerns. We sincerely appreciate your service to the state of Montana and we look forward to answering any questions you may have and providing additional comments if possible.

Yours truly,

LINDA VAUGHEY
JON BENNION