

# **WHERE TO DRAW THE LINE: CRITERIA FOR REDISTRICTING IN MONTANA**

Prepared for the Montana Districting and  
Apportionment Commission  
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In the 2000 cycle of redistricting, 42 states were sued, and in more than a dozen, courts either drew or modified district plans.<sup>1</sup> What steps can the 2010 Montana Districting and Apportionment Commission take to make sure Montana is not one of those states in the 2010 cycle? One of the answers to that question lies in the selection of appropriate criteria adopted by the Commission to be utilized in drawing district lines.

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<sup>1</sup> The U.S. Supreme Court has recognized that state courts have a significant role in redistricting and requires federal courts to defer to state courts. *Scott v. Germano*, 381 U.S. 407 (1965). After a federal court has determined that a state redistricting plan violates federal law, it will usually allow the state authorities a reasonable time to conform to state law. *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd* *Bush V. Vera*, 517 U.S. 952 (1996). Once a state court has completed its work, the Full Faith and Credit Act, 28 U.S.C. Section 1738, requires a federal court to give the state court's judgment the same effect as it would have in the state's own court. *Parsons Steel Inc. v. First Ala. Bank*, 474 U.S. 518 (1986). A state's judgment may only be modified by the U.S. Supreme Court on appeal from the state's highest court.

The purpose of this memo is to inform the Montana Districting and Apportionment Commission of the requirements imposed by law for redistricting congressional and

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legislative districts and offer possibilities for potential discretionary criteria for legislative districts.

The Commission should adopt separate sets of criteria for congressional and legislative districts and be especially careful in applying the same mandatory and discretionary criteria to each district. The issue of redistricting is complex in that it involves both federal and state laws and Constitutions. Accordingly, some background information regarding the legal framework surrounding redistricting is essential.

## **BACKGROUND—OR PUTTING THINGS INTO PERSPECTIVE**

Federal courts use two different standards for judging redistricting plans—one for congressional plans and a different one for legislative plans.

### **Criteria for Congressional Plans<sup>2</sup>**

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<sup>2</sup> Based on the 2010 Census, the U.S. population is apportioned among a set number of districts, whose

Montana’s Congressional Redistricting Plan is due 90 days from the receipt of U.S. Census figures in April 2011.<sup>3</sup> The primary criteria for congressional districts is population equality or “one person, one vote,” based upon Article I, Section 2 of the U.S. Constitution. U.S. Supreme Court cases interpret that section to mandate congressional districts that are as nearly equal in population as is practicable,<sup>4</sup> which

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boundaries are then redrawn. The 435 seats in the U.S. House of Representatives are apportioned among the 50 states and if population changes necessitate it, redrawing of the boundary lines of the districts would have to occur until the population of each district was within the accepted range. According to Polidata projections, eight states (primarily in the South and Southwest) are positioned to gain one or more seats in the remapping necessitated by the 2010 Census and 10 states (generally the Northeast and Industrial Midwest) are slated to lose a seat or more. It does not appear that there will be any congressional district changes in Montana as the population of the state has not grown to the extent that we would receive a second congressional seat. Accordingly, this section on criteria for congressional plans will likely not come into play during the 2010 redistricting cycle for Montana. However, the concepts surrounding it are important ones to be aware of.

<sup>3</sup> During that 90 days, the Commission must hold a public hearing on the congressional district plan and send a letter to the Montana Secretary of State, upon notification from the Clerk of the House of Representatives of the United States, that the State of Montana comprises one congressional district and is entitled to one representative in the U.S. House.

<sup>4</sup> “Practicable” is defined by Random House Unabridged Dictionary of English Language, 2<sup>nd</sup> ed.,

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means that the populations must be as mathematically equal as is possible.<sup>5</sup> This requirement is a much stricter test than the federal equal protection clause population equality test for legislative districts which will be discussed later.

The standard for judging congressional plans is that of strict equality. In 1983, in *Karcher v. Daggett*,<sup>6</sup> the U.S. Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range of less than 1%. The plaintiffs showed that at least one other plan before the legislature had an overall range less than the plan enacted by the legislature, thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population.

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as “that which is capable of being done.” It is not the same as “practical” which is defined as “adapted or designed for actual use.” Something may be practicable, but not practical, making practicable a more stringent standard.

<sup>5</sup> *Karcher v. Daggett*, 462 U.S. 725 (1983).

<sup>6</sup> 462 U.S. 725 (1983).

However, if the deviation is necessary to achieve “some legitimate state objective” the congressional redistricting plan could be saved by showing that each significant deviation from the ideal was necessary to achieve “some legitimate state objective.”<sup>7</sup> Objectives should be articulated in advance, be followed consistently, and it should be shown that the objectives in each district could not have been achieved with districts that had a smaller deviation from the ideal.<sup>8</sup>

### **Criteria for Legislative District Plans Generally**

As we’ve seen, while the standard for congressional redistricting plans, based on Article I, Section 2 of the U.S. Constitution, is quite strict, the U.S. Supreme Court has adopted a less exacting standard for legislative plans,<sup>9</sup> premised on the Equal

Protection Clause of the 14<sup>th</sup> Amendment.<sup>10</sup> Based on the federally recognized standard, legislative plans should aim for an overall population deviation range of less than 10% from the ideal population.<sup>11</sup> Historically, an overall population range of 10% was considered to constitute a “substantial equality of population.”<sup>12</sup> However, the Commission should know that more recently, an overall range of 10% was ruled to not be a safe harbor. In *Larios v. Cox*,<sup>13</sup> the court struck down the districts as a violation of the equal protection clause even though they were within the 10%

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<sup>7</sup> Karcher at 740. Any number of consistently applied legislative policies might justify some variance including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives.

<sup>8</sup> *Turner v. Arkansas*, 784 F. Supp. 585 (E.D. Ark. 1991).

<sup>9</sup> Article V, Section 14(1) of the Montana Constitution provides that Montana 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 comprised of two adjoining house districts and shall elect one senator.

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<sup>10</sup> 14<sup>th</sup> Amendment of the U.S. Constitution. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>11</sup> Meaning that the population deviation range between the largest and smallest districts (from ideal district population) in the plan should not exceed 10%. The ideal district population is equal to the total state population divided by the total number of districts. In the 2000 redistricting cycle, the total population of Montana was 902,195 with the ideal population of a legislative house district standing at 9,022. If a district had a larger population than 9,022, it had a plus deviation. Less than 9,022, a minus deviation.

<sup>12</sup> *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thompson*, 462 U.S. 835 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).

<sup>13</sup> 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (2004).

range, because the plans tended to ignore traditional districting principles such as keeping districts compact, keeping counties whole, etc.

But, on the other hand, if deviation is necessary to achieve some “rational state policy” a deviation of even more than 10% can be legitimate. The U.S. Supreme Court in *Reynolds v. Sims*<sup>14</sup> had anticipated that some deviations from population equality in legislative plans had to be justified if they were based on legitimate considerations incident to the effectuation of a rational state policy. To this point, the only “rational state policy” that has served to justify an overall range of more than 10% in a legislative plan has been respecting the boundaries of political subdivisions. And

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*McBride v. Mahoney*

that has happened in only three cases.<sup>15</sup>

There is an important Montana case addressing deviations of more than 10% in legislative plans. In *McBride v. Mahoney*,<sup>16</sup> involving the 1983 legislative redistricting plan, the population deviation between the largest and smallest House districts was 10.94% and between the largest and smallest Senate districts was 10.18%, which created a prima facie case of discrimination because the totals exceeded 10%. To be upheld, the deviations must be justified by legitimate state objectives. The federal district court determined that legitimate state objectives were stated in criteria established by the Reapportionment Commission. The criteria addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal population. The court held that these criteria were considerations and that conflicts between them as they existed within a district or between districts must be balanced in arriving at a plan embracing the entire state. The Commission interprets its own criteria, such as what constitutes a community of interest and the possible ripple effects of any particular change; thus

<sup>14</sup> 377 U.S. 533 (1964).

<sup>15</sup> *Mahan v. Howell*, 410 U.S. 315 (1973); *Brown v. Thompson*, 462 U.S. 835 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).

<sup>16</sup> 573 F. Supp. 913 (D.C. Mont. 1983).

when the Commission made a good faith effort to balance the criteria, the reapportionment plan could not be struck down on the contention that it failed to exactly follow its own criteria.

In summary, the criteria for drawing congressional districts is as equal as practicable, while the standard for drawing legislative districts has traditionally been plus or minus 10% population deviation range from the ideal population. With regard to legislative districts, in light of ever more increasingly sophisticated mapping capabilities, it may be wise for the Commission to aim for an even lower population deviation to the extent possible, respecting or balancing the other criteria adopted by the Commission.

### **APPEARANCE OF DISCRIMINATION CAN BE FATAL TO ANY PLAN**

When drawing district lines, one of the most important principles to keep in mind is not to discriminate against racial or language minorities. Any attempts to do so will be subject to strict scrutiny and the plan potentially thrown out by the courts. What are the recognized standards for racial or minority discrimination in districting?

### **Section 2 of the Voting Rights Act**

Section 2 of the Voting Rights Act of 1965, codified at 42 U.S.C. Section 1973, provides there shall be no denial of the right to vote on account of race or color and has been

used to attack reapportionment and redistricting plans on the grounds they discriminated against Blacks, Hispanics, or American Indians and abridged their right to vote by diluting the voting strength of their population in the state.<sup>17</sup> Section 2 is an issue of importance in Montana because of our Native American population.

In a Montana Section 2 case, *Old Person v. Brown*,<sup>18</sup> the plaintiffs<sup>19</sup> contended that the 1992 redistricting plan for the Montana House of Representatives and Senate diluted the voting strength of American Indians in violation of Section 2 of the

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<sup>17</sup> All jurisdictions, including Montana, come under section 2 of the Voting Rights Act. There are two categories of counties in Montana with regard to the Voting Rights Act.

1. Counties that have been involved with Voting Rights Act litigation: Big Horn, Rosebud, Roosevelt, and Blaine Counties. Any county that has significant minority populations that are geographically compact will affect district creation.
2. All other counties: All counties are still subject to the Voting Rights Act, but may be without significant minority populations that are geographically compact and sufficient in number to affect district creation. The numbers should be reviewed each census to make this determination.

<sup>18</sup> 312 F3d 1036 (2002) (Pl. Petition for Cert. denied by U.S. Supreme Court, Nov. 17, 2003).

<sup>19</sup> The plaintiffs were four Native Americans: Earl Old Person, Carol Juneau, Joe MacDonald, and Jeannine Padilla.

Voting Rights Act of 1965. The plaintiffs also alleged that the redistricting plan was adopted with a discriminatory purpose in violation of Section 2. The federal district court dismissed the claim, holding that the totality of the circumstances did not establish vote dilution in the American Indians' districts. On appeal, the 9<sup>th</sup> Circuit court affirmed. Nothing in the record showed that the district court's conclusion about racial polarization was clearly erroneous, as the American Indians presented no new evidence concerning their socio-economic status in Montana, and the court had previously upheld the district court's finding that American Indians had a lower socio-economic status than whites in Montana. Even though the court found that the district court erred by limiting the frame of reference for proportionality to the legislative districts where the American Indians resided and by considering the number of Indian-preferred candidates who had been elected, the court held that given the totality of the circumstances, its determination that there was no vote dilution was not clearly erroneous. There was an absence of discriminatory voting practices, a viable policy underlying the existing district boundaries, and Native Americans had been successful in elections. The judgment dismissing the American Indians' vote dilution claim against the state officials was affirmed.

## **What Do Courts Rely On In Determining Whether There Has Been A Violation Of Section 2?**

Before examining the totality of circumstances to determine the presence of discrimination in a Section 2 case, one must first look to a well-known U.S. Supreme Court case, *Thornburg v. Gingles*,<sup>20</sup> which established three preconditions [known as the Gingles preconditions] that a plaintiff must meet before a court will proceed to a detailed analysis of the redistricting plan for discrimination examination purposes. Those preconditions are: 1) that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) that it is politically cohesive; and 3) that, in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate. Once these three preconditions are satisfied, a court must look at a number of other factors in determining the totality of the circumstances surrounding an alleged violation of Section 2. These other factors include such things as the extent of the history of official discrimination, denial of access to the candidate slating process, and the extent to which members of the protected class have been elected.<sup>21</sup>

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<sup>20</sup> 478 U.S. 30 (1986).

<sup>21</sup> 478 U.S. at 36-37.

A violation of Section 2 is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election are not equally open to participation by members of a class of citizens protected by Section 2 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. However, that right is not absolute. Nothing in Section 2 establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Similarly, in *Bush v. Vera*,<sup>22</sup> the Court pointed out that, if the minority population is not sufficiently compact to draw a compact district, there is no violation of Section 2; if the minority population is sufficiently compact to draw a compact district, nothing in Section 2 requires the creation of a race-based district that is far from compact. The Court reached a similar conclusion in a more recent case, *League of*

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*United Latin American Citizens (LULAC) v. Perry*.<sup>23</sup>

Even more recently, in *Bartlett v. Strickland*,<sup>24</sup> the U.S. Supreme Court reached the conclusion that Section 2 does not require the creation of a district that a minority population has a fair chance to win unless the minority will constitute a majority of the voting age population<sup>25</sup> in the district.

Next we'll discuss the non-discrimination companion to Section 2 of the Voting Rights Act--Section 5 of the Voting Rights Act.

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<sup>23</sup> 548 U.S. 399 (2006). The Court said that for the Hispanic minority in the case before the court, citizen age voting population was the proper measure for a district under Section 2. The Court also said that the compactness precondition of Gingles refers not just to geographical compactness of the district, but also to compactness of the minority group.

<sup>24</sup> 129 S. Ct. 1231 (2009). The Justices voted 5-4 in setting a more than 50% threshold of the voting age population for Section 2 minority districts.

<sup>25</sup> There is some uncertainty as to the "correct" count to use in determining population for purposes of a Section 2 challenge. Should it be voting age population or citizen voting age population as set forth in LULAC? The U.S. Supreme Court has long held that other than for a state's congressional districts, population deviations between voting districts cannot be greater than 10%. However, the Court has not definitely stated what is the relevant "population" to be counted for purposes of that population deviation determination, whether it's voting age or citizen voting age.

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<sup>22</sup> 517 U.S. 952 (1996).



## Section 5 of the Voting Rights Act

When the Voting Rights Act was adopted in 1965, Section 5<sup>26</sup> was considered one of the primary enforcement mechanisms to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination. The intent of Section 5 was to prevent states that had a history of racially discriminatory practices from developing new ways to effectively disenfranchise minority voters.<sup>27</sup> Sixteen states, either wholly or partially,<sup>28</sup> are required by Section 5 to obtain approval of any change in election law by either the U.S. Department of Justice or the federal district court in Washington, D.C. That process can take up to four months. Montana is not one of the states subject to Section 5.

There has been some debate on whether there is still a need for Section 5. That debate remains open even though the issue

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<sup>26</sup> Pub. L. No. 89-110, sec. 5, 79 Stat. 437, 439 (1965), codified at 42 U.S.C. Section 1973c (2006).

<sup>27</sup> In 2006 Congress extended Section 5, a temporary section, so that it would cover all redistricting cycles through 2031. Pub. L. No. 109-246, sec. 4, 120 Stat. 577, 580 (2006).

<sup>28</sup> Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; most of Virginia; counties and townships in California, Florida, Michigan, New Hampshire, North Carolina, and South Dakota; and three New York City boroughs, Manhattan, Brooklyn, and the Bronx.

recently became before the U.S. Supreme Court. In a closely watched Section 5 case decided just this last April, Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Eric Holder,<sup>29</sup> the Supreme Court chose not to address the constitutionality of Section 5, ruling instead on narrow statutory grounds, that the utility district in Austin, TX, that had challenged the constitutionality of Section 5, might be eligible to “bail out” from being covered by it. The law limits the kinds of jurisdictions that can seek bailouts to states and their political subdivisions, which are defined in the law to mean counties, parishes, and units of government that register voters. Although the utility district did not meet any of these definitions, the Supreme Court said it might still be eligible to seek a bailout. What remains to be seen is whether other jurisdictions will now take advantage of the opening this opinion provides to try to opt out from coverage under Section 5.

In summary, although the Commission needs to be very aware of the non-discriminatory requirements of Section 2

One must be careful to consider race as simply another districting principle, giving it the same weight as the other criteria. Never make race your dominant motive.

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<sup>29</sup> 129 S. Ct. 1695 (2009).



and Section 5, this does not mean that race cannot be considered as one of the factors in redistricting. In redistricting, one is always aware of race when drawing district lines, just as one is aware of age, economic status, and a variety of other demographic factors. The district lines may be drawn, for example, to maintain communities of interest or the integrity of political subdivisions. One must be careful to consider race as simply another districting principle, giving it the same weight as the other criteria. Never make race your dominant motive.

That being said, the Commission must be diligent with regard to consideration of race in redistricting, being especially careful to avoid drawing racial gerrymanders<sup>30</sup> or creating bizarre shapes,<sup>31</sup> focusing instead on drawing districts that are reasonably compact and that follow traditional districting principles. Focus on the effect of the redistricting, not the intent.

Now, with that background redistricting legal framework in place, let's look at redistricting in Montana specifically.

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<sup>30</sup> The process of drawing districts with odd shapes to create an unfair advantage is called "gerrymandering."

<sup>31</sup> Reapportionment is one area in which appearances do matter. *Shaw v. Reno*, 509 U.S. 630 (1993).

#### TRADITIONAL DISTRICTING PRINCIPLES

Since 1993, seven policies have been judicially recognized as "traditional districting principles."

1. Compactness,<sup>1</sup>
2. Contiguity,<sup>2</sup>
3. Preservation of counties and other political subdivisions,<sup>3</sup>
4. Preservation of communities of interest,<sup>4</sup>
5. Preservation of cores of prior districts,<sup>5</sup>
6. Protection of incumbents,<sup>6</sup> and
7. Compliance with Section 2 of the Voting Rights Act.<sup>7</sup>

<sup>1</sup> *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Bush v. Vera*, 517 U.S. 952 (1996).

<sup>2</sup> *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

<sup>3</sup> *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Abrams v. Johnson*, 521 U.S. 74 (1997).

<sup>4</sup> *Miller v. Johnson*, 515 U.S. 900 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997).

<sup>5</sup> *Abrams v. Johnson*, 521 U.S. 74 (1997).

<sup>6</sup> *Abrams v. Johnson*, 521 U.S. 74 (1997).

<sup>7</sup> *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996).

#### **DECIDING UPON REDISTRICTING CRITERIA FOR MONTANA**

##### **Authority for the Redistricting Process**

In Montana, direction for redistricting comes from the Montana Constitution and perhaps<sup>32</sup> statute:

1. Article V, Section 14 of the Montana Constitution.  
Districting and apportionment. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

and

2. Section 5-1-115, MCA.  
Redistricting Criteria.  
(1) Subject to federal law, legislative and congressional districts must be established on the basis of population.  
(2) In the development of legislative districts, a plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:  
(a) The districts must be as equal as practicable, meaning to the greatest extent possible,

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<sup>32</sup> There is a redistricting statute in the MCA, Section 5-1-115, MCA, which was passed in 2003. However, there is a question as to whether the legislature has the authority under the Montana Constitution to pass any laws relating to redistricting as under the Montana Constitution the power of redistricting was given to the Districting Commission, not the legislature. *Wheat v. Brown*, 85 P.3d 765 (2004). See later discussion for more detail.

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. The relative deviation may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act.  
(b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.  
(c) The districts must be contiguous, meaning that the district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that prevent transportation within a district may not be considered contiguous.  
(d) The districts must be compact, meaning that 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.

(3) A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress. The following data or information may not be considered in the development of a plan:

- (a) addresses of incumbent legislators or members of congress;
- (b) political affiliations of registered voters;
- (c) partisan political voter lists; or
- (d) previous election results, unless required as a remedy by a court.

### **Past Precedence: Mandatory Criteria For Legislative Districts In Montana**<sup>33</sup>

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<sup>33</sup> 1974 Mandatory Districting Criteria: “Substantial equality” of population/one person, one vote. 1980 Mandatory Districting Criteria: Population equality, established as an overall relative range of plus or minus 5% from ideal average district population; compactness; contiguity. 1990 Mandatory Districting Criteria: Compactness and contiguity; population equality; maximum population deviation – relative

Both mandatory and discretionary redistricting criteria in Montana have historically been based on federal caselaw, traditional redistricting principles, and the Montana Constitution.

In 2000 the Districting Commission chose as its mandatory criteria:

- Population equality and maximum population deviation of no more than plus or minus 5%.
- Compact and contiguous districts.
- Protection of minority voting rights and compliance with the Voting Rights Act.
- Race cannot be the predominant factor to which the traditional discretionary criteria are subordinated.

All of the mandatory criteria for 2000 are still mandatory in 2010 based on the U.S. Constitution, the Montana Constitution, and case law and are necessary mandatory criteria for the 2010 redistricting cycle.

Article V, Section 14(1) of the Montana Constitution provides that “All [legislative] districts shall be as nearly equal in population as is practicable.” Under the Equal Protection Clause of the 14<sup>th</sup>

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population deviation from ideal population for an individual district may not exceed plus or minus 5%; final results of the 1990 census must be used to form plan; protection of minority rights, compliance with Section 2 of the Voting Rights Act.

Amendment, state legislative districts must adhere to the one person, one vote principle of equality. The test, based on years of federal court case holdings 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.

Article V, Section 14(1) of the Montana Constitution also establishes the mandatory principle of compact, contiguous districts. Compactness is largely determined by looking at the district and using a general appearance test.<sup>34</sup> Compactness also takes into account such things as ease of travel and communication within a district, or what is called functional compactness. Contiguity means the district must be all in one piece—or one continuous mass. 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. Each individual district should be examined for compactness as well as the total plan.

Another 2000 mandatory criteria that should likely be articulated in 2010 is that

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<sup>34</sup> This is generally referred to as geographic compactness or what is the shape of the district in question. There is also the issue of racial compactness within a district. There may be one without the other.

race cannot be the predominant factor to which the traditional discretionary criteria are subordinated.<sup>35</sup> This does not mean that the Commission cannot intentionally create a district in which Native Americans 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 in drawing the district lines. Court have 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 thus race must be taken into account when drawing

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.”

*Shaw v. Reno*

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<sup>35</sup> 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. In addition, both Section 2 of the Federal Voting Rights Act of 1965 and the Equal Protection Clause of the 14<sup>th</sup> Amendment prohibit the drawing of district lines in a manner that dilutes the vote of a citizen on the basis of race or color. This applies to Native Americans in Montana.

district lines. For each district created by the Commission in which Native Americans are a majority, it is crucial that the Commission establish a record showing that the criteria were considered and followed with respect to the district.

### **Past Precedence: Discretionary Criteria For Legislative Districts In Montana<sup>36</sup>**

Here is the area where the Commission may have a bit more leeway in determining how the 2010 legislative districts will be drawn, as discretionary criteria are not mandated by the federal or state constitution or any other law. There are two basic purposes for

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<sup>36</sup> 1974 Discretionary Districting Criteria: Keeping counties intact; maintaining communities of interest; considering on a case-by-case basis the following factors-geography, trade areas, county lines, minorities, economic interest, rural-urban interests, district homogeneity. 1980 Discretionary Districting Criteria: Consideration of existing governmental lines; respect for geographic boundaries, especially the Continental Divide and the Missouri River; consideration to existing legislative district boundaries, when practical; Senate district boundaries to follow congressional district division when possible; consider communities of interest and defined communities of interest. 1990 Discretionary Districting Criteria: Consideration to local government boundaries; consideration when practical to existing voter precinct lines; consideration when practical to school district lines; preserve communities of interest when possible; respect geographical boundaries to the extent possible; consideration to existing districts when practical; political fairness-districts may not be drawn for the purpose of favoring a political party or defeating an incumbent legislator.

selection of discretionary criteria: 1. Deciding where lines should be drawn; and 2. Defending a district's lines, population, or characteristics of its residents in possible future legal proceedings.

In 2000 the Districting Commission chose as its discretionary criteria:

- Following the lines of political units.
- Following geographic boundaries.
- Keeping communities of interest intact.

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. Districts can be drawn along geographic boundaries, such as mountain divides and ridge lines, rivers and creeks, and highways and roads.

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

All of the above discretionary criteria from 2000 could be selected by the 2010 Districting Commission as discretionary criteria and have been recognized as

There are two basic purposes for selection of discretionary criteria: 1. Deciding where lines should be drawn; and 2. Defending a district's lines, population, or characteristics of its residents in possible future legal proceedings.

legitimate discretionary criteria in *McBride v. Mahoney*<sup>37</sup> mentioned earlier.

In addition, the 1990 Redistricting Commission adopted a discretionary criteria of political fairness which stated that a district may not be drawn for the purpose of favoring a political party or to protect or defeat an incumbent legislature. This concept mirrors the language in current Section 5-1-115 (3), MCA, and may be a criteria the Commission wishes to consider.

Something else for the Commission to consider is whether it wishes to preserve the lines of existing legislative districts as a starting point for the 2010 redistricting cycle.<sup>38</sup> Existing districts may provide a starting point from which to determine any variation in population from the ideal population and its compliance with the criteria for equal population within a certain deviation, keeping in mind that an existing

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<sup>37</sup> 573 F. Supp. 913 (D.C. Mont. 1983).

<sup>38</sup> Continuity of existing district boundaries will likely be appealing to those involved in the election process as they would not have to deal with district line changes that in turn affect precinct lines, which must then be changed under Section 13-3-102, MCA.

district may no longer comply with some of the redistricting criteria because of new population data. The Commission will also need to decide where in the state it wishes to start the redistricting process.<sup>39</sup>

### **What Should The Commission Adopt As The Appropriate Population Deviation Ratio?**

One of the more thought-provoking decisions for the Commission in the 2010 redistricting cycle is what should it choose for its mandatory criteria as the appropriate population deviation standard for drawing legislative districts in Montana. Selection and implementation of the standard for deviation from the ideal district population is a critical element in withstanding legal challenges to the districting plan. The Commission has several options: "as nearly as practicable"<sup>40</sup> as stated in the Montana Constitution; 1% contained in Section 5-1-115, MCA; 5% as the past three

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<sup>39</sup> The 2000 Districting Commission began redistricting in Glacier County, and adjacent Flathead and Lake Counties as necessary, and proceeded in a clockwise motion throughout the state. The Commission proceeded along the Hi-Line to eastern Montana, then west through southcentral Montana, finishing up in the western third of the state.

<sup>40</sup> Should the Commission choose this standard, some sort of number percentage would likely need to be adopted within the definition of "as nearly as practicable" so as to have a baseline measurement from which to draw redistricting lines.

Commissions have chosen,<sup>41</sup> or something in between. Any of these deviation standards are possible. We've discussed the first two options a bit already so let's talk about that 1% population deviation standard from the ideal population imposed by Section 5-1-115, MCA.

The 2003 Montana Legislature passed HB 309 which was codified at Section 5-1-115, MCA. There was an attempt in 2009<sup>42</sup> to insert language in the Montana Constitution that would have mirrored the 1% deviation language in Section 5-1-115, MCA. That attempt failed.

Although Section 5-1-115, MCA, is arguably not binding on the Commission (see later discussion), the Commission could decide to adhere to the 1% population deviation from the ideal population contained in Section 5-1-115, MCA and to the specific criteria described in that statute. Drawing districts with a 1% deviation is certainly technically possible. And the statute does say that the 1% population deviation can be exceeded to keep political subdivisions intact or to comply with the Voting Rights Act, so there is some discretion included within the statutory language. However, the Commission should keep in mind several

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<sup>41</sup> Plus or minus five percent from the ideal district population was chosen as the mandatory population deviation in the last three redistricting cycles: 1980, 1990, and 2000.

<sup>42</sup> SB 187 (2009) which died in House State Administration.

factors involved with adopting a 1% population deviation factor. A 1% deviation is a very exacting standard and may present a number of areas for Commission consideration in actual practice. Adopting a 1% population deviation as a mandatory criteria would, by the very nature of its exactness, make this criteria the most "weighty," subjecting the other criteria to it.<sup>43</sup> This 1% standard would leave less room for deviation when considering factors such as communities of interest and Montana's varied geography. For example, when putting together a district in Eastern Montana, finding another 100 people to bring the deviation to 1% could mean a large district gets much larger. Or, it may mean slicing off a few blocks of the outer edge of Miles City. Accordingly, you would have some residents of Miles City belonging to a very rural district. Another example: a city or county has 120 people more (or fewer) than the ideal district size. You would need to split a county or city to keep it within 1%. If you had a larger deviation to work with, you might keep that city or county whole. From a technical standpoint, it is certainly possible to draw districts with a 1% population deviation. But it seems likely that adherence to such a deviation would affect other redistricting criteria considered traditional including contiguous and compact districts.

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<sup>43</sup> This is in keeping with the wording of Section 5-1-115, MCA, which contains the words "in order of importance" before listing the 1% population deviation as the first criteria.



The Commission should also be aware that should it opt to go with a population deviation other than the 1% specified in Section 5-1-115, MCA, there are several arguments supporting that choice.

The 1% population deviation requirement in Section 5-1-115, MCA, may be unconstitutional. As we all know, the Montana Constitution trumps statute and the Constitution articulates the line drawing standard should be as “nearly in population as practicable.” Can “practicable” be defined as 1%? Perhaps, perhaps not.

Case law also supports the notion that the Commission may choose a population deviation standard other than the statutory 1%. In 2003, the Montana Legislature passed Section 5-1-116, MCA, granting to itself the power to assign holdover senators to districts for the remainder of their terms and prohibiting the Districting Commission from making those assignments. In *Wheat v. Brown*,<sup>44</sup> three of the holdover senators challenged the legislative assignments. The district court declared Section 5-1-116, MCA, and the implementing language unconstitutional and the Montana Supreme Court affirmed. Thus, the 2003 legislation designed to transfer the power to assign holdover senators from the Commission to the legislature was unconstitutional and of no force and effect.

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<sup>44</sup> 2004 MT 33, 320 M. 15, 85 P.3d 765 (2004).

“The constitutional grant of redistricting power to the Commission constitutes a denial of any latitude to the legislature to invoke its plenary powers.”

*Wheat v. Brown*

Similarly, in *Brown v. Commission*,<sup>45</sup> on Feb. 5, 2003, Bob Brown, Montana Secretary of State, refused to accept the 2003 final redistricting plan based on HB 309, which had been signed into law on Feb. 4, 2003. HB 309 contained the plus or minus 1% deviation language now codified in Section 5-1-115, MCA, and the plan had been drawn using a plus or minus 5% deviation. Judge McCarter, First Judicial District, ruled that HB 309 impermissibly conflicted with Article V, Section 14, of the Montana Constitution<sup>46</sup> and was void on that basis. She stated that 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<sup>47</sup> 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

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<sup>45</sup> Cause No. ADV 2003-72, 2003 ML 1896 (1st Jud. Dis., July 2, 2003).

<sup>46</sup> Establishing the Districting and Apportionment Commission authority for redistricting in Montana.

<sup>47</sup> Governing elections.

the Commission’s plan and his refusal to do so was a violation of the Montana Constitution.

Several Montana Attorney General Opinions also serve to illustrate that the Districting Commission has the power regarding redistricting processes, and not the legislature. “The constitution and statutes provide no authority for changing Senators’ terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission which has the inherent authority under Article V, Section 14 of the Montana Constitution to do what is necessary to implement a plan that complies with the state’s laws. How to deal with holdover Senators is the responsibility of the Commission.”<sup>48</sup> In 35 A.G. Op. 12 (1973), it was determined that prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature via Article VI,

“With the adoption of the new constitution, the people of the state divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation in Article V, Section 14, 1972 Montana Constitution.”

*35 A.G. Op. 12 (1973)*

1889 Montana Constitution. However, with the adoption of the new constitution, the people of the state divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation in Article V, Section 14, 1972 Montana Constitution. Another opinion that same year provided that “the Commission to Redistrict and Reapportion has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Article V of the Montana Constitution.”<sup>49</sup>

So, as you can see, the 1% population deviation in statute does present some possible issues should the Commission select that as its population deviation standard. Accordingly, the Commission may wish to consider a bill draft repealing the 1% language from 5-1-115, MCA, to prevent these sorts of confusion and conflicts in the future. Or the Commission may decide to follow the 1% statutory deviation, in which case there is not an issue.

Regardless of which population deviation standard the Commission chooses, “as nearly practicable as possible,” 5%, 1%, or something in between, the Commission should pick a population deviation standard as one of its mandatory criteria and take care to adhere to that standard in the

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<sup>48</sup> 40 A.G. Op. 2 (1983).

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<sup>49</sup> 35 A.G. Op. 12 (1973).

drawing of lines for each district. The Commission may be wise to pick a population deviation standard somewhere in between 5% and 1%, such as 3%, which would be looked at in conjunction with other mandatory and discretionary criteria. The Commission should also keep in mind that this issue of population deviation from the ideal district is one that will likely be addressed in the public comments received during the hearings in April and the Commission may get valuable input from that process regarding this decision.

## WRAPPING UP

The Montana Districting and Apportionment Commission should adopt mandatory criteria for redistricting congressional and legislative districts at a public hearing held prior to the time that the Commission begins the process of creating congressional or legislative districts. Throughout April 2010 the Commission will be seeking public comment on discretionary criteria and by next fall, the Commission should adopt the criteria it believes most appropriate for Montana. The mandatory criteria should be strictly applied. The discretionary criteria should be applied in a consistent manner in each district to the extent that they can be applied.

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 preserved carefully documented record clearly stating the grounds for the Commission's decisions with regard to each legislative district is essential for, among other things, historical research into the proceedings of the Commission and successfully defending against inevitable lawsuits (see introductory paragraph).

All discretionary criteria may not always be followed exactly, since sometimes the criteria may be 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*.

The U.S. and Montana Constitutions and case law provide the foundation for criteria the Commission should adopt to guide redistricting and the criteria adopted should reflect the traditional redistricting principles recognized nationally. It is a complex balancing act that you, as Commissioners, must perform in applying the criteria consistently throughout the state. Good luck!

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