

**THE POSSIBILITY OF AN ACCELERATED REDISTRICTING FOR THE  
2000 ROUND**

Prepared for the Districting and Apportionment Commission  
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Montana being one of the last states to have the legislative reapportionment plan become law has piqued interest in whether the legislative redistricting could be accelerated so that the new districts could be in effect for the 2002 election cycle instead of the 2004 election cycle. Under the assumption that the filing and primary dates will be those that are in effect today (as opposed to changing Montana law to allow Montana's participation in the proposed western states primary), this report will outline some of the issues involved in accelerating legislative redistricting.

The current provisions for the Districting and Apportionment Commission were created by the 1972 Constitutional Convention. The new Montana Constitution was approved by the electorate on June 6, 1972, which provided an accelerated effective date of January 1, 1973, for the proposed sections on annual legislative sessions and reapportionment. The effective date allowed the first Districting and Apportionment Commission to be appointed by the 1973 Legislature and to report its plan to the 1974 Legislature.

*The purpose of this report is to explore the possibility of the Districting and Apportionment Commission accelerating the fulfillment of its responsibilities in order that the legislative districts could be in effect in time for the 2002 elections. Background information, statutory provisions, and current issues are discussed in this paper to provide information on whether an accelerated schedule is possible or advisable for the 2000 round .*

The transcripts of the 1972 Constitutional Convention reveal little about the intent of the delegates regarding the timing of redistricting, especially in regard to any effect of biennial sessions. In reference to concern that a redistricting would have to be accomplished following ratification of the constitution, a three-year redistricting with something other than annual sessions was briefly referenced with some disdain (Trans. 690). A reference to submission of a redistricting plan to the Legislature by the 10th legislative day was included in an unsuccessful proposal but did not find its way into the adopted constitutional proposal (Trans. 693). The 10th legislative day submittal was subsequently enacted into statute. In discussion of the methods and characteristics regarding the appointment of a commission, a delegate referenced that he expected that when the census figures became available, the Commission "would then submit to the legislature immediately a plan" (Trans. 722). No other mention is made indicating when a plan would be submitted to the Legislature.

The 1973 Legislature enacted the first statutes regarding redistricting (Ch. 21) to guide the appointment and work of the first Commission. The legislative history holds no information as to the intent for timing of redistricting other than the statutes themselves. The Commission was appointed and began its work in 1973.

The first districting and apportionment plan under the new commission form was filed with the Secretary of State and became law on February 27, 1974, which in turn triggered the effective date of the sections of the constitution on the size of the Legislature and the election and terms of the legislators for the 1974 election cycle. The terms of all legislators ended on December 31, 1974, and the senators first elected under the new constitution drew lots to establish terms of 2 years for one-half of the senators in order to initiate staggered terms.

An amendment to the constitution was proposed by initiative petition that provided that the Legislature "shall meet each odd-numbered year" and that the biennial sessions be lengthened to 90 days. It was adopted at the general election of November 5, 1974, and became effective December 31, 1974. The

amendment resulted in biennial sessions, rather than the annual sessions anticipated by the Constitutional Convention delegates. No transition schedule or new provisions for future redistricting were made.

Article V, section 14 (4), of the Montana Constitution provides, "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." The intent of this provision and contemplation of an accelerated scenario in the 1980 round resulted in a request for an Attorney General opinion by Gene Mahoney, chairman of the 1980 Districting and Apportionment Commission. Mahoney requested an opinion as to whether the Legislature could recess and reconvene at a later time to receive and make recommendations on the Commission's plan. Citing Article V, sections 6 and 10(5) of the Montana Constitution, the Attorney General opined that "the Legislature may recess, with consent of both houses, and reconvene at any time within the odd-numbered year. If the session does not meet in excess of ninety days, it would still be considered to be a regular session. As long as the commission submits the plan to the Legislature in regular session, the provision of the Constitution will be satisfied." (38 A.G. Op. 99 (1980)).

Attorney General Greely determined that the Districting and Apportionment Commission was required to submit its plan to the 47th Legislature (1981) if census data was available in December 1980. Census data became available in March 1981, and the Commission planned to present its plan to the 1983 Legislature.<sup>1</sup> This proposed schedule prompted the Attorney General to bring suit against the Commission to cause redistricting to be accomplished in 1981. In the Greely decision, the court held that the Commission was required to submit its plan to the first regular session of the Legislature following the Commission's appointment or to the first regular session of the Legislature following the availability of census figures, whichever session came later. In the specific instance, the Commission was required to submit its plan to the 48th Legislature (1983), meeting in a regular session.

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<sup>1</sup>Brief of the 47th Legislature, State ex rel. Greely v. Montana Districting and Apportionment Commission, No. 46873, First Judicial District (August 1981).

In addition, in the decision, the plan was viewed as a single plan composed of both the congressional and legislative redistricting. The combined result of the change to biennial sessions and the single plan decision was that the new congressional and legislative districts were not available for election purposes until 1984 and the new representatives would take office in 1985.

Because of this delay, the 1980 Commission recommended a constitutional amendment to provide that the congressional districts be redistricted within 90 days of receipt of the official decennial census figures. The reasons given for the acceleration were that congressional redistricting was a simpler task in which fewer boundaries needed to be adjusted and the strict population guidelines reduced the influence of other criteria in developing the districts. The Commission recommended not to alter the timeframe for legislative redistricting. The 1980 Commission submitted its congressional and legislative redistricting plan to the 1983 Legislature and to the Secretary of State on March 4, 1983. The constitutional amendment providing for separate congressional and legislative plans with an accelerated schedule for the congressional plan was approved at the general election on November 6, 1984, and became effective October 1, 1985.

The 1980 Commission may not have foreseen the eventuality of the loss of Montana's second congressional seat in the apportionment that followed the 1990 census. But, as a single congressional seat requires no redistricting (and although a legal challenge to the method of apportionment was brought and lost by the state), the constitutional amendment fortuitously allowed the single-seat congressional redistricting plan to be filed with the Secretary of State on April 10, 1991. The election in 1992 of our single representative was implemented. As a corollary, should Montana be reapportioned a second seat, it would be able to be filled as a new district for the 2002 election.

The only statutory changes that have been made since the ratification of the constitution and its subsequent amendments that affect the scheduling of redistricting were in 1983, upon the adoption of

the 1983 constitutional amendment to allow separate plans for the congressional and legislative redistricting plans. The current statutory provisions that affect the accelerated schedule are as follows:

5-1-106, MCA, The Legislative Services Division shall provide technical staff and clerical services.

5-1-108, MCA, The Commission shall hold one public hearing on the congressional redistricting plan and one public hearing at the State Capitol on the legislative redistricting plan.

5-1-109, MCA, The Commission shall submit the legislative redistricting plan to the Legislature by the 10th legislative day of the first regular session after its appointment or after the census figures are available.

5-1-110, MCA, The Legislature shall return the plan to the Commission with its recommendations within 30 days of submission.

5-1-111, MCA, The Commission shall submit the final plan for congressional redistricting within 90 days after the official final decennial census figures are available. Within 30 days of receiving the legislative redistricting plan and the Legislature's recommendations, the Commission shall file the plan, and it becomes law.

13-3-102(1), MCA, The county governing body may change precinct boundaries to conform to the adoption of a districting and apportionment plan within 45 days of the filing of the final plan and changes may not be made within 100 days before any primary or between a general election and the primary for that election. Section 13-3-102(3), MCA, requires that the Commission shall consider the problems of conforming the present precinct boundaries to the new districts as well as existing boundaries of wards, school districts, and other districts. The election administrators of counties involved in the plan must be consulted before adoption of the final plan.

For the 2000 round of redistricting, the first regular session after the appointment of the Commission will be the 57th Legislature (2001), which will convene on January 3, 2001 (5-2-103, MCA). The

census data is not expected until sometime between February 12, 2001, and March 21, 2001, during the 2001 session.<sup>2</sup>

The constitution requires that the congressional redistricting plan be filed within 90 days of receipt of the federal decennial census figures, so that must be the first order of business. The latest political analysis indicates that it is not certain that Montana will receive a second congressional seat, so this may be a simple task. However, the final decision on Montana's congressional apportionment will not be known until early 2001, when the Secretary of Commerce is required to report to the President, who in turn reports to Congress, the apportionment of the House of Representatives<sup>3</sup> between the states.

The Montana statutes cited above require that the legislative redistricting plan must be submitted to the Legislature by the 10th legislative day of the first regular session after its appointment or after the census figures are available. The first regular session after the Commission's appointment is 2001, but the 10th legislative day would be January 13, 2001, from 4 to 10 weeks prior to expected receipt of the census data. Theoretically, these provisions would allow the Commission to complete its work in 2001, but this scenario is dependent upon the following variables that are anything but certain:

1. In order to fulfill constitutional and statutory requirements, the Legislature would have to do as the Attorney General suggested and have both houses recess before the 10th legislative day and reconvene within the year. The composition of the House and Senate and subsequent leadership decisions will not be made until following the November 2000 elections. To assume that the House and Senate would agree to recess before the 10th legislative day and to reconvene with sufficient time passage to allow

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<sup>2</sup> P.L. 94-171 requires the U.S. Census Bureau to report selected census tabulations to the states by April 1 of the year following the census year. The Census Bureau has scheduled completion of the release redistricting data to the states by March 21, 2001.

<sup>3</sup>13 U.S.C. 141(b), 2 U.S.C. sec. 2a(a) and (b).

the Commission to complete its work after it receives the data around March 21, 2001, is a major and dubious assumption.

2. If the accelerated schedule were adopted, staff would have to work under the assumption that the Legislature will recess prior to the 10th legislative day and that the data would be received in February or March 2001, as planned. In addition, the Legislature would have to have made contact with the clerk and recorders and state and county central committees of each party prior to the 2001 session. Much of the information that was used by staff in the past round to present to the clerk and recorders would not be available yet and there would be less time for specific interactive detail work.

3. The Commission is required only to have one public hearing on each of the completed congressional and legislative redistricting plans. This could be accomplished in a limited schedule. The limited schedule would most likely preclude holding the dozen public hearings that were held around the state during the development of proposed plans in the past two redistricting rounds, and the plans would have to be developed with less local input. Section 13-3-102(3), MCA, requires that the Commission consider the problems of conforming the present precinct boundaries to the new districts as well as to existing boundaries of wards, school districts, and other districts. The election administrators of counties involved in the plan must be consulted before adoption of the final plan. This consultation could be accomplished, but without the specific information and in a less interactive manner than was accomplished in previous rounds. An accelerated plan would not affect the local election administrators' charge to change precinct boundaries within 45 days of the filing of the plan in order to meet the 100-day requirement prior to a primary election and to allow for candidates to make the filing deadline in March 2002.

4. Any delay in the legislative session has other ramifications. Codification cannot be completed until the session has adjourned, and publication of the new statutes cannot be accomplished until codification is complete. The public, in general, and the legal community and the Executive Branch, in particular,

may have difficulty with a delayed publication schedule. The new fiscal year begins July 1 and the default effective date of most legislation is October 1. In order for agencies to have the budget analysis completed by July 1, 2001, the remainder of the session would have to occur expeditiously, which would leave the Commission approximately 2 months or less to complete its work for both congressional and legislative redistricting.

5. With the new technology that is available, it is technically possible to complete this task in about 2 months, but this would not allow much time for the commission or staff to work with local officials and local party representatives to work out specific details. One of the traditional redistricting criteria is to consider communities of interest, and the less communication with the actual communities, the less ability to justify the redistricting plan on those grounds. For legislative redistricting alone, the 1970 Commission produced a plan within 6 months and held 3 public hearings, the 1980 Commission spent approximately 12 months and held at least 10 public hearings outside of Helena, and the 1990 Commission spent 8 months and held 12 public hearings around the state prior to the final public hearing in Helena. Technological advances were used each time, but the public relations and human elements remain constant. The 1980 Commission did not change the schedule of the redistricting because the legislative redistricting involved more leeway in population deviation and therefore allowed more consideration of traditional redistricting criteria.

Article II, section 8, of the Montana Constitution states, "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Accelerating the schedule after the census data is received would, by necessity, limit public participation and might make the plan more susceptible to legal challenge on the grounds that the public was not given reasonable opportunity to participate before the plan was finalized.

6. Litigation may ensue regarding any decisions that the Commission makes involving the use of the unadjusted or adjusted census figures. Litigation cannot be initiated until a cause of action exists, and it is unknown what legal actions may be taken between the time the Commission makes decisions on the data and methodology, the receipt of the data, and the completion of the redistricting plans. Although the Commission need not take any preemptive action regarding litigation, except for due diligence in performing its duties and responsibilities, the effects of litigation may prevent the Commission from accomplishing its work in a timely manner, and the Legislature may lose its patience and proceed without the Commission having completed its work. The end result would be that the prep work will have been accomplished with its resource ramifications, and the Commission would have approximately 2 years in which it may be expected to revise and refine any plans that it had previously adopted.

7. Increased staff involvement in 2000 and 2001 would require restructuring of the staff allocations of the Office of Research and Policy Analysis in the Legislative Services Division. Staff would have to be dedicated solely to reapportionment during the year 2000 and the 2001 session, whereas under the scenario of reporting to the 2003 session, staff can still be assigned interim committee duties and session duties of bill drafting and committee staffing. The progress and completion dates of the Capitol restoration will also be unknown until summer of 2000, and the decisions regarding the move of the legislative branch back into the Capitol and the operation of the subsequent 2001 Legislature have potential to cause disruption in the technical support and legislative consideration that the Commission receives.

The major stumbling block to acceleration is the constitutional provision that, "[t]he 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" in conjunction with the requirement in 5-1-109, MCA, that the plan be submitted "to the legislature *by the 10th legislative day*" (emphasis added). The Honorable Gordon Bennett based some of his opinion in the Greely decision upon the fact that the Legislature "required submission of the plan by the 10th legislative day of a regular session. It most certainly would

not have laid down such a requirement if it believed it would consider a re-apportionment plan based on census figures received during the regular session." Another troublesome stumbling block is that the accelerated schedule hinges on the (unknown) leadership of the next Legislature approving this scheme and following through on the requirements of recess before the 10th legislative day and reconvening when the Commission has completed its work. The traditional legislative calendar would be severely disrupted, as would required post-session publication and fiscal requirements.

For these reasons, an accelerated schedule is not recommended. Although it is possible, making certain assumptions, it is not probable or realistic. It is clear that the timing of the biennial sessions and the receipt of census data under current statute delays Montana's implementation of new legislative districts. However, it still fulfills the constitutional requirements for redistricting of "one-person, one-vote" based on the decennial census. Proposal of statutory changes or constitutional amendments by the Commission are possibilities that the Commission may wish to explore in order to transform the situation for future rounds of redistricting.

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