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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

ROBERT WILLEMS, PHYLLIS WILLEMS, TOM BENNETT, BILL JONES, PHILIP WILSMAN, LINDA WILSMAN, JASON CARLSON, MICK JIMMERSON, DWAYNE CROOK, MARY JO CROOK, JAMES STUNTZ, RANDY BOLING, ROD BOLING, BOB KELLER, GLORIA KELLER, ROALD TORGESON, RUTH TORGESON, ED TIMPANO, JEANNIE RICKERT, TED HOGELAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, AND DAVID ROBERTSON, Plaintiffs, vs. STATE OF MONTANA, LINDA McCULLOCH, in her capacity as Secretary of State for the State of Montana, Defendants.	Case No.: ADV-2013-509 [Prior Case No.: DV13-07 (14th Jud. Dist)] **PLAINTIFFS' OBJECTION TO NEW ARGUMENTS RAISED IN STATE'S REPLY BRIEF AND REQUEST FOR LEAVE TO FILE SUR-REPLY**

In its initial brief filed on September 11, 2013, the State asserted that the Districting Commission (Commission) is not an "agency" as defined by § 2-3-102, MCA. (State's Resp Brf., pp. 13-14). Plaintiffs responded on September 27 by explaining why the Commission is an "agency" as defined by § 2-3-102, MCA. (Pltfs' Resp. Brf. pp. 2-6). The State is now shifting gears

and presenting two new arguments in its Reply Brief filed on October 21, 2013 as to why the Commission is supposedly not an "agency."

First, the State argues for the first time in its Reply Brief that § 2-3-102, MCA, is unconstitutional under Article V, § 14 of the Montana Constitution to the extent the statute applies to the Commission. (State's Reply, p. 8.) By contrast, the State initially argued in its Response Brief that the wording of § 2-3-102(1)(a), MCA, required the Commission to be considered a "branch" of the Legislature rather an "agency" under § 2-3-102(1), MCA. (State's Resp. Brf., pp. 13-14.) The plain language argument in the State's Response Brief and the constitutional argument the State is now making in its Reply Brief are two very different arguments requiring two very different responses.

The State had previously argued that § 5-1-115(3), MCA, violated Article V, § 14. (State's Resp. Brf., p. 28). Plaintiffs found this argument persuasive and therefore stipulated to the dismissal of claims arising under § 5-1-115(3), MCA. (Pltfs' Resp. Brf., p. 20.) Plaintiffs strongly disagree, however, that applying the Right of Participation in Article II, § 8, and its enabling statutes (§ 2-3-101, MCA, *et seq.*) to the Commission violates Article V, § 14. Had the State timely presented this argument in its Response Brief, Plaintiffs would have responded to that argument in the brief they filed on September 27.

Second, the State argues for the first time in its Reply Brief that a definition of "agency" found in BLACK'S LAW DICTIONARY is controlling and that Plaintiffs' statutory-based argument concerning the Commission "fl[ies] in the face" of this dictionary definition. (State's Reply Brf. pp. 5-7.) The definition of "agency" is critical to deciding Plaintiffs' Right of Participation claim, and had the State properly presented its new, dictionary-based argument in its Response Brief on September 11, Plaintiffs would have responded to the argument in their September 27 brief.

The State's attempt to raise new arguments in its reply brief is inappropriate, especially in light of the State having received two extensions totaling four weeks in this time-sensitive case. New arguments in reply briefs are normally waived. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.2007) ("The district court need not consider arguments raised for the first time in a reply brief"); *State v. Sattler*, 1998 MT 57, ¶ 47, 288 Mont. 79, 956 P.2d 54 ("Legal theories raised for the first

time in an appellant's reply brief are outside the scope of such a brief and we do not address them"). At the very least, the State's new arguments provide good cause for Plaintiffs to be granted leave to file a sur-reply. *Flynn v. Veazey Const. Corp.*, 310 F. Supp.2d 186, 189 (D.D.C. 2004) ("[i]f the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply").

If the Court is inclined to consider the State's new arguments, Plaintiffs respectfully request that the Court also consider their short sur-reply regarding these arguments, especially given that the time-sensitive nature of this case will likely preclude supplemental briefing after the hearing on November 8, 2013. For the Court's convenience, Plaintiffs' proposed sur-reply and proposed order are attached to this Objection.

DATED: October 25, 2013

Respectfully submitted,

By: _____

Matthew G. Monforton,
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INTRODUCTION

Subject to this Court's ruling on Plaintiffs' Objection & Request for Leave to File a Sur-Reply, Plaintiffs submit the following sur-reply:

ARGUMENT

I. APPLYING THE RIGHT OF PARTICIPATION TO THE COMMISSION DOES NOT VIOLATE ARTICLE V, § 14

The State argues that the enabling statutes enacted pursuant to the Constitution's Right of Participation, if applied the Commission, would "impermissibly conflict[ ] with Article V, Section 14, of the Montana Constitution." (State's Reply Brf., p.8, quoting *Brown v. Mont. Districting and Apportionment Comm'n,* p. 12 (1st Dist. Cause No. ADV-2003-72)). This argument is flawed for two reasons.

First, the statutes at issue in *Wheat v. Brown*, 2004 MT 33, 320 Mont. 15, 85 P.3d 765, and the related district court case cited above deprived the Commission of authority granted to it by the Montana Constitution. The Court in *Wheat* held that Article V, Section 14, was a self-executing provision giving the Commission power to assign holdover senators. *Wheat*, ¶ 35. Because this power arose from the Constitution, the Court further held that the Legislature lacked authority to remove it and the statutes purporting to do so were therefore unconstitutional. *Id.*, ¶ 36.

The statutes enacted pursuant to the Right of Participation in Article II, § 8, (§ 2-3-101, MCA, *et seq.*), by contrast, do not transfer any of the Commission's power to the Legislature. The Commission retains final say on redrawing district boundaries and assigning holdover senators after giving the public a reasonable opportunity to participate in its operations.

Second, the State's assertion that applying the Right of Participation statutes to the Commission would "impermissibly conflict" with its authority is contradicted by the State's later assertion that "the Commission worked very hard to encourage public participation in the entire redistricting process, and thus did provide sufficient notice to comply with [Article II,] Section 8 and the participation statutes." (State's Reply Brf., p.10.) While this latter claim is demonstrably false

with regard to approval of the Jones Amendment in February 2013,[1] the State has marshaled considerable evidence showing that, before February 2013, the Commission accommodated substantial public participation in its operations while still performing its tasks. (State's Resp. Brf, pp. 4-9.) The State cannot on the one hand offer evidence showing that the Commission adhered to the Right of Participation statutes and successfully carried out its mandate while at the same time arguing that adherence to those statutes "impermissibly conflicts" with Commission's authority.

The State's claim is further undermined by the Commission's adherence to other open meeting statutes. While the *Wheat* court invalidated several statutes regulating the Commission, one that remains is § 5-1-108, MCA, which requires the Commission to hold at least one public meeting at the State Capitol prior to submitting its plan to the Legislature. The Commission repeatedly acknowledged its obligations under this statute. (See, *e.g.*, Ex. 1, p.4. ("A final public hearing will be held in the Capitol to fulfill the requirement in 5-1-108, MCA"); Ex. 12, p.10 ("Section 5-1-108, MCA, requires the commission to hold at least one public hearing on the entire legislative redistricting plan at the State Capitol. The December 19 hearing satisfied that requirement"). If the Legislature may staturorily require the Commission to hold public hearings, then other statutes ensuring meaningful public participation during those hearings, such as § 2-3-111, MCA, should also apply.

Applying the Right of Participation statutes to the Commission does not transfer any of its constitutional authority to another entity or impermissibly conflict with the exercise of that authority. Because "the people, through the legislature, have plenary power, except in so far as inhibited by the Constitution," *Wheat*, ¶ 27, quoting *Missouri River Power Co. v. Steele*, 32 Mont. 433, 438, 80 P. 1093, 1094 (1905), the Right of Participation statutes can and should be applied to the Commission.

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[1] For example, despite insisting that the Commission "did provide sufficient notice to comply with Section 8 and the participation statutes" (State's Reply Brf., p.10), the State has never explained how approval of the Jones Amendment satisfied § 2-3-111, MCA, or even cited this statute in either of its briefs. The reason for this evasion is obvious - the State cannot explain how the Commission could have complied with the statute by waiting until February 12, 2013, to propose the Jones Amendment after imposing a February 11 deadline for the public to comment upon proposed amendments.

II. THE LEGISLATURE'S DEFINITION OF "AGENCY" TRUMPS THE DICTIONARY DEFINITION RELIED UPON BY THE STATE

The State incorrectly attempts to use BLACK'S LAW DICTIONARY to circumvent the Legislature's authority to define "agency." (State's Reply Brf, pp. 5-7.) The Montana Supreme Court has long held that "where the legislature has clearly adopted a definition of words used in an act at variance with that found in dictionaries and decisions, this court will follow the definition as found in the legislative act." *State ex rel. State Bd. of Equalization v. Jacobson*, 107 Mont. 461, 86 P.2d 9, 11 (1938); see also *State Bar of Montana v. Krivec*, 193 Mont. 477, 632 P.2d 707, 710 (1981) (citing *Jacobson* in holding that "in construing definitions, courts will determine the meaning of the definitions as found in the legislative act"); *Jones v. Burns*, 138 Mont. 268, 288, 357 P.2d 22, 33 (1960) (courts are "bound to follow the legislative definitions contained in the act, even though they are contrary to the usual and ordinary meaning of the words"); see also 82 C.J.S. *Statutes* § 372 (2013) ("when the legislature defines a term in a statute, that definition governs").[2]

As the Supreme Court has made clear, "the term 'agency' is defined in Part 1 of Title 2, Chapter 3, MCA. That part implements Article II, Section 8 of the Montana Constitution, which provides for the public's right to participate in government operation." *SJL of Mont. v. City of Billings*, 867 P.2d 1084, 1087 (1993). Thus, the definition of "agency" found in § 2-3-102, MCA, is binding on this Court. That definition includes "any" rule-making commission not falling into one of the four exceptions in subparagraphs (a) through (d) of the § 2-3-102(1), MCA. The State has argued that only one of those exceptions apply: the legislative-branch exception in § 2-3-102(1)(a), MCA. (State's Resp. Brf., pp. 13-14.) Plaintiffs have shown why that exception does not apply. (Pltfs' Resp., pp. 5-6.) Thus, contrary to the State's argument, an independent body such as the Commission can be an "agency" under § 2-3-102, MCA, without being part of the executive branch or subordinated to some other principal.

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[2] Of course, dictionaries are appropriate when analyzing statutorily *undefined* terms. *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. For example, Plaintiffs cited BLACK'S LAW DICTIONARY to define "branch," a statutorily undefined term contained in § 2-3-102(1)(a), MCA. (Pltfs' Resp. Brf. p.5).

The State's last-minute reliance upon a narrow definition of "agency" from BLACK'S LAW DICTIONARY strongly suggests that it realizes the statutory definition in § 2-3-102, MCA, is fatal to its case, especially given its nonsensical attempts to construe the statute. These efforts to cabin the definition of "agency" also run contrary to the admonition that Montanans' Right of Participation be "given a broad and liberal interpretation." *Bryan v. Yellowstone County Elementary Sch. Dist.*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381.

The State's lexicological cherrypicking further undermines its argument. An older version of BLACK'S LAW DICTIONARY defines "governmental agency" as "a subordinate creature of the federal, state, or local government created to carry out a governmental function or to implement a statute or statutes." BLACK'S LAW DICTIONARY (6th ed. 1991), p. 696. This definition could certainly apply to the Commission because it is a subordinate creature of the state government that carries out a governmental function: redistricting. And this definition was in use more closely in time to the drafting and ratification of the Montana Constitution than the one relied upon by the State. If the Commission's status is to be derived from dictionaries, there is no reason why the 2004 edition of BLACK'S LAW DICTIONARY should be used rather than the 1991 edition.

Alas, dictionaries are not controlling as to the definition of "agency" because the Legislature has already defined that term. While the legal community properly reveres BLACK'S LAW DICTIONARY, that research tool does not displace the Legislature's rightful authority to define statutory terms as it sees fit. The State's dictionary-based arguments should therefore be rejected.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request this Court grant their motion for summary judgment and deny the State's cross-motion for summary judgment.

DATED: October 25, 2013

Respectfully submitted,

By: _____

Matthew G. Monforton,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 25th day of October, 2013, that I mailed a true and correct copy of the foregoing document, via U.S. Mail, postage prepaid, to the following address(es):

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I also transmitted an electronic copy of this brief to the following email addresses on this day:

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The Court has reviewed Plaintiffs' Objection to New Arguments Raised in State's Reply Brief & Request for Leave to file Sur-reply. Good cause showing, leave to file a sur-reply is hereby GRANTED to Plaintiffs. The sur-reply lodged with the Clerk shall hereby be filed.

IT IS SO ORDERED.

DATED _____, 2013.

_____
Honorable Mike Menahan
District Court Judge