



Montana Districting and Apportionment Commission

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MINUTES

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of documents.

Montana Historical Society Conference Room
February 5, 2003

COMMITTEE MEMBERS PRESENT

Janine Pease Pretty On Top, Presiding Officer
Sheila Rice, Vice Presiding Officer
Joe Lamson
Jack D. Rehberg
Dean Jellison

STAFF PRESENT

Susan Byorth Fox, Research Analyst
Greg Petesch, Attorney
Lois O'Connor, Secretary

VISITORS LIST AND AGENDA

Visitors' list (ATTACHMENT #3)
Agenda (ATTACHMENT #4)

COMMITTEE ACTION

- Failed to approved a motion by Commissioner Jellison to proceed immediately to redo a plan using the 1% deviation as recommended by the Legislature while maintaining the Indian-majority districts and try to get that accomplished while the Legislature is still in session
- Approved an amendment moving the Big Sky portion of Madison County back to House District #71 from House District #70 and the area east of Cardwell to House District #77
- Approved an amendment that moves 44 persons from proposed house district #29 into proposed house district #28 and use the Fort Benton Elementary School District line
- Approved an amendment moving population from proposed house district #100 to proposed house district #97 and #98 in Missoula County

- Approved an amendment that moves 315 persons from proposed house district #68 into proposed house district #63 in Gallatin County
- Approved the final plan as amended and submit it to the Secretary of State

Because of inclement weather conditions and the 58th Legislative Session, the 10:00 a.m. meeting was postponed until 11:00 a.m. The following is testimony and exhibits given by Senators Fred Thomas and Greg Barkus to Commissioners Rehberg and Jellison and staff after 10:00 a.m. and prior to the beginning of the official meeting and prior to the arrival of Commissioners Rice, Lamson, and Pretty On Top.

Fred Thomas, Senator, Senate District #31, Stevensville: Senator Thomas provided a packet of material containing Senate Resolution No. 2, House Resolution No. 3, the minutes from the Joint Select Committee on Districting and Apportionment, and the minority report from those meetings. He also provided a packet containing the tapes taken from the Joint Select Committee. (ATTACHMENTS #1 and #2 respectively.)

Here are the resolutions from the House and Senate that have some of the official findings that we found in regard to the plan that your Commission has done. They also include the minutes, tapes, and Minority Report from the Joint Select Committee on Districting and Apportionment. Then we had, in addition, gone over and prepared a few things that we felt were specifically important to be looked at. These specific things were put together by Sen. Barkus and myself, particularly. We would like you to consider them and maybe make a motion on them this afternoon or this morning later if you can. I don't know about our ability to be back over here. I'm just not sure.

But, when we went through and did some specific things--looked more specifically, the resolutions were designed to treat the big surface issues that we found. These are specifics that we think could be addressed by the Commission easily today and correct some things that we found to be there or things that we though could enhance the plan. (See Exhibit #4)

We mentioned the city of Brockway and it being divided in one-half. We tried to fix that. We also in (proposed) house district #38, it's approximately five blocks wide and three to four miles long. (Proposed) house districts #37 and #38, we are asking that they be redrawn so that they are compact versus long, skinny parcels. We are also have a little bit of heartburn to continue to see that Anaconda is cut in one-half by (proposed) house districts #71 and #72. We are hoping that they could be redrawn to keep the communities of Anaconda and then the outside line communities together so that they have those compact interests together.

I think (proposed) house districts #74 might have been down in the Bitterroot. On that, this could easily be done because you have Plan 200 that deals with this--Yes (proposed house districts) #74 and #76--where you can see is in the current plan, for some reason, they have gone in and carved out the community of Corvallis--the town of Corvallis--out of the community of Corvallis and stuck it into Hamilton which means that the community, the heart of Corvallis, which is schools, the main street, and the downtown section, really won't have any say because it will be outweighed by the Hamilton city. This could be easily redrawn because you've got all of this territory around Hamilton to include the city of Hamilton to keep more community of interest there and leave Corvallis within the heart of the Corvallis community. We find that to be a much better interest there.

Commissioner Rehberg: Will the population fit where you can do that? Will it be approximate?

Senator Thomas: Yes, and it was actually drawn in (Plan) 200 more along those lines keeping Hamilton together and Corvallis together. Similar in Stevensville, for some odd reason which I have no idea why, but. . .

Commissioner Rehberg: Yes you do.

Senator Thomas: Well, you are right. There was more partisan gerrymandering here frankly. This plan comes up the (Bitterroot) River and takes Stevensville, as well as Corvallis, and takes it out of the community of Stevensville and puts it up with Florence. Now, there is nothing wrong with Florence, but yet, you could have more--Florence is a lot of suburban-Missoula working residents and you have the west side of Stevensville or you've got more east side of the valley of Stevensville that could be put in with Florence to make it a community of interest because of commonality. And yet, the Stevensville, in the heart of the Stevensville district, which is here. So those are things that I think could be done easily to take care of and make those areas much more compact and keep the communities of interest together, which only seems to be blatantly partisan, the only reason to change it the way that they have been done so here.

Also, (proposed) house districts #80, #81, #82, #83, and #84, we think that they need to be redrawn to reflect compactness. And, those are also drawn in Plan 200 so that they would fit within the (population) deviations that you have now adopted in the 10% swing. (Proposed) House district #98 up in the Flathead--and Greg (Sen. Barkus) you can speak to this better than I--I haven't been up. . .

Sen. Barkus: They have basically taken the community of Northridge here--the subdivision of Northridge and actually hook it up clear up to north of Whitefish. Totally going around Whitefish, coming up to Olney, Marion, and Kila--clearly not a division of communities of interest.

Sen. Thomas: So, our thinking is that that district could be redrawn. There is guidelines in (Plan) 200 that we think would fit. But the aspect of making a horseshoe out of the district by coming down here just outside of the town of Kalispell and looping all the way back up around to the north side of Whitefish--I mean, you know, it seems a little bit strange.

Commissioner Jellison: That district also adjoins the district that Polson is in.

Sen. Barkus: Well, that is the one to the south. It take that little Lone Pine Subdivision out of the city of Kalispell and links it with Lakeside/Sommers.

Sen. Thomas: Lastly and more specifically, it is probably irrelevant now because the Legislature will be assigning the holdover seats because we got a law signed yesterday (February 4, 2003) that assigns that detail to the Legislature. By resolution, we will be adopting those holdover seats and assigning them by resolution of the Legislature. We had specifics in here addressing things that we thought you should change in the holdover assignment, but I would recommend that you probably motion to take the holdover assignments out of this because they certainly aren't in order at this point in time. The law has been changed. We are not abdicating that part of the apportionment to the Redistricting Commission. We are doing it ourselves. So that is our little report to you. I am sorry that the other members (of the Commission) aren't here.

Commissioner Rehberg: In all sincerity, do you think that they will listen?

Sen. Thomas: So far, we haven't found an open ear, but one can only hope that they will. They are suppose to represent the state of Montana, not the Democrat Central Committee.

Sen. Barkus: Did the Commission ever find a vice-chair?

Commissioner Rehberg: Yes, they elected a vice-chair. I don't know if you were there or not. Were you at the meeting when we elected a vice-chair?

Sen. Barkus: I was there when the Chairman (Commissioner Pretty On Top) refused to have a vice-chair.

Commissioner Rehberg: Yes, and then I think that they did decide to elect one. That was probably the only vote where they could have gone half-way nonpartisan because they. . . and you made a nomination if I recall; and they wouldn't even accept that even though the vice chair has no responsibility or authority. It's been very biased and partisan all the way through, as you all well know.

Sen. Thomas: It's all so obvious, yeah.

Commissioner Rehberg: And, I'm certain that had we been a full Commission, you would not have had the opportunity to present this this morning because this is not a hearing. It is an executive session for the purposes of making decisions. But, thank you for coming.

Sen. Thomas: Yeah, it's probably good that they weren't here because maybe they wouldn't have heard us.

Commissioner Rehberg: It has been an interesting session. I have served on two sessions. I found the first time a great opportunity, and I found this one extremely frustrating, but I may volunteer in 10 years to do it again. So, keep that in mind if you get rid of term limits that whoever is going to be in charge. . . .

Sen. Thomas: We'll try to fix the system so that it's more nonpartisan.

Commissioner Rehberg: I hope you can.

Sen. Thomas: It can be done, but it will take the legislators and it will take the voters.

Commissioner Jellison: Is there a constitutional amendment in the process?

Sen. Thomas: Yes.

Commissioner Rehberg: Well, it's too bad that it came to that.

Sen. Barkus: We had excellent testimony at the hearing of Rep. (Roy) Brown's bill. One of the framers of the Constitution, Mae Nan Ellingson, testified. It was very interesting to hear her suggest that maybe this should have been a nonpartisan Commission.

Commissioner Rehberg: I also thought it said in that article that it wasn't guaranteed to be fair. Now, maybe I read that wrong, but I thought that Mae Nan's comment was that there was no guarantee of nonpartisanship.

Sen. Thomas: She said something to the degree that there was no guarantee; but the point has been made that this is a partisan thing so, therefore, you should expect these results. Of course, that is just an excuse to justify what has been done. A point though is that the design of the Commission was designed to create more nonpartisan districts, etc.; and not one that is drawn to benefit one party or the other.

Commissioner Jellison: The other point that she missed (Mae Nan Ellingson) is that this requirement of equality of population makes it very difficult to do a whole lot of fiddling around with gerrymandering and that sort of thing. Somehow, they don't ever seem to recognize that.

Commissioner Rehberg: In fact the last time 10 years ago when we first elected a retired Supreme Court Judge. . . .

Sen. Thomas: Yes, Gulbrandson.

Commissioner Rehberg: We had one before him and he died, and then Gulbrandson was the next choice. I thought in both cases, even if you went back to the Supreme Court Judges, hopefully, they would be objective of the whole subject.

Sen. Thomas: You would expect them to be.

CALL TO ORDER AND ROLL CALL

The Executive Session was called to order by Commissioner Pretty On Top, Presiding Officer, at 11:15 a.m. Roll call was noted; all Commission members were present. (ATTACHMENT #5)

Commissioner Pretty On Top: As many of you know, while you are welcome to be here during an Executive Session, we are at the business of our Commission and the speakers are those members of the Commission present--all of us--and we have our agenda set before us today. Ms. Fox, would you go over our agenda for today?

Susan Fox, Research Analyst, Legislative Services Division: This could be loosely called an agenda. These are the things that I felt we needed to cover today, but I certainly don't know if they are in the appropriate order or how you are going to do your business. Because this is the end of the period for the Legislature to present its recommendations to the Districting and Apportionment Commission and because there has been other legislative activity in relation to the Commission, in your packets are their recommendations in the form of two resolutions and a copy of the minority report that comes with the Senate and House Resolutions. (EXHIBITS #1, #2, and #3 respectively) This morning at 10:00 a.m, Senators Fred Thomas and Gregory Barkus and Rep. Roy Brown put a letter in your packet and a review of Native American districts in view of a plus or minus 1% population deviation (EXHIBITS #4 and #5 respectively).

The first thing would be to go through the legislative recommendations. Traditionally, the Legislature presented its recommendations to you in the form of resolutions. So you can go through those resolutions. I believe other than slight tweaking, they started out identical but they are slightly different now. Also the pieces of legislation--House Bill No. 309 and Senate Bills No. 258 and No. 429. (EXHIBITS #6, #7, and #8 respectively) This will set the stage of procedurally some decisions that you will have to make.

We have Greg Petesch, (Legal Director, Legislative Services Division) here today as our legal counsel. John MacMaster is involved in a big (House) Judiciary meeting. Since some of the decisions to be made have legal ramifications, Greg will give you some counsel on those. After we do that, we can go actually to the plan itself. I have also prepared a packet of amendments. Some are leftovers from before that people have reiterated that they want you to consider, and we have a couple of new ones. (EXHIBIT #9) Depending on the policy decisions that you make in the initial part of the meeting and, if your intention is to submit your plan today, I will need some time to make some technical changes and prepare the final packet. So, I would ask that you recess and come back later in the day to submit the plan. Or if you decide to make other actions, I would need some direction as to how you would like to proceed with the plan.

Commissioner Pretty On Top: In terms of the agenda, as Ms. Fox said, there are several areas that she knew that we needed to visit today. Are there any comments in terms of the order or preference in which you would like to take these things?

Commissioner Lamson: Seems to make sense as usual.

Commissioner Jellison: It would seem to me that since House Bill No. 309 is passed, which renders what we have done in our existing plan unacceptable, that there isn't a great deal of point in talking about anything in terms of amendment of our existing plan, and we ought to start out the discussion with talking about we are going to proceed to redo the plan so that it is acceptable through the law of the state of Montana.

Commissioner Pretty On Top: Are you offering a motion?

Commissioner Jellison: You asked what kind of order we ought to be talking about.

Commissioner Pretty On Top: That particular item in that regard isn't in this list.

Commissioner Jellison: House Bill 309 and Senate Bill 258. If you would like, I can make a motion that we use that subject as the first item on the agenda since it will have great effect on everything else that we talk about.

Commissioner Lamson: If you would like, I don't have any objection to talking about House Bill 309 first, but you don't need a motion to talk about it first.

Commissioner Pretty On Top: I would be happy to move it to first. The floor is now open to the discussion of the resolution, House Bill 309, and Senate Bill 258. Mr. Petesch, could you give us an overview of what is in the two resolutions.

Mr. Petesch: The two resolutions, one is House resolution and one is a Senate resolution, essentially urges the rejection of the plan and starting over in order to comply with House Bill 309 and Senate Bill 258.

Commissioner Pretty On Top: Starting over? Scrapping everything we have done?

Mr. Petesch: Yes. They urge the rejection of what you have done to date.

Commissioner Lamson: I would like to speak to (House Bill) 309. I attended all of the formal hearings on (House Bill) 309 as well as having numerous discussions with legislators individually from both parties and legal counsel. It is the strong testimony that we received when the bill was in the Senate from one of the original drafters of the Constitution, Mae Nan Ellingson who was at that time Mae Nan Robinson, a Republican and the youngest delegate in the Con Con. In her testimony, she was of the strong belief that once the Commission is formed, we are an independent body and that the Legislature cannot interfere with our activities. (House Bill) 309 is a direct affront to that power that was in the Constitution. It not only tries to set a new criteria imposed by the Legislature--they can make recommendations but they can't establish that once we have started--and it gives a Secretary of State extraordinary powers to veto particular legislation. For that reason, I believe strongly that House Bill 309 does not impact this particular Commission and that we need to go forth with our duties as we have been doing for the last two years.

Commissioner Jellison: (House Bill) 309 is an expression by our Legislature that the Montana Constitution should be interpreted much more tightly than you have in the past. My feeling is that we ought to be expressing our thanks to the Legislature for clarifying the situation with regard to that. As you know, I have been saying for some time that the 5% deviation does not work, it does not fit in the Constitution, and I made a motion a couple of meetings ago that we scrap what we have done and start over again for that very reason. What the Legislature has done in passing (House Bill) 309 is to interpret what the authors or adopters of the Constitution meant when they said "as equal in population as is practicable". There has not been any interpretation of that prior to that. The Montana Supreme Court has not looked at it. The Legislature has not looked at it. The Commission, when it adopted that criteria, was under the impression that the 5% thing was a mandatory thing under Montana law, which is just simply not true.

John MacMaster wrote a memo that was handed out to all of you at the beginning of this in which he talked about this criteria. It was clear from his memo that, at least in his opinion when he wrote that, the 5% was not mandatory. It was a thing that had been used in a series of federal court cases that were concerned with interpreting the equal protection clause of the United States Constitution, and in those cases, they did not say that you could use 5% willy-nilly. It says that if you use 5%, if the deviation is more than 5%, the presumption is that--it shifts the burden of proof to show that it is a fair and equitable effort to create equality is on the state or, in effect, the Commission to show that there are good reasons for having to do beyond the 5%. But if you are under 5% deviation, it simply shifts the burden to whoever is challenging that to show that, in fact, the result was not a result of a fair effort to create districts that were equal in population.

Back then an error was made. If the Commission misinterpreted the law at the time that it adopted that criteria, that does not mean that that is somehow effective regardless of the law. The Commission does not have the power to expand or change its situation or its obligations. In adopting (House Bill) 309, what the Legislature has done is to say what was intended by the people who created the Montana Constitution was that you are going to have districts that are equal in population as is practicable and left it at that. But, that language was lifted from the United States Supreme Court decision which dealt with the U.S. Constitution. The Supreme Court interpreted the U.S. Constitution as meaning "districts shall be as equal in population as is practicable". That to them meant "as is possible".

To say that you are changing the rules somewhere in midstream or whatever, that is not true. The rules have been "as equal as is possible" from the very beginning. What the Legislature is doing is clarifying that by saying "Okay, we know it doesn't mean absolute, but we think that it means that you can create districts that are within 1% of the magic ideal number". That is simply what they believe the Montana Constitution provided. The basis for doing that was the fact that the plan that we have adopted demonstrates, absolutely, that it is possible to create large numbers of districts in large areas and stay within the 1%. For instance, the 12 districts in northwest Montana are all between 104% and 105% of population. Those are mountainous districts and they are as difficult as any to deal with, and yet, we did that. It is pretty difficult for anybody to say "No, you really can't do this 1% thing because it doesn't give you enough latitude."

There has been criticism that this somehow is going to make it impossible to do the Indian-majority districts. This is simply not true. You all received a thing that (Rep.) Roy Brown sent over (See Exhibit #5)--some calculations that somebody had made which indicates that going through the various Indian-majority districts with some slight tweaking, they will conform to the 1%. It seems to me that what we really ought to be talking about here is how do we proceed to redo this. The alternative to that is somebody takes this thing to court and we spend the next several years arguing about what does that mean and what should the Court rule, and whose appeal should go where; but the districts remain as they are at the present time. But that has very substantial risks, I think, in terms of things that we have tried to do, and one of those is the creation of the Indian-majority districts. It does not say "You will do this absolutely regardless of the situation".

I am a retired attorney. I have been in Court a lot and I have been in the Supreme Court a lot. I know that if the thing gets into litigation, everything is going to be on the table. The people on each side are going to throw every weapon that they've got into that. That means that the Indian-

majority districts are going to be challenged that we created in this plan that we have adopted are going to be challenged, and there is a pretty good chance that those would not all survive. Again, I think John MacMaster covered that very nicely in his memo that he submitted to us. I spent part of yesterday reading Sheila's (Commissioner Rice) "magic red book" (ABA, The Realists' Guide to Redistricting) that she has relied on and that has pretty good coverage too of the criteria and factors that are included in the Indian-majority districts, and it leaves you with a feeling that "Hey, these may or may not survive". So, it would seem to me that we owe the people of the state of Montana to proceed with what the Legislature has, in effect, told us to do and that is to reapportion or redistrict with a plan that deviates only or not more than 1% from the ideal number. I **move** that we do that.

Commissioner Lamson: The 5% (deviation) was what we used all through this process. It was made on a motion unanimously made by Commissioner Rehberg to accept that. We did that, and it was to give states the flexibility to take into consideration communities of interest and balance the various criteria. I also looked in the dictionary under "practicable", and there is a distinction in the dictionary that I think is important and relevant to this thing. I understand that the dictionary is not the Montana Annotated Code or anything like that but it says that "practicable" applies to what has been proposed and seems feasible but has not been actually tested in use. I think that is a key point because when you start to try to put these things together and see how they run up against different criteria, then you run into problems.

I noticed that the report delivered by the Senators this morning does some analysis on that, but there is a key thing missing in that analysis on the two districts which are in contention which are the Crow and (Northern) Cheyenne because those two districts are the low end and would require putting 350 nonIndian people into those district. They have worked out a percentage that has to do with percentage of Native Americans. What we look at is the percentage of voting age, and the voting age is a very different number. When we ran models to try to do that, we found that those districts went from Indian-majority districts to Indian-minority districts. The exact figures are outlined in the minority report that was presented to the Joint Committee (on Redistricting and Apportionment) (See Attachment #1). Consequently, we believe that the 1% runs smack up against our mandatory criteria to adhere to the Voting Rights Act, and we would opening ourselves up to what legal lawsuits--it wouldn't be the Tribes versus Cooney anymore, it would be the Tribes versus the Commission. That is one of the reasons that we used 5%.

The 5% has been jumped upon with very little analysis. We went around the state, held 14 public hearings, numerous hearings in Helena, and got the information from the people. That was the plans that they looked at. This plan actually has a smaller deviation range than the previous plan in 1990 and actually about the same deviation range as the plan that was supported by most Republican citizens that testified in favor of Plan 200. Those deviations were there to meet communities of interest. So whether it was Plan 300 or Plan 200, when you start to go around Montana and take into account various communities, you need that 5% to make a good plan. I would have to oppose this motion.

Commissioner Jellison: Are you suggesting that if the six house districts and three senate districts that have been proposed are adopted and modified by the 1%, the Indians will sue?

Commissioner Lamson: There has already been a press release issued from represented leaders from the Northern Cheyenne, Rocky Boy, and, I believe that it was Fort Peck Reservations, that said that they definitely will sue.

Commissioner Pretty On Top: The districts that you bring up right now have been in place since the 1980 Commission. It would be really a rollback--a serious rollback--in the Crow and Northern Cheyenne area to lose the majority. There wouldn't be a way to find an Indian legislator coming to Helena from that.

Commissioner Jellison: I just can't accept the idea that you can't find an Indian-majority in that area and keep the deviation less than 1%. But, the important thing here is what you are talking about and what you are saying is what you are going to be arguing in court because we know, as we sit here, that the plan that we have approved is going to be rejected. We have two choices. We either can say "Okay, let's go do it right. Let's start over again and do the 1% thing." or you can say "No way, we are going to see you in court." If we do that, you are sitting here for years without solving any of those problems.

Commissioner Rice: I have great respect for Commissioner Jellison's legal research and his history as a fine attorney as well as Commissioner Rehberg and his history in the past as a member of this Commission. I think we all have our chickens or our eggs depending on what the case may be, and I feel like the way to answer this very sticky question is to request an opinion of the Attorney General as to the status of this Commission and its plan. Toward that end, I took a look at whether we have the ability to do that, and I will read just very quickly from the Montana Code Annotated 2001 (2-15-501, MCA--General duties of the attorney general) . . . #7 under duties is to give an opinion in writing without fee to the Legislature, either House, state office, board, or commission, which is what we would be, when required. Upon any question of law relating to their perspective offices. . . . Subsequently it says, the Attorney General's opinion is controlling unless overruled by a state district court or supreme court. It seems to me that we have a third option here and that is to request an opinion of the Attorney General. To move along with our agenda and to finish our work as required by the Constitution of the state of Montana and take it over to the Secretary of State which the Constitution also requires us to do, subsequent to that, ask the Attorney General to give a ruling relative to the status.

Commissioner Rehberg: I would like to address Joe (Commissioner Lamson) and the Democrat Party on their 5% plus or minus. Yes, I made the motion, and I made the motion based on the fact that I thought that you were going to have an honest and reasonable Commission. At one point, I challenged Joe (Commissioner Lamson) to be honest about what his ultimate goals were, and Sheila (Commissioner Rice) you chided me saying the opposite of honest was dishonest, and the Chairman (Commissioner Pretty On Top) took me to the woodshed and said "Rehberg" if you talk that way any further, I will shut you down"; at which point I reminded her that I was a Commission member and I was entitled to speak too.

Ten years ago when I was on the Commission, that 5% was reasonable because we had a reasonable Commission. I can assure you that we have a very unreasonable Commission this time. It appeared very clearly that you were going to use anything you could to be arbitrary and do exactly what the Democrat Party wanted to, not what the majority of the people wanted to. Now, when we talk about threats and (law)suits, 10 years ago we heard that in every single Commission hearing--the Native Americans threatened that they would sue us. Finally, we suggested that they quit making those threats and they did sue us. Chances are, there is no doubt in my mind, that after this is completed, we will be sued again. But, I agree with Mr. Jellison that the Legislature has spoken. It has given us an opportunity to review it and, I think, do a better job using a better criteria than 5%. I guess I erred in recommending 5% or moving it because I expected reasonableness, and I certainly don't think it worked out that way. So, I would

support Mr. Jellison's recommendation that we revert back to the 1% and redo our Commission work.

Commissioner Pretty On Top: I would like to be clear what's on the table. Commissioner Jellison, you offered a motion. Could you clarify what motion you placed on the table?

Commissioner Jellison: I don't remember exactly how I stated that but the intent of my motion is that we recognize that the plan that we have adopted is not acceptable and that we proceed immediately to redo a plan with the 1% deviation and try to get that accomplished while the Legislature is still in session.

Commissioner Rehberg: Is that also with the intent of maintaining the Indian districts?

Commissioner Jellison: Yes, absolutely.

Commissioner Rehberg: That is part of the goal too?

Commissioner Jellison: Yes. What Sheila (Commissioner Rice) suggested of asking for an opinion from the Attorney General, I think is a great idea. What I had intended as I visualized this meeting proceeding was that we make this motion, and the motion ought to reasonably carry. But, on the off chance that it shouldn't carry, then I was going to ask that we postpone further consideration of this and ask each of you to consult with counsel who have actually read the cases that John MacMaster talks about and that I have read; and after counsel has looked at that stuff, what they think the chances are of your succeeding in getting the plan, somehow, ultimately approved. I am reasonably certain that you are going to wind up with an attorney saying there is always some possibility in these things, and I guess that you would have a 1-out-of-10 chance or maybe a 2-out-of-10 chance of getting this ultimately approved. I think that referring it to the Attorney General is a fine idea if you don't recognize that we ought to just dump it and start a new one right now. It is going to take, in my experience, 3 months or 6 months to get something out of the Attorney General.

Commissioner Pretty On Top: How long would it take to get an opinion from the Attorney General?

Mr. Petesch: I believe the average time right now is 6 months. However, when you request an opinion from the Attorney General, you must submit a proposed legal analysis and resolution of the question along with your request for an opinion. Traditionally, the Attorney General has declined to rule on questions involving the constitutionality of legislation. The reason for that is, if the legislation is challenged, the Attorney General is required to defend the legislation. So, it puts him in an untenable position.

Commissioner Rice: Just to make it clear, I have actually drafted a letter to the Attorney General. (EXHIBIT #10) It's not a question of the constitutionality, it is simply the status of this Commission and its plan as submitted to the Secretary of State.

Mr. Petesch: I think that the Commission needs to realize that the law is, right now, what is contained in House Bill 309. There is the presumption that law is valid until it is challenged. There are several specific and distinct legal issues involved in House Bill 309, however. The first is the ability of the Legislature to interpret the language of the Constitution, and that is what section 1 of the bill does. Essentially, the only thing it has is a definition of "nearly as practicable". Other things in that section are already in the Constitution. The second thing it does is give the Secretary of State the authority to reject a plan that does not conform to this statute. That is a separate legal issue from the ability of the Legislature to interpret the constitutional language. The third thing that this legislation does is to apply section 1 retroactively to the work of this Commission. So there are at least 3 specific and distinct legal issues involved in House Bill 309.

Commissioner Pretty On Top: When I accepted being the Presiding Officer of this Commission, I did not have any idea from the appointment document nor did I have any idea from things that I had read on voting rights that this Commission was hired or appointed at the behest of the Legislature per se. I understood our Commission to be independent. I understood that our Commissioners, then, were to exert their best judgment based on our ability to analyze the information put before us on voting rights and this whole process. I believe that we have. I think that it is an undue judgment of this Commission that somehow the 5% plus or minus (deviation) has been assigned willy-nilly.

Being specific, I would like to suggest that if you think that you can go out and find 300-odd, plus-or-minus Indians in Bighorn County, you are downright wrong. I was a part of the movement in 1980 that helped us acquire an Indian-majority district. There are no odd, left out Indian voters there. These are finite numbers; these are real people. This is not an academic exercise. This is one that has to do with the real lives that people live. I guess maybe you think you should look north across the river or north across the county line or someplace to find 300 Indians that you need to make a majority. It doesn't work like that. It doesn't work like that in any district. It is a process that has developed over these four years. We have come this far, and it would seem that our Legislature would have paid attention all this time. I see this move on behalf of the Legislature as a direct effort to take out the six Indian-majority districts in the House. There just isn't anyway that it can be had. I see them saying the intent to keep them (the Indian-majority House Districts) while reducing the percentage to take them out. That seems sort of two-faced. It's pretty obvious to me.

I believe that in the best interest of Montana, the Constitution gives us our responsibilities, and I believe that we followed those responsibilities. To ask us to neglect, ignore, and otherwise throw out four years of work, I think that they are overstepping their boundaries. The Constitution states what this Commission "will do". We have done our work, and we have done it well. I think that we have a great deal of pride to take in the work that has been done by this Commission. The minority on this Commission has continually been disgruntled over being the minority. Certainly, it isn't an easy position, but we have, I think, very distinguished members of this Commission who have done outstanding work in putting together a plan for Montana.

If the leaders of this Legislature had truly been interested in this process, they would have been to every hearing to talk to us about how, in fact, 300 people, real people, can be found in any one district. But instead, we get to the eleventh hour and they start throwing mud. It's very objectionable for Montana to be in the position where we can express the intention to provide this kind of representation for our American Indian citizens and then back up and say "Oh well, Republicans simply don't want us to do this so golly darn, we had better not". It is a serious travesty.

Commissioner Jellison: Could I respond?

Commissioner Pretty On Top: I am not sure I'm done. You have had the floor four times. Sometimes Indian people pause, and it means a whole lot more than speaking.

There are at least a dozen people in the process of our hearings who are Republicans whose amendments have been passed and who have stated to us that they are quite satisfied with their districts. But, the Republican leadership is willing to overlook those or act like they didn't happen.

We have been very interested in the statements all along. This has been work done in good faith, and I believe that it can stand as it is. It can withstand the test, so put it to the test, as Jack (Commissioner Rehberg) said. So, put it to the test.

Commissioner Rehberg: Good, we will do the bill as it is stated and do what the Legislature has told us to do, and you can put it to the test.

Commissioner Pretty On Top: The Constitution is one document, and the Constitution established how this Commission comes about. This Legislature did not write that Constitution, so I believe that following the Constitution is where my duties come from and I believe that I am doing so.

Commissioner Jellison: I want you to know that the effect on Indian-majority districts has not been a consideration in the question of challenging this 5% rule. I don't know how you all reached the conclusion that somehow this is a big conspiracy against the tribes because it is not.

Commissioner Pretty On Top: It is my conclusion. If you take out two districts of six, it is damage on the way in which we had the intent.

Commissioner Jellison: It doesn't have to happen that way. To assure you of our good intentions, like Sheila (Commissioner Rice) anticipated what might be going on here--and I did a little thinking and writing about things--I prepared what I thought were a set of mandatory criteria and discretionary criteria that maybe could guide us. (EXHIBIT #11) I have been giving out copies of that, and I don't have one for you, Joe (Commissioner Lamson). But I would invite your attention to paragraph two of the mandatory criteria that, I believe, should properly be a part of our redo of the plan. That paragraph says "In keeping with interpretation of equal protection clause of the United States Constitution and with their proportion of the Montana population, six Indian-majority house districts and three Indian-majority senate districts shall be created. Such districts shall be contiguous but need not be unreasonably compact." That, of course, was an effort to solve the problem with what has been the "muskrat district", which is not compact. We do not intend to harm the Indian districts. What we are trying to do is to do away with the manipulation that was done in Plan 300 of populations trying to get a political benefit out of them.

You say that it was done in good faith. I can remember listening to Joe (Commissioner Lamson) telling a group that his changing of the numbers in the districts had gotten the Bozeman a new, additional representative. That's political. That is not good faith trying to get equal population in the districts. It cannot possibly have been a result of good-faith efforts to wind up with the 12 districts in northwest Montana, all being over-populated between 4% and 5%. That is the kind of things that have resulted in our taking a look at the Constitution and taking a look at the cases that have been decided. The 5% has nothing to do with the standard criteria that ought to be applied as we redo districts in the state of Montana under the Montana Constitution. I can assure you that if we do a redo and we adopt this kind of criteria, your districts are going to be safe. It is possible that in the course of that, if it really works out that you can't find enough people to create an Indian-majority districts in (proposed districts) #29 and #30, maybe we come back with a plan that says to the Legislature, "Hey, we just couldn't do this. But we tried, and here are the things that we tried and it didn't work." If the cases all indicate that if you have a reasonable explanation to deviate from this, then that may be accepted and be the solution to the problem. But, believe me, it is not an effort to undo your districts or to do any harm to your folks.

Commissioner Pretty On Top: Well, it is quite interesting and curious that the two districts that it impacts are the districts where I lived. It would seem that it is almost a target in a way, and

if you really meant to do well by it, you didn't. On its face, it is what it is. If it looks like a duck and it walks like a duck, it probably is.

Commissioner Jellison: You haven't had a chance to see that.

Commissioner Pretty On Top: I walked in today to see it on the table here.

Commissioner Lamson: This is my point that I was raising on this. The key difference is that (proposed district) #29--the Northern Cheyenne proposed district--lists the voting age population as 57.3% currently which is correct. Under their new particular plan, they reference a mathematical formula in which they do a proportion off of the total number of Native Americans--percentage of Native Americans, and then they extrapolate the mathematical formula. That formula tells you what the percentage potentially could be of Native Americans, but not the voting age. We know that there is a great deal of difference in these populations between voting age on the reservation and off the reservation in those communities. So, it is much more severe and magnified, in effect, than is indicated.

If I may go further, the majority members of the Legislature passed these resolutions and these laws. They were strongly opposed, unanimously, by the Montana Democratic Party. In the resolution, they speak specifically to what they object to is six Indian-majority house districts and senate districts in their WHEREAS as a violation of the Shaw v. Reno. So, if the intention of the Republicans voting for this was not to make any statement or cause any harm towards the districts, then I, for the life of me, can't understand why that was included in the resolutions that we received.

Commissioner Pretty On Top: It is the sixth WHEREAS. It is pretty hard to overlook it.

Commissioner Jellison: The reason that that is in there is because there are some Republican legislators who are outraged at what have been doing in terms of creating these districts. I have been talking to the Leadership of the Legislature, the Republican Leadership of the Legislature, including some people who were outraged at the district that we proposed. I have indicated to them that the law coming out of the federal court system is such that we not only can do this kind of thing but that we ought to do this kind of thing. I think they have, I think, made really good headway. I can tell you that the Leadership of the House and the Senate, or at least the principal members of the Leadership, have told me that they have no problems with a redo using the criteria that I have set out which call for us to create six Indian-majority house districts and three Indian-majority senate districts. We Republicans maybe don't have the party discipline that you have. We've got individuals in our party who do their own thing, and I cannot assure you that there would not be some outraged cries or some votes against. But I can tell you that if we redo this right away while we've got the same people here, you will not have a problem with getting those nine districts approved and they are not going to be a basis for a big argument.

Commissioner Jellison's motion to recognize that the plan to date is unacceptable and that the Commission redo a plan with 1% deviation while maintaining Indian-majority districts failed on a 3 to 2 vote with Commissioners Rehberg and Jellison voting yes and Commissioners Lamson, Rice, and Pretty On Top voting no.

Commissioner Jellison: I would **move** that we adopt Commissioner Rice's suggestion of submitting this (the plan) to the Attorney General for an opinion as to whether or not our plan as we have approved it jumps through all of the hoops or whether it doesn't.

Ms. Fox: I am not sure I understand what we are submitting. This motion is not what Commissioner Rice's motion was and whether or not there are constitutional issues involved.

Commissioner Rice: My intentions would be to make whatever amendments we have and submit the plan to the Secretary of State today. Our constitutional duty is very clear, very clear, on what we do there. Subsequent to that, I believe that the letter to the Attorney General is in order (See Exhibit #9). But, I don't want any confusion in the fact that my intentions are to submit a plan to the Secretary of State today.

Commissioner Jellison: I don't have any problem with that.

Commissioner Pretty On Top: So, your motion would be that we submit something to the Attorney General to express an opinion about, and as Ms. Fox said, what is the submission?

Mr. Petesch: What is to be submitted to the Attorney General? And, if this plan is submitted today, this Commission would be dissolved, so who would be doing the legal documentation to submit to the Attorney General from a body that no longer exists?

Commissioner Jellison: The constitutional provision is that the Commission is dissolved when the plan is filed. The plan is not going to be filed, it is going to be rejected.

Commissioner Pretty On Top: How do you know that, Dean (Commissioner Jellison)? Why do you say that?

Commissioner Jellison: Because the law of the state of Montana today says that the Secretary of State may not accept a plan such as this one.

Commissioner Pretty On Top: The Constitution says that or the resolutions from the Senate?

Commissioner Lamson: The resolutions.

Commissioner Jellison: The press has reporting all of this in terms of (House Bill) No. 309 authorizes the Secretary of State to do something. That is not right. That language says that he may not do it.

Commissioner Pretty On Top: But, the Constitution says to us what we are to do. We are submitting the plan, and when it is submitted, it becomes law.

Mr. Petesch: The Constitution specifically says that you have received the Legislative recommendations to date. Therefore, you have 30 days to consider them and within that 30 days, you are to file your final plan with the Secretary of State, and the plan becomes law. The statute now says that the Secretary of State may not accept the plan for filing unless it complies with the legislative determination of the phrase "nearly as equal as practicable". Assuming that the documentation you submit to the Secretary of State does not comply with the statute, then the Secretary of State has a statutory duty to reject the plan for filing. Now, this is where the legal issues will begin. Assuming that someone challenges the statute as imposing a condition on the Secretary of State's office that is not contemplated by the Constitution, there will be a question of when the plan was filed. This would have to be decided in litigation. You would assumably not be within the 30 days for submission of the plan as required by the Constitution, so the litigation is going to have to occur very quickly assuming there will be litigation. This Commission is required to file its plan within 30 days from today.

Commissioner Jellison: It would seem to me that if it was presented for filing, and the Secretary of State said "No, I can't do that because of this statute", and if the Attorney General later said that the statute is unconstitutional or whatever. . . .

Mr. Petesch: The Attorney General will not opine on the constitutionality of a statute because he has a duty to defend it if it is challenged.

Commissioner Pretty On Top: Would you say that again please?

Mr. Petesch: The Attorney General will not issue an opinion on the constitutionality of a statute because he has a duty to defend the constitutionality of statutes if they are challenged.

Commissioner Jellison: So, the only chance we have of a getting a plan in effect before the termination of this Legislature is to do a new one that is acceptable to the Secretary of State and go with it. There is no possibility that the litigation is going to be done by the middle of April or whenever the Legislature adjourns.

Commissioner Lamson: Again, I believe that the Constitution is clear, and I believe that this has real serious retroactive consequences, but that is what we have our courts for. That is why I would urge that we proceed with the Constitution--it is very clear--file our plan, and then the Secretary of State will do what he has to do. He did swear to uphold the Constitution. He said that he would uphold the bill (i.e., HB #309) rather than the Constitution in press statements. I think Commissioner Rice has an excellent idea, and it seems to have some consensus of at least three of us, although I haven't heard anything from the Chairman or Commissioner Rehberg, and if Commissioner Rice would talk about what her letter would say, it might shed some light on this.

Commissioner Rehberg: Why do we have to hurry through it today if we have 30 days?

Commissioner Pretty On Top: What would be the pros and cons of it being in a hurry or not in a hurry?

Commissioner Rehberg: I think that there is a lot of unanswered questions that are not going to be answered today unless you are going to cram it down our throats. Then the question has been answered. But, as long as we have 30 days and racing against the clock, it would seem logical, as complicated as it has been becoming, that we sit down and analyze it and utilize (Commissioner) Mr. Jellison's comments that we check with attorneys to find out exactly where we are.

Commissioner Lamson: It seems clear from the intent of the delegates that the reason that the Commission was given exclusive power was because these things are very disruptive to a sitting Legislature. As a person who has now attended 14 public meetings that were probably the worst-notified public meetings that I have ever seen in the history of this Legislature, spent hours and hours in that, and we haven't even gotten to the point of actually drawing a line. I think the constitutional mothers and fathers were quite perceptive about what the impact that this has. The issues before this Legislature go way beyond what we are doing here today. They are critical around the future of this state in providing good jobs, taking care of those who cannot take care of themselves, and providing a good education. I think the state is, obviously, going to court. We might as well get this process moving along and let the legal system do what the legal system is set up to do. I have talked to various attorneys, and they believe that we are on sound footing. When we passed these motions on every single 100 districts, which members of this Commission objected to our reading aloud, we were very specific about what the criteria were that we were fulfilling and what the communities of interest in those districts were there. The record is exhaustive, and we know that. We had 1,600 people make comments on this subject. I think that it's time to move on and do what we think the intent of the constitutional framers was.

Commissioner Jellison: The people who framed the Montana Constitution lifted language from a Supreme Court decision which said that you will create districts that are as equal as is possible. The U.S. Supreme Court, following that original ruling, has rejected districts that are .07%--7/10ths of 1%--off from the ideal number because they could have been made closer from the evidence before them. If they remember now that their objective was as you describe it,

I would submit that their memories are not really right because I think what they understood at the time they adopted that was we are going to have districts that are equal in population--as equal as is possible. Beyond that, you people have the power and you can do what you please. But I want to be very clearly understood that you have an opportunity to have something done that can be approved during this legislative session--a 1% redo. If you don't do that, then you are deliberately choosing to bypass the possibility of getting that done this year, and you are choosing to depend on whenever the court finally decides that case which may or may not be before the next redistricting is done.

Commissioner Lamson: It sounds like this issue is going to eventually go through the state court system and end up in the Montana Supreme Court. That seems to be the argument that Commissioner Jellison is making. I think that given the nature and gravity of this particular question and the court's realization that we have very concrete deadlines in Montana that we have to go through to make this happen, it may be expeditious in terms of doing that. Another point, on the .07% that is cited, I believe that was dealing with congressional districts. The congressional system and the Montana system of districts is obviously very different. If you were going to look at using what we do, which would be taking the entire national population and dividing that by 435 members of the House, you would find that there is no congressional district in the United States established under the 2002 plan that meets that 0% criteria. That is regard to districts within the state, and there is broad variance. Montana is the most malapportioned state in that we have 900,000 people. Basically, the ideal is 650,000 people. We are upward of plus or minus 60% between Montana and Wyoming. This notion that congressional is this perfect 0% is false.

Commissioner Jellison: It doesn't call for the perfect 0%, it calls for 1% if you created 12 districts all together that are all within 1%. You all do what you want to do but you have to recognize that you are abandoning the possibility of getting something done this season if you do not decide to redo this this time.

Commissioner Rice: Dean (Commissioner Jellison) again, I respect you very much as an attorney. But, I think it is an overstatement to say that we're rejecting that anything would be done. We can't predict what will happen when this day is over. We know what the Constitution says. We know that this Legislature, the Legislature of the state of Montana, in every past redistricting has accepted 5%, has through its staff allowed those Commissioners in place at the time, to use 5%. We know that there are many questions of constitutionality with House Bill No. 309, and lastly, we know again that we have a constitutional duty at hand here. Delay is simply delay. Let's move on with our constitutional duty, let's submit a plan today with amendments as we see fit, and go forward.

Ms. Fox: It is my understanding, and Mr. Petesch can correct me if I'm wrong, that the Legislature's role is no longer--the legislative session has no consequence to us anymore because the Legislature has returned its recommendations to the Commission. Their role has now ceased. There is no other role for them now in this process unless there is an individual legislator who wanted to file suit. But, right now, there is no other role for the Legislature so the legislative session timing--we under a 30-day deadline with the Constitution but, even if the Commission were to redo a 1% plan, there is no vehicle, there is no law that tells us to resubmit it to the Legislature for their approval. I want to be clear that I don't think the Legislature as a whole, as an institution, has any other role in this process at this point in time.

Commissioner Jellison: I suspect that a legal analysis would reach the conclusion that if we do an entirely new plan, we owe the Legislature the opportunity to comment on that entirely new

plan. If we do an entirely new plan and never show it to the Legislature, seems to me would be questionable.

Mr. Petesch: I concur with Ms. Fox's analysis that this Commission has the Legislature's recommendations and you have 30 days within which to act on them, at which time you file the plan with the Secretary of State. One of the legislative recommendations that you have received is to redraw a plan with a plus a minus 1% population deviation. That is the recommendation that you have and it is up to you to accept or reject that recommendation. There is no need or any ability under the Constitution, in my opinion, to resubmit the plan to the Legislature.

Commissioner Jellison: I will accept that Mr. Petesch's analysis is correct and that the Attorney General is not going to rule on the constitutionality of this thing in which case I don't guess there is much point in spending six months waiting for him not to rule. I will withdraw my motion.

Commissioner Pretty On Top: I would venture a guess that a plan redrawn at 1% would also become objectionable because the judgment that has been expressed by the majority of this Commission is never, ever probably going to meet the criteria that the Leadership in the Legislature has, whatever it may be. It would seem that they just want to see "R" behind our names and that just plain won't happen, not in this lifetime. Perhaps they would like a new Chair, but in the life of this Commission, I am the Chair. I make the difference in the vote, and I am not going to be a different person even with the 1% criteria. So, I would submit that if we are going to just conjecture here, there are lots of objections that could still happen. We could get another set of resolutions maybe narrowing it down to 0%. Even at 0%, golly darn, you people just aren't right. You don't have "R" behind your name. The whole process has become remarkably partisan. It is interesting to me that its become this way because I really rolled up my sleeves and tried to get a hold of this matter. I am forced into being far more Democratic than I have ever been, and I probably won't--well never mind. My point is that if we want to conjecture, I think what is objected to here will be objectionable at 1%, and it may even be objectionable at 0%. That is how the words and the actions of this Legislature feel to me as Presiding Officer. When you are objectionable, you are objectionable, no matter whether you're 5%, 1%, or 0%. That is how it feels. It seems to me that we can roll over, and roll over, and roll over, and you'll still never be acceptable. That is my conjecture.

Commissioner Jellison: Are you inviting a response?

Commissioner Pretty On Top: I think that if you can conjecture all over the table, so can I, Dean (Commissioner Jellison).

Commissioner Jellison: I accept, absolutely, your right to conjecture. I have no problem with that. I do want to note that the partisanship that has crept into this process stems, not from us, but from your colleagues--your fellow voter--indicating very candidly and honestly that he believes his job is to improve the chances of the Democratic Party in winning elections. He has used a system that, we think, violates the Montana Constitution to try to do that. So be it, he is doing what he thinks is right. I am reasonably certain that he is going to find out that he is wrong, but what we are really talking about, is how long is it going to take. If you all could recognize that you are not going to get the job done for years, and years, and years, unless you accept the Legislature's mandate that you switch to a 1% thing (population deviation). You may well continue to be the Chairman of this Commission on into the next biennium. I would not have any problem with that at all. I enjoy working with you as a Chairman, but you are somewhat misguided on occasion.

Ms. Fox: The other policy issue that you need to discuss is in regard to the holdover Senators and their appointments. You need to speak to that piece of legislation that has been passed into law. I am not sure if you prefer to dispense with the plan or get the plan in a condition that you are ready to submit, make your decisions on what you are going to submit, and how you are going to submit it. I just wanted to remind you that there is the secondary issue of holdover Senators and their appointments that are now subject to a new law that was just signed yesterday.

Mr. Petesch: You have the options of talking about the holdover-Senator issue now or after you have adopted the district lines and deciding whether you want to include the transition portion of the plan.

Commissioner Rehberg: I would **move** that we go to the amendments. You are going to do what you are going to do and we might as well get it done and get out of here.

Commissioner Pretty On Top: Our procedure has been that we accept the plan and then we accept the amendments, or is it that we accept the amendments and then accept the plan?

Commissioner Jellison: We've accepted the plan.

Ms. Fox: The plan has been adopted--the plan that you adopted on December 6, 2002.

Commissioner Rice: I would **move** amendment 1-B in the list of prepared amendments. (See Exhibit #8) This amendment request moves the Big Sky portion of Madison County back to House District #71 from House District #70 and moves the area east of Cardwell to House District #77. It was requested by Representative Diane Rice.

Commissioner Lamson: Representative Rice, a Republican, has requested this amendment. It seems reasonable. We've heard testimony from folks on their opinions on whether that should be in there or not. I think we have only received one letter from folks in Big Sky, and they seem to want to do this. So in trying to be agreeable with folks and people along the county line, I think that this is a good amendment.

Commissioner Rehberg: What effect does this have on (proposed district) #77?

Commissioner Lamson: It just moves some people down. . . .

Commissioner Rehberg: Did we have any comment from them?

Ms. Fox: There was some discussion about Jefferson County wanting to be all intact. To the extent that this adds more Jefferson County people up with the predominant Jefferson County district, I believe that it would make them happy.

Commissioner Rehberg: Are you recommending Section 1-A also?

Commissioner Rice: No, my motion was 1-B.

Commissioner Rice's motion passed unanimously.

Commissioner Lamson: I would **move** amendment #2 in Chouteau County. This was proposed by the Clerk of Chouteau County to assist them in making their precincts and school district lines to be more in alignment. They are very receptive of those kinds of decisions, it doesn't move that many people, and I think that it is a good suggestion.

Commissioner Jellison: It suggests a problem to me. The Clerk and Recorder also indicates that she's having trouble determining what the boundary lines are. Can you print something that shows the TigerLines that you have used in more detail?

Ms. Fox: Yes, I can do that.

Commissioner Jellison: If one of these Clerks asks "Where is that line really?", they can call you and you can print them a thing that shows exactly?

Ms. Fox: Yes, although I would contend that that would be the goal of the Secretary of State's Office. I have spent the last 10 years being that resource for Clerk and Recorders. I will continue to be that resource.

Commissioner Lamson's motion passed unanimously

Commissioner Rice: I would **move** adoption of amendment #4. This is Missoula County, and as stated, it moves population from proposed house district #100 to proposed house district #97 and #98.

Commissioner Jellison: Who requested that?

Commissioner Lamson: Holly Raser, the Representative from that area. She talked about the river and keeping the neighborhoods in that area together. It is very similar to Big Sky, and it made some sense.

Commissioner Rice's motion passed unanimously.

Commissioner Lamson: I have one additional amendment. Representative Peterson from Fergus County called me last night and asked if I might propose this amendment for the Commission's consideration. I would want to look at it and go over the record of what we had in that area to see what its implications might be. This amendment, and I am not moving this amendment, I am just presenting it. If anyone wants to pick it up, feel free because I think that you will see my conclusion of why I couldn't support it right now.

His suggestion is that Highway 191 travels down through Fergus County, and he wanted to use that as the line as opposed to the county line that we used. He was curious about why this "jigged" around. Well, that is the county line and that is how it was drawn. This would involve 20 people which is a key point. When you have 20 people that probably gets down to about 15 voters, so you would be establishing a precinct, in all likelihood, for 15 people. We received strong objections in Flathead County when we had inadvertently created a precinct for 10 people who raised questions about the confidentiality of the voters. It was an oversight at that time but, for good reason, we got rid of it. I think this sets up a situation where you are going to have a pretty unhappy Clerk in that area. We were following county lines like most people in eastern Montana wanted us to do. For these reasons, I cannot support this amendment.

Commissioner Rehberg: I would **move** that we review Mr. (Rep.) Peterson's request. I think that he has a valid reason. Basically, what you are doing is putting his (Rep. Peterson's) ranch into a new district, and he would prefer to be kept in the district that he represents.

Commissioner Lamson: Unfortunately, you've got one of those uncomfortable situations where we have three Representatives and only two districts out there. Mr. (Rep.) Peterson is right on the line. I am also hesitant of supporting it also for the reason that we heard from Mr. (Rep.) Peterson but we have not heard from Mr. Thomas and Mr. Kasten (Representatives) on that same thing. They may have an opinion about who they would choose to ultimately share a district with.

Commissioner Jellison: Representative Peterson talked to me yesterday, and I understood that this jog that included his land in proposed district #15 would put him out of the county that he

lived in. His ranch is in Judith Basin County. If the line came straight down the highway, he would stay in the county that he lives in. But, with this jog, it moves him into a different county. It puts him with the voters in a different county than where he has been. Do we know that that county line correctly follows that little jog?

Ms. Fox: I don't know where he (Rep. Peterson) lives, but I do know that within the current district we have this big donut district. It didn't matter which side of the line that he is on because it is all in the same district. As soon as we use the county line--the one thing in the Census Bureau that does seem to be accurate is county lines. When we changed it and split the district using the county line, we didn't change his county of residence but the district changed. I am not sure where his ranch is specifically, but all we did was follow the county line and it does change districts on either side of the line.

Commissioner Lamson: Again, my main concern is that we are creating a precinct that in all likelihood is going to be very, very small, will have few voters, and it will be an extra expense to the county.

Commissioner Rehberg: Don't you think he is in a precinct now of that size?

Ms. Fox: I have precinct boundaries for Fergus County if you want to look at them. Because of the way the district is configured, using the county line and then the highway, it's probably going to split a precinct anyway. Whereas, if you just slice off a corner--plus you have to go in a tiny bit because the Highway doesn't even stay all up in Fergus County. It goes in and out of Judith Basin and Fergus County, so you have to go find the next likely census block. They are going to create a new precinct anyway, but at least, if you look at the southern one-half, it's much more populated there.

Commissioner Jellison: It's just the principle involved in all of this. There are going to be two votes saying that it should be done and three votes saying it shouldn't be done. It doesn't make any difference how we vote. So, let's just vote on it.

Commissioner Pretty On Top: You know, I really don't know how to vote. Does it really put people into a precinct of 15 people? We don't actually know that do we?

Ms. Fox: The Clerks and Recorders make those decisions. I don't know if they. . . .

Commissioner Pretty On Top: They could add them into another precinct it would seem.

Ms. Fox: Precincts don't necessarily have to be contiguous.

Commissioner Lamson: I would like to ask **Adam Quinn, Montana Democratic Party**, who has done some preliminary analysis on this request, if he could shed some light on it.

Mr. Quinn: If the precinct is not contiguous to the Clerk and Recorder, then the answer is fine; the precinct would be 20 people down by Buffalo and a bunch of people up by Moore. If they decided to create separate precincts that are contiguous to each other, it would clearly be a precinct that would be small. I think the voting age population that I have on my data was 11 or 12 which is a very small precinct. I can also further say that at one point, a drawing that I had, had the division line on the highway, and we changed it to the county line with the idea of having the boundaries follow the county lines.

Commissioner Rehberg's motion failed with Commissioners Rehberg and Jellison voting yes, Commissioners Lamson and Rice voting no, and Commissioner Pretty On Top abstaining.

Commissioner Rice: I have one further amendment. I've had time to look at Option 1-A (See Exhibit #8), and it looks like the Gallatin County Clerk and Recorder is right. She has a real problem down there. I would **move** that the Commission adopt Option 1-A. These are my

favorite maps--"Plan 300 problem areas" is its title. It essentially moves 315 people out of (proposed) house district #68 into (proposed) house district #63.

Commissioner Jellison: Does our staff have an opinion as to whether this motion should carry?

Ms. Fox: I don't have an opinion as to whether it should carry or not, but I do know that when it came up at the June meeting, it came up late and the Commission did say that it would reconsider it. She (Shelley Vance, Gallatin County Clerk and Recorder) was under the impression that it had been adopted and was shocked that it hadn't been. I do know that she thinks it is important, and I think it's important that you reconsider this.

Commissioner Rice's motion passed on a 4 to 1 vote with Commissioners Rice, Lamson, Pretty On Top, and Jellison voting yes and Commissioner Rehberg abstaining.

Commissioner Lamson: Do we have to have a motion to accept the new numbering of the plan?

Ms. Fox: Maybe in the final motion, that might be a good place to include that.

Commissioner Jellison: I would **move** that we make the changes that are requested in the February 3, 2003, letter addressed to the Chairman (Commission Pretty On Top) by Senators Barkus and Thomas. (See Exhibit #4)

Commissioner Lamson: These districts, I believe, were part of the presentation on the second day of hearings before the Joint Committee of the Legislature, which I attended. This was the Republican "dirty dozen" list. It recited basically objections that were raised at various public hearings throughout the process, and I believe that we spoke in our motions when we were drawing these districts that involved these areas rather forcefully about why we thought we were correct in what we were doing. I would have to oppose the motion. In the interest of brevity, I would not go into each reason why I think that they are incorrect on that because it is already well established in the testimony and the motions that we had before us. This was the "dirty dozen" districts, I believe.

Commissioner Jellison's motion failed on a 3 to 2 vote with Commissioners Rehberg and Jellison voting yes and Commissioners Lamson, Rice, and Pretty On Top voting no.

Commissioner Rehberg: I would like to make the statement that I think it is unsafe to ignore that. I don't question what you said in that there is no sense in discussing them because we know what is going to happen. But, I do feel that it is unfortunate that we. . . .

Commissioner Lamson: I didn't say that we shouldn't discuss those and possible outcomes. I said that we had addressed those in terms of the public testimony and the record to date. Those were my reasons for objecting to the motion.

Commissioner Pretty On Top: In consideration of the final plan, Ms. Fox, is this where we put the numbering in or do we do the numbering as a separate item?

Ms. Fox: On that phase, I'm not really sure. This would be part of the final adoption of the plan, I think you could say "as renumbered", and reflect it in the map of today. The map doesn't reflect the amendments though. But, you could accept the new renumbering. You could make a separate motion or include it in the motion, whichever.

Commissioner Pretty On Top: We also have the assignment of the holdover (Senators).

Commissioner Rehberg: I thought that we did that already.

Commissioner Lamson: We adopted that in the plans.

Commissioner Pretty On Top: The plan was submitted, however, we have a resolution on hand, do we not?

Commissioner Jellison: The statute that was adopted says that the Legislature will select the holdover district locations, and we have adopted that.

Mr. Petesch: No, you have not. You have tentatively done that. Senate Bill No. 258 currently provides that the Legislature shall assign holdover Senators to districts for the remainder of their terms, and the Districting and Apportionment Commission may not assign holdover Senators to districts. It is a prohibition on this Commission.

Commissioner Jellison: To get that on the floor, then we need a motion that would withdraw or strike from our plan any reference to assignment of holdover Senators. I would so **move**.

Commissioner Lamson: Again, there was a very interesting discussion on this before the Legislature that we attended. This was one area that you can't point to any statute or the Constitution as to how this should be done. So, I believe, what the Courts generally looked to in these times is past practices. This came out of the Attorney General's opinion that we had to provide each Senator with a 4-year term, consequently, we needed to do assignments. We just couldn't start there and think back. That is where it came from. Again, I think the past practice is inherent in the data that we were established when the Supreme Court filled out the Commission in August 3, 1999. We had exclusive powers onto us as a body. We had jealously guarded that independence from the beginning. We were requested by the ACLU and the Attorney General to give up that independence and we unanimously opposed that. In keeping with that, I believe the Legislature may very well have the power to do this, but in the Commission, not this Commission. It is a retroactive law. For those reasons, I would have to oppose this motion.

Commissioner Jellison: I would respond by saying that this is kind of a hot-potato item wherein you are not going to please hardly anybody. Obviously, we didn't anybody with the assignments that we made. It would seem to me that if somebody else is willing to take over the hot potato, we ought to be delighted to get rid of it. The concern that has always existed about Legislatures doing this kind of thing is that they are unable to get it done because of partisan bickering. Here, the districts are there and the holdover Senators are there. It's just a question of which districts are going to be assigned to which Senators. I think their (the Legislature) sense would be infinitely greater than ours. I don't see a disadvantage in letting them do it, and I see a lot of advantage in letting them do it.

Commissioner Lamson: Two corrections for the record. We only have two holdover Senators out of 25 who objected to their assignments--Senators Sherm Anderson and John Bohlinger. We have not received any objections from any other Senators. This is actually--I was a little bit disappointed in the Legislature. I have told them numerous time in public and private that this is the easiest part of redistricting. You don't need a fancy computer. You just need to pull the map out and make the assignments. There are some interesting things when you run into cases where you have too many Senators and not enough districts. So, there are variations on that. But, the reality is, 23 out of 25 holdover Senators have not made objections to their assignments.

The Commission was very responsive to two of those--it would have been five Senators, actually--Senator Black, Senator Perry, and Senator Bales. Our actions were applauded by

Senator Black. Senator Perry, we quickly moved him into the district that he wanted to be in. And then Senator Bales, we even moved a line to accommodate his concerns. So I think that we have been more than responsive to holdover Senators, and after the 30 days asking them to come to us with this list, they still failed to do that. I don't really think we should agree to that. That is just my opinion.

Commissioner Jellison: It's going to be a disputed item in the litigation that is coming up in any event.

Mr. Petesch: I think it's important, since I addressed this in front of the Legislature, to provide the same analysis to this Commission that I provided to the Legislature. When I drafted and reviewed this bill (SB 258), I reviewed the language of the Constitution, the statutory provisions governing redistricting, and I reviewed the Constitutional Convention transcripts. There is no discussion in any of those documents concerning the assignment of holdover Senators by this Commission. The general rule is that the Legislature is free to act in any area it chooses in the absence of constitutional constraints. The reason for that is because the Constitution is a limit upon, rather than a grant of authority to the Legislature. This particular bill does not apply retroactively. It applies prospectively to plans filed after the effective date of the bill which was yesterday. So, it was my analysis in front of the Select Committee that this bill would withstand constitutional muster.

Commissioner Pretty On Top: It would withstand constitutional muster, meaning that it would stand?

Mr. Petesch: Yes.

Commissioner Lamson: I have yet to read Mr. Petesch's interpretation, but I think, again, this is a constitutional issue. I would argue that inherent in our duties that discussed what we had to do when we were formed, we can't put a plan forward unless that is done (assignment of holdovers). I think that this will be another part of the case. The courts will have to make that decision it sounds like, unfortunately.

Commissioner Rice: I would like to suggest or go with the idea that we adopt what we have already for assignments of Senators (albeit, Mr. Petesch comments). I feel like history is behind us and that the Commissions have always made the assignment of holdover Senators since the ruling came down that we should do or someone should do an assignment of Senators.

Commissioner Jellison: If the motion dies, we'd leave it as we have already done it don't we?

Commissioner Lamson: Your motion is that we strike all of the assignments that we have done.

Commissioner Jellison: Yes.

Commissioners Jellison's motion failed on a 3 to 2 vote with Commissioners Jellison and Rehberg voting yes and Commissioners Rice, Lamson, and Pretty On Top voting no.

Commissioner Rice: I would **move** that we file with the Secretary of State today the plan tentatively adopted with the amendments adopted today and the new (district) numbers.

Commissioner Rehberg: Why tentative?

Commissioner Rice: I'm saying that we tentatively adopted it before. This is our final adoption.

Commissioner Pretty On Top: The date that we tentatively adopted it was December 6, 2002. That could be included in your motion.

Commissioner Rice: I withdraw my prior motion, and my new motion is that I **move** that this Commission file today with the Secretary of State its final plan which is the tentative plan adopted December 6, 2002, with renumbering and the amendments made today.

Commissioner Jellison: I was kind of offended by the fact that the tentative adopted plan never got put together and sent to us before it was submitted to the Legislature as being our final plan. I understand that there is some effort to get it in there very quickly, but it does seem to me like we ought to have had. . . .

Commissioner Pretty On Top: You never received one? It seems to me that I got one.

Commissioner Jellison: Not with the changes made before. We had a meeting, made some changes, and the next day or two days later, it was submitted to the Legislature. Anyway, my feeling is on this one, which is now the final, final, we ought to have that in hand so that we can review it and be sure that, in fact, what it says is what we have voted on and approved before it is submitted to the Secretary of State. I would feel, yes, by all means, we should proceed with it, but we should not try to file that today because we've got a whole bunch of amendments that aren't going to be in there. And, I want to see it before we submit it to the Secretary of State.

Commissioner Lamson: I have supreme confidence in Ms. Fox's abilities to translate our bizarre ruminations into some law that will do that. I think that was the notion was, that we were going there. We have actual documentation up to this date on everything we have done--maps, and maps, and maps, and maps. I think that if you just reviewed your records, it would be quite clear.

Commissioner Jellison: When it happened before, I could understand that there was real urgency because you guys wanted the thing in there to start the clock running as soon as was possible. Here, the clock hasn't started running. We have 30 days in which to submit the plan to the Secretary of State. It just seems to me like it is reasonable for every one of us to be able to look at that in its final form, with all the documents assembled and what not, before it is submitted. I have great confidence in Susan (Ms. Fox) too. I recognize that I am almost perfect, but every once in a while, I miss something.

Commissioner Rice: We are done with our process here. This Commission has labored long and hard over many, many things--18, 19, 20 meetings--I forget how many. But today's amendments, I would put into the category of relatively minor. I feel very comfortable that we adopt this plan.

Commissioner Rice's motion passed on a 3 to 2 vote with Commissioners Lamson, Rice, and Pretty On Top voting yes and Commissioners Rehberg and Jellison voting no.

Commissioner Lamson: I suggest that we have one outstanding item which was the request for the Attorney General's opinion. That might be good to get that out of the way. (See Exhibit #9)

Commissioner Rice: As I mentioned to the Commissioners, I have worked on this letter to summarize what kinds of things we would want the Attorney General to deal with. I will just read through it quickly. I think I have gone over what the key points are, but just to review them, if you would indulge me, please. The letter would be signed after we approve it and if it's approved by our Chairman Janine (Pease Pretty On Top). (See Exhibit #10 for the letter's content.)

Attachment A is basically all of the timelines that we have gone through. I would **move** that this letter be signed by you (Commissioner Pretty On Top) and sent to the Attorney General today.

Commissioner Rehberg: I would like to ask our counsel over here if you are of the opinion that it won't make much difference. Is that correct?

Mr. Petesch: I believe that in order to comply with the Attorney General's guidelines for requesting opinions, you need to accompany this request with the legal analysis that the Commission believes addresses the issue. That is a requirement for opinions. I also believe that based on the Commission's actions today that if the Secretary of State rejects the plan, litigation will be quickly filed and that the Attorney General will be defending the constitutionality of the statute that allows the Secretary of State to reject the plan. Until that litigation is resolved, I do not believe he (the Attorney General) would address this request.

Commissioner Lamson: I think we should let the Attorney General make that decision.

Commissioner Jellison: Is anybody volunteering to do the legal analysis that would have to accompany this?

Commissioner Rice: I believe that there is two paragraphs in here that constitute some or all of that legal analysis. Let me go on record by saying that I have never done a legal analysis, but I submit that the Attorney General will tell us if this doesn't meet his guidelines or criteria. So, I again would support the motion that we adopt this letter as written and authorize Chairman Pretty On Top to sign it and send it.

Commissioner Jellison: Could you describe for us what you understand the legal analysis the Attorney General wants to be?

Mr. Petesch: It is usually your written analysis and legal conclusions concerning the matter for the Attorney General's consideration.

Commissioner Jellison: Typically, it would include case citations and that sort of things so that his people do not have to start research from the beginning of time.

Mr. Petesch: Correct.

Commissioner Lamson: Again, I think we should take it over with more information. He can request it or reject it.

Commissioner Jellison: I would submit that if we simply send this letter to the Attorney General, it is pretty obvious that we are going to get one back saying "No, you haven't done what you need to do". We wind up with a bit of egg on our face because we ought to have known, in fact, have been told, that we have to do before we do that. I think we ought not to adopt that.

Commissioner Lamson: Again, I would submit that the constitution addresses that pretty thoroughly laying out the process.

Commissioner Pretty On Top: I see that there is an overriding interest by the Legislature to control this process--the redistricting process. I'm curious to know if there was any discussion of, perhaps, a constitutional amendment. I didn't attend all of the hearings. Well, I didn't attend any of them but I did read about them in the paper. It seems to me the quibble that the Legislature has is with the constitution and the way this process is set up. They have a big quibble with those of us who have done the planning. But, it seems to me that they are interested to have control of the criteria, control of the doing, and control of the process. Do we have a constitutional amendment coming up?

Mr. Petesch: There is a bill draft request for one.

Commissioner Pretty On Top: There are lots of Legislatures who are apparently more involved in the workings of a Commission. Montana is one that doesn't, but it is a major change in the flow of the intent of the Constitution that is going on, I think. There could be two roads coming together.

Commissioner Lamson: If the question is that this may not have sufficient legal analysis, I would be glad to work with Commissioner Rice after lunch that we insert a paragraph that said something to the effect that "We believe that we have provided the legal analysis in this letter. If more is required, we would be glad to provide that." or something to that effect.

Ms. Fox: If the Commission submits its plan today, it is dissolved. If the Attorney General comes back and says. . . . There is still an issue of whether a Commissioner exists or not and who would provide the legal analysis for the Commission should the AG come back and say. . . . Perhaps, the motion could include the expectation of where any future legal analysis should be procured.

Commissioner Pretty On Top: If the Legislature--the majority that voted on these resolutions thought that they would get a new Commission by doing all of this. I don't know what the discussion was, but it seems to me, that there is sort of something that has been overlooked.

Mr. Petesch: I don't recall any discussion, either in the drafting or the hearings, about a new Commission.

Commissioner Rehberg: Call for the question.

Commissioner Lamson: Before you do that, I am referring to this paper where Sen. Thomas finds that the Legislature will probably have to appoint a new Commission. I believe it was also discussed in the Republican caucuses.

Mr. Petesch: My advice to the Legislature would be that they have created a Commission under the Constitution and that they would have no authority to create a new Commission. That would be my analysis which they would be free to reject also.

Commissioner Pretty On Top: The trend of Commission bashing is pretty clear to me. Wherever we need bashing, they will go.

Commissioner Rehberg: That is why I called for the question.

Commissioner Rice's motion passed on a 3 to 2 vote with Commissioners Rice, Lamson, and Pretty On Top voting yes and Commissioners Rehberg and Jellison voting no.

Ms. Fox: I would like to know how to proceed. I propose that I go back, make these amendments, and do a final check. I can print out a new map, and I was planning on. . . . It is a little bit cumbersome to figure out how to submit this because we don't have legal descriptions, but my plan was, just as 10 years ago, to submit to the Secretary of State a block list which assigns every, single census block in the TigerLine File to a house district.

I have a copy of the letter here and it hasn't received a final legal review. In light of all of the changes, I would like Mr. Petesch to review it. It's taken basically verbatim from what we did 10 years ago with the minor changes of dates. The transition schedule is what Greg (Mr. Petesch) referred to earlier dealing with the senatorial district. Ten years ago, it had a severability clause and it still has a severability clause. So, it does keep those issues distinct. But, what I propose to you, depending on how long you are willing to take break, we could then reconvene and the Commissioners could have the whole packet, sign the final form--the letter--and then you are free to take it and submit it to the Secretary of State if you wish.

Commissioner Pretty On Top: Who signs the final form? All of us?

Ms. Fox: Five years ago, all five Commissioners signed the form.

Commissioner Pretty On Top: I'd have to have a protest column or minority report.

Ms. Fox: Absence would be a . . . It is a choice you could make. I would suspect though that we would need at least a majority of the Commission to submit the plan.

Commissioner Jellison: My plan at the moment is to head for Kalispell as soon as we adjourn because I've got to drive.

Ms. Fox: I have an original copy with the signature page if you want to sign it. If not. . . .

Commissioner Jellison: Jack (Commissioner Rehberg) are you going to stick around?

Commissioner Rehberg: No, I'm going, too. May we have copies of that even though it is not official? I have no intention of signing the final plan.

Commissioner Pretty On Top: Is it your intention to not sign it? Is that what you just said?

Commissioner Rehberg: I have no intentions of signing it, and I say that with regret.

Commissioner Pretty On Top: You could sign next to the way you voted. Then it would be on record.

Commissioner Rehberg: I think it is on record. No, I have no intention of signing it.

Commissioner Jellison: There is nothing that says it has to be signed by everybody who votes. So, the Chairman can sign that and. . . .

Ms. Fox: It has been a tradition.

Commissioner Pretty On Top: Oh, we don't want to go with tradition. We can't go with tradition, oh no! We are antitraditionalists. Those who wish to sign may and those who wish not to may.

Commissioner Jellison: Unofficially, I have total confidence in Susan (Ms. Fox), but officially, I ain't going to sign it.

Commissioner Pretty On Top: Officially, you are not going to sign either.

Commissioner Rice: So, regardless, you won't be signing it.

Commissioner Pretty On Top: Well, then we may or may not be together again as a Commission. That's definitive isn't it? It would seem that this is our last meeting.

Commissioner Jellison: I can assure you that if after you think about what we have done today, you will decide "I think I'd really rather go with a redo now and get this over with that to sit around for the next umpteen years". The determination can be made that the Commission still exists and we really ought to do that.

Commissioner Pretty On Top: I think that you already know what the answer to that is.

Commissioner Jellison: There is always hope.

Commissioner Lamson: Susan (Ms. Fox), are we going to meet in your office to sign or do you want us to sign it now?

Ms. Fox: Either which way.

Commissioner Lamson: I think that it is important to have the severability put in there seeing that there is so many questions raised by these events. I think that it makes sense to have Mr. Petesch speak to that.

Mr. Petesch: The purpose of a severability clause is to ask the Court that if a piece of the plan is found invalid and other portions of the plan can be upheld that the Court would do that. However, the Courts sometimes use severability clauses and sometimes reject them. They

reject them when they find that the portion to be severed was so integral to the rest of the plan that it cannot be severed. Then they would not honor the severability provision.

Ms. Fox: I need about an hour and one-half to process this, and then I'm willing to meet with those who are willing to meet. If the majority can't stay to sign it, then I would prefer that somebody signs it now.

Commissioner Lamson: Why don't we just sign it now in case some obscure thing happens to all or three of us between now and lunch. We've gone through weather, the Legislature, and all kinds of things. At least that part is done. We could then meet and submit the plan.

There being no further business, the meeting adjourned at 12:50 p.m.

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