

CLERK OF DISTRICT COURT

ADV-2013-509

FILED

BY *Apotunak*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

ROBERT WILLEMS, PHYLLIS WILLEMS, TOM BENNETT, BILL JONES, PHILIP WILSMAN, LINDA WILSMAN, JASON CARLSON, MICK JIMMERSON, DWAYNE CROOK, MARY JO CROOK, JAMES STUNTZ, RANDY BOLING, ROD BOLING, BOB KELLER, GLORIA KELLER, ROALD TORGERSON, RUTH TORGERSON, ED TIMPANO, JEANNIE RICKERT, TED HOGLAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, and DAVID ROBERTSON,

Plaintiffs,

v.

STATE OF MONTANA, LINDA MCCULLOCH, in her capacity as and Secretary of State for the State of Montana,

Defendants.

Cause No.: ADV-2013-509

00

**DECISION AND ORDER ON
CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Pending before the Court are cross motions for summary judgment.

Matthew G. Monforton represents Plaintiffs. Lawrence VanDyke and J. Stuart

1 Segrest represent Defendants State of Montana and Secretary of State Linda
2 McCulloch. The Court held oral argument on November 8, 2013. Upon consideration
3 of the parties' arguments, the Court grants Defendants' motion
4 for summary judgment in accordance with this Order.

5 **BACKGROUND**

6 On March 14, 2013, Plaintiffs filed a complaint seeking injunctive and
7 declaratory relief in the Montana Fourteenth Judicial District Court, Wheatland
8 County. Plaintiffs are registered voters in Fergus and Wheatland Counties seeking to
9 invalidate the Montana Districting and Apportionment Commission's (Commission)
10 assignment of two "holdover" senators (senators who were elected to a four-year term
11 in 2012 who do not have to seek re-election during the 2014 general election.)
12 Defendant Linda McCulloch (McCulloch) is the Secretary of State for the State of
13 Montana. Her primary responsibility is maintaining the official public records for
14 the State of Montana and conducting elections. In their initial complaint, Plaintiffs
15 alleged the following causes of action: Count I --- denial of right of suffrage in
16 violation of Article II, Section 13 of the Montana Constitution; Count II --- denial
17 of the right to participate in violation of Article II, Section 8 of the Montana
18 Constitution; Count III --- failure to submit redistricting plan to the legislature in
19 violation of Article V, Section 14(4) of the Montana Constitution; Count IV --- denial
20 of equal protection in violation of Article II, Section 4 of the Montana Constitution;
21 Count V --- denial of equal protection (inverse class of one) in violation of Article II,
22 Section 4 of the Montana Constitution; Count VI --- unlawful consideration of an
23 incumbent legislator's address in redistricting in violation of Section 5-1-115(3)(a),
24 MCA; and Count VII --- unlawful consideration of previous election results in
25 redistricting in violation of Section 5-1-115(3), MCA. Plaintiffs request: (1) an Order

1 from this Court declaring the Commission's February 12, 2013 assignment of Senator
2 Rick Ripley (Ripley) to Senate District 10 and Senator Brad Hamlett (Hamlett) to
3 Senate District 15 unlawful and void; (2) an Order enjoining Defendants from giving
4 any legal effect to the Commission's February 12, 2013 assignment; and (3) an award
5 of attorney fees and costs.

6 On May 8, 2013, Defendants filed a motion for change of venue from
7 Wheatland County to Lewis and Clark County. Plaintiffs opposed the motion. On
8 June 27, 2013, the district court granted Defendants' motion and transferred the
9 proceedings to the First Judicial District, Lewis and Clark County. On July 31, 2013,
10 Plaintiffs filed an amended complaint alleging an additional cause of action: Count
11 VIII --- failure to permit public observation of agency deliberations in violation of
12 Article II, Section 9 of the Montana Constitution.

13 This case arises out of the 2013 redistricting of the Montana Legislature
14 into 100 house districts and 50 senate districts. Specifically, Plaintiffs seek to
15 invalidate the Commission's 2013 redistricting plan wherein the Commission assigned
16 two holdover senators at its February 12, 2013 meeting. The term "holdover senator"
17 refers to those Montana senators who have served two years of their four-year term at
18 the time of redistricting. Plaintiffs allege the reassignments were made without public
19 notice and legislative review and disenfranchised voters in Senate District 15 which
20 includes Judith Basin, Fergus, Petroleum, Wheatland, Meagher, and Golden Valley
21 Counties. Plaintiffs are registered voters in Fergus and Wheatland Counties who last
22 voted for a state senator in the 2010 general election.

23 In 2010, Llew Jones (Jones) was elected to the Montana Senate in Senate
24 District 14. After reapportionment, Jones' residence (in Pondera County) lies in
25 Senate District 9. Initially, the Commission assigned Ripley as a holdover senator to

1 represent Senate District 9. Under the tentative redistricting plan, Jones would have
2 to wait until the 2016 general election to seek re-election to the Montana Senate in
3 Senate District 9, the district in which Jones resides. Under the final redistricting
4 plan, however, the Commission assigned Ripley as the holdover senator in Senate
5 District 15. Plaintiffs, who reside in Senate District 15, will have to wait six years
6 (until the 2016 general election) before having an opportunity to elect a senator to
7 represent them in the Montana Legislature.

8 Montana's legislative districts are determined after each federal census.
9 Article V, Section 14 of the Montana Constitution establishes a Districting and
10 Apportionment Commission to prepare the plans for redistricting and reapportioning
11 the state into legislative districts. It provides:

12 **Section 14. Districting and apportionment.** (1) The state
13 shall be divided into as many districts as there are members of the
14 house, and each district shall elect one representative. Each senate
15 district shall be composed of two adjoining house districts, and shall
16 elect one senator. Each district shall consist of compact and
17 contiguous territory. All districts shall be as nearly equal in
18 population as is practicable.

19 (2) In the legislative session following ratification of this
20 constitution and thereafter in each session preceding each federal
21 population census, a commission of five citizens, none of whom
22 may be public officials, shall be selected to prepare a plan for
23 redistricting and reapportioning the state into legislative districts and
24 a plan for redistricting the state into congressional districts. The
25 majority and minority leaders of each house shall each designate one
commissioner. Within 20 days after their designation, the four
commissioners shall select the fifth member, who shall serve as
chairman of the commission. If the four members fail to select the
fifth member within the time prescribed, a majority of the supreme
court shall select him.

(3) Within 90 days after the official final decennial census
figures are available, the commission shall file its final plan for
congressional districts with the secretary of state and it shall become
law.

1 (4) The commission shall submit its plan for legislative
2 districts to the legislature at the first regular session after its
3 appointment or after the census figures are available. Within 30
4 days after submission, the legislature shall return the plan to the
5 commission with its recommendations. Within 30 days thereafter,
6 the commission shall file its final plan for legislative districts with
7 the secretary of state and it shall become law.

8 (5) Upon filing both plans, the commission is then dissolved.

9 After the 2010 federal population census, the legislative leadership
10 appointed four members to the Commission and the Montana Supreme Court selected
11 the fifth member. In an effort to allow citizen participation to establish criteria for
12 redistricting, the Commission held public hearings in Helena, Missoula, and Billings,
13 in which citizens in Havre, Great Falls, Kalispell, and Miles City participated via
14 videoconference. On May 28, 2010, the Commission adopted redistricting criteria. In
15 July 2011, the Commission directed its staff to develop statewide maps for discussion
16 and to elicit public comment. The Commission subsequently held public hearings in
17 14 different locations across Montana, including rural and urban communities and
18 areas with a sizeable population of Native Americans. In August 2012, the
19 Commission adopted a tentative plan for 100 legislative districts.

20 The Commission then created senate districts, which it accomplished by
21 joining adjacent house districts. After soliciting public comment on potential senate
22 districts, the Commission considered the assignment of the 25 holdover senators. As
23 an unavoidable consequence of redistricting, each holdover senator is assigned to a
24 newly apportioned and redesigned district to serve the remaining two years of their
25 term. The remaining 25 senate districts will hold elections in 2014. In December
2012, the Commission directed its staff to prepare a "Tentative Commission Plan"
for submission to the 63rd Montana Legislature on January 8, 2013. Upon review

1 of the tentative plan, the House and Senate adopted resolutions providing its
2 recommendations to the Commission. The legislative resolutions did not address
3 Jones' inability to run for re-election under the Commission's tentative plan. On
4 January 27, 2013, a bipartisan group of six senators, six representatives, and four
5 leaders of non-profit and community associations submitted a letter to the
6 Commission asking it to assign Jones to a district in which he could run for re-election
7 to the Senate in 2014. Like all public comment submitted to the Commission, the
8 letter was posted to the Montana Legislature's website. The Commission also
9 received letters from government and community leaders from northcentral Montana
10 asking the Commission to assign Jones to a senate district in which he could run for
11 re-election in 2014.

12 Upon receiving the legislative recommendations, the Commission
13 scheduled February 12, 2013 as its final meeting date at which the Commission
14 planned to discuss and revise its tentative plan and adopt a final legislative
15 redistricting plan. The agenda for the February 12, 2013 Commission meeting
16 included an opportunity for public comment. At the meeting, a majority of
17 Commission members voted to assign Senator Ripley to Senate District 10 and assign
18 Senator Hamlett to Senate District 15, thereby leaving Senate District 9 without a
19 holdover senator. This revision, which Plaintiffs' designate the "Llew Jones
20 amendment," was the last matter the Commission considered at its final meeting.
21 Thereafter, the Commission gave an opportunity for public comment. When no one
22 testified, the Commissioners adopted the final redistricting plan. The Commission
23 was dissolved upon submitting its final plan to the Secretary of State.

24 Plaintiffs argue the Commission violated several provisions of the
25 Montana Constitution by privately deliberating on the Llew Jones amendment and

1 failing to provide adequate public notice prior to their February 12, 2013 meeting.
2 The final redistricting plan, according to Plaintiffs, will unlawfully deprive them an
3 opportunity to vote in a senate election in 2014.

4 Plaintiffs have stipulated to dismissal of their claims arising under the
5 Montana Constitution's guarantee of equal protection, Sections 5-1-115(3)(a) and
6 5-1-115(3)(d), MCA, the fourth, fifth, sixth, and seventh causes of action in their
7 amended complaint.

8 STANDARD OF REVIEW

9 Summary judgment is appropriate when "the pleadings, the discovery
10 and disclosure materials on file, and any affidavits show that there is no genuine issue
11 as to any material fact and that the movant is entitled to judgment as a matter of law."
12 Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish
13 the absence of any genuine issue of material fact and the party is entitled to judgment
14 as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*,
15 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its
16 burden, the party opposing summary judgment must present affidavits or other
17 testimony containing material facts which raise a genuine issue as to one or more
18 elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174,
19 943 P.2d 1262, 1266 (1997)). Conclusory statements and assertions are not enough to
20 defeat a motion for summary judgment. *Id.* The mere denial of a fact does not satisfy
21 the non-moving party's burden of establishing a genuine issue of material fact and is
22 not a proper basis for denial of a motion for summary judgment. *Vettel-Becker v.*
23 *Deaconess Med. Ctr. of Billings, Inc.*, 2008 MT 51, ¶ 27, 341 Mont. 435, 177 P.2d
24 1034.

25 ////

1 **DISCUSSION**

2 The Court grants Defendants' cross-motion for summary judgment and
3 denies Plaintiffs' motion for summary judgment in accordance with this Order.

4 **I. Denial of Right of Suffrage --- Article II, Section 13 of the Montana**
5 **Constitution**

6 Article II, Section 13 of the Montana Constitution provides that "All
7 elections shall be free and open, and no power, civil or military, shall at any time
8 interfere to prevent the free exercise of the right of suffrage." The right of suffrage
9 is a fundamental constitutional right. *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont.
10 196, 113 P.3d 281 (citations omitted). Plaintiffs claim because approximate 19,000
11 (95 percent of the district's population) residents of Senate District 15 last voted for
12 a senate candidate in 2010, they are disenfranchised and deprived of their right of
13 suffrage when forced to wait six years between senate elections instead of four.
14 Defendants note Plaintiffs' case is not supported by state or federal law, that in the
15 context of legislative redistricting, the primary concern is that population deviation
16 between districts remain relatively close to the "ideal deviation." *McBride v.*
17 *Mahoney*, 573 F. Supp. 913 (D. Mont. 1983) (citations omitted). In the present
18 matter, the Commission adopted a deviation criteria of 3 percent from the ideal.
19 In fact, under the Commission's final plan there are no house or senate districts
20 with a deviation greater than 3 percent.

21 Montana's Constitution requires legislative reapportionment every ten
22 years, resulting in 25 senate districts to which the Commission assigns a holdover
23 senator. As a direct result of the constitutional requirement that Montana state
24 senators serve staggered four year terms, one-half of the state's population will
25 inevitably reside in a district to which the Commission assigns a holdover senator.

1 It is an inescapable consequence of the redistricting process that many Montanans
2 will cast their votes in two senate (general) elections over a ten year period. The
3 Commission has many compelling interests, statutory criteria and constitutional
4 rights which they must consider and balance when drafting a redistricting plan. As
5 the Commission assigns holdover senators, however, there are no statutes or case
6 law requiring it to minimize the affected population.

7 **II. Denial of the Right to Participate --- Article II, Section 8 of the Montana**
8 **Constitution**

9 As set forth above, the Commission encouraged and facilitated public
10 participation throughout the redistricting process. Defendants argue the right of
11 participation under Article II, Section 8 of the Montana Constitution applies only to
12 “agencies” defined by Section 2-3-102, MCA, and the Commission is not an “agency”
13 subject to the right to participate. Article II, Section 8 provides: “The public has the
14 right to expect governmental agencies to afford such reasonable opportunity for
15 citizen participation in the operation of the agencies prior to the final decision as may
16 be provided by law.” Section 2-3-102(1)(a), MCA, excludes from the definition of
17 agency “the legislature and any branch, committee, or officer thereof.” Plaintiffs
18 insist the Commission satisfies the definition for an agency which includes “any
19 board, bureau, *commission*, department, authority, or officer of the state or local
20 government.” Section 2-3-102(1), MCA (emphasis added).

21 The Montana Supreme Court determined the Commission is “an
22 independent, autonomous entity,” appointed by the legislative leadership, but
23 insulated from political pressure inherent in the redistricting process. *Wheat v. Brown*,
24 2004 MT 33, ¶¶ 20, 23, 320 Mont. 15, 85 P.3d 765. Although the Commission is
25 independent from the legislature, it is clearly a part of the legislative branch of

1 government. The powers and duties of the Commission are established under Article
2 V of the Montana Constitution—entitled “The Legislature.” The Commission
3 operates much like an interim legislative committee. The Legislative Services
4 Division provides the research analysts, attorney, and secretary to staff the
5 Commission and maintains its website. (Defs.’ Resp. Pls.’ Mot. S.J. & Br. Supp.
6 Defs.’ Cross-Mot. S.J., Ex. A (Sept. 11, 2013).) In fact, the electronic copy of
7 the Commission’s minutes, submitted as Defendants’ Exhibits A through I, are
8 maintained and may be accessed from the “Legislative Branch” home page.
9 Because the Commission is not an agency, but a component of the legislative
10 branch, its deliberations are not subject to Article II, Section 8.

11 Nonetheless, the record in this matter amply demonstrates the
12 Commission strived to ensure public involvement at every step of the redistricting
13 process and thereby complied with the requirements of Article II, Section 8. The
14 Commission provided notice prior to its February 12, 2013 meeting that it would
15 discuss potential revisions to the tentative plan, which could foreseeably have
16 included changes to the assignment of holdover senators. (Pls.’ Compendium Evid.
17 Supp. Pls.’ Mot. S.J., Ex. 15 (Aug. 2, 2013).) Further, the Commission posted to its
18 website letters from community leaders, legislators and others urging the Commission
19 to assign Jones to a senate district in which he could seek re-election. The
20 Commission provided sufficient notice to the public so that they could participate in
21 the redistricting process, including the assignment of holdover senators.

22 **III. Failure to Submit Redistricting Plan to the Legislature --- Article V,**
23 **Section 14(4) of the Montana Constitution**

24 Article V, Section 14(4) of the Montana Constitution provides the
25 following:

1 The commission shall submit its plan for legislative districts
2 to the legislature at the first regular session after its appointment
3 or after the census figures are available. Within 30 days after
4 submission, the legislature shall return the plan to the commission
5 with its recommendations. Within 30 days thereafter, the
6 commission shall file its final plan for legislative districts with the
7 secretary of state and it shall become law.

8 The Commission, after receiving the legislature's recommendations,
9 re-assigned Senator Ripley to Senate District 10 and Senator Hamlett to Senate
10 District 15 at the February 12, 2013 meeting. As a result, the Commission filed a final
11 plan for legislative districts with the secretary of state without first presenting it to the
12 legislature for additional recommendations. By failing to do so, Plaintiffs argue the
13 Commission violated Article V, Section 14(4), which renders void the Commission's
14 final assignment of Senators Ripley and Hamlett. Defendants argue the Commission
15 fulfilled its constitutional obligation when, on January 8, 2013, it submitted its
16 tentative redistricting plan to the legislature for its recommendations.

17 Montana's constitutional requirements do not support the Plaintiffs'
18 claim. The Commission must submit its redistricting plan to the legislature for
19 "its recommendations" only once. As an independent and autonomous body, the
20 Commission is largely insulated from political pressure or similar constraints from
21 the legislature. Wheat, ¶ 20. The Commission is not bound by legislative
22 recommendations nor does the Constitution require the Commission to submit its
23 final plan to the legislature for further recommendations before submitting it to the
24 secretary of state.

25 ////

 ////

 ////

1 **IV. Failure to Permit Public Observation of Agency Deliberations --- Article II,**
2 **Section 9 of the Montana Constitution**

3 Article II, Section 9 of the Montana Constitution, the Right to Know
4 Clause, provides that “No person shall be deprived of the right to examine documents
5 or to observe the deliberations of all public bodies or agencies of state government and
6 its subdivisions, except in cases in which the demand of individual privacy clearly
7 exceeds the merits of public disclosure.” Section 2-3-203(1), MCA, requires that “All
8 meetings of public or governmental bodies, boards, bureaus, commissions . . . must be
9 open to the public.” When government officials violate this requirement, any decision
10 they make “may be declared void by a district court having jurisdiction.” Section
11 2-3-213, MCA. A plaintiff seeking to void a decision, however, must commence a
12 suit “within 30 days of the date on which the plaintiff or petitioner learns, or
13 reasonably should have learned, of the agency’s decision.” *Id.*

14 Plaintiffs contend the Commission’s private deliberations on reassigning
15 holdover senators violated the public’s right to know under Article II, Section 9. In
16 support of their claim, Plaintiffs identify instances in which commissioners conversed,
17 telephoned, or sent e-mail to each other in which they discussed matters pending
18 before the Commission, particularly the proposed amendments to re-assign holdover
19 senators prior to the February 12, 2013 meeting. Defendants argue because Plaintiffs
20 missed the deadline, their Article II, Section 9 claim is time barred and should be
21 dismissed. Plaintiffs filed their amended complaint on July 23, 2013—five months
22 after the Commission reassigned the holdover senators at its February 12, 2013

23 ////

24 ////

25 ////

1 meeting.¹ Having waited more than 30 days in which to bring this claim, Plaintiffs
2 cannot now avail themselves of the remedy set forth in Section 2-3-213, MCA.

3 Nonetheless, the record does not support Plaintiffs' claim members of the
4 Commission violated Montana's open meeting laws. Section 2-3-202, MCA, defines
5 a "meeting" as a "convening of a quorum of the constituent membership of a public
6 agency or association described in [section] 2-3-203, [MCA,] whether corporal or by
7 means of electronic equipment, to hear, discuss, or act upon a matter over which the
8 agency has supervision, control, jurisdiction, or advisory power." Although *quorum* is
9 not defined for purposes of the open meeting laws at Sections 2-3-101 through -221,
10 MCA, the Montana Code Annotated provides elsewhere that a majority of the
11 members of a board or commission constitutes a quorum for purposes of transacting
12 business. See Sections 15-2-103, 20-2-101, 20-2-111, 85-8-308, MCA. Thus three
13 out of the five members of the Districting and Apportionment Commission members
14 constitute a quorum. Two Commission members (in person, by telephone or other
15 electronic means) discussing redistricting are not conducting a meeting contemplated
16 in Section 2-3-202, MCA, and are not subject to the open meeting requirements of
17 Article II, Section 9. The record indicates the Commission members communicated
18 with each other outside their formal meetings, but only made their final decisions at
19 public meetings after first considering public comment.

20 In conclusion, Defendants are entitled to summary judgment in
21 accordance with this Order. Based on the foregoing,


22 ////

24 ¹ Plaintiffs' Article II, Section 9 claim first appeared as the eighth cause of action in Plaintiffs'
25 amended complaint.

1 **IT IS HEREBY ORDERED:**

- 2 1. Defendants' motion for summary judgment is GRANTED.
3 2. Plaintiffs' motion for summary judgment is DENIED.
4 3. Each party shall be responsible for its own attorney fees and costs.

5 DATED this 6th day of December 2013.

6
7 
8 MIKE MENAHAN
9 District Court Judge

10
11 c: Matthew G. Monforton
12 Lawrence VanDyke/J. Stuart Segrest

13 MM/d