



# Legislative Council

## 65th Montana Legislature

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## REDUCING THE SIZE OF THE LEGISLATURE

Prepared for the Legislative Council

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The question of changing the size of the Legislature is a complex one. There are several attorney general opinions that legally complicate the matter. A previous Legislative Services Division attorney opined in a law review article: “Even though the Montana Constitution appears to give flexibility in determining the size of the Legislature, that flexibility was effectively eliminated by the first reapportionment and redistricting plan that established 100 House Districts and 50 Senate Districts. Because of the requirement to elect one-half of the Senators every 2 years, it is arguably impossible to implement the constitutional authorization to reduce the size of the Legislature to the lower numbers provided for in the Montana Constitution.”<sup>1</sup>

This brief report provides the relevant constitutional and statutory provisions as well as a hypothetical transition plan for reducing the size of the Legislature that does not address the potential legal impediments raised by past attorney general opinions. Attached to this report in Appendix A is a 1989 Legislative Services Division legal staff opinion and a 2013 legal review note on Senate Bill 98 (2013) that analyze potential legal impediments to reducing the size of the Legislature.

Article V of the Montana Constitution provides:

**Section 2. Size.** *The size of the legislature shall be provided by law, but the senate shall not have more than 50 or fewer than 40 members and the house shall not have more than 100 or fewer than 80 members. (Emphasis added.)*

**Section 3. Election and terms.** A member of the house of representatives shall be elected for a term of two years and a member of the senate for a term of four years each to begin on a date provided by law. *One-half of the senators shall be elected every two years. (Emphasis added.)*

**Section 14. Districting and apportionment.** (1) *The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator.*

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<sup>1</sup> The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

(2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative districts and a plan for redistricting the state into congressional districts. The 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.

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

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

Following the adoption of the 1972 Constitution, the apportionment plan submitted to the Legislature in 1974 by the Montana Districting and Apportionment Commission provided for 100 House districts and 50 Senate districts. The members of the 1974 Districting and Apportionment Commission decided to leave the size of the Legislature at 100 representatives and 50 senators because they felt it was more appropriate for the Legislature, which is the direct voice of the people, to determine whether to reduce its size prior to the next reapportionment.<sup>2</sup>

Article V, sections 2 and 3, of the Montana Constitution provide that the term of office for a member of the House of Representatives is 2 years and that the term of office for a member of the Senate is 4 years and also requires that one-half of the senators are to be elected every 2 years. For the transition after the constitution was adopted and the redistricting plan became effective after the 1974 Legislative Session, the terms of legislators serving in that session would end December 31, 1974, and one-half of the senators first elected would serve only 2-year terms in order to implement the requirement for electing one-half of the senators every 2 years at the November 1974 elections.

Statutes provide:

- "The plans for redistricting and reapportionment of legislative districts must be based on the number of members in the house of representatives and the senate to be determined in the legislative session before the census."<sup>3</sup>
- "The legislature consists of senators and representatives elected from the several senatorial and

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<sup>2</sup> Report of 1973-1974 Montana Districting and Apportionment Commission, pages 72 and 73.

<sup>3</sup> 5-1-101(2), MCA.

representative districts of the state in the number specified by law.”<sup>4</sup>

Reconciling prior attorney general opinions, the Legislature could potentially change the number of districts. The transition is the tricky part in terms of the argument that the first Districting and Apportionment Commission boxed the Legislature in as to the number of districts. A hypothetical transition schedule follows:

1. Pass legislation in 2019 to state the size of the Legislature. This legislation would have to address the transition.
2. The Districting and Apportionment Commission is appointed in 2019. Census occurs in 2020 and data is delivered in 2021. Would redistrict to new numbers.
3. The Districting and Apportionment Commission would present its new plan to the 2023 the plan would session and be implemented in the 2024 election for the 2025 Legislature.
4. In order to comply with the requirement that a senator’s term is four years, the senators who are elected in the 2022 election must be allowed to complete their term (25 senators). For the 2023 session, there would be 50 senators.
5. The Commission would have to assign the 25 holdover senators to districts to represent for the last two years of their term (2025-2026) and with the new plan in place, there would only be 20 Senate districts open for the 2025 election, electing half as provided by law.
6. For one session (2025), there would be 45 senators.
7. After the 2026 election, there would be 40 Senate districts for the 2027 session.

### **Attorney General Opinions**

*Legislative Determination of Size of Legislative Assembly — Not Controlling:* The Commission to Redistrict and Reapportion was not bound by a legislative determination of the size of the Legislative Assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. 35 A.G. Op. 12 (1973).

*Reapportionment Commission — Exclusive Power to Apportion Legislative and Congressional Districts:* The Reapportionment Commission has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Art. V, Mont. Const. 35 A.G. Op. 12 (1973).

*Constitutional Grant of Power to Apportion — Historical and Current:* Prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature. See Art. VI, 1889 Mont. Const. However, with the adoption of the new Constitution, the people of this state divested the Legislature of all power concerning apportionment of the Legislature, except for the power of recommendation in Art. V, sec. 14, 1972 Mont. Const. 35 A.G. Op. 12 (1973).

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<sup>4</sup> 5-2-101, MCA

*Reapportionment Plan Becomes Law:* Upon submission of the apportionment plan, proposed by the Reapportionment Commission, to the Secretary of State, the plan becomes law and all previous statutory provisions in conflict with that plan are, in effect, repealed. 35 A.G. Op. 12 (1973).

*Legislative Determination of Size of Legislative Assembly — Not Controlling:* The Reapportionment Commission was not bound by a legislative determination of the size of the legislative assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. 35 A.G. Op. 12 (1973).

*Reapportionment — Holdover Senators:* Article V, sec. 3, Mont. Const., provides that state Senators be elected to 4-year terms on a staggered basis. The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under Art. V, sec. 14, Mont. Const., to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission. The terms of office of members of the Montana State Senate who were elected in 1982 may not be shortened as a result of reapportionment and redistricting. 40 A.G. Op. 2 (1983).

### **Compiler's Comment**

*Section Not Codified:* Section 43-202.1, R.C.M. 1947, stating that the purpose of the act was to implement Art. V, sec. 9, Mont. Const., was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 91, L. 1977.

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