MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

SELECT COMMITTEE ON REDISTRICTING AND APPORTIONMENT

Call to Order: By **CHAIRMAN GREGORY D. BARKUS,** on January 31, 2003 at 8:00 A.M., in Room 335 Capitol.

ROLL CALL

Members Present:
Sen. Gregory D. Barkus, Chairman (R)
Sen. Gerald Pease (D)
Sen. Fred Thomas (R)
Rep. Joey Jayne (D)

Members Excused: None.

Members Absent: None.

Staff Present: Prudence Gildroy, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted: HB 309
Executive Action: HB 309

CHAIRMAN GREGORY BARKUS stated that **Greg Petesch, Legislative Services,** clarified there are two separate committees--a Senate Select Committee and a House Select Committee. In initial discussions, they expected to hear both resolutions in the committee and that was why they were actually seated in this fashion. Subsequently, assignment of the House Resolutionto the **State Administration Committee** has eliminated any need to bring to order the House Select Committee. He indicated **REP. JOEY JAYNE** was welcome to stay.

REP. JAYNE asked if the committee would take executive action on the senate side.

CHAIRMAN BARKUS answered yes.

REP. JAYNE concluded the House members would be voting on HB 309 when it comes to the floor.

CHAIRMAN BARKUS indicated it had already been heard and passed out of the House.

REP. JAYNE stated an objection over the process and wanted the record to note that she was in opposition to HB 309.

HEARING ON HB 309

Sponsor: **REP. ROY BROWN, HD 14, Billings**

Proponents: **SEN. JOHN BOHLINGER, SD 7, Billings**
SEN. FRED THOMAS, SD 31, Stevensville
REP. JOE BALYEAT, HD 32, Bozeman

Opponents:

Opening Statement by Sponsor:

REP. ROY BROWN, HD 14, Billings, explained HB 309 defines criteria for drawing legislative district boundaries and prohibits the Secretary of State from accepting a plan that does not meet this criteria. He contended that if the current commission had conducted its business as did previous commissions the bill would not be necessary. Most of the votes of previous commissions have been unanimous but this commission from the onset has been extremely partisan and nearly all its votes have been three Democrats against two Republicans. There were four redistricting plans prepared--three by the nonpartisan **Legislative Services Division** and the other plan, Plan 300, was prepared by the Democratic party. The three nonpartisan plans were a waste of time and money because any attempt to use even a portion of them was rejected and all votes were 3-2. There was tremendous opposition to the Democrat plan and in some hearings there were absolutely no proponents for Plan 300. In Billings, which he attended, there were eight in favor of plan 300 out of the 34 that presented testimony. Despite the outcry across the state nearly all attempts to amendments of Democrat Plan 300 were rejected 3-2, he claimed. While ignoring the "compact and contiguous" criteria and using the plus or minus 5% criteria strictly for political advantage rather than to keep communities of interest together, the Democrat Plan 300 makes a mockery of "one person, one vote." The plan packs already Republican districts and rural areas with an extra allowable 4-5% population. Democrat and urban areas are underpopulated by -4 to -5% so the chances of more Democrat seats are increased. A commission guided by logic would have done exactly the opposite.

Inner city districts have very little room to grow and suburban districts are where the growth is occurring. By overpopulating suburban districts at the end of this ten-year cycle, these districts could easily have 15,000 people in them while the urban inner city districts are still populated at 8500 people. Yet each of those districts will have but one representative. Article II Section 13 of the Montana Constitution says that no civil power shall at any time interfere and prevent the free exercise of the right to vote. Article IV Section 3 of the Montana Constitution says the legislature shall insure the purity of elections and guard against abuses of the electoral process. Most importantly, Article V Section 14 of the Montana Constitution says each district shall consist of compact and contiguous territory; all districts shall be as nearly equal in population as practicable. Democrat Plan 300 violates all these constitutional mandates and the principle of one person, one vote is reversed and its one person 9/10 of a vote. This plan is politics at its very worst, he stated. To take the politics out of this process HB 309 allows only a plus or minus 1% population deviation from the 9000 person ideal. Currently, nine states already apportion their districts on this basis. In fact California with its 25 million people divides its 100 districts so closely that the difference from ideal population is negligible. The **Legislative Services Division** says that it is technically possible to provide such a plan. The plus or minus 1% criteria of this bill will stop the political gimmickery, he held. Opponents will say it's unconstitutional for the Secretary of State to accept or deny the plan. All he really has to do is look at the list of districts and if they're below the 1% plus or minus he can accept it. The Secretary of State makes decisions on electoral processes all the time. Opponents will also say the federal court has already allowed a plus or minus 5%. It is allowable if used to keep communities of interest and other criteria intact. It's not meant to be used for political advantage. The only community of interest protected in Plan 300 is the community known as the Democrat party, he charged. The Montana Constitution goes beyond the US Constitution in its protection of individual rights. In order to divert attention from the flaws of Democrat Plan 300, opponents to HB 309 have tried to make this a racial issue, he charged, and its just not true. There will still be six majority Native American districts and the system works if its allowed. The commission reports a 6.2% Native American population and they are currently well represented by 6% in the House, he believed. That will not change with the plus or minus 1% criteria and the inference that this bill has anything to do with race was extremely offensive to him as he has many Native American friends. The plus or minus 1% that the bill puts forward does not take away any of the Native American majority districts. He emphasized six districts will still be available. Anyone can sit down and find a scenario to

take 300 people away from a district and it might change that district from a majority Native American district to a slight minority. He contended that with time and effort the districts can be kept intact. He explained he wasn't concerned with the six Native American districts but was very concerned with what has been done to the other 94 districts. Further, he felt the Native Americans should be suspect of the concentration that the Native American vote will have in the six districts because it limits their power and influence, he claimed. If the Native American vote was spread over nine districts instead of six, their influence would be much more powerful regardless of whether a Native American was their representative or not. If he had 30 or 40% Native American constituents, he would be paying close attention, he claimed. The concentration of all the Native American votes in these six districts makes an expansion of influence limited to those six seats in perpetuity. He had no intention of changing it with the bill and committed to oppose any plan that changes these seats away from a majority Native American district. Plus or minus 1% deviation is the only way to get politics out of the process and save the principle of one person, one vote, he reiterated.

CHAIRMAN BARKUS advised proponents that HB 309 was being heard and this was not a global redistricting discussion.

Proponents' Testimony:

SEN. JOHN BOHLINGER, SD 7, Billings, stated his district would be significantly affected by the redistricting plan that has been adopted. Plan 300 will create a new senate district that moves him to the west side and he was concerned about the people that elected him. The plus or minus 5% allows for unfair rendering of districts and he favored the use of 1%. He advised his district is probably the most racially diverse district in the state of Montana and he has worked hard to develop relationships with his constituents. Plan 300 is a disservice to people that elected him and he hoped SB 309 will move through the process.

SEN. FRED THOMAS, SD 31, Stevensville, advised SB 309 is needed and necessary in order to establish criteria the commission should have followed all along in developing the reapportionment of districts in Montana. It is needed to direct the commission to comply with the constitutional criteria that these districts be compact and contiguous and that they be as equal as practicable. The bill stipulates the plan must use a plus or minus 1% deviation from the ideal population in each district. The legislation is necessary, he contended because of the political nature of the actions of the commission and to do everything possible to make sure the constitutional provisions

are carried out. He believed that if the commission had come forward and said they were going to use the wide 10% deviation across the state to accomplish Native American districts and that purpose only and/or to use it in specific cases to keep communities of interest together, and thereafter create districts that were as equal as practicable, the plan would probably be just fine. He felt they used the Native American race card to play politics at its most disgusting level. He believed that even with this bill in effect, there could be six Native American house districts, three senate districts and thereafter, except for the need to keep communities of interest together, have a near equal population in every other district in the state. He explained that Ravalli County Commissioners used census data and drew districts that were within 20 people of each other and he felt the state redistricting plan could have done the same. The "little red book" indicates the deviation be used for specific good reasons such as creating Native American districts, and keeping communities of interest together and shall not deny any person in the state equal protection of the law. Districts are redrawn so that people can be equally represented. He felt using the 10% deviation across the state was politics at its worst level. Further, the "little red book" says a deviation below 10% might be challenged if it is a product of some unconstitutional, irrational, arbitrary state policy such as intentionally discriminating against certain groups of voter, cities, or certain regions of the state. He submitted this applies to 94% of the public. He favored that Native American districts were created, but opposed splitting the city of Anaconda in half for no other purpose other than political gain. Future legislation would address the situation with holdover senators, he reported. He hoped the HB 309 works to force the commission to meet with the legislature, accomplish Native American districts as they are and then redraw the plan to create equal population in these districts thereafter as well as keeping communities of interest together. That will meet constitutional muster, he reasoned, and the plan as presented is an abomination.

REP. JOE BALYEAT, HD 32, Bozeman, testified that Article II Section 13 of the Montanan Constitution says that no civil power shall anytime interfere to prevent the free exercise of the right to vote and Article IV Section 3 says the legislature shall insure the purity of elections and guard against abuses of the electoral process. He reiterated the Montana constitution states all districts shall be nearly equal in population as is practicable. When these articles are combined with voting rights guarantees enumerated in the US Constitution, the courts have consistently ruled that one person, one vote is the essential ingredient to insure the purity of the process. The democrat party majority which controls the redistricting commission consistently and blatantly gerrymandered house district lines

across the state of Montana and it is obvious that one person, one vote is not longer the rule in Montana, he asserted. The **Legislative Services Division** can provide charts showing population statistics for each of the presently established house districts and the pattern is obvious. Probable democrat districts are consistently underpopulated by almost 5% and the most probable republican districts are consistently overpopulated by 5%. He first pointed this out to a reporter last May, he noted. The current rules only permit at most a plus or minus 5% deviation from the average and it is quite obvious the democrat majority is attempting to manipulate their control to the maximum amount the system would allow. They are spreading out the democrat minority in this state to control the maximum number of house districts possible while cramming as many republican voters into as few house districts as the law will allow. He pointed out this isn't like traditional gerrymandering which had a check and balance. In house districts roughly equal in population size, one can attempt to maximize a party's influence by spreading out a party's voters and trying to have 52% majorities in as many districts as possible while the opposing party districts have districts where 80% of the voters are republican. The downside to the traditional type of gerrymandering is losing some house districts if you spread yourself too thin. Plan 300 has no check and balance--to consistently under populate probable democrat districts and overpopulate republican districts has no downside to it. They can steal five house districts from the voters of Montana. He contended this was blatant abuse and argued it was borderline voter fraud. He further contended that the legislature under Article IV Section 3 has a constitutional mandate to guard against this abuse and assure the purity of elections. If the process had been guided by logic rather than blatant democrat partisanship, big city urban districts would be weighted at approximately plus %5 above average while the surrounding rural donut districts would be weighted 5% below average because over the ten years those donut area districts will continue to grow exponentially while the inner city districts have no room to grow and will be steadily shrinking relative to the average house district population size. Present inner city Bozeman districts are far below the state average while his house district 32 and house district 27 and other surrounding rural districts rank among the state's top population counts. His district is the third largest population count in the state while the district right next to it is the first highest. The inner city districts are way below average. Rather than follow logic, the democrat plan does the opposite. Ten years down the road, the discrepancy in voting power could average as much as 20% or more. ***{Tape: 1; Side: B}*** The plan would disenfranchise 10% of voters in Republican districts and cram many Republican voters into rural Republican ghettos--as few house districts as they can possibly be crammed into. They are

systematically diminishing citizens' rights of those that happen to be in Republican districts to something less than full citizenship. He believed a plan could be structured that complies with the Voter Rights Act that has six Native American districts and use plus or minus 1% in the rest of the state. He felt voting rights of Native Americans in his district have been diminished by 10%--one person 9/10 of a vote. Democrats in his district have also been disenfranchised. All minorities that live in Republican districts should be angry with what the democratic party has done for the sake of political partisanship to in effect steal five house districts from the voters of Montana. He was not willing to accept this borderline voter fraud without a fight. He urged the passage of HB 309 and taking the politics out of redistricting. **EXHIBIT(sds21a01)**

Opponents' Testimony:

Mae Nan Ellingson, Missoula, stated she is a partner in the law firm of Dorsey and Whitney, the state's bond counsel, and she hoped her comments would not be held against her or Dorsey and Whitney in the furtherance of their work for the state. Her concern about that was giving her some reluctance to appear before the committee, she noted. Her other reluctance was a comment by a legislator on a panel on the Constitution in Missoula the previous fall that the legislators over in Helena do not like the constitution very much, and having been one of the 100 Constitutional Delegates she felt reluctant to come before the committee and talk about the constitution particularly as it pertains to reapportionment. One of the enduring burdens of being the youngest delegate at the convention is there are fewer and fewer delegates able to comment on the constitution and stand up for it and that was what compelled her to testify. She thought reasonable people can differ about the role the legislature should play in reapportionment and stated reasonable people did differ significantly when drafting the constitution. She described reviewing the transcripts and committee reports about the discussion on Article V Section 14 and there were plenty of people who felt the legislature should have a greater role in reapportionment than the constitution gives it. The majority of the delegates and certainly the legislative committee on which she served, felt the legislature couldn't and hadn't and perhaps shouldn't be in a position to reapportion itself. In most states, including Montana, where the legislature had played a significant role in reapportionment, the courts were generally the entity that ended up determining the reapportionment plans. The constitution Article IV Section 14 gives the legislature very limited authority with respect to reapportionment--the majority and minority in both houses appoint two members of the commission and it is the role of the commission to establish the reapportionment plan. The legislature is further given the power

to make recommendations to the commission within 30 days of the submission of the plan after which the plan is filed and becomes final. That really is the only power the constitution saw fit to give the legislature in reapportionment. She advised HB 309 is an attempt by the legislature to exercise powers over the reapportionment process that it constitutionally does not have. She had not read the reapportionment plan and said she was in no position to judge how political the deliberations were or the disparities that had been talked about. HB 309 sets a precedent. She was not sure that the legislature defining as equal as practicable to include 1% was unconstitutional and may well be constitutional whether it's wise or not. Defining and making that a requirement of a plan that has been submitted to the legislature through an immediate effective date and applying that retroactively is clearly an attempt to exercise power over the reapportionment plan that the legislature simply doesn't have. She advised the legislature does not have the authority to grant a different role to the Secretary of State by legislation with respect to the reapportionment plan than what was given in the constitution. She felt HB 309 was before them because some felt the plan was developed in a partisan manner and is unfair. She didn't know but what those feelings were justified but didn't think it was reason to enact a bill she believed to be unconstitutional on its face. Ultimately, it is the Supreme Court that will decide, she contended. She believed if the committee and the legislature believe the plan violates equal protection--one man, one vote--and its recommendation has not been heard, the appropriate remedy for that is directly to the Supreme Court--that the plan itself violates other constitutional rights. If the legislature wants to change the method by which it has an impact on reapportionment then the only way is through a constitutional amendment. The legislature cannot give itself more power in this area, she held, than the constitution does. At this point, if the legislature wants and thinks they need more power in the reapportionment process to prevent these perceived abuses the remedy should be a proposed amendment of the constitution to Article V Section 14 so the voters give the legislature the power it seeks.

SEN. MIKE COONEY, SD 26, Helena, stated opposition to the bill because of the provision directing the Secretary of State not to accept the plan as submitted by the commission. He served as Secretary of State for 12 years including the year the last plan was submitted. A plain reading of the Constitution indicates when a plan is developed it is filed with the Secretary of State, both the congressional and legislative districts. It does not give the Secretary of State any authority to reject it. He advised 10 years ago he had issues with the plan but it was never even raised that the Secretary of State had any authority other than to accept the plan as it was presented and to file it. The

function of that office is to basically hold public documents and that is how the constitution views the office of the Secretary of State. The Secretary of State is presented the plan, accepts it and the commission dissolves. That is the reason, when the lawsuit was brought against the plan ten years ago, the Secretary of State was named in the lawsuit. The Secretary of State had nothing to do with the development of that plan. The Secretary of State was not on the commission and didn't do anything to draw up that plan and yet the way the constitution describes the process, the plan is given to the Secretary of State to file and then the commission dissolves. The case ten years ago was known as *Old Person v. Cooney.* He advised caution regarding the separation of powers. To legislatively tell an independently elected constitutionally empowered officer of the state that they must ignore the constitution is a terribly dangerous step to take and a bad precedent, he held. He advised these plans typically end up in litigation anyway, but for the legislature to try to exercise powers it doesn't constitutionally have is sending the wrong message. He suggested changing the constitution by constitutional amendment.

CHAIRMAN BARKUS asked if he would have been sued had he not accepted the plan as Secretary of State in 1992.

SEN. COONEY advised he would not have allowed himself to be put in that position. The question never crossed his mind as to whether or not he had the authority to reject or accept the plan. He had to accept it as it was filed with him. The Secretary of State files many documents and has no choice whether to accept them or not, he stated. The Secretary of State also has the ability in some cases to reject some documents. All legislation that is passed into law is ultimately filed in the Secretary of State's office. There were a lot of bills he didn't agree with when he held the office. He advised the legislature does not want to give the Secretary of State veto power. The Governor is given the constitutional authority to do that. He would not have allowed himself to be put in that position. If he was Secretary of State now, and the legislation passed, he would live up to the constitutional provision and would not let the legislature put him in that position. Ultimately, yes he'd have been sued, he affirmed.

REP. CAROL JUNEAU, HD 85, Browning, stated opposition to HB 309. She advised the Indian Caucus of the 58th Legislative Session, including **REP. NORMA BIXBY, REP. JOEY JAYNE, REP. VERONICA SMALL-EASTMAN, REP. FRANK SMITH, SEN. GERALD PEASE** and herself, have taken a position supporting the current plan of the Montana Reapportionment Commission and the committee was given copies the previous day. She noted **REP. BROWN's** remark in his opening that

this was not a racial issue and she found it interesting he spent a great deal of his opening remarks discussing the Indian districts. **REP. BALYEAT** spoke about federal mandates to follow in creating Indian districts. She commented it's too bad the state of Montana has to look at creating Indian majority districts based upon federal mandates. It is probably something that should be a normal part of the political process and going to court should not be necessary on these issues, she held.

Don Judge, representing himself, noted the committee was pretty slim to get the whole extent of the testimony of such an important bill. He hoped the other members of the committee would take the time to read the transcripts before taking action on the bill. He thanked the commission for their hard work and for holding more public hearings on reapportionment than any other previous commission had done, soliciting more public comments than any other commission in history has done, developing districts which recognize the population diversity of our state in creating six house districts and three senate districts in which Native Americans actually have the opportunity to compete electorally and creating legislative districts which are competitive. Too often, he held, legislative elections are determined by what follows a candidate's name, which is either an R or a D and has very little to do with the issues and the positions on which that candidate, if they are elected, will be required to make decisions. The truth is, he stated, reapportionment results in winners and losers. Candidates and legislators are moved out of their districts and depending on the population shifts communities are split or they're combined. Population shifts require those kinds of things, he held. The commissioners worked hard to create the best possible mixtures of compatibility, compactness and population deviation which afforded Montanans the opportunity to elect their representatives based on issue identification and not on party label. He commented this had gone far enough. He indicated the Great Falls Tribune had done an analysis of the legislative reapportionment and concluded that the republicans had 40 solid legislative seats and democrats had 30 solid legislative seats as a result of the reapportionment plan 300. He felt that all of the hoopla about the plan was more about greed and not about need. He wondered if 40 solid legislative districts for Republicans enough and are 30 solid legislative districts for Democrats are enough. Putting 30 legislative districts in play is the right thing to do, he held. He felt that while discussing an issue of greed, the issues of need were being ignored--the lack of affordable insurance, child care, poverty, utility costs, and budget deficits. Far too much time, he held, has been spent dealing with an issue that perpetuates the battle between democrats and republicans and does not resolve the problems of all Montanans. He urged a do not

pass recommendation and letting the bill gracefully slip away and getting on with the thing that needed to be done.

SEN. BARKUS stated for the record that this is the committee.

Bob Ream, Chairman Democratic Party, stated he expressed confusion at the previous day's hearing about two different resolutions being heard by two different committees and expressed disappointment that the house has not cooperated with the Select Committee. The process lacks consistency, he advised. The first two opponents clearly stated his objections to the constitutionality of HB 309, he stated. Much had been said about the 1% and he pointed out that 1% was 90 people. Ninety people is smaller than most of the census districts in the state. The 1% is technically feasible but difficult because of the small numbers and because communities of interest would be split up even more, particularly in small towns. Some people had referred to a 10% deviation--its not 10% its plus or minus 5%, he informed the committee. The plus and minus the maximum in plan 300 was 9.85%. That is smaller than either of the last two commissions and in fact is slightly smaller than Plan 200 that is favored by most Republicans. He disagreed with the implication that the 1992 commission was somehow unbiased. When the chair of the commission was elected it was a four to one commission. It was dominated by Republicans and the effects of their plan were painfully obvious in the next election--painful for democrats and gleeful for republicans.

CHAIRMAN BARKUS advised **Mr. Ream** to keep his testimony to HB 309.

Mr. Ream testified he greatly resented the language used by **REP. BALYEAT** that Plan 300 will "steal" seats from the Republicans. Using that language, the Republicans stole 14 house seats from the democrats in the 1992 commission and 11 seats from the senate. As prior testimony pointed out, a Great Falls Tribune analysis speculated a Republicans would have a ten-seat advantage going into the 2004 election. Plan 300 makes more seats competitive and he thought that was the Montana way. More races need to be decided on the basis of issues and the persons involved in individual races.

{Tape: 2; Side: A}
REP. NORMA BIXBY, HD 5, Lame Deer, testified the Northern Cheyenne and Crow Reservations are in her district. As she was listening to the discussion she began to think she was listening to a Bureau of Indian Affairs Committee--the committee asks for input, the committee doesn't listen, and goes on passing things not in the best interest of Indians. She voiced opposition to HB 309 stating it is unconstitutional. American Indians have had to

fight for so many rights for so long, it is normal process to go to court. The impact of the 1% deviation violates the Voting Rights Act. If the 1% criteria is adopted, in HD 29 the Indian voting age population would decrease from 57.3% down to 47.6% and the voting age Indian population of the adjoining Crow Reservation district will decrease from 55.2% down to 45.5%. The senate district which encompasses both of the two reservation house districts would have its American Indian voting age population reduced from 56.3% down to 46.6%, impacting their only senator. **SEN. PEASE, REP. EASTMAN** and she should have an equal chance to run in their districts, she felt. She noted American Indians have been disenfranchised in the last ten years. The only reason they have won is because they had better candidates with a better message. Opponents did not present their case to the people but relied on the Republican vote to get them through. The 5% deviation gives everyone a fair chance and gives Indians a chance at a couple of other senate districts. She has watched Indian bills not be considered over the years. What is important for Indian people is also important to non-Indians, she held. She implored the committee to reject HB 309 and get on with the work of the people. Plan 300 is good for Montana, is good policy and will do the job for Montanans and Indians.

Scott Chrichton, Executive Director American Civil Liberties Union of Montana, testified he had served in that capacity for more than 14 years during which time they had represented Montana's Indians as they have asserted their voting rights in school district, county commission and state legislative elections.

SEN. BARKUS urged him to keep his comments to HB 309.

Mr. Chrichton advised they had represented American Indian interests under Section II of the Voting Rights Act and consistently tried to make it clear that this government serves and is accessible to all people. He felt the committee was lucky to hear **Constitutional Delegate Mae Nan Ellingson,** who understands the constitution probably better than anyone else in the room. He thought it lucky they had **Susan Fox** as staff, who understands the redistricting process probably better than anyone in the room. It seemed to him a tremendous amount of time was being spent on what is politics at its worst--partisan bickering that is creating casualties of the people who are being encouraged to participate in the political process. He thought the cases made by **Ms. Ellingson,** and **SEN. COONEY** were clear and would be upheld by the courts.

Informational Witnesses:

Commissioner Joe Lamson, representing himself, said he listened to **REP. BROWN'S** summations on HB 309 twice before and he does an excellent job in pointing out his particular party's position. He ends those discussions by quoting from a report done by an aide of his on the current redistricting. A key point at the end of the report concludes: "...though the apportionment plan will likely end up challenged in court it is unlikely that it will be ruled unconstitutional." He agreed with that advice and thought everyone has had their say and he suggested passing the recommendation of the commission and getting on with our constitutional duties.

Questions from Committee Members and Responses:

SEN. THOMAS asked **Mr. Chrichton** about representing Native Americans in Montana.

Mr. Chrichton indicated they had worked with various members of the tribes all across the state through the reapportionment process of the last decade as well as county and school district elections challenging the lack of representation in electoral government.

SEN. THOMAS asked if he would be okay with a plan that created the current proposed Native American districts, senate and house, and beyond that created other districts that were as equal as possible.

Mr. Chrichton advised the thrust of what he was trying to get across was missed.

SEN. THOMAS stated he wanted his question answered and was not trying to get back to his testimony.

Mr. Chrichton advised the legislature did not have the authority to reconstruct a process that has been completed.

SEN. THOMAS contended he didn't ask that. He asked **Mr. Chrichton** if the commission had created six Native American House Districts and three Senate districts as proposed using the 5% plus or minus deviation and thereafter created another 94 house districts that complied with the constitution's language of equal as practicable and got within a 1% deviation, would such a plan be okay with him.

Mr. Chrichton stated he can't understand how there could be two separate criteria for creating districts--one that acknowledges Indians as a special interest and the rest of the population with a different set of criteria for developing the districts.

SEN. THOMAS asked if that was not what the Voting Rights Act was about.

Mr. Chrichton advised the Voting Rights Act makes it clear that deviations up to 10% are considered constitutional.

SEN. THOMAS argued if used for a specific purpose, not just to be gerrymandering.

Mr. Chrichton reasoned gerrymandering goes with the turf of redistricting whether partisan or racial. It is always an argument about whose interests were going to be served through creation of the districts.

SEN. THOMAS asked if he said it is okay to create partisan plans in these districts.

Mr. Chrichton held partisan plans have been created since the history of Montana.

SEN. THOMAS asked if he was justifying that today with his testimony.

Mr. Chrichton indicated what he was justifying today was that Indians have a place at the table, they have the right for equal representation in government at all levels and that the constitution provides for a separation of powers that is being ignored by HB 309.

SEN. THOMAS noted it seemed to him that the Constitutional Convention in 1972 changed the process of legislative districting to a commission as a mechanism to eliminate politics from the process. He asked **Ms. Ellingson** if that was why the Constitutional Convention took the duty of assigning and redistricting from the legislature and created the commission.

Ms. Ellingson advised even though some might think the delegates were very naive, she didn't think any of them were naive enough to think that politics could ever be taken out of apportionment no matter how it's done--it's a political process. She testified she was on the legislative committee and studied reapportionment in Montana and other states. The provision was adopted on Second Reading by a vote of 55 to 36--a pretty sizable majority, she held. She reasoned the legislature shouldn't be setting the rules by which it's selected.

SEN. THOMAS asked why.

Ms. Ellingson replied there is an inherent conflict in legislators setting up legislative districts--the Governor doesn't get to set the qualifications for running for office, and the PSC people don't get to decide what their districts should look like. There were former legislators who were delegates that argued very strongly for a greater legislative role. They admitted it was sometimes hard to cut their seat mate out of a job. She didn't know if what the delegates did was totally the right thing, but the reason was to remove legislative involvement in setting up the districts in which they would run.

SEN. THOMAS asked if it was true the endeavor was to remove politics from the process more so than it was before.

Ms. Ellingson advised she could not answer that question any differently. The convention operated on a totally nonpartisan basis even though the delegates ran with political designations. If they had wanted to take politics out of it they wouldn't have given the legislature any control over appointing the commission. They would have had the Supreme Court or maybe the Governor appoint the commission. The fact the majority leader and minority leader of both houses appoint four of the members recognizes that there will be some political bias for these decisions.

SEN. THOMAS said in the constitution there is a provision that if those four people can't agree on a chairman, the Supreme Court would decide the fifth position. He asked why the provision was established and if it was a further attempt to appoint a neutral party to the commission.

Ms. Ellingson said clearly a five-member commission was needed to avoid the potential of stalemate. If the appointees cannot agree on who the fifth member should be the decision would be given to someone who would be neutral. She thought because of her experience she had a naive view that might doesn't make right. She believed if this commission has exercised abuses, what goes around comes around. She held it is an inherently political process. She hoped people appointed to these commissions would look at the guidelines of the constitution and try to operate and create a system that is as fair and equitable as possible and listen to the recommendations of the legislature.

SEN. THOMAS wondered if the language of districts being as equal as practicable was re-adopted or adopted new. He asked her opinion on taking the state's population and dividing it by the number of house districts to get a number to strive to accomplish in every case. He asked if that was what the constitutional language was speaking to.

Ms. Ellingson advised it was new language. When they were working on the constitution, they had the benefit of all of the one man, one vote decisions that had come down from the Supreme Court. The language is taken from Supreme Court cases saying what the standard was. She responded every effort should be made to have them as nearly equal in population as possible.

SEN. THOMAS referred to the process adopted in the Constitutional Convention--the unbiased commission would bring a plan into the legislature for their review and the legislature had up to 30 days to review it and the commission had 30 days to finalize their plans. He asked how she felt about the fact this commission had indicated to the legislature that on day one after the legislature responds, the commission is going to hold a meeting, contemplate what the legislature has given them and adopt a final plan on the first day that they can respond. They had already set up a meeting in the Secretary of State's office with media and photographers to document it.

Ms. Ellingson thought it creates the impression the commission may not be fully considering the comments the legislature provided. She thought the provisions of HB 309 with an immediate effective date, retroactive to any plan not filed by the effective date, put them in the position to give short shrift. She advised the bill was unconstitutional and there would then be no apportionment plan.

SEN. THOMAS advised the constitution was being violated by the commission's work and he didn't feel the commission was going to consider input as outlined in the constitutional provision. He expressed concern the Constitutional Convention established the Supreme Court appointing the deciding member of the commission, but will also decide what is constitutional about the process.

Ms. Ellingson advised the Supreme Court of Montana clearly has the right to determine whether any legislative provision is constitutional. In this case, she didn't know if the fifth member was appointed or not and thought it was really immaterial to the fact that the Supreme Court ultimately decides. It very well may be, she stated, that Plan 300 does violate equal protection but adopting HB 309 doesn't get at that. All that the court is going to decide is whether HB 309 is constitutional. If she was a legislator and thought the plan violated the rights of Montana citizens for equal protection, she would try to get it before the Montana Supreme Court, the final arbiter of what equal protection, one man, one vote due process means at least under the state constitution.

{Tape: 2; Side: B}

SEN. PEASE asked **Ms. Ellingson** if HB 309 goes through the process, will there be another lawsuit.

Ms. Ellingson advised she didn't know. The previous lawsuit he referred to was about the reapportionment plan per se. This really is related to HB 309. She believed the provisions of HB 309 would be challenged in court.

SEN. PEASE advised the tribes said they would take action.

CHAIRMAN BARKUS asked about the separation of powers.

Ms. Ellingson advised that was a provision of the constitution that remained virtually intact from our 1889 constitution. Basically it divides the powers of government into three distinct branches--legislative, executive and judicial. She quoted, "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power belonging to either of the others except as this constitution expressly directed or committed."

CHAIRMAN BARKUS asked if she was an attorney.

Ms. Ellingson answered yes.

CHAIRMAN BARKUS said it seemed to him that if the Supreme Court appointed someone as a fifth neutral party that did not create or allow for a neutral transition, in other words did exercise power over another branch of government, would not that in itself be unconstitutional.

Ms. Ellingson advised she did not think so. The Constitution itself says no branch can exercise the power of any other except as it is constitutionally expressly directed or permitted. The judicial power is what is granted to the Supreme Court. She didn't think the power to appoint a fifth neutral member to a commission is a judicial function. It could have easily been the Governor. It was just to take it out of the realm of the legislature because the legislature had appointed the other four. The same argument might be made if you had the Governor or the executive branch interfering. The court has no power in the plan itself. It has only the power to nominate one member if the other four cannot agree.

CHAIRMAN BARKUS asked if that member was definitely partisan and every vote on the commission was the same, 3-2, and that person having been a chairman of the democratic party in her county, if that was not partisan.

Ms. Ellingson affirmed it sounds partisan.

CHAIRMAN BARKUS asked if that was the intent of the constitution under the provision that the Supreme Court can select the fifth member.

Ms. Ellingson clarified she didn't want to leave him with the illusion that the convention felt that partisan politics would be taken out of the reapportionment process. The Supreme Court has the authority to appoint a person of their judgement. It does seem partisan but she didn't think it was unconstitutional.

CHAIRMAN BARKUS asked if she heard **REP. BALYEAT'S** testimony and **Ms. Ellingson** indicated yes. He asked her opinion on the 5% as used in 18 house districts north of Missoula. Those districts are overpopulated by plus 7441 people. The eighteen districts in and around Helena, Butte, Anaconda and Deer Lodge County are underpopulated by over 6000 people. The difference between those two is 13,000 people--nearly one senate district. He asked if that was fair, in her opinion.

Ms. Ellingson advised that consistent with his direction to all the witnesses today, the hearing is on HB 309 and not the reapportionment plan; she had not personally studied the plan and didn't want to. She felt the hearing really was on HB 309 and in fairness to those that worked on the plan she thought it would be totally unprofessional of her to comment on a plan she hadn't read or studied.

CHAIRMAN BARKUS maintained his question does focus on HB 309--the population deviation that **REP. BROWN** is trying to correct.

Ms. Ellingson said she understood the 1% and what they were trying to do. Maybe it is a good thing to have for future reapportionment. She advised no matter how valuable the goal is, enacting a bill that is retroactive to a plan that was started under the constitution is unconstitutional. The end doesn't justify the means.

CHAIRMAN BARKUS said with all due respect she was asked a question and chose not to answer it and he would prefer she didn't.

CHAIRMAN BARKUS asked **Commissioner Lamson** if he asked **John McMaster, Legislative Services,** for any legal opinion relative to the 5% deviation.

Commissioner Lamson advised the whole issue of the 5% deviation never came up because it has been the established standard in all

previous commissions and seemed pretty clear. For a variety of reasons folks chose to make it an issue. It was used to keep communities of interest intact.

CHAIRMAN BARKUS asked if **Mr. McMaster** ever talked about the *Cartier v. Daggett* case--the court threw out a plan that deviated .7% because its deviation was not a good faith effort and gave New Jersey democrats an advantage.

Commissioner Lamson said he was not sure, but thought it spoke to congressional districts--a key point he contended. There is a notion that all the congressional districts have a 0% deviation. The federal system is very different and there is not a single district in the current plan of redistricting in the current congress that meets that 0% criteria.

SEN. THOMAS asked when Plan 300 was drafted at his direction, was there ever any effort to draw a plan that actually accomplished districts that were as equal as possible that would have accomplished a 1% deviation or less.

Commissioner Lamson indicated that until the plan was completely done it was never raised by any member of the commission to attain that. They were going by legal advice that if they were within the 5% range they were presumed to be constitutional and that was the standard they were operating under.

SEN. THOMAS referred to the "little red book" that even a deviation below 10% might be challenged. It can't be unconstitutional, irrational or arbitrary--it has to be for a rational reason such as the creation of Native American districts. He asked if **Commissioner Lamson** ever attempted to draw a plan that accomplished the Native American Districts and thereafter tried to craft districts that were as nearly equal as possible to the 9022 citizens in those remaining house districts.

Commissioner Lamson repeated 5% was the standard. If it is believed the commission did that in an arbitrary manner, he suggested going before the Supreme Court and making that case. He thought each district clearly outlined the communities of interest and met the criteria. He didn't believe the challenge would succeed.

SEN. THOMAS asked if the commission ever created a plan that established the six Native American House Districts and three Senate districts, using the 5% deviation for a good purpose, and then thereafter crafted districts with populations as equal as practical. He asked for a yes or no answer.

Commissioner Lamson said **SEN. THOMAS** was advocating a dual standard that was referenced earlier. He assumed the attorneys for the Republican party could then go to court and say it was a violation of *Reno v. Shaw* and that a separate standard was being set for Native American districts. They did not use the standard of plus or minus 1% because it had not been proposed. He argued that in itself is an arbitrary standard--if you really wanted to get perfect, you should be proposing zero. When you do that, small towns like Cutbank and Conrad and counties get split. Since the plus or minus 5% was the standard they were using, the town of Conrad and many counties were preserved.

SEN. THOMAS indicated other towns were chopped in half including Anaconda, Hardin and the Hamilton district. He didn't buy the position **Mr. Lamson** endeavored not to do that, because it seemed that he did. He repeated the question that after the Native American districts were created, which he thought were fine, did the commission attempt to draw districts thereafter that were as nearly equal to the 9022 people or not.

Commissioner Lamson answered they didn't first draw all the Native American districts and then fill in the state. They went from region to region and the districts were built in a sequence. As they were doing that they were taking testimony from citizens across the state and they were talking about communities of interest that had nothing to do with Native American districts. They were talking about individual neighborhoods and towns. They put together all of that information and came up with a plan. Their legal counsel told them numerous times if they were within that deviation they were presumed to meet one person, one vote criteria.

SEN. PEASE asked when the fifth person was appointed by the Supreme Court.

Commissioner Lamson advised the fifth person was chosen after the commission could not agree on a fifth person. The constitution does not say the person has to be nonpartisan, it just says the Supreme Court will select a person. The person was chosen unanimously as the most qualified, as testified by **Supreme Court Justice Karla Gray.** She was also chosen by **former Justice Turnage,** so he thought there was wide agreement on the qualifications of **Jeanine Pease Pretty on Top** to be the chair.

SEN. PEASE asked if the process had started already when the two sides could not agree on a fifth person.

Commissioner Lamson indicated the constitution says they are given 20 days. They first nominated **Ron Delighting,** an American

Indian from the Flathead Reservation and the other members of the commission also selected a fifth person.

Closing by Sponsor:

REP. BROWN closed on the bill. He thought it very clear the Constitutional Convention wanted to keep the process very nonpartisan. He said **Ms. Ellingson** admitted she didn't know whether the plan is proper or not and he wished she would have looked into the plan because there was a lot of talk about the constitutionality of the whole situation. He reasoned it was unconstitutional to disenfranchise the votes of the Montana people. The process became partisan when it became a tool that was manipulated by the democratic party. HB 309 does remove the legislature from the process, because the plus or minus 1% population deviation takes all of the politics out of the situation, he argued. The legislature does have a constitutional responsibility to guard against abuses in the electoral process and he though it was one of their prime constitutional responsibilities. The Secretary of State makes all kinds of decisions that have to do with voting rights and it's perfectly within his purview to do what the bill allows. He wished that some of the remarks made during commission hearings of the commission had been paid attention to by the commission. He did not agree that the opinion of one reporter about whether districts were republican or democrat in one newspaper article counts as an exhaustive study as to whether that was true or not. He addressed **REP. BIXBY'S** concerns and contended that in the Indian districts only 300 people would have to be added to those two districts and there were ways to do that, even if those 300 people were not Indians, and still provide a majority Native American district. He thought the commission was fortunate to have the legislative services staff and it was a shame they were not listened to in the plan. He reiterated the constitutional requirement that goes to the heart of the bill. Article V Section 14 states each district shall consist of compact and contiguous territory. All districts shall be nearly equal in population as practicable. Any notion that this plan follows that constitutional mandate is purely delusional, he contended. It negates the one person, one vote and creates one person, 9/10 of a vote. The dirty politics of apportionment must stop, he contended. Plan 300 is contrary to the intent of the 1972 constitution and previous redistricting commissions. He claimed Montana's redistricting history until now has been one of the most bipartisan and unblemished in the nation. He asked the committee to get the politics out of this process and HB 309 does that, and keep our proud heritage unblemished.

EXECUTIVE ACTION ON HB 309

Motion: **SEN. THOMAS** moved that **HB 309 BE CONCURRED IN.**

SEN. PEASE asked **SEN. THOMAS** about the drafting of another bill to keep the Native American districts in place.

SEN. THOMAS advised HB 309 doesn't quite do what he would like to do. He said it needs to go forward hopefully creating a situation where the commission would work with the legislature and create districts. He wanted to accommodate the Native American districts drawn by the commission and thereafter create districts that are as equal to the 9022 population as could be. He understood there were deviations that would need to be taken into account but thought those two steps would create a scenario he would be happy with. He hoped this legislation might bring the commission back to create a plan that accomplished the two key things and then Republicans would be happy. ***{Tape: 3; Side: A}***

CHAIRMAN BARKUS advised the testimony of the proponents of HB 309 indicated a lot of voters were disenfranchised and communities of interest were not kept intact. The 1% deviation would fix those things and he urged concurring with HB 309.

Vote: Motion **carried 2-1 with PEASE voting no.**

ADJOURNMENT

Adjournment: 9:58 A.M.

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SEN. GREGORY D. BARKUS, Chairman

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PRUDENCE GILDROY, Secretary

GB/PG

EXHIBIT(sds21aad)