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From-MT ATTORNEY GENERAL OFFICE

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

BOB BROWN, in his official capacity as  
the Montana Secretary of State,

Plaintiff,

v.

MONTANA DISTRICTING AND  
APPORTIONMENT COMMISSION,

Defendant,

and

JOE MACDONALD, JEANNINE  
PADILLA, CAROL JUNEAU,  
JONATHAN WINDY BOY, GERALD  
PEASE, FRANK SMITH, NORMA  
BIXBY, VERONICA SMALL  
EASTMAN, JOEY JAYNE, MONTANA  
WYOMING TRIBAL LEADERS  
COUNCIL, JAY ST. GODDARD, GERRI  
SMALL, D. FRED MATT, ALVIN  
WINDY BOY, RAY EDER, BEN  
SPEAKTHUNDER and CARL VENNE,

Intervenors.

Cause No. ADV-2003-72

**DECISION AND ORDER**

Jul-02-2003 12:14

From-MT ATTORNEY GENERAL OFFICE

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Several motions are currently before the Court. Plaintiff and Defendant have filed cross motions for summary judgment. Intervenors have filed a motion to dismiss or for summary judgment. A hearing on the motions was held May 15, 2003. Plaintiff Bob Brown, Secretary of State was represented by Robert Cameron; Defendant Montana Districting and Apportionment Commission (Commission) was represented by Brian Morris; and Intervenors were represented by Beth Brennaman. The motions have been fully briefed and are submitted for decision.

#### **BACKGROUND AND UNDISPUTED FACTS**

This case arises out of recent legislation pertaining to legislative districting. On January 6, 2003, the Commission submitted its plan for legislative districts to the 2003 legislature. The legislature appointed the Joint Select Committee on Districting and Apportionment to receive and consider testimony on the Commission's plan. After testimony, House Resolution No. 3 and Senate Resolution No. 2 were passed on February 4, 2003, which requested the Commission to reconvene and adopt a new plan. On that same day, Governor Martz signed HB 309, which was the basis for the legislative resolutions. The Commission met on February 5, 2003, where it considered the resolutions and ultimately adopted its original plan. The Commission tendered its plan to the Secretary of State for filing, but the Secretary refused to file it.

The Secretary of State filed a complaint for declaratory judgment, asking the Court to rule: (1) whether the Commission's plan is unconstitutional under Article V, Section 14, of the Montana Constitution; (2) whether the Commission's plan is unenforceable under HB 309; and (3) whether the Secretary of State's refusal to file the Commission's plan is valid under Montana law. All parties filed motions for summary

1 judgment, and Intervenors also filed a motion to dismiss.

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### 3 LEGAL STANDARD

4 Summary judgment will only be granted when the record discloses no  
5 genuine issue of material fact and the moving party is entitled to judgment as a matter of  
6 law. See Rule 56(c), M.R.Civ.P.; *Dillard v. Doe*, 251 Mont. 379, 382, 824 P.2d 1016,  
7 1018 (1992). The moving party must establish both the absence of genuine issues of  
8 material fact and entitlement to judgment as a matter of law. *Hadford v. Credit Bureau of*  
9 *Havre, Inc.*, 1998 MT 179, ¶ 14, 289 Mont. 529, ¶14, 962 P.2d 1198, ¶14. Once the  
10 moving party has met its burden, the opposing party must present material and substantive  
11 evidence, rather than mere conclusory or speculative statements, to raise a genuine issue  
12 of material fact. *Id.*

13 With respect to a motion to dismiss, the allegations of the complaint must  
14 be viewed in a light most favorable to plaintiffs, admitting and accepting as true all facts  
15 well-pleaded. *United States Nat'l Bank of Red Lodge v. Montana Dep't of Rev.*, 175  
16 Mont. 205, 207, 573 P.2d 188, 190 (1977), citing *Bd. of Equalization v. Farmers Union*  
17 *Grain Terminal Ass'n*, 140 Mont. 523, 531, 374 P.2d 231, 236 (1962). A complaint will  
18 not be dismissed for failure to state a claim unless it appears beyond any doubt that the  
19 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

### 20 DISCUSSION

21 The motions raise several legal issues, none of which involve disputed  
22 issues of material fact.

23 A. Whether HB 309 constitutes an impermissible conflict with Article V

1 **Section 14 of the Montana Constitution.**

2 Article V Section 14 of the Montana Constitution provides:

3 **Districting and apportionment.** (1) The state shall be divided into as many  
4 districts as there are members of the house, and each district shall elect one  
5 representative. Each senate district shall be composed of two adjoining  
6 house districts, and shall elect one senator. Each district shall consist of  
7 compact and contiguous territory. All districts shall be as nearly equal in  
8 population as is practicable.

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

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

23 (4) The commission shall submit its plan for legislative districts to  
24 the legislature at the first regular session after its appointment or after the  
25 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.

17 House Bill 309 included new sections, and amended Section 5-1-111, MCA. The  
18 pertinent portions of the bill read as follows:

19 **Section 1. Redistricting criteria.** (1) In the drawing of legislative  
20 districts, the districting and apportionment commission shall comply with  
21 the following criteria:

- 22 (a) the districts must be compact and contiguous; and
- 23 (b) the districts must be as equal as practicable.

24 (2) For the purposes of this section, "as equal as practicable" means  
25 within a plus or minus 1 % relative deviation from the ideal population of a  
district as calculated from information provided by the federal decennial  
census.

1 Section 5-1-111, MCA, as amended, reads in pertinent part:

2 **Final plan – dissolution of commission.** (1) Within 90 days after  
3 the official final decennial census figures are available, the commission  
4 shall file its final plan for congressional districts with the secretary of state  
5 and it shall become law.

6 (2) Within 30 days after receiving the legislative redistricting plan  
7 and the legislature's recommendations, the commission shall file its final  
8 legislative redistricting plan with the secretary of state. The secretary of  
9 state may not accept any plan that does not comply with the criteria in  
10 section 1. Upon acceptance of a plan by the secretary of state, the plan is  
11 considered filed and becomes law.

12 (3) Upon the acceptance and filing of both plans, the commission is  
13 dissolved.

14 The bill also contained a provision making it retroactive "to any legislative  
15 redistricting plan of the districting and apportionment commission that was not filed with  
16 the secretary of state on [the effective date of this act]."

17 In addressing this issue, the Court is mindful of well settled rules of law.  
18 One pertinent rule provides that in addressing a constitutional challenge to any statute, the  
19 statute is presumed constitutional, and the challenging party has the burden of establishing  
20 the statute's unconstitutionality. *Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 656  
21 (1988). If a doubt exists with respect to a finding of unconstitutionality, it must be  
22 resolved in favor of the legislation. *Id.* Another rule provides that the legislature can  
23 expand, but may not restrict rights guaranteed by the state or federal constitution. See  
24 *Marbury v. Madison*, 1 Cranch 137 (1803); *Noll v. City of Bozeman*, 166 Mont 504, 506,  
25 534 P.2d 880, 881 (1975); *Shroyer v. Sokol*, 550 P.2d 309, 311 (Colo. 1976). Finally, in  
interpreting provisions of the constitution, the Court is constrained and guided by various  
rules of construction applicable to interpreting legislation. *Great Falls Tribune Co. v.*  
*Great Falls Public Sch. Bd. of Trustees*, 255 Mont. 125, 129, 841 P.2d 502, 504 (1992).

1 Accordingly, the Court must construe Article V, Section 14, of the Montana Constitution  
 2 according to the plain meaning of the language therein. *State ex rel. Woodahl v. Dist. Ct.*,  
 3 162 Mont. 283, 511 P.2d 318 (1973). When the language of the provision is plain,  
 4 unambiguous, direct and certain, the provision speaks for itself and there is nothing left for  
 5 the court to construe. *Hammill v. Young*, 168 Mont. 81, 85-86, 540 P.2d 971, 974 (1975).

6 Article V, Section 14, of the Montana Constitution requires the Commission  
 7 to create legislative districts that are "as nearly equal in population as is practicable." This  
 8 section lacks any more specific language. The Secretary of State argues that the  
 9 legislature, using its "plenary power," can "implement" this provision by enacting  
 10 specifics, such as Section 1(2) of HB 309, which defines "as equal as practicable" as "a  
 11 plus or minus 1% relative deviation from the ideal population of a district . . ."

12 The Court finds no ambiguity in the language of Article V, Section 14, in  
 13 this respect, and is therefore constrained from looking beyond the constitutional provision  
 14 to interpret it.

15 The Secretary of State contends that this constitutional provision is intended  
 16 to be implemented by the legislature. The Court disagrees, finding the provision to be  
 17 self-executing, and needing no implementation by the legislature. A provision is  
 18 self-executing if it supplies a sufficient rule by which the right given may be enjoyed and  
 19 protected, or the duty imposed enforced; and is not when it merely indicates principles  
 20 without laying down rules by which they may be given force of law. *State ex rel. Bennett*  
 21 *v. State Bd. of Examiners*, 40 Mont. 59, 64, 104 P. 1055, 1057 (1909). Put another way, a  
 22 constitutional provision is self-executing when it can be given effect without the aid of the  
 23 legislature and there is nothing to indicate that the legislation is contemplated in order to

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1 render it operative. *State ex re. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont.  
2 52, 73, 132 P.2d 689, 700 (1942).

3 A reasonable and logical reading of the constitutional provision reveals that  
4 the Commission created pursuant to that provision is charged with the responsibility to  
5 designate the legislative districts, and in doing so, to exercise its own discretion and  
6 expertise in determining the equal as practicable factor. The language of Article V,  
7 Section 14, does not indicate an intent to involve the legislature in this process, other than  
8 its selection of four commissioners pursuant to subsection (2), and its recommendations to  
9 the Commission pursuant to subsection (4). Counsel cited no authority that validates the  
10 legislature seizing discretionary authority from a constitutional body such as the districting  
11 and apportionment commission. To the extent that HB 309 authorizes the legislature to  
12 preempt the Commission in determining the equal as practicable factor, the bill is void.

13 **B. Whether HB 309 is a Valid Implementation of Article IV, Section 3, of  
14 the Montana Constitution**

15 Article IV, Section 3, of the Montana Constitution provides:

16 **Elections.** The legislature shall provide by law the requirements for  
17 residence, registration, absentee voting, and administration of elections. It  
18 may provide for a system of poll booth registration, and shall insure the  
19 purity of elections and guard against abuses of the electoral process.

20 The Secretary of State argues that HB 309 is valid because its purpose is to  
21 insure the purity of the elections and guard against abuses of the electoral process. In  
22 making this argument, the Secretary of State asserts that the legislation removes partisan  
23 influence from the Commission, thereby protecting the redistricting process.

24 Again, in interpreting this provision, the Court is guided by the pertinent

1 rules of statutory construction. *Great Falls Tribune Co.*, 255 Mont. at 129, 841 P.2d at  
2 504. A fundamental rule of construction requires the words of a statute to be read in their  
3 context and with a view to their place in the overall statutory scheme. *Davis v. Mich.*  
4 *Dep't of Treasury*, 489 U.S.803 (1989), citing *United States v. Morton*, 467 U.S. 822, 828  
5 (1984). Each statute should be read as a whole. *Dover Ranch v. Yellowstone County*,  
6 187 Mont. 276, 283, 609 P.2d 711, 715 (1980). Applying these rules of construction, the  
7 Court concludes that Article IV, Section 3, of the Montana Constitution pertains to the  
8 mechanics of elections and not to the legislative redistricting process.

9           With respect to the Secretary of State's contention that legislative  
10 interference is needed to protect the redistricting process from political influence, the  
11 legislature is already substantially involved: Article V, Section 14(2), of the Montana  
12 Constitution provides that the majority and minority leaders of the legislature appoint four  
13 of the five members of the Districting and Apportionment Commission, who then select  
14 the fifth member. At the hearing on the motions for summary judgment, it became  
15 apparent that the members of the Commission constituted a good representation of the  
16 state population. The language of this constitutional provision indicates that the drafters  
17 of the constitution intended to protect the integrity of the redistricting process by requiring  
18 equal participation of both political parties in appointing the commissioners, and by  
19 prohibiting the commissioners from being public officials.

20           The argument that HB 309 is needed to protect the redistricting process is  
21 without merit.

22           **C. Whether the Secretary of State's Refusal to File the Commission's Plan  
23 was Legal**

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1 Secretary of State, the legislature's attempt to do so is in conflict with the constitution and  
2 is void.

3 **D. Whether the Secretary of State Has Standing to Seek a Declaratory**  
4 **Judgment on the Constitutionality of the Plan Adopted by the**  
5 **Commission**

6 Intervenor's assert that the Secretary of State lacks standing to seek a  
7 declaratory judgment on the constitutionality of the plan adopted by the Commission and  
8 have moved to dismiss that portion of the complaint. The Commission raises the same  
9 issue in its answer to the complaint. As discussed above, the Secretary of State's role with  
10 respect to filing the commission's plan pursuant to Article V, Section 14, of the Montana  
11 Constitution is ministerial, and he therefore has no basis to exercise discretion in the  
12 process of filing the plan. In other words, when the Commission presents the plan to the  
13 Secretary of State, he must file it, and he has no authority to refuse to do so. The language  
14 of the constitutional provision is clear in this respect.

15 Intervenor's assert that the Secretary of State's legal rights are not affected by  
16 the enactment of HB 309. However, the Court acknowledges that the enactment of HB  
17 309 placed the Secretary of State between a rock and a hard place. On one hand, the  
18 constitution required him to file the plan upon presentation by the Commission, while on  
19 the other hand, HB 309 required him to refuse to file the plan if it did not comply with the  
20 terms of the bill. On this basis, a controversy clearly exists for the Secretary of State, but  
21 only to the extent that the Court should determine which provision the Secretary of State  
22 must follow. Upon such determination by the Court, the Secretary of State is bound by  
23 law to follow that provision as a ministerial officer, and he has no legal interest in further  
24 legal challenges to the Commission's plan.

1           The test for the existence of a judicial controversy is: (1) that the parties  
2 have existing and genuine, as distinguished from theoretical, rights or interests; (2) the  
3 controversy must be one upon which the judgment of the court may effectively operate, as  
4 distinguished from a debate or argument invoking a purely political, administrative,  
5 philosophical or academic conclusion; and (3) the controversy must be one the judicial  
6 determination of which will have the effect of a final judgment in law or decree in equity  
7 upon the rights, status or legal relationships of one or more of the real parties in interest, or  
8 lacking these qualities, be of such overriding public moment as to constitute the legal  
9 equivalent of all of them. *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117  
10 (1997). The Secretary of State as a ministerial officer has neither a legal right nor interest  
11 in a declaratory judgment as to the constitutionality of the Commission's plan. On this  
12 basis, the Secretary of State has no standing to seek a judgment as to the constitutionality  
13 of the plan.

14           The Secretary of State argues that his duty as the chief election officer to  
15 obtain and maintain uniformity in the application, operation and interpretation of the  
16 election laws provides sufficient basis to give him standing to request a declaratory ruling  
17 on the constitutionality of the Commission's redistricting plan. He asserts that his standing  
18 arises from his interest in the effective discharge of his official duties and points to  
19 *Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review*, 282 Mont. 255,  
20 937 P.2d 463 (1997), in support of this assertion. However, the Court finds that case  
21 distinguishable for two reasons. First, as noted above, the Secretary of State's duty with  
22 regard to the redistricting process is strictly ministerial, and he has no regulatory authority  
23 over this constitutionally mandated process, nor does it impact the manner in which he

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DECISION AND ORDER - Page 11

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1 performs his duties to oversee the election laws. Second, although this issue is  
2 undoubtedly one of importance to the general public of Montana, the interest of the  
3 Secretary of State is not distinguishable from or greater than the interest of the public  
4 generally.

5 The Secretary of State also argues that his standing arises from his sworn  
6 duty to support, protect and defend the Montana Constitution. He asserts that this position  
7 is supported by *Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 543 P.2d 1317 (1975).  
8 Again, the Court finds that case distinguishable. *Judge* did not involve a general  
9 challenge to a statute based on an executive officer's duty to protect the constitution; the  
10 governor in that case was arguing that the statute at issue was an infringement on the  
11 separation of powers doctrine by allowing the legislature to exercise discretion exclusively  
12 reserved to the executive branch, thus directly impacting the manner in which he fulfilled  
13 his discretionary duties. Here, as already discussed, the Secretary of State's role is  
14 ministerial only and the redistricting plan does not affect the discharge of his discretionary  
15 duties. Furthermore, there was no discussion at all of standing in that case. The only  
16 discussion of the governor's duty to uphold the Constitution arose in the context of  
17 whether the governor was estopped from challenging the acts because he had signed them.

#### 18 SUMMARY

19 HB 309 impermissibly conflicts with Article V, Section 14, of the Montana  
20 Constitution, and is void on that basis. HB 309 is not a valid implementation of Article V,  
21 Section 14, because that constitutional provision is self-executing, and because Article IV,  
22 Section 3, of the Montana Constitution does not authorize the legislature to interfere with  
23 the redistricting process beyond the express authority given to it in Article V, Section 14.

1 The Secretary of State was required to file the Commission's plan, and his refusal to do so  
 2 was therefore in violation of the Montana Constitution. Finally, the Secretary of State  
 3 does not have standing to seek a declaratory judgment on the constitutionality of the  
 4 Commission's plan.

5 **ORDER**

6 Intervenor's motion to dismiss the Secretary of State's request for  
 7 declaratory judgment on the constitutionality of the Commission's plan is GRANTED.  
 8 The motions for summary judgment are GRANTED and DENIED in accordance with this  
 9 decision.

10 DATED this \_\_ day of July, 2003.

11  
 12 DOROTHY McCARTER  
 District Court Judge

13  
 14 pc. Ward A. Shanahan/Robert Cameron  
 Mike McGrath/Brian M. Morris  
 15 Beth Brenneman  
 Laughlin McDonald

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 17 T/DMc/BROWN V DISTRICTING D&O.WPD