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The Interaction of Montana Political Parties and American Indians through the Issue of Districting and Apportionment since 1992

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The Interaction of Montana Political Parties and American Indians through the Issue of Districting and Apportionment since 1992

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Submitted in partial fulfillment of the requirements for graduation with honors to the Department of Political Science at Carroll College, Helena, Montana.

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This thesis for honors recognition has been approved for the Department of Political Science.

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Abstract:

Districting and Apportionment in Montana is a process unlike almost every state in the Union. Montana’s large size, small population, and growing American Indian population have lead to many intense Legislative and legal debates since the 1960’s. However, few sessions have matched the intense partisanship and racial tension of the Districting and Apportionment debates of 1992 and 2002. In the center of this partisanship is Montana’s American Indian population which was denied proportional representation until 2002, but because of Democratic Party control of the 2002 process, has gained an additional Indian-majority House district and two Senate districts to create proportional representation. The Republican opposition to this plan in almost every elected office of state was strong and has lead to charges of racism and gerrymandering on both sides. This thesis explores how the debate over Districting and Apportionment is indicative of relations between Montana Indians and Montana political parties and further explores the future of interaction in light of the past decade.
Introduction

The state of Montana has one of the largest Indian populations in the United States, second only to Arizona and New Mexico. Montana’s Indians are the state’s fastest growing minority group and now constitute six percent of the State population.¹ Its seven reservations include eleven nations with the Confederated Salish-Kootenai holding the Flathead near Kalispell, the Blackfeet holding land east of Glacier National Park, The Crow and Northern Cheyenne with neighboring reservations in southeastern Montana, the Assiniboine and Sioux in Fort Peck, the Chippewa-Cree holding Rocky Boy and the Gros Ventre and Assiniboine in Fort Belknap. Despite growing numbers, political equality for Indians in Montana has always been an uphill battle.

Indians face political tangles with white landowners, state government, federal regulations, and at times a hostile political environment. Issues between political parties and Montana Indians first have to be understood legally and historically in terms of how federal and state governments have aided or hurt Indians. Ultimately, a legal and historical viewpoint is necessary to understand why Montana Indians have fought so hard for proportional representation. As will be shown in the history, Indians only recently gained any appreciable power to manage their own affairs. Before 1935 and Indian Reorganization, they had minimal influence on their rights or even the state of their tribes. This historical trend of denying Indian rights has fed an undercurrent of animosity that has run in state and Indian relations since before statehood.

In the 1870’s and 1880’s the federal government divided up reservation land into allotments for tribal members to ranch or farm. Whatever land that was undistributed was opened to settlers for homesteading or sold outright by the Department of Interior. While it was well intentioned, it was also misguided and many Indians were forced to sell their plots when taxes came due or ventures failed. Furthermore, Allotment led to heavy settlement of reservations by Non-Indians. This was a source of constant tension when it came to reservation laws for non-Indian residents and tribal attempts to reclaim reservation land. After the failure of Allotment became apparent, the federal government engineered a new policy of Indian reorganization in 1928. The Tribes were given back surplus land and were encouraged to reorganize their governments and adopt a constitution. While they had more independence, they were still subject to the Department of the Interior for any changes in government. Reorganization and independence, albeit limited, was widely accepted by most tribes in Montana with only the Crow refusing to reorganize.

Indian Reorganization created new conflicts as non-Indians were now reservation residents which created the complex legal issues of jurisdiction of tribal government and taxation of non-Indians. Adding to the conflict, Indians were given the right to vote over the objection of states. State government often argued that Indians should not be allowed to vote because of false assumptions such as that they did not pay taxes, were not competent to vote, and their rights

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3 Ibid., p. 23.
were still being “held in trust” by the government. However, Reorganization was abandoned in the early 1950’s when the federal government pushed for termination and relocation of Indian nations.

Termination was a policy of severing government support for Indians and even dissolving several tribes. Furthermore, Indian sovereignty was trumped by state law via Public Law 280 which passed the responsibility of managing tribes onto states. The only sovereignty Indians were given was what the states let them have. This created multiple problems; Indians had no rights to bargain with states and a grant program paying Indians to move to cities created an urban Indian population base that had to deal with poverty and dislocation. The policy of termination and Public Law 280 also created a burden on states as the federal government passed an unfunded mandate to states to govern, support, and negotiate with Indians with no federal direction or funding.

However, the situation of Indian civil rights started to improve as the battle for civil rights in the South spread across the nation. During the struggle for civil rights for African Americans, Indian groups such as the American Indian Movement (AIM) pushed for recognition of Indian rights. In 1968, the Indian Civil Rights Act was passed which guaranteed rights for self-government of Indians and laid out the basic rights of all Indians under Tribal law. In 1970, President Richard Nixon declared termination a failure and asked for a new policy. In addition, in 1970, the Voting Rights Act was amended to extend full

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4 Ibid., p.56.
5 Ibid., p.28.
6 Indian Civil Rights Act of 1968, Public Law 25, 90th Cong. (1968) 1330-1335
protection of voting rights to American Indians as a “language minority.” In 1975, the Indian Self-Determination and Education Assistance Act was passed, which allowed Indian tribes to enter into contracts for management of their own affairs. This was a large step for Indians, but it led to further problems on the state level as tribes sought to regain reservation land and states had to again shift their policies and lose rights over Indians. However, the changes also meant that Indians could again negotiate with states over issues such as economic development and gaming.

In terms of the State of Montana’s interactions with its seven reservations, there is plenty of conflict stemming from previous Federal-Tribal relations. Allotment turned half the Flathead reservation land into non-Indian holdings which the Confederated Salish-Kootenai Tribes are trying to regain. There is also continued negotiation over the development of natural resources on Fort Peck and other reservations. Under most of the Northern Cheyenne Reservation is a rich coal bed which has been pursued by development companies. The Northern Cheyenne, so far, do not want to see the environment destroyed by mining and have blocked most overtures to develop the resource by private interests. Furthermore, local jurisdiction issues between Tribal and State law enforcement still remain to be sorted out.

Despite conflict, there is significant advancement. The 1972 Montana State Constitution recognized a need to preserve the cultural heritage of

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7 Canby, *American Indian Law in a Nutshell* p. 31

Montana’s Indians and see it is a part of statewide curriculum. Furthermore, there has been a deliberate effort from the state to educate legislators and other elected officials about Montana's Indian population and encourage cooperation with Tribes. However, recognition does not solve for the problem of unemployment and severe economic depression on reservations.

Unemployment runs as high as 21.8 percent on some reservations, because only a few reservations possess the natural resources or access to major population centers to improve the local economy. Compounding the problem is that without a strong economic base Montana Indians lack a political lever to gain attention and support for Indian issues such as education, unemployment, and local development. The only source of political leverage for Montana Indians is their population. Montana Indians currently occupy six House seats and one Senate seat, all Democratic. They now comprise six percent of the state population and are steadily growing. They represent an expanding, politically cohesive voting bloc that can help secure local and statewide seats. For that reason Montana Indians have aggressively pushed for proportional representation of six House seats and three Senate seats in the Legislature. As a result there have been efforts by both parties to either recruit or diminish the Indian voting bloc.

The Democratic Party platform concerning Montana’s Indians is over three pages long and calls for improved Indian education, full recognition of Indian treaty rights, protection of religious practices, and equitable representation
on all levels of government.\textsuperscript{11} The Democratic Party has worked to elect the six Indian members of the Legislature and the one Senate seat. In every election cycle, it engages in an aggressive reservation Get-Out-the-Vote campaign and makes a deliberate effort to recruit Indian candidates. As a result Montana Indians have been loyal to the Democratic Party, usually supporting Democratic candidates by a three to one margin on reservations.\textsuperscript{12} This loyalty is not lost on Democrats who see a proportional number of Indian seats in the legislature as vital to the Democratic Party regaining a majority it lost ten years ago and rebuilding the party.

The Republican Party has also made some overtures, but faces obstacles due to the perception that the Republican Party against Indian rights. This is fueled by other state Republican parties such as the Washington state GOP which called for an end of all tribal governments and the use of force if necessary to dissolve them.\textsuperscript{13} There are also issues of indifference to Montana Indians as Montana Republicans have consistently pursued social welfare policies that would harm reservation economies. Furthermore, Republican attempts to undo the 2002 Redistricting and Apportionment plan that promised Montana Indians proportional representation has magnified issues between Republicans and Montana Indians.


\textsuperscript{12} Brad Martin (Executive Director Montana Democratic Party), personal interview, June 2003.

\textsuperscript{13} Julie Titone, “Resolution Would End Tribal Sovereignty” \textit{The Spokesman Review}, July 3, 2000
Redistricting and Apportionment is the act of redrawing House and Senate districts to adjust for population change for the previous decade. Before the 1972 Constitution reapportionment was the duty of the Legislature. It usually led to political deadlock and issues of vote dilution for Indians with the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act. However, the reapportionment method detailed in the 1972 Constitution, which uses an independent commission, has had its own controversy. Partisan controversy and debate have surrounded every effort at redistricting and the past two plans in 1992 and 2002 are no exceptions. The debate and legal issues that arose from the 1992 Districting and Apportionment Plan provides background and context for the intense continuation of that debate over the 2002 Districting and Apportionment Plan. The 2002 debate exposes issues of the interaction between political parties and Montana Indians, including perceptions of racism, opportunism, and pandering.

The first chapter of this thesis will serve as a primer on the complexities of districting and apportionment in Montana, including court cases and laws and how they apply to Montana Indians’ struggle for proportional representation. The second chapter will use the debates over the 1992 and 2002 plans to deconstruct the partisan debate to examine how the major two political parties interact with Montana Indians and what issues have arisen specifically from the 2002 debate.

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Chapter One:

A Primer on Montana Redistricting

Redistricting is a politically and legally complex task in which the partisanship of those writing the plan must be weighed against legal issues considering population, district shape, and racial composition. While 39 states use either their Legislature or the Governor's Office to draw district lines, Montana is one of 11 states that use an appointed or elected commission. Montana is also unique in that its Districting and Apportionment Commission members may not run for office until ten years after they conclude their service, which means that members cannot engineer ideal campaign districts and then run in them. Montana chose a commission method after it became clear during the redistricting debates of the 1960’s that the Legislature was too divided by party interests to effectively draw district lines. This partisanship ran roughshod over the actual requirements of redistricting explained below and often produced plans that were rejected by District Courts for ignoring mandatory criteria. Despite attempts to make the Commission neutral, partisanship has always managed to find a prominent place in the redistricting debate, whether the split is between rural and urban representation before the 1972 Constitution or along party lines in the past few decades.

Redistricting: 1889-1972

The 1889 Montana Constitution established legislative districts by county modeling what is called a “little federal” plan. House seats were determined by county population and one Senate seat was given to each county regardless of
population. Reapportionment was to be carried out every five years to match population and counties could be combined or fractured to create parity in the House. However the "little federal" model of state representation started to slowly collapse in Montana as rural population shrank relative to urban. By 1921, four rural counties lacked the 6,000 people or major portion thereof to create their own districts but maintained their Senate seats regardless. Despite the growth in urban populations, rural districts maintained disproportionate power under the current plan. With such control, it was impossible to change the districts to solely reflect population because it would require a constitutional amendment and rural Senators fiercely opposed a plan that would sap their power base. Rural-Urban partisanship prevented effective redistricting on the argument from rural Senators and Representatives that rural voters would be shut out of the legislature if districts were drawn by population. Despite the disparity there was no relief from the courts, with the Supreme Court ruling on cases such as Colegrove v. Green.

The Court ruled in this case that it was the role of the people to determine districts. If a district is malapportioned, then the remedy is not through the courts, but through state government. Under such a standard, malapportionment could only be fixed by the malapportioned legislature. In states with shrinking rural populations, such as Montana, a change was unlikely given the intense fight to keep rural representation. However, by the 1950’s and 1960’s the Court ruled on

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1 Ellis Waldron, "100 Years of Reapportionment in Montana," *Montana Law Review*, 28 (1966): 1
2 Ibid., p.3
4 Ibid., p.105
several cases that reversed that trend and forced Montana to attempt reapportionment.

The two cases that established a trend of judicial intervention in apportionment were Dyer v. Kazuhisa Abe in Hawaii and Magraw v. Donavan in Minnesota. Both cases involved their respective state legislatures refusing or failing to reapportion after over 50 years. In both cases the states remedied the problem, but only after the Court made it clear that if they failed to do so, it would be done for them.\(^5\) The implications of these rulings were further clarified in 1962 when the Supreme Court ruled in Baker v. Carr that the Tennessee General Assembly’s 60-year-old apportionment plan did not fairly represent voters, because it granted rural districts with small populations a disproportionate number of seats in the Legislature.\(^6\) While establishing that voters had a right to equity in apportionment, Baker v. Carr failed to answer questions over the application of the Equal Protection Clause of the Fourteenth Amendment and what remedy the Courts can grant in cases of malapportionment. The ruling and the resulting unanswered questions led to litigation in almost every state in the US.\(^7\) The resulting cases of Reynolds v. Sims and Gray v. Sanders would force Montana to accept reapportionment.

Reynolds v. Sims served to clarify Baker and then went further to establish seven standards in reapportionment, including equal representation, mathematical precision, and a requirement for states to reapportion every ten

\(^5\) Ibid., p.105-106

\(^6\) Ibid., p.107

\(^7\) Ibid., p.108
years. This combined with *Gray v. Sanders* to establish a standard of “one man, one vote.” Finally, the “little federal” plan was struck down in cases involving similar structures in Maryland, Delaware, and Alabama. Despite the rulings, Montana was slow to accept the changes. In Governor Tim Babcock’s 1965 address to the 34th Legislative Assembly, he argued that “the theory of ‘one person-one vote’ simply does not fit Montana”; however, he saw a need to show a sign of good faith and called for a Constitutional amendment to provide for Senate districts based on population rather than county lines. By this point, malapportionment in Montana had grown so severe that 14 percent of the state could muster a majority vote in the Senate and 40 percent a majority vote in the House. Rural counties with only one thousand people could join to set policy for the entire state regardless of actual population.

In January 1965, the day after Babcock proposed a Constitutional amendment to fix Senate districts, Phoebe Herweg of Silver Bow County filed suit in District Court alleging that there was a severe state malapportionment in state legislative districts, and that to await an amendment to the Montana Constitution would delay equal voting rights through the next election. The suit demanded that the Legislature be advised of its duty to reapportion and that the Courts oversee and direct the effort to create districts based on population rather than urban-rural interests. The District Court ruled that though discrimination

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8 Ibid., p.109

9 Waldron, “100 Years of Reapportionment in Montana,” p. 5

10 Ibid., p.8-9

11 Ibid., p.8
was evident, it would delay proceedings and await a remedy from the Legislature.\textsuperscript{12} If the Legislature failed to take action then the Court would enact a remedy. The Herweg case was boosted by a Federal Court finding in the case of Reynolds \textit{v. Babcock} that Montana Congressional districts were also malapportioned. The Federal Court went further to establish new Congressional districts rather than wait for remedy from the state.\textsuperscript{13}

The Legislature was now being forced to take action to address malapportionment. However, it was still divided by the same partisan issue of urban versus rural interests. Petroleum County had less than a thousand people, but had the same Senate representation as Yellowstone County with 79,000 people. If the state was forced to redistrict by population, rural Senators would be given the task of committing political suicide by abolishing the "little federal" plan which guaranteed their seats. Rural Senators were adamant to prevent their loss and showed this by following Governor Babcock's suggestion that they push for a Constitutional Amendment in Washington, D.C., and delaying apportionment plans by demanding unconstitutional deviances to accommodate rural areas.

In January of 1965 the Legislature established Standing Committees on Apportionment in both chambers, but adjourned with no accepted apportionment plan. The only accomplishment was an amendment to the Montana Constitution to determine districts based on population that still had to face the voters. In May of 1965 the Court noted the failure of the legislature to create reapportion and

\textsuperscript{12} Ibid., p.9

\textsuperscript{13} Ibid., p.11
created a reapportionment plan for the 1966 elections.\textsuperscript{14} The Legislature failed to reapportion in 1967 and 1969 and the District Court plan stood. In 1971, the Legislature convened and while several apportionment bills were debated, the issue took a backseat to a financial crisis.\textsuperscript{15} However, the people of Montana agreed with the Legislature and Governor Forrest Anderson by supporting their call for a Constitutional Convention. Because the 1970 census was complete, it became necessary under the provision of \textit{Reynolds v. Sims} to reapportion according to census data before delegates could be elected to the Convention.\textsuperscript{16} The Legislature moved into the first of two special sessions on March 8\textsuperscript{th} 1971. The Legislature passed a plan and it was approved in April, but it was struck down in State Court for a population deviance of 37.06 percent between House districts and 23 percent between Senate districts. The second special session produced a reapportionment bill that created 100 House seats and 50 Senate seats with a \textit{de minimis} standard of only 10 to 11 percent deviance. The Court, noting the impending elections of delegates, accepted the plan as constitutional and it was passed into law.\textsuperscript{17} If the plan had been delayed any further, the election of delegates for the 1972 Constitutional Convention would have been impossible and the Convention would have been stalled.

\textbf{Post-1972 Redistricting}

\textsuperscript{14} Ibid., p.13


\textsuperscript{17} Dudis, "Apportionment: Past to Future," p. 121
For the previous 83 years redistricting has been dominated by a geographic standard that gave severely disproportionate representation to rural counties, allowing them to dominate the state and create a clear rural/urban split of representation in the Legislature. This split prevented the Legislature from addressing the problem; therefore, a new method had to be found that could avoid the partisanship and create equitable districts. After the problems shown in the past Legislative sessions, it became clear to Convention delegates that Legislative control of districting and apportionment was unwise. And to avoid the special session and lawsuits tied to partisanship a new structure was needed for redistricting. As a result, the 1972 Constitution made significant changes in the structure and practice of redistricting.\textsuperscript{18} The 1972 Constitution established a Districting and Apportionment Commission composed of citizens who do not hold a public office. Members are individually appointed by the Majority and Minority leaders of each chamber for four members total.

The appointed four members must then vote to appoint a fifth member to serve as chairperson. The fifth member's vote is usually only needed to break ties; otherwise, they manage meeting and proceedings. If the Commission fails to appoint a fifth member, then the responsibility of appointment passes to the Montana Supreme Court.\textsuperscript{19} This appointment can secure a severely partisan makeup of the Commission. If the fifth member is not a moderate, then the Commission could become intensely partisan as votes of 3-2 along party lines

\textsuperscript{18} Susan B Fox, Primer on Districting and Apportionment: Basic Facts, Montana Legislative Services Division, June 2001, p. 1.

\textsuperscript{19} Montana Const Art V § 14(2) 1972
show the clear political slant. However partisan the Commission is or how bitter the debate the Commission has several responsibilities that have to transcend the debate in order to draw a plan.

After the fifth member is appointed, the Commission members then examine census reports, district maps, and studies provided by the Legislative Services Division. Citizens and Commission members can submit suggestions and plans to Legislative Services and those plans will be integrated by Legislative Services to be presented to the Commission. The Commission is then required to hold at least one public meeting in Helena; however, it is standard for Commissions to hold several public hearings around the state to receive suggestions from local citizens and officials. After compiling the information they then assemble and present a plan to the Legislature for suggestion and comment.\(^{20}\) The Legislature has no authority to approve or disapprove of a plan and cannot change the makeup of the Commission, its standards, or plans without a Constitutional amendment. Finally, they present the finished plan to the Secretary of State who is required to receive the plan into law. Theoretically, the structure of Districting and Apportionment is a panacea for the problem of partisan district maps. A Commission is appointed with equal representation of the two major parties in each chamber. These four members are supposed to seek consensus on a fifth and then draw an equitable and practicable map that the partisan Legislature cannot change or reject. However, as the second chapter will

\(^{20}\) Joe Lamson (2002 Districting and Apportionment Commission member), personal interview, October 2003
demonstrate, partisanship often becomes entangled in the actual priorities of the Commission.

The Districting and Apportionment Commission has to consider several factors when drawing district lines. The shape of a district can help political parties, recognize an ethnic minority, and shape the outcomes of elections in that district for the next decade. The same lines can isolate minority groups by breaking apart their regions into voting districts where they have limited power. In Montana, an Indian population of six percent should, theoretically, have six seats in the State Legislature and three in the Senate. However, the district lines cannot be gerrymandered; they have to be compact, contiguous and have only a plus or minus five percent population variance. This can create conflict between commissions, legislatures, parties, and ethnic groups. State Senators can lose their seat in their home district after being reassigned. Indians can be boxed in to prevent majority districts or be given seats by nature of the lines drawn. Political parties can actively draw maps that exclude or minimize their opponents. The mandatory guidelines that govern redistricting are those of population, shape, and race, along with several discretionary criteria.

Population

The basic guidelines of redistricting call for several considerations in redistricting. The first is population equity. Under the Equal Protection Clause of the Fourteenth Amendment, every person is guaranteed equal protection and rights under the law, including proportional representation based on population. In terms of redistricting, this means that each elected official represents an equal
number of people, thereby guaranteeing an equal right to participation. The Supreme Court further dictates in several cases, including Baker v. Carr, that Legislative and Congressional districts must be substantially based on population. However, Baker v. Carr left open many questions of how population should factor into current and future apportionment plans. These are clarified in the case of Reynolds v. Sims. This case establishes seven standards that states must follow when reapportioning by population:

(1) The Equal Protection clause of the Fourteenth Amendment is applied in calling for equal standing among all voters regardless of where they live.

(2) Every voter has a right to equal representation that shall not be diluted by overpopulating districts.

(3) The "little federal system" and other apportionment schemes based largely on geography are unconstitutional.

(4) While exact populations are impossible, districts must be substantially based on population.

(5) State Legislatures are required to reapportion every ten years.

(6) Elections cannot be carried out in malapportioned districts unless the Courts grant relief.

(7) Reapportionment plans approved by referendum using any standards besides population are unconstitutional.21

Ultimately, Sims does two important things. It forces redistricting to happen after every census and demands that it be based on population. This not only ends the rural/urban representation battle; it demands action every decade

without delay, this prevents the severe deadlock that dominated the 1960’s redistricting efforts.

On the state level, Article V Section 14 of the Montana Constitution states, “All [districts] shall be as nearly equal in population as practicable.” Each district is to have an approximately equal number of people to be represented in the State House and Senate. In a state of 900,000 people, there should be roughly 9,000 people per House district and 18,000 per Senate district. However, this can be difficult as population does not distribute into neat blocks of people over a uniform area – some districts will have smaller or larger population because of distribution. In cases of population deviance, there should only be a plus or minus ten percent difference between the most and least populated districts, effectively an overall rule of plus or minus five percent deviance from the ideal. If a plan exceeds the ten percent de minimis standard and it is possible to reduce the variance while considering the other two criteria, it must be redrawn. Deviations of over five percent can be acceptable on an individual basis when considering race or compactness of a district, but those considerations are rare. As stated above, Montana cannot be divided into neat blocks of people; thus, creating population equality requires contorting the neat blocks into actual districts that are functionally compact and contiguous.

Compactness and Contiguity

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22 Article V § 14(1) Mont. Const. 1972

23 John MacMaster Mandatory and Discretionary Criteria for Redistricting, Montana Legislative Services, 2000, p. 4
Article V Section 14(1) of the Montana Constitution requires that all districts be compact and contiguous. This considers the physical shape of the district along with travel and communication within it. Compactness refers to the shape of the district; it also considers "functional compactness" which is how well a person can travel or communicate in the district. If the district has an area that is only reachable from the main body of the district through dirt or unplowed roads or is isolated in such a way that an elected official would have to travel outside the district to campaign, then the district is not functionally compact.24 Redistricting commission members have to consider roads, geography, and other physical factors that could affect communication of voters with their representative. Contiguity refers to a district being in one solid piece, not divided into sections connected by slim corridors or wholly separated. Although population and contiguity are important to a district, race remains as a major consideration in creating fair and legal voting districts along.

Race

Several laws and court decisions shape how race can affect redistricting. Section Two of the Voting Rights Act of 1965 requires that a minority district be neither packed in, isolated to create a minimal number of minority districts, nor fractured among majority districts to prevent them from having a candidate.25 It also prevents the use of tests and devices as prerequisites to voting. In a 1975 amendment, the Voting Rights Act was expanded to protect American Indians and

24 Ibid., pg 7
other "language minorities." The Voting Rights Act, however, leaves a large scope of interpretation as to what is a breach and how that can be recognized and remedied.

Interpretations of the Voting Rights Act are found in a number of Supreme Court Cases – all of which have an application to Montana’s redistricting. In the case of Thornburg v. Gingles, the Supreme Court established a threshold by which a Section Two complaint can be filed: the minority is sufficiently large and geographically compact to constitute a majority in a single member district; the group is politically cohesive; and in the absence of special circumstances, bloc voting by a white majority usually defeats the minority’s preferred candidate.

After the threshold, a clear totality of abuse has to be established. The examination of the alleged abuse involves examining issues such as the success of minority preferred candidates in elections, white support for minority candidates, incidence of white-bloc voting to defeat minority candidates and proportionality of power in federal, state and local offices relative to size of the minority population.

Race would seem to be predominant factor in determining districts. Yet as outlined in Shaw v. Reno, while race is important, it cannot be a superceding factor in drawing district lines. In Shaw, the state of North Carolina was forced to rewrite its redistricting plan under Section Five of the Voting Rights Act to create another African American majority district. It created a district that was

\[26\] Ibid., 1973(a)

\[27\] Thornburg v Gingles 478 US 30 (1986)

over 160 miles long and no wider than the I-85 corridor. The state was sued, alleging racial gerrymandering to create an African American district without concern to compactness or contiguity. This district construction represented racial segregation to create a minority-majority voting bloc, and to pack minority voters to a minimal number of districts. The Supreme Court ruled that “state legislation that expressly distinguishes among citizens on account of race – whether it contains an explicit distinction or is unexplainable on grounds other than race” bears close scrutiny. Further, because redistricting falls into that category, it deserves consideration on the basis that straight racial gerrymanders can lead to racial hostility, and an impression of legislators that they do not serve the whole state, rather only that section.\textsuperscript{29} The Supreme Court found that ultimately there is direct harm in a deliberate racial gerrymander – regardless of intent. Therefore, race cannot be a superceding factor to compactness, contiguity, and population.

Though race cannot supercede population, it has become a tool of partisan politics to secure or suppress votes of a minority group. Lawsuits filed by minorities usually have a political party in the wings rallying for a victory that would solidify minority and therefore party seats. In Montana, the Supreme Court cases are relevant because they lay the legal framework for both sides of the 1992 and 2002 debates. \textit{Thornburg v. Gingles} is significant in that it lays out exact criteria by which Montana’s Indian population could sue under Section Two. In the Montana case over the 1992 Redistricting Plan, Earl Old Person sued under Section Two and \textit{Thornburg v. Gingles} was the central test. The details of this

\textsuperscript{29} Ibid.
case will be addressed in chapter two, along with resulting efforts to remedy and the controversy surrounding them.

For the 2002 districts, which were drawn to benefit Montana Indians, Shaw takes an oppositional view. Shaw presents a clear challenge to creating the proportional representation Montana Indians that they and the Democratic Party have fought for. Indian-majority districts would have to respect issues of compactness in uniting Indian population centers across large expanses of territory. Indian-majority districts cannot be drawn without considering other criteria. If a plan does draw lines for largely racial reasons, then the plan would be invalidated and the districts would be lost. Besides the mandatory criteria, there are several discretionary criteria that factor into and even aid in drawing legal districts.

**Discretionary Criteria**

These discretionary criteria include drawing lines along political units — attempting to maintain continuity of cities, county lines, reservations, and voting precincts. Geographic boundaries include mountain ranges, the Continental Divide, rivers, and highways. Finally, redistricting should try to preserve existing lines and consider incumbent officials in preserving their district, regardless of their party. However, if a Commission seeks to preserve incumbent seats, then the districts have to protect all incumbents equally or none at all, lest it appear that there was a clear effort to promote a party.

Though the laws that govern redistricting on the state and federal level are quite clear, intense partisan debate always manages to find a way into the process.

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30 MacMaster, *Mandatory and Discretionary Criteria for Redistricting*, p. 8
Under the system Montana uses, partisan politics usually finds a place in appointing the Commission. There are no restrictions stating that a Democrat has to appoint a Democrat; nor is the Supreme Court obligated to appoint a moderate member when the Commission fails to appoint a fifth member. A Commission can become dominated by a party early in the process and maps drawn demonstrate the bias. In 1992 the Commission was controlled by Republicans and there were accusations of political and racial bias in denying Indians proportional representation. In the 2002 the situation was reversed and Democrats were accused of political and racial bias in creating proportional seats for Montana Indians. The 1992 plan led to a protracted legal battle and the debate over the 2002 plan occupied a Republican Legislature with attempts to modify the Commission and undo the 2002 plan. Redistricting in Montana is supposed to be largely free of partisanship and strife because the Legislature cannot control it. However, as the next chapter demonstrates, partisanship can find a way into any system; all it needs is a difference of opinion. One such difference in the 1992 and 2002 debates was the rights of Montana Indians.
Chapter Two:

The 1992 and 2002 Debates

Redistricting and reapportionment causes intense party rivalry as political partisans vie for winnable districts and the protection of their constituents. In states with racial and language minorities, the partisanship can be at its worst. It can turn into racism on both sides, as groups strive to either prevent a specific minority from gaining power or to pander and use minority rights to increase party power. The past two Montana Redistricting Commissions demonstrate this process with disturbing clarity as Democrats and Republicans viciously fought for power using Montana’s Indian population as leverage to gain or secure electoral advantage. The battle over the 1992 Districting and Apportionment Plan, with charges of political and racial gerrymandering, set the stage for a more contentious debate over the 2002 Plan. The 2002 redistricting debate featured both sides waging partisan battles on the Commission and later in all branches of state government. The debate was replete with claims from both sides of racism, political gerrymandering, and violating the Montana Constitution. The debate over the 2002 Districting and Apportionment Plan serves as a lens into the interaction and issues between Montana political parties and Montana Indians.

The 1992 Plan

Partisan conflict started long before the 1992 Plan was written. However, it was the conflict over the 1992 Plan that led to the fierce debate over 2002 redistricting. The Districting and Apportionment Commission that produced the 1992 Districting and Apportionment Plan was formed in 1989 by the Legislature
in accordance with the Montana Constitution which demands redistricting after each decennial census. Between 1980 and 1990, the non-Indian population of Montana had grown only 1.6 percent while Indian population grew by 27.9 percent. Further complicating redistricting was a large shift in population, with only 17 counties showing an increase while several counties such as Prairie and Silver Bow lost significant population. The Legislature was split, with Republicans controlling the Senate and Democrats the House. Commission members were appointed in the constitutionally prescribed manner; Selden Frisbee of Cut Bank and Jim Pasma of Havre were appointed by the majority leaders of the Senate and House respectively. Jack Pinsoneault of Missoula was appointed by the Senate Minority Leader and Jack Rehberg by the House Minority leader. The Commission then selected former Montana Supreme Court Chief Justice Frank Haswell as chairman. However, Chief Justice Haswell passed away in 1990. In April of 1990, the Commission selected former Montana Supreme Court Justice L.C. Gulbrandson as chairman. Gulbrandson resigned in 1992, leading to the appointment of Jean Barrett of Helena in January of 1992.

None of the members was a Native American and there was considerable controversy over the appointment of Jack Pinsoneault, a conservative Democrat who voted with Republican members Jack Rehberg and Selden Frisbee on almost all votes.


2 Ibid., p. 5
The Commission faced several issues in creating the 1992 Plan. Because population growth in the state was so small, there was an option of reducing the number of House districts to as low as 80 and Senate to a low of 40 districts. This was rejected as it would severely affect representation in rural areas which already presented challenges to elected officials with extremely large districts and scattered populations. Also, because of low population, Montana was stripped of its second Congressional district, and after lawsuits were filed to regain it, the Commission prepared a contingency plan in case a second seat was available. Despite the legal battles, Montana became the largest state to have only one U.S. House seat and the plan was abandoned. The two issues that dominated the debate over the 1992 Plan were accusations of partisan bias in drawing the map to benefit the Republican Party and equitable representation of Montana Indians.

The 1992 Plan (see table 1) was formed in the normal manner of public hearings and votes to determine the shape and size of districts. The Commission moved in a relatively non-partisan manner with the chairman only having to use his tie-breaking vote once. However, this did not mean that it was free of controversy. Democrats alleged partisan gerrymandering and deliberate vote dilution of Montana Indians. The Democratic Party cried foul, claiming the Commission was effectively run by the Republican Party. At the center of this charge was that Senate Minority Leader Bill “Doc” Norman (D-Missoula) appointed Jack Pinsoneault, a Republican. 2002 Commission member Joe Lamson claimed it was in retaliation for the 1982 Districting and Apportionment

\(^3\) Ibid., p. 11

\(^4\) Ibid., p. 4
Plan which extended Pinsoneault’s Senate district up into Polson. The result was a Commission of three Republicans to one Democrat (Jim Pasma) who were able to control the direction of the Commission and the shape of districts. Brad Martin, the Executive Director of the Montana Democratic Party, claimed that Pasma decided to leverage small concessions rather than have a consistent “no” vote. This is reflected in the 1992 Districting and Apportionment Report which stated, “Eleven substantive votes on the various plans were 4 to 0, and one vote was 3 to 1. Only once, was it necessary for the presiding officer to break a tie vote. Votes on all other matters were unanimous.” The Democrats claimed that the damage was done by breaking existing Democratic districts into swing districts and consolidating swing districts to create Republican strongholds. The charges were given weight in 1994 when the Republican Party gained strong majorities in both chambers of the Legislature and decisive victories in the US House and Senate.

The rebuttal to this comes from Jack Rehberg who served on the 1992 and 2002 Commissions. He argues that there was minimal partisanship on the 1992 Commission and that the voting record proves that. Furthermore, he argued that the 1992 Plan was “not a Republican victory”; rather it used the same criteria

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6 Brad Martin (Executive Director Montana Democratic Party), personal interview, June 2003.


8 Martin, personal interview, June 2003.
from 1982 while still creating a larger number of Indian districts. Also he stated that Montana Democrats refuse to consider that the Democratic Party across the U.S. suffered severe election losses during Newt Gingrich's "Republican Revolution" which swept Congress and many levels of state government.

Democrats argued the proof of gerrymandering was in the poor election returns of 1994, when Republicans gained fourteen House seats and eleven Senate seats for a solid majority which they held for the next ten years.

There is further argument that denying proportional Indian-majority districts was a political move to deny rights to Indians and thereby reduce Democratic seats by minimizing the strength of a strong supporter of the Democratic Party. Brad Martin, Executive Director of the Montana Democratic Party, claims that in 1992 Jim Pasma and Sheila Rice attempted to put forth a plan to support Indians and improve voting districts, but the 1992 Commission rejected them along with the two Tribal plans which would have led to proportional representation (see table 2). In its attack of the 1992 Plan, it became clear that the Democratic Party was staking out a position with Montana's Indians to improve Democratic majorities and secure the voting rights of Montana Indians. In 1996, a lawsuit by Earl Old Person, Carol Juneau, the ACLU, et al was filed to overturn the 1992 Plan, alleging deliberate vote dilution and gerrymandering to prevent proportionality of Indian representation.

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10 Susan Fox (Researcher for Legislative Services Division), personal interview, February 2004.

11 Rehberg, phone interview, December 2003
The charges of gerrymandering stem from the 1992 Commission’s plan which failed to provide proportional representation to Montana Indians while rejecting feasible alternatives that would allow for equitable representation. Montana’s Indian population composed six percent of the state’s population and 4.8 percent of the voting age population in the 1990 census. By that time Montana Indians had a majority vote in four House districts and one Senate district. This was not proportional to the population and could be seen as a violation of Section Two of the Voting Rights Act if similar districts were drawn.

The 1992 Plan drawn by the Legislative Services Division allowed for five Indian-majority House districts (HDs 5, 6, 85, 92, and 98) and one Indian Senate district (SD 3) while attempting to roughly adhere to the district lines of the 1982 plan where allowable. However, the Commission’s plan did not offer proportional representation to Montana Indians.

During the public meetings to receive comment on the proposed districts, the Commission plans for HD’s 73, 74, 85, and 86 were challenged with a new plan presented by Native American leaders called the Blackfeet-Flathead plan. Another plan, called the Rocky Boy-Fort Belknap-Fort Peck Plan, was put forth for HD’s 91, 92, 97, and 98. The new plans would have created six Indian majority House districts and three Senate seats by combining reservations to create Indian majorities. The Commission rejected the Blackfeet-Flathead plan

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12 Old Person v. Cooney, Ninth Circuit Court of Appeals, (2000) 13552


14 Old Person v. Cooney, Ninth Circuit Court of Appeals, (2000) 13554
because the Indian population of Lake County constituted only 30 percent of the population and the plan crossed the Continental Divide a significant geographic boundary that interfered with compactness of the district.\textsuperscript{15} The Eastern Hi-Line and Northeastern regions, where the Rocky Boy-Fort Belknap-Fort Peck Plan would have created a large Indian-majority Senate district, was divided over three Senate districts with two Indian-majority House districts. The Rocky Boy-Fort Belknap-Fort Peck Plan was rejected for similar reasons, including compactness and a desire of the Commission to try to maintain 1982 district lines. The resulting map was considered discriminatory by Montana Indians and after the plan was accepted by the Secretary of State a suit was filed by Earl Old Person \textit{et al} to overturn the plan for being in violation of Section Two of the Voting Rights Act.

\textit{Old Person v. Cooney} originally brought challenges to HDs 73, 74, 85, and 86 (Lake and Glacier Counties) along with 91, 92, 97, and 98 (Blaine, Phillips, Valley, and Roosevelt Counties), arguing that the 1992 Plan was deliberate vote dilution on the part of the Republican-controlled Commission and the plan should be overturned. After a bench trial, the District Court for the State of Montana ruled that there were two steps to prove effective vote dilution: The first was the threshold test of\textit{Thornburg v. Gingles} which requires that a minority group claiming vote dilution show that the group is (1) sufficiently large and geographically compact to constitute a majority in a single member district; (2) the group is politically cohesive; and (3) in the absence of special circumstances,

\textsuperscript{15} Montana Legislative Council, Districting and Apportionment Commission, \textit{A Report of the Montana Districting and Apportionment Commission} (Helena, 1992), p. 32
bloc voting by a white majority usually defeats the minority’s preferred candidate. The second test used by the District Court was whether or not there was a “totality of circumstances” that prevented Indians from effectively participating and electing officials; included in these standards was “proportionality.” “Proportionality” is the “political or electoral power of minority voters” relative to their proportion of the population. Essentially, do minority voters have enough representatives across the whole of state and local government to effectively represent their interests? While Montana’s Indian population meets the first two standards of Gingles, the District Court found that racial bloc voting was not significant. Further, there was evidence of “proportionality” in that the five House districts was proportional to the 4.8 percent Indian voting age at the time of the 1990 census. The Court concluded that for the above reasons there was no white-bloc voting or totality of circumstances, and therefore, no violation of Section Two.

The case was appealed to the Ninth Circuit Court of Appeals but only for the districts in Lake and Glacier Counties. The Court reversed the District Court ruling over erroneous application of Thornburg v. Gingles, first by not finding evidence of racial-bloc voting to block minority-preferred candidates. And secondly, the court concluded that the finding of proportionality for Montana

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16 Thornbury v Giles 478 US 30 (1986)
17 Voting Rights Act of 1965, Public Law 509, 89th Cong. (1965) 1973(b)
19 Ibid., p. 13559
20 Susan B Fox, Final Outcome of the 1990 Redistricting and Apportionment Plan, Special report prepared at request of the Montana Legislative Services Division, May 2003.
Indians was inaccurate. However, rather than overturn the plan, the Appellate Court remanded the case back down to District Court to address the errors and issue a new ruling.\(^{21}\) The case was delayed with the death of Judge Paul Hatfield and the transfer to Judge Phillip M. Pro of Las Vegas. In January of 2002 Judge Pro rendered his decision that there was no vote dilution demonstrated in the Blackfeet and Flathead Reservation districts.\(^{22}\) The case was further appealed, and the Circuit Court found unanimously that there was no dilution and there was no erring on the part of the District Court. Further appeals have been denied on the basis that the 2002 redistricting plan addressed the harms claimed by the plaintiffs.\(^{23}\)

The 1992 Commission was controlled by Republicans by a 4-1 margin. Democrats claim that this margin was the reason Montana Indians were denied proportional representation, as Republicans sought to reduce the number of Democratic House and Senate districts. Furthermore, they contend that Montana Indians became a casualty of this partisanship and gerrymandering. Republicans have denied partisanship and pointed to overall election returns where Republicans won statewide as well as Legislative races. They also contended that the Democratic Party used Indians as a way to pursue their own power. These claims all unfold further in the 2002 Districting and Apportionment Debate.

The 2002 Plan

\(^{21}\) Old Person v. Cooney, Ninth Circuit Court of Appeals, (2000) p. 13578

\(^{22}\) Fox, Final Outcome of the 1990 Redistricting and Apportionment Plan, May 2003.

\(^{23}\) Ibid.
In accordance with the Montana Constitution, the 1999 Legislature appointed a Districting and Apportionment Commission to draw a plan for the 2004-2014 Legislative districts (see table 3). State population had grown 12.91 percent in ten years, along with a 17 percent increase in Montana’s Indian population. Despite the population change, there was little difference in the situation facing the Commission. Montana only had one Congressional District, Indian population growth outstripped the rest of Montana, and “proportionality” and voting rights were still a major focus of Indian leaders, especially with the continuing Old Person lawsuit. At that time both chambers of the Legislature were held by Republican majorities. Elaine Sliter of Somers and Sheila Rice of Great Falls were appointed by the Senate majority and minority leaders respectively. The House Majority Leader appointed 1992 Commissioner Jack Rehberg of Billings and the House Minority Leader appointed Joe Lamson of Helena.24 Because the 2002 Commission appointees were all strong partisans for their respective parties, the four Commission members could not agree on a chair. Protracted debate ensued with Lamson and Rice arguing for the appointment of Rhonda Whiting, a Native American and Democrat. Rehberg and Sliter offered Democrats Jerry Driscoll and Republican Jane Fallon, both moderates.25 The result was deadlock and the Commission reported to the Montana State Supreme Court, which was required to appoint a fifth member.26 After reviewing


26 Montana Const Art V § 14(2) 1972
applications from across the state, the Montana Supreme Court chose Janine Pease-Pretty on Top, a Crow Indian, former president of Chief Dull Knife College, expert on race and voting rights and a Democrat.\textsuperscript{27} In September of 2001 Elaine Sliter resigned to fill the seat vacated by her husband’s death. The Senate Majority leader then appointed Greg Barkus of Kalispell who later resigned to run for the State Senate in 2002. Majority Leader Fred Thomas then appointed Dean Jellison of Kalispell to fill Barkus’s seat.\textsuperscript{28}

Where the 1992 Commission rarely had to use tie-breaking votes and conservatives had a 4-1 advantage over Democrat Jim Pasma, the 2002 Commission was intensely partisan with Democrats holding a 3-2 majority over Republicans. This split was reflected in almost every vote.\textsuperscript{29}

However, there was more than a simple partisan slant that changed the nature of the Commission. In 1992, the technology to draw district maps was expensive and difficult to use. This usually meant that the Legislative Services Division would take suggestions and try best to fit them into several maps for the Commission to amend and adopt. However, with the new technology a person or party could draw a complete state map to fit its needs and submit it for consideration. Joe Lamson and the Democratic Party took advantage of this to draw a state map that granted Montana Indians proportional representation and created swing districts in which Democrats typically perform better (see table

\textsuperscript{27} Montana Legislative Council, Districting and Apportionment Commission, \textit{2000 Final Legislative Redistricting Plan} (Helena, 2003) p. 7

\textsuperscript{28} Ibid., p. 8

\textsuperscript{29} Fox, personal interview, February 2004
4). With the change of technology and increased partisanship, the solution for the 1960s legislative deadlock fell to party manipulation and bickering. A bitter debate ensued between the parties with Montana Indian districts in the balance.

“The whole commission was a façade!” claimed Jack Rehberg when it became clear that the maps being voted on were not designed by the Legislative Services Division, but were Joe Lamson’s design with help of the Democratic Party. Jack Rehberg’s exclamation became the cry of Republicans in the Legislature – this plan was gerrymandering and it could not stand. For Democrats the plan was a return to the “stability of the 80’s” and a realization of rights for Montana Indians – anyone who stood in the way was against Montana’s Indians and against true bipartisanship.

The first resolution passed by the Commission on a 3-2 vote took place on May 30, 2001. This announced that because there was evidence of racial bloc voting in the Blackfeet-Flathead area, the Commission would reject the former lines and redraw the region to provide an additional Indian-majority Senate seat and provide guarantees for House seats. It also adopted a resolution calling for the creation of an Indian majority House district in the North-central region that can be paired with another in the Northeastern section to create an Indian-majority Senate district. These plans were written by Joe Lamson and submitted to the

30 Martin, personal interview, June 2003.

31 Rehberg, phone interview, December 2003.


33 Montana Legislative Council, Districting and Apportionment Commission, Resolution No. 1 (Helena, May 2001)
Legislative Services Division to be considered by the Commission. They were slightly amended to extend the northern border of SD 8 north to Canada and SD 16 was amended to include Roosevelt County and the Fort Peck reservation.

Overall the plan granted six Indian-majority House seats and three Senate seats along with breaking traditional districts that were Republican strongholds on the Hi-Line and around Flathead Lake. While it was no guarantee for better returns for Democrats, they considered it a improvement over “Republican gerrymandering of 1992”\textsuperscript{35} by creating swing districts that “Democrats do better in.”\textsuperscript{36}

The Democratic Party had the two things they wanted: control of the Commission and a reapportionment plan that benefited Indians and Democrats. However, that did not mean that the Republican Party would capitulate. Republicans considered it “stacking the deck,” “cheating,” and “gerrymandering,” to quote Senate Majority Leader Fred Thomas (R-Laurel).\textsuperscript{37} The plan faced severe opposition from the beginning from Republicans on the Commission, the Legislature, and the Secretary of State’s Office.

The Republican opposition to the Commission started with the appointment of Chairwoman Pretty-on-Top. After her appointment, the two Republican members of the Commission stood in staunch opposition to most plans proposed by the other Commission members, arguing that the entire process

\textsuperscript{34} Montana Legislative Council, Districting and Apportionment Commission, \textit{North Central Region Daft Regional Plan} (Helena 2001) pg. 1

\textsuperscript{35} Martin, personal interview, June 2003.

\textsuperscript{36} Ibid.

\textsuperscript{37} Fred Thomas, (Senate Majority Leader), Email Correspondence. 11 March 2004
was “totally rigged” and that they were not going to participate in “a bent process.”\textsuperscript{38} The Republican opposition worsened when the plan was presented to the 2003 Legislature. Under the Montana Constitution, the Commission’s plan is presented to the Legislature for comment and suggestion, but by no means for a vote of approval.\textsuperscript{39} The Republican-controlled Legislature was openly hostile to the plan, and after comment, prepared several bills to rewrite the plan and reform the structure of the Commission. It first approved Senate and House resolutions that charged that the 2002 Plan had several major issues:

(1) The five percent standard was politically motivated and unfair, and that a one percent is practicable for population shift.

(2) The Commission failed to consider compactness is drawing district lines.

(3) American Indian voters had been isolated from the state and other groups were ignored.

(4) The Commission used race as a deliberate factor in drawing the districts in violation of mandatory criteria.

(5) The Commission ignored current district lines.

(6) The Commission ignored discretionary criteria by dividing towns and communities of interest.

(7) The assignment of holdover Senators was “at its best wrong, blatantly unethical, and simply unfair to electors.”

\textsuperscript{38} Rehberg, phone interview, December 2003.

\textsuperscript{39} Montana Const Art V § 14(2) 1972
The plan was “conceived in a mean spirited and partisan manner” that disregards adopted criteria in order to gerrymander districts.\(^\text{40}\)

The three major bills of the Legislative offensive were HB 309, SB 445, and SB 258. HB 309 established a plus or minus one percent deviation for districts and banned the Secretary of State from accepting any plan (including the current one) that did not meet that standard.\(^\text{41}\) The second and third were SB 445 and 258 which jointly removed the power of reassigning holdover Senators from the Redistricting and Apportionment Commission and placed the duty in the hands of the legislature.\(^\text{42}\) Both bills passed their respective chambers and waited for the signature of the Governor. Other attacks included SB 428 and 429, which worked concurrently to put a constitutional amendment before the voters to place the Redistricting Commission in the jurisdiction of the legislature and then to change the structure of the Commission to allow for only a one percent deviance and to control reappointment of members by making the fifth member optional.\(^\text{43}\) However, the two amendments failed to gain the necessary 33 votes to move beyond the Senate.

In response to the charges, the Democratic Party released a “Minority Report” written by American Indian Legislators, Representative Joey Jayne and Senator Gerald Pease. In it they refuted the claims made by HR 3, arguing that:

1. The five percent deviation was suggested Jack Rehberg and accepted by all

\(^{40}\) *House Resolution No 3 and Senate Resolution No. 2, 2003 Montana Legislature*

\(^{41}\) *House Bill 309, 2003 Montana House of Representatives*

\(^{42}\) *Senate Bills 445 and 258, 2003 Montana State Senate*

\(^{43}\) *Senate Bills 428 and 429, 2003 Montana State Senate*
members. Also that a one percent standard was impractical because of radical rural to urban population shifts and that it would completely remove Indians from participation and open the state to another lawsuit. Furthermore, that the map created 40 “safe” Republican districts, 30 Democrat districts and 30 swing districts – hardly an advantage for Democrats.

(2) Montana is a sparsely populated, large state and that population is not evenly distributed which means that rural areas will have fewer people and require larger area to create an equitable district.

(3) With the creation of proportional representation American Indians are encouraged to participate, and minority growth in Billings was addressed by adding another district the Southside to allow for local minority communities to elect representatives.

(4) There is no evidence to suggest that race was the sole factor. Also there are other factors considered from public testimony including communities of interest, socio-economic characteristics and political concerns which are aided by having a single representative for there are rather than several.

(5) It was impossible to stick to previous district lines, as the population change in several districts meant that the deviation produced would range as high as 86 percent from the ideal. Additionally, preserving district lines and sticking to a one percent standard is mathematically impossible.

(6) The Commission received local input and amended the plans to fit the desires of communities and voted for several amendments put forth by the other two
Commission members. Also, several communities were reunited that were divided by the 1992 Plan.

(7) Of the 25 holdover Senators only two posted objections to the final plan and Senator Jerry Black (R-Shelby) thanked them for their work in assigning his district.

(8) The plan created a ten seat advantage for Republicans and the Commission made many amendments to satisfy Republican legislators. It was the Majority leadership’s failure or negligence to not post further suggestions to amend the plan.⁴⁴ The Republican Party maintained its opposition from the beginning. There was minimal support for the Plan besides the Democratic Party and Montana Indians leaders, who applauded the plan and were present to see it filed at the Secretary of State’s Office.

As was discussed in the previous chapter, the Legislature, the Secretary of State, and the Governor have no power or authority over the Commission and what plan it submits. However, that did not stop the string of Resolutions and Bills from the Legislature, nor did it stop Secretary of State Bob Brown from filing an injunction to prevent the Commission from filing the plan at his office.⁴⁵ With Montana Indian leaders present to applaud the efforts of the Commission, Bob Brown stood to block the plan and the realization of proportional representation for Montana Indians. Republican attempts to prevent the plan from being enacted were unsuccessful, as all related House and Senate bills have been

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⁴⁵ Lamson, personal interview, October 2003.
struck down in District Court of Montana and the injunction to prevent filing was ignored by Joe Lamson and Sheila Rice when they delivered the plan. The battle over the 2002 Plan in the Legislature was heated but futile. Nonetheless, the debate was not futile, as in another sense, it provided a clear picture of how political parties interacted with Montana Indians over the issue of redistricting.

Montana Indians now have a potential to make significant gains as a result of the Democratic Party Districting and Apportionment Plan. However, the Republican failure does not mean that the 2002 Plan is beyond scrutiny, as it could be legally challenged, especially considering that a redistricting case in Georgia saw an Appeals Court rule that the ten percent de minimis standard was unconstitutionally high and that a lower deviance was necessary. If the plan is overturned, Montana Indians would likely lose their new districts. Whereas the opposition of the Republican Party may have further alienated Montana Indians, the loss of proportional representation because of Democratic partisanship could do more harm to Montana Indians. While the actions of both political parties have been noted, the most important issues are the motivations of those actions and what their consequences may be for political parties and Montana Indians.

46 Fox, personal interview, February 2004
Conclusion:

Interaction and Issues: Present and Future

The 1992 Districting and Apportionment Plan did not attempt to create proportional representation for Montana Indians, despite the alternatives offered by Tribal leaders. As a result, the plan faced a legal challenge for vote dilution under the Voting Rights Act. Democrats claimed that this was because the plan was written by Republicans and in turn prepared a map of their own when they gained control of the 2002 Districting and Apportionment Commission. The 2002 Plan attempted to create proportional representation for Montana Indians while benefiting Democrats by drawing a large number of swing districts. The ensuing debate and actions provided a glimpse into the issues surrounding interaction between Montana Indians and political parties.

The actions of the Republican Party over the 2002 Plan were indicative of the Republican Party's relations with Montana Indians. The Redistricting debate brought forth two underlying tensions between the Republican Party and Montana Indians: perceptions of racism and indifference on the part of Republicans. When the Republican Party fiercely opposed a plan that granted Montana Indians the representation they fought for, it exacerbated a perception among Indians and the Democratic Party that Republicans do not care about Indians. This can be seen in the comments about the 2002 Plan and Republican alternatives to it. In interviews and correspondences with Senate Majority Leader Fred Thomas (R-Laurel), Chuck Denough, Executive Director of the Montana GOP, and 1992 and 2002 Commission member Jack Rehberg, the consistent thread of opposition to
Indian districts were that they were unnecessary and represented Democratic Party pandering to Montana Indians.

The first charge of districts being unnecessary is dismissed by many Indian lawmakers who see over a century of denied rights finally being addressed because reservation voters can have a candidate that represents them.\(^1\) Rep. Carol Juneau (D-Browning) argues that “It is time that Indians share in the political power system that non-Indians have dominated for many, many years.”\(^2\) Furthermore, to oppose such a plan, especially so vehemently, demonstrates the necessity for Montana Indians to have a voice when their rights seem so opposed by majority lawmakers. Feeding the argument that the districts are unnecessary is the notion that the plan was a way for the Democratic Party was simply pandering to Indian voters. This has been rejected by Democrats, who claim that the Democratic Party has consistently reached out to cooperate with Montana Indians outside of redistricting and already had a strong relationship.\(^3\) Additionally, Republicans refuse to consider that Montana Indians vote for Democratic candidates because the Republican Party has failed to offer better alternatives in outreach or representation. The alternatives offered by the Republican Party to the 2002 Plan demonstrate this problem.

Chuck Denough claims that the districts that Montana Indians fought for did not benefit Indians. Denough suggests that a better method of representation would be to spread Indians among several districts where they would occupy

\(^1\) Bob Anez, “State Redistricting,” *Helena Independent Record*, December 7, 2002

\(^2\) Ibid

\(^3\) Brad Martin (Executive Director Montana Democratic Party), personal interview, June 2003.
roughly 40 percent of the electorate in a district. The districts would allow Indians to be a significant bloc while giving them more representatives. Other alternatives presented include the one percent deviance standard proposed by legislative Republicans; and in fact, there was an effort to redraw the 2002 Plan by attempting to match the 1992 districts. However, these proposed district designs are exactly what Indian leaders fought against.

To break Indian populations into groups of 40 percent would not only mean dividing communities of interest, it would be considered “fracturing” under the Voting Rights Act. Also, by destroying Indian majority districts the plan would guarantee a minimal number of Indian Representatives elected from districts around the Crow and Northern Cheyenne reservations or Arlee and nearby sections of Missoula. Even compared to the 1992 Plan, such a plan would be a step backwards in terms of representation. The proposed one percent deviance would destroy all Indian-majority districts even in HDs 29 and 30 on the Crow and Northern Cheyenne reservations. The one percent plan is a significant reversal of the 1992 Plan which created the only Indian-majority on the Crow and Northern Cheyenne reservations. This plan would openly violate the Voting Rights Act and could be mathematically impossible with several rural districts having lost significant percentage of population between 1992 and 2002. To return to the 1992 districts would only lead to a renewed lawsuit over the Voting Rights Act, especially after the Appellate Court found incidence of Montana

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4 Chuck Denough (Executive Director Montana Republican Party), phone interview, March 2004.

5 Susan B Fox, 2000 Census Population Report and Analysis, Special report prepared at request of the Legislative Services Division, May 2001, p 3
white bloc voting in *Old Person v. Cooney*.⁶

The Republican alternatives intentionally created Indian minority districts in which white bloc voting could easily defeat Indian-preferred candidates. The Republican alternatives destroy proportional representation in every case, and in the first example give white voters a 60-40 advantage over Indians in reservation districts. In the above mentioned cases the Republican Party used language to minimize Indian rights and needs while providing alternatives that structurally favored whites over Indians in every case. Given the presented evidence, it is clear why there is a perception of racism. However, it is more likely that politics is the central factor in opposing Indian districts. As stated in the introduction, Montana Indians are loyal to the Democratic Party and often support Democrats by a three to one margin over Republican candidates. While the Republican Party has made overtures, these attempts have been largely unsuccessful. Furthermore, the creation of proportional representation for Montana Indians is a guaranteed loss of six House and three Senate seats for Republicans. Furthermore, Denough, flatly denying racism, claims that his interest is in rural Montana and the residents who have to deal with changes to districts and the potential harm to their rights.

Regardless of intent or interest, the Republican Party made a deliberate effort to minimize Indian representation in opposition to the 2002 Plan and in the presented alternatives. While intention may not be racist, there is clear indifference to the concerns of Indian leaders in the 2002 debate. The Republican Party has to review how it approaches Montana Indians if it hopes to gain their votes. As for the Democratic Party, which has had a cooperative and mutually

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beneficial relationship with Montana Indians, there are still problems in terms of opportunism and pandering.

The Democratic Party wrote the 2002 Districting and Apportionment Plan with two intentions. The first was to resolve what they perceived as the Republican gerrymandering of 1992; the second was to create proportional representation for Montana Indians. The Democratic Party claims to feel an ethical requirement to create proportional representation. Montana Indians have the worst economic situation. Moreover, they have minimal power in the federal government, as most decisions pass through the notoriously inefficient Bureau of Indian Affairs. In order for Montana Indians to have an effective voice and to prevent the disaster of termination from reoccurring, the Democratic Party feels it has to guarantee proportional representation.

The issue of interaction between Montana Democrats and Indians involves the Republican charge of racial and political pandering and in those, the issue of opportunism. The Republicans argue that Joe Lamson’s plan was written to do more than prevent a lawsuit similar to Old Person v Cooney. They charge that the 2002 Plan was deliberately written to secure Indian votes which would ensure additional Democratic districts.7 Furthermore, Republicans claim that the Democratic Party has ignored rural voters in order to play to Montana Indians via the 2002 Plan.8 Chuck Denough cited the creation of SD 16, which forces several other rural districts to reshape. Along the Hi-line several districts have a minus

7 Rehberg, phone interview, December 2003.
8 Denough, phone interview, March 2004.
four percent deviance in an area that is progressively losing population\(^9\). In less than ten years the districts are likely to not fit the standard of “one man, one vote” as population continues to shrink. The Democratic Party may have marginalized rural voters in order to benefit Montana Indians and the Democratic Party.

Despite the political leanings and benefits, the Democratic Party reapportionment plan could still stand in the current courts. However, in Georgia, a redistricting case has come forward that could open the 2002 Plan to legal challenge. The case of \textit{Larios v. Cox} addresses a redistricting plan written by Georgia Democrats which pushes the limits of the ten percent \textit{de minimis} standard for the admitted purpose of political gain.\(^10\) This case is now moving to the Supreme Court and if it succeeds it could strike down the ten percent standard when not applied in good faith. Neither Denough nor Sen. Thomas ruled out legal options and if the Republican Party were to lose control of either chamber of the Legislature they would file suit, especially if the Supreme Court strikes down the ten percent standard.\(^11\) The Montana Democrats may have helped defeat their own plan by creating a partisan Commission, openly drawing a partisan map, and then proclaiming that it benefits them.

If the Supreme Court uses \textit{Larios v. Cox} to redefine the use of the ten percent standard, then the 2002 Plan may be overturned by a Republican lawsuit. Even if the plan does not face legal challenge, the new standard may mean that in

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\(^10\) \textit{Larios v. Cox}, US District Court for District of Georgia, 2003

\(^11\) Denough, phone interview, March 2004
2010 the new Districting and Apportionment Commission may be obligated by
the new standard to dismantle proportional representation. The future of the
proportional representation relies on how the political parties interact up to and
through the 2010 Districting and Apportionment Commission. At best Montana
Indians will keep their districts. But after the intense conflict over the 2002 Plan,
it is unlikely that they will receive an extra House seat when they comprise seven
or eight percent of state population.

There are several scenarios for the development of redistricting for the
2014 elections. The first two are that the Commission is once again dominated by
a political party. If Democrats dominate the Commission, it is likely that the
Indian-majority districts will stand even if Larios does change how districts are
shaped. If Republicans can gain control, it is likely, given their past and current
opposition, that several Indian-majority districts would be lost. The Republican
map would probably resemble the 1992 Plan with five Indian-majority House
seats and one Senate seat. The final scenario is more utopian in proposing that the
intense partisanship that has dominated redistricting for the past two sessions
would be absent, as moderates sought to create equitable districts regardless of
partisan intent. In such a framework it is possible that Montana Indians would be
able to keep their districts. Even if some of the districts are lost, it is more likely
to be for reasons of population change and careful consideration of alternatives
rather than a partisan attempt to protect or diminish a Democratic Party power
base. However, there is more than politics involved. At its core is the essential
question of the ethics of creating proportional representation.
Overall, the debate over 1992 and 2002 demonstrates the issues of interaction between parties and Montana Indians and what flaws could damage future relations. The Republican Party took a stance antithetical to the concerns of Montana Indians. If Republicans hope to successfully court Indian voters, then they have to examine the perceptions of indifference and racism that have dominated relations. The Democratic Party’s plan benefited Montana Indians, but the benefits are not secure, and in the Democratic Party’s opportunistic approach to redistricting, it may have endangered the districts Montana Indians fought for. Ultimately, both parties have stumbled in dealing with Montana Indians, and in doing so have endangered Indian rights.
Table 1: 1994-2004 Legislative districts\(^1\)

\(^1\) 1994-2004 Legislative District Map, Montana Legislative Services, 1992
Area of proposed Blackfeet-Flathead Plan is divided among three Senate districts preventing an Indian majority Senate district.

Area of proposed Rocky Boy-Fort Belknap-Fort Peck plan is divided among three Senate districts splitting Fort Peck and isolating it from the other two reservations.

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2 Ibid
Table 3: 2002 Districting an Apportionment Plan

Montana Legislative Districts 2004 — 2014

Each Senate District is a different color and labelled in pink. The two House Districts in each Senate District are outlined and labelled in blue.

3 2004-2014 Legislative District Map, Montana Legislative Services, 2000
Table 4\textsuperscript{4}: Additional Indian majority districts created by the 2002 Commission

Senate District 8: combines the Blackfeet and Flathead reservations across the Continental Divide. It is similar in shape to the 1992 Blackfeet-Flathead Plan. However, critics charge that by creating the Senate districts the plan crosses geographic barriers and is not compact in shape.

Senate District 16: Combines the Rocky Boy, Fort Belknap, and Fort Peck reservations to create two Indian majority House seats and one Senate seat. However, Republicans argue it does so by separating predominantly white towns into other districts and because of its shape, leads to accusations of gerrymandering.

\textsuperscript{4} Ibid
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Appendix

Montana Legislative Services, 1994-2004 Legislative District Map (1992)