

**VOLUME NO. 35****Opinion No. 12**

**CONSTITUTIONAL LAW — Reapportionment Commission, duties of; CONSTITUTIONAL LAW — Apportionment of congressional and legislative districts, reapportionment commission; CONSTITUTIONAL LAW — Apportionment of congressional and legislative districts, legislature; REAPPORTIONMENT COMMISSION — Apportionment of congressional and legislative districts; LEGISLATURE — Apportionment of congressional and legislative districts; REAPPORTIONMENT COMMISSION — Legislative assembly, size of; LEGISLATURE — Legislative assembly, size of; STATUTES — Reapportionment commission, power to enact; STATUTES — Legislature, cannot establish size of legislative assembly. Article V, sections 2 and 14, Constitution of Montana, 1972; sections 43-106.6 and 43-106.7, R.C.M. 1947; Chapter 21, Laws of 1973.**

**HELD:** 1. The reapportionment commission is empowered by the constitution to determine the size of the legislative assembly and the geographical makeup of the legislative and congressional districts.

2. **The legislative assembly is without power to determine the size of the legislative houses under the Constitution of Montana, 1972.**
3. **The reapportionment commission is not bound by legislative determination of the size of the legislative assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947, enacted prior to the adoption of the Constitution of Montana, 1972, are not controlling.**
4. **Upon filing with the secretary of state, the apportionment plan adopted by the reapportionment commission shall become law and all previous statutory provisions are superseded.**

April 11, 1973

Mrs. Elsie McGarvey, Acting Chairman  
Redistricting and Reapportionment Commission  
Montana Legislative Council  
State Capitol  
Helena, Montana 59601

Dear Mrs. McGarvey:

This is in response to your letter concerning the authority of the Reapportionment Commission. In your letter you asked the following questions:

1. Whether, after the adoption of the final reapportionment plan, the legislative assembly could change the size of the legislative houses and thus render the adopted reapportionment plan ineffective.
2. Whether the Reapportionment Commission is bound by sections 43-106.6 and 43-106.7, R.C.M. 1947, in establishing its reapportionment plan.

The reapportionment commission was established under Article V, section 14, Constitution of Montana, 1972, which provides as follows:

- (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.
- (2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative and congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four

commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time prescribed, a majority of the supreme court shall select him.

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

The 43rd Legislative Assembly provided the implementing legislation under Chapter 21, Laws of 1973, and used approximately the same language as the constitution in defining the powers and duties of the reapportionment commission.

Prior to the adoption of the Constitution of Montana, 1972, the state of Montana utilized the traditional grant of apportionment power to the legislature. See: Article VI, Constitution of Montana, 1889. However, with the adoption of the new constitution, the people of Montana divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation cited above. This concept is not new to the states of the Union as evidenced by provisions of other states establishing an independent apportionment agency, i.e., Alaska, Article VI, section 3, Alaska Constitution; Arkansas, Article VIII, section 1, Arkansas Constitution; Missouri, Article III, section 2, Missouri Constitution; and Michigan, Article IV, section 6, Michigan Constitution. Other states have established an independent apportionment committee which acts only if the legislature is unable to establish a plan. See, for example: California, Article IV, section 6, California Constitution; Oregon, Article IV, section 6, Oregon Constitution; and Illinois, Article IV, section 3, Illinois Constitution. It must be first noted that the legislature is **not** empowered to set the size of the houses of the assembly. Article V, section 2, Constitution of Montana, 1972, provides:

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

The constitutional provision does not provide that the size of the legislature shall be determined by the legislature itself, but merely provides that the size “shall be provided by law”. In the normal course of government only the legislative assembly is empowered to enact laws. The Supreme Court of Montana stated in **Hilger v. Moore**, 56 Mont. 146, 163, 182 Pac. 477 (1919):

The legislative department of this state possesses all the powers of law-making which inhere in any independent sovereignty, **except only**

**in so far as those powers are curtailed by the Constitution of the state, or the supreme law of the land.** (Emphasis supplied)

Under the new constitution the reapportionment commission is empowered to provide for the enactment of law in one specific area under Article V, section 14 (2), *supra*:

... [A] commission of five citizens, none of who may be public officials, shall be selected to **prepare a plan for redistricting and reapportioning the state** into legislative and congressional districts. . . . (Emphasis supplied)

The effect of the reapportionment plan is provided in Article V, section 14 (3), *supra*, which states in pertinent part:

... Within 30 days thereafter, the commission shall file its final plan with the secretary of state and **it shall become law.** . . . (Emphasis supplied)

Thus, the final adoption and submission of the commission's plan is the "provision of law" referred to in Article V, section 2, *supra*.

It is the duty of the reapportionment commission to not only determine the geographical makeup of the legislative and congressional district, but to determine the size of the legislative houses, subject only to the restrictions of the constitution.

The aforementioned conclusion is not only dictated by reference to the plain meaning of the language contained in the various constitutional provisions (see: **State ex rel. Jones v. District Court**, 158 Mont. 67, 488 P.2d 1141 [1971]), but by logical construction. It is presumed that legislative action does not lead to absurd results. **State ex rel. Ronish v. School District No. 1**, 136 Mont. 453, 348 P.2d 797 (1960). This same presumption must be logically extended to the actions of the people in adopting their constitution.

If the constitutional provisions previously noted were to empower the reapportionment commission only with the power to determine the geographical makeup of the legislative and congressional district and permit the legislature to determine the size of the houses of the assembly, then the legislature could effectively negate any action taken by the commission. Presuming that the reapportionment commission adopted a plan which the legislature found disagreeable, the legislature need only establish the size of the houses at a number different from that set forth in the commission's plan to nullify the plan's effect. *In toto*, the legislature would have a veto over the commission's work. This is not contemplated under the constitution, as indicated by the lack of constitutional authority in the legislature to adopt apportionment plans and by specific reference to Article V, section 14 (3), *supra*, which provides only:

The commission shall submit its plan to the legislature at the first regular session after its appointment or after the census figures are

available. Within 30 days after submission, the **legislature shall return the plan to the commission with its recommendations ...** (Emphasis supplied)

The legislature has only the authority to recommend, not to adopt, alter or amend.

Finally, assuming that the legislature did change the size of the legislative houses so as to nullify the commission's plan, no body then exists to adopt a plan. Article V, section 14 (3), *supra*, provides for the dissolution of the commission after submission of its plan to the secretary of state. Article V, section 14 (2), provides that the commission may be called into being only "in the legislative session following ratification of this constitution and thereafter in each session preceding federal population census . . .".

In summary, to allow the legislative assembly the power to determine the size of the legislature would be to allow 1) legislative veto of the commission's plan, 2) the potential impotency of the commission's work, and 3) the creation of a situation wherein no one is empowered to reapportion.

The conclusion indicated above dictates the answer to your second question concerning whether the reapportionment commission is bound by the terms of sections 43-106.6 and 43-106.7, Revised Codes of Montana, 1947, which establish the size of the legislature at 50 members in the senate and 100 members in the house.

As discussed before, the reapportionment commission is the only agency empowered by the constitution to determine the size of the legislative houses and their geographical makeup. When the commission has finally submitted its plan, that plan will become law and all previous legislative enactments must be, in effect, repealed. The provisions of sections 43-106.6 and 43-106.7, *supra*, stand only until submission of the plan, and the commission is not bound by their terms in establishing its reapportionment plan. The commission is, however, bound by the constitutional limitations of 40 to 50 senators and 80 to 100 representatives.

**THEREFORE, IT IS MY OPINION, in light of the foregoing discussion:**

1. The reapportionment commission is given the exclusive constitutional power to determine the size of the legislative houses and the geographical makeup of the congressional and legislative districts, subject only to the restrictions of the constitution.

2. The Constitution of Montana, 1972, removed all power from the legislature to apportion itself or determine the size of the legislative houses.

3. The reapportionment commission is not bound by the provisions of sections 43-106.6 and 43-106.7, R.C.M. 1947, limiting the sizes of the legislative houses.

4. That upon submission of the plan proposed by the reapportionment commission to the secretary of state, the plan becomes law, and all previous statutory provisions in conflict with that plan are, in effect, repealed.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General