November 17, 2006

Mr. George Corn, Esq.
Ravalli County Attorney
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Hamilton, MT 59840-2853

Dear Mr. Corn:

You have submitted a request that this office review an issue arising from the recent election on the proposed amendments to the Ravalli County form of government proposed by the Ravalli County Local Government Study Commission ("Study Commission").

You inform me that prior to the election Ravalli County operated under a Commission form of government with three commissioners nominated from districts and elected at large on a partisan ballot to staggered six year terms. The Study Commission recommended five changes to the system:

- Change from partisan to non-partisan elections
- Increase the number of commissioners from three to five
- Decrease the length of commissioner terms from six years to four
- Change the election for commissioners from at-large to by-district
- Change from staggered to concurrent terms

The voters approved the second and third recommendations, increasing the number of commissioners from three to five and decreasing their terms from six years to four, and rejected the other three.

Since Ravalli County will be adding two new commissioner positions, a new districting and apportionment plan must be developed. The question you present is whether responsibility for developing the new five district apportionment plan rests with the Study Commission or the existing three member Board of County Commissioners. You have concluded that the Board of County Commissioners has the responsibility. Since you

believe your request involves exigencies of time that will not allow completion of a formal opinion, I have agreed to review your conclusions and provide my advice thereon.

In reviewing your question I have considered memoranda submitted by your office and by a member of the Study Commission, and have reviewed a draft of the Study Commission's final report as well as the Final Report as filed with the clerk and recorder. These documents show that the Study Commission included in its Final Report a certificate of a plan of apportionment dividing the county into five districts. The certificate in turn states the Study Commission's belief that the information on which it based the plan of apportionment may have been inaccurate, and purports to "retain[] the right to amend this Plan at a later date to accurately and legally apportion boundaries under MCA 7-4-2102." You inform me that the Study Commission submitted no amendments to the plan of apportionment prior to the election.

The issue of local government review is covered by the provisions of Mont. Code Ann. tit. 7, ch. 3, pt. 1. Twenty years ago, Attorney General Greely noted that these statutes suffer from a significant lack of linguistic precision that makes their application difficult. 41 Op. Att'y Gen. No. 44 at 178 (1986). That observation remains pertinent today. This is, therefore, not a situation in which the statutes will provide a crystal clear answer to your question. I will try to provide my best advice as to how to apply the statutes.

The statutes governing a study commission contemplate that a study commission will be elected, will conduct a study, and will produce a final report that must include its recommendations for the changes, if any, that it proposes. The recommendations may range from no suggested changes to a complete overhaul of the local government resulting in adoption of a completely new form of government. The recommendations may also consist of proposed amendments to the existing government form, which is the case here. Mont. Code Ann. § 7-3-185.

Montana Code Annotated § 7-3-187 governs the contents of the final report document. Where as here the study commission recommends changes in the form of government, § 187(1)(a) in turn incorporates the requirements found in Mont. Code Ann. § 7-3-142, a statute that sets forth the required contents of a petition proposing such changes. Section 142(3) requires that a proposal contemplating the creation of commissioner districts must include a plan of apportionment dividing the county into the districts that would be required if the proposal were approved by the voters.

By virtue of Mont. Code Ann. § 7-3-187(1)(a), the requirement for inclusion of an apportionment plan in the final report applied to the Study Commission's report here.

The Study Commission complied with the requirement by including such a plan in the Final Report at 28.
Your letter suggests that the Study Commission's plan should be considered to have been rejected by the voters by virtue of their rejection of the proposed changes in the manner of election of commissioners set forth in bullet point 4 above. I do not agree with that interpretation based on the contents of the Final Report. Nothing in the report indicates the Study Commission intended to limit the application of the plan of apportionment only to the question of the manner of election. Such a limitation would put the Final Report in violation of Mont. Code Ann. § 7-3-142(3), since, in light of the voters' rejection of the change in manner of election, the Study Commission then would in effect have proposed a change to a five-district system without including a new apportionment plan for the five districts. The more natural interpretation of the Final Report, in my view, is that the proposed apportionment plan was intended to apply to the creation of a five-district commission and to the recommended change in the manner of election. The failure of the latter does not make the apportionment plan inapplicable to the former.

I also am not persuaded that the conditional language of the apportionment plan renders it inoperable. The apportionment plan acknowledged that the Study Commission had received information from the county tending to indicate that the apportionment plan was based on flawed information, and purported to reserve the right to amend the plan if more accurate information were provided. However, the conditioning language clearly stated: "For purposes of this Final Plan the boundaries described above will serve as the boundary description ***until and unless*** we are provided with additional data by the county to correct [any inaccuracy]." (Emphasis added.) Since no changes were proposed, this language, in my view, sufficiently indicates the Study Commission's intent to abide by the proposed districting plan.

However, I find no indication in the statutes that the legislature intended to allow the Study Commission to amend the Final Report once it is filed as provided in Mont. Code Ann. § 7-3-187(4). The statutes clearly intended that the Final Report be available for consideration by the voters at least 30 days prior to the election. Mont. Code Ann. § 7-3-187(4) and (5). It seems clear to me that "final" means "final," and that the Study Commission retained no authority to change the report in any of its required elements, at least after the 30-day deadline prior to the election. The Study Commission had only those powers provided to it by law, and it cannot reserve to itself a right or power that it does not legally possess. I find nothing in the statutes to suggest that a study commission may propose one apportionment plan prior to the election and then change it afterwards.

A member of the Study Commission has suggested that such authority may be found in Mont. Code Ann. § 7-3-157(1), which provides:

> The governing body shall prepare an advisory plan for orderly transition to a new plan of local government. The transition plan may propose necessary ordinances, plans for consolidation of services and functions, and a plan for reorganizing boards, departments, and agencies.

By virtue of Mont. Code Ann. § 7-3-193(2)(b), the study commission is substituted for the "governing body" with respect to the preparation of the advisory plan. The Study Commission member argues that the reference to "reorganizing boards" would allow it to "reorganize" the Board of County Commissioners after the election by redrawing its member districts.

I believe this argument is unpersuasive. I am dubious that the reference to "boards" refers to the Board of County Commissioners. I also note that the transition plan is "advisory," and culminates only in the power to "propose necessary ordinances, plans for consolidation of services and functions, and a plan for reorganizing boards, departments, and agencies." Subsection (2) of the statute preserves in the Board of County Commissioners the power to "enact ordinances to bring about an orderly transition," on the sole condition that the ordinances must "be consistent with the approved plan [i.e., the proposal approved by the voters] and necessary or convenient to place it into full effect."

In this case the Study Commission has already proposed the advisory plan contemplated by this section. It is found in the Final Report at 31. The statute contemplates a single advisory plan, not one before the election and a second afterwards. For all of these reasons I would not find in Mont. Code Ann. § 7-3-157 the power for a study commission to amend its apportionment plan after it is included in the Final Report.

The 1986 Attorney General opinion requires that all of the pertinent statutes must be read together. In this case that would include not only the provisions of Title 7, chapter 3, part 1, but also the general election statutes found in Title 13 and the general provisions for apportionment of county commissioner districts found in Mont. Code Ann. § 7-4-2012. Under § 2102, general authority for apportionment rests with the Board of County Commissioners, subject to review and approval by the local district judges.

The 1986 Attorney General opinion suggests that the statutes should be harmonized to give effect to all. In my view the best way to accomplish this goal would be to submit to the district judges as required by § 2102 the plan of apportionment proposed in the Study Commission's Final Plan. In the event the judges find that the plan of apportionment satisfies the requirements of Mont. Code Ann. § 7-4-2102(1), i.e., that its districts are "as compact and equal in population and area as possible," see Barthelmess v, Bergerson,

218 Mont. 398, 402, 708 P.2d 1010, 1013 (1985), the plan should be adopted and govern the election to be held next spring.

If, however, the judges find that the proposed plan fails to meet statutory requirements, in my view the best way to harmonize the statutes would be to default to the county commissioners' general authority under § 2102 to redistrict "at any time for the purpose of equalizing in population and area such commissioner districts." The commissioners of course have the power to consider input from any lawful source, including the Study Commission members, in exercising their powers under this section.

I hope you find the foregoing helpful. This letter of advice may not be considered a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym
By fax (406-375-6731) and mail