

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

AUG 10 2010

Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JAMES E. LARGE, et al.,

Plaintiffs,

vs.

FREMONT COUNTY, WYOMING, et
al.,

Defendants.

Case No. 05-CV-0270

ORDER ON REMEDIAL PLAN

This matter is before the Court to determine the appropriate remedy for the violations described in this Court's Opinion Stating Findings of Fact and Conclusions of Law. At the hearing on the proposed remedial plans, held July 27, 2010 in Cheyenne, Wyoming, the plaintiffs, five members of the Eastern Shoshone and Northern Arapaho Tribes, were represented by Laughlin McDonald and Bryan Sells from the American Civil Liberties Union. The defendants, Fremont County, Wyoming, the Fremont County Commissioners, and the Fremont County Court Clerk were represented by J. Scott Detamore of the Mountain States Legal Foundation, Jodi Ann Darrough and Brian Varn of the Fremont County Attorney's Office. Having carefully considered the proposed

remedial plans, the applicable law, and the arguments of counsel, the Court FINDS and ORDERS as follows:

Introduction

In the April 29, 2010 Memorandum Opinion Stating Findings of Fact and Conclusion of Law, this Court stated:

Plaintiffs have carried their burden of proving compactness, cohesion and white bloc voting and have also satisfied the totality of the circumstances test. The Court finds and concludes that the plaintiffs have shown that at-large elections for the Fremont County Commission dilute Indian voting strength in violation of Section 2 of the Voting Rights Act. Accordingly, there is no need or reason to address plaintiffs' claim that such elections also violate the United States Constitution.

In their complaint, plaintiffs asked the Court to (1) enter declaratory judgment of a Section 2 violation, (2) enter permanent injunction against further use of the at-large system, (3) enjoin defendants from failing to conduct elections for the County Commission in a timely fashion pursuant to a redistricting plan that complies with Section 2 of the Voting Rights Act, (4) in the event that defendants fail or are unable to conduct elections in a timely fashion pursuant to redistricting plan that complies with Section 2, implement a court ordered redistricting plan and scheduling of elections.

The issue as to appropriate remedies was not addressed in the initial trial of this matter. In *Windy Boy v. Big Horn County*, 647 F. Supp. at 1023, the district court stated:

“A district judge adopting districting plans to replace an invalidated at-large system must adhere to the middle of the road.” *Jones v. City of Lubbock*, 727 F.2d 364, 386 (5th Cir.1984). It must be remembered that “[a]pportionment is principally a legislative responsibility [and] a district court should ... afford to the governmental body a reasonable opportunity to produce a [statutorily] permissible plan.” *Id.* at 387.

Defendants are hereby ordered to propose a remedy to this court, consistent with the caselaw, that requires the election of some or all Commissioners and school board members by district. The court believes a new system can be put in place for the 1986 elections (1987 for school board) and would instruct defendants to propose a timetable for implementation with that in mind. Defendants shall submit a proposal by June 30, 1986. If need be, interim remedies, alternative remedies, or revised election schedules may be proposed. The court will schedule a hearing soon thereafter to ensure the proposed voting system complies with Section 2. *Edge v. Sumter Co. School Dist.*, 775 F.2d 1509, 1510-11 (11th Cir.1985) (a hearing must be held). Plaintiffs will, of course, be given an opportunity to comment on the proposal. The court believes time is of the essence and seeks to have a remedy in place as soon as possible.

This Court agrees that the approach adopted by the court in *Windy Boy v. Big Horn County* is a reasonable and fair approach, particularly given the concern that the court interferes with the legislative process when it crafts a remedy without allowing the governing body to first design an electoral process designed to eliminate barriers to full Indian participation in the electoral process. Thus, the Court finds that the governmental body must be given a reasonable opportunity to produce a permissible voting plan in this case.

To that ends, the defendants are hereby ordered to propose a remedy to this Court, consistent with this opinion and applicable caselaw, that requires the election of county commissioners in Fremont County by district rather than at-large. It is quite probable that a new system could be put in place for the next election cycle. The Court orders the defendants to propose a timetable for implementation with that in mind as well. Defendants shall submit a proposal by June 30, 2010; plaintiffs shall have until July 30, 2010 to respond and offer comments on defendants' proposal. A hearing shall be held August 13, 2010 at 1:30 p.m. in Cheyenne, Wyoming, to ensure that the proposed voting system complies with Section 2. It is further ordered that defendants are permanently enjoined from utilizing the existing at-large voting system in the future.

At the defendants' request, the hearing on the proposed remedial plans was expedited and was held on July 27, 2010 in Cheyenne, Wyoming.

Defendants' Proposed Plans:

The defendants have proposed a Preferred Plan and an Alternative Plan. Defendants have proposed as a Preferred Plan a two district plan, including one single-seat super-majority district for the Native American minority and one multi-member district encompassing the remainder of the County. The Native American super-majority district (District 1) would comprise nearly 78% Native American majority. District 1 has a total voting age population ("VAP") of 4,269 and a Native American VAP of 3,123 (73% of the total VAP of District 1). Candidates for District 1 would be required to reside in District. The remaining voters in District 2 would vote for the four remaining commissioner seats at-large and candidates for the District 2 seats would be required to reside in District 2.

With the Preferred Plan, the County's population is split into two districts, with District 1 accounting for approximately 1/5 (20%) of the total County population and District 2 for 4/5 (80%) of the total County population. Defendants maintain this 20/80 split ensures compliance with the one man one vote 14th Amendment requirement, in that 20% of the population will be voting for one commissioner, while the remaining 80% of the population will be voting for four commissioners at-large.

Defendants state that it considered certain factors in fashioning this plan, including maintaining continuity on the board between elections. To accomplish this, elections remain staggered, with two commissioners being elected during presidential election years and three

commissioners elected on other even-numbered non-presidential election years. Further, the two commissioners elected in 2008 will remain in office until their terms expire in 2012, in compliance with state law, as they were elected at-large and the plan maintains an at-large system of a multi-member district. The 2010 election and subsequent elections every four years would be for District 1, elected by residents of District 1, and two at-large seats elected by residents of District 2. The 2012 election and subsequent elections every four years will be for two at-large seats from District 2, elected by residents of District 2.

Defendants assert they have attempted to closely adhere to current state election laws in development of this plan and assert this plan is preferred because it most closely complies with Wyo. Stat. § 18-3-501. This statute provides for districting within a county only after a positive referendum vote. There is no statutory authority vested in any elected official to actually re-district a county into five single member districts. Defendants assert once the plan is put into effect, the Fremont County voters can determine in a later election whether they want the entire County to be divided into single member districts.

Defendants assert the plan is preferred because it preserves Fremont County's and Wyoming's historical and traditional at-large voting system while providing an acceptable and "nearly lawful" remedy in response to this Court's decision. The Preferred Plan has a deviation from ideal district size which is well under the 10% deviation guideline required by one man one vote and vote districting criteria. Defendants argue the plan most closely conforms to Wyoming state law,

Wyo. Stat. § 18-3-501, which requires that if a single member districting system is implemented it must be approved by referendum of the voters.

The Board has also proposed an alternative plan to be considered if the Preferred Plan is unacceptable as a legal remedy under the Voting Rights Act. Here, the County's population would be split into five districts, each of which would be approximately 1/5 of the total population. Elections would remain staggered, with two commissioners elected during presidential election years and three elected on other even-numbered years. This year's election and subsequent elections every four years would be for the District 1 Native American single member commissioner seat as well as for two at-large seats, one each from Districts 3 and 4. The 2012 election and subsequent elections every four years will be for two candidates, one each residing in Districts 2 and 5. District 2-5 candidates must reside in the district in which they are running but will be elected at-large by residents of Districts 2-5. Defendants assert the second plan does not conform with Wyoming election law allowing districting only after voter approval after referendum. A later referendum could be held to make the determination whether these at-large districts should become true single seat districts and thus, comply with state law. The parties' submissions indicate that a referendum on this issue has been held in the past but was not approved by voters in the County.

Both plans proposed by defendants allow a special election to proceed this year, but under the alternative plan, defendants assert the administrative implementation may cause unforeseen delays in ballot preparation, as this has never been accomplished on a compressed schedule in

Wyoming.

The defendants state they utilized the plans presented by plaintiffs at trial as a starting point. Those districts were well designed and balanced between minority Native American population and non-Native population and as drawn, met the one man, one vote principal of the 14th Amendment. But, defendants determined that, if so adopted, these districts would cause certain voting and balloting issues. The plaintiffs' plan split precincts, school districts and House Districts. In such situation, the County Clerk's office would have to prepare different ballots for voters in the same precinct, causing additional preparation work and voter confusion and "anger." There would be additional difficulties for the Clerk's office in preparing the election, especially on a compressed special election schedule.

The district lines as proposed by defendants were drawn as closely as possible to school district lines, existing precinct lines and legislative House District 34 lines, to avoid split ballots where the election judges in a precinct would be required to distribute several different ballots to voters within that precinct. The defendants' proposed plan did not make many changes to the plaintiff's proposed Native American super-majority district except in three areas:

- 1) between Hudson and Riverton there were census blocs that were predominantly Native American. Plaintiffs' plan would have excluded these from the Native American super-majority district. The Board believes the population should be included in the Native American super-majority district, enhancing both the voting

population and the Native American population percentage within that district.

2) South of the airport in Riverton, there is an Indian Housing area not included in the plaintiffs' proposed reservation district. The board believes this should be included in the Native American super-majority district.

3) In the Morton area, there was a census bloc with a lower percentage of Native American people, so the bloc was moved out of the Native American super-majority district to enhance both the voting population and the Native American population percentage within that district.

Defendants state the adjustments were made solely to meet the statistical requirements of one man one vote under the 14th Amendment. The result is slightly lower Native American population in the super-majority district, but a higher overall percentage of Native American voters in that district.

Precincts 2001 and 2201 vary from the plaintiffs' plan because, defendants assert, those areas are more rural in nature and also contain mining interests with little in common with the City of Riverton population. The two precincts were joined with the southern portion of the County, where there is said to be more commonality of issues.

The plaintiffs' plan divided Lander north/south. Defendants split Lander more east/west, keeping precincts, school districts and House Districts in mind. Precinct 0601 is still divided, as in the plaintiffs' plan A, although the Board attempted to keep the precinct whole. Within Lander, the Board changed the direction of district lines to coincide with existing precincts, to avoid the split

ballot problem. The County's plan splits precinct 0601 to keep the population deviation within 10%, necessary due to inclusion of precincts 2001 and 2201. The lines were redrawn to keep the proposed districts equal as possible while remaining contiguous.

The Board's plan includes a section in the Native American super-majority district stretching north of the boundaries established by the plaintiffs' proposed reservation district, referred to as the Crowheart precinct. Defendants argue that plaintiffs' plan splits this precinct, adding to overall confusion of ballot preparation. The Board's plan includes this precinct in the super-majority district while maintaining precinct integrity. While Crowheart precinct is sparsely populated, it is predominantly Native American. Plaintiff's evidence indicated that Native American population votes as a cohesive unit, and thus, the Board believes the population is more properly included in the Native American super-majority district, enhancing the voting population and the Native American population percentage within that district.

Although the Board attempted to use legislative House District 34 as a template, two precincts are outside of those district boundaries. This does not deviate from the plaintiffs' plan. Dubois precinct 0701 is in a legislative district with Teton County and Atlantic City precinct 2401 is in a legislative district with Sweetwater County. In the Board's Preferred Plan, both precincts are outside the boundaries of the Native American super-majority district and are included in the at-large district. In the alternative plan, Dubois precinct 0701 is included in the northernmost district; Atlantic City precinct 2401 is included in the southernmost district.

Defendants assert the Preferred Plan remedies any Section 2 violation, is not newly violative of Section 2 or the 14th Amendment, reflecting informed judgments made by the County government regarding the County's electoral process that pertains to the legislative prerogative of the state and its subdivisions. Many factors have been taken into consideration in drafting both plans. The defendants offer reasons for selecting at-large voting in both plans for districts not included in the Native American super-majority district including: 1) at-large voting is the only method of election contemplated by law in Wyoming, unless determined otherwise by referendum and approved by the voters; 2) at-large voting preserves historical voting methods of Fremont County; 3) at-large voting as traditionally provided a larger pool of qualified candidates; 4) districts historically tend to favor incumbents; 5) in at-large voting, qualified candidates must have countywide appeal, making for a more broad-based candidate; 6) at-large reduces regionalism because it forces candidate to represent voters across the entire county; 7) at-large allow the electorate, by referendum, to determine whether they desire a districting system; 8) administrating the Preferred Plan is easier to implement at lower cost and in a timely manner; 9) the ballots in an at-large system are easier to develop and publish because they do not have to be divided up and adjusted prior to publication as would be required by a re-districted system; and, 10) dividing the county into five districts is likely to cause the most delay, because of the labor intensive effort required to develop individual district ballots.

Formation of the Native American super-majority district provides the minority American

Indian population the best opportunity to elect a preferred candidate of their choice for a seat on the Fremont County Board of Commissioners. The Preferred Plan remedies the Section 2 violation and was approved by the current members of the Fremont County Board of Commissioners, in consultation with the Fremont County Clerk and a voting districting expert, reflecting the current legislative policies of the state and county. This Preferred Plan is entitled to deference.

If the plan is rejected and the Court determines that single-member districts are the only feasible remedy, the Board urges the Court to adopt the districts set forth in the Board's alternative plan. Those district lines were drawn with care and provide the best design for districts, based on population, existing precinct lines, existing House District boundaries and existing school district lines.

The Board also requests that a decision be issued before August 15, 2010, to facilitate the proposed election schedule providing for both a primary and general special election, seating the commissioners on January 3, 2011 with the other elected officials. This anticipated schedule requires 127 days before election to accomplish on or before August 15, 2010. Decisions after that date will result in the late seating of three county commissioners.

Plaintiffs' Response and Proposed Plan:

Plaintiffs urge the court to adopt a remedial plan using all single member districts. They state that single member districts are the preferred remedy for Section 2 violations.

Plaintiffs contend that the reasons single member districts are preferred in court ordered reapportionment plans apply with equal force to a districting plan adopted for Fremont County. They argue that a multi-member plan of the sort proposed by Defendants, with or without residency districts, would contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities.

Plaintiffs contend that the continued use of at-large voting for four of the five commission seats would perpetuate the discriminatory effects of at-large elections on Indian voting strength and would not be an adequate remedy for the Section 2 violation. The large size of the four member district, the limited resources of Indian candidates, and the prevalence of racially polarized voting would make it much more difficult for Indians to participate effectively in the political process than would be the case if all single member districts were used. They would facilitate campaigning and the formation of coalitions with non-Indians.

Plaintiffs assert single member districts are the appropriate remedy under state law. They contend that Wyoming law only provides for two options for electing members of the five member county commission – at-large or from all single member districts, citing Wyo. Stat. § 18-3-501(b) and (h), and argue that there is no provision or sanction under state law for the use of a plan containing both single member and at-large districts, either with or without residency districts. Plaintiffs contend that no deference is due the defendant's multi-member district plan. Plaintiffs argue that after an election plan has been held unconstitutional, the commissioners are free to

exercise their inherent legislative powers to enact a new system providing for single member districts without following the referendum procedure required by Wyoming law. This is contrary to the defendants' argument that while they are bound by procedural aspects of state law (that a referendum be held approving the adoption of single member districts), they are also free to ignore the substantive provisions of Wyoming law, which plaintiffs argue provides only for at-large voting or single member districts with respect to county commissioner elections, not the hybrid system that has been proposed by the defendants.

Plaintiffs argue that single member districts are the norm in Fremont County. Districts, or residency wards, are the norm for the county and for the state legislature. Lander and Riverton elect their municipal governments from wards or districts, rather than at-large. There are eight school districts in the County, three which are predominantly Indian and located in the reservation. St. Stephens is located on the reservation and is primarily Indian. School Board members in the County are elected from their respective districts rather than from the County at-large. Boards of the eleven fire districts in the County are elected by residents of the district rather than from the County at-large. The board of the LeClair Irrigation district is elected from single member districts. The state legislature is elected entirely from single member districts.

Plaintiffs urge that it is not necessary to deviate from single member districts to remedy the Section 2 violation. Single member districts would provide a full and complete remedy and it is not necessary to deviate from them to comply with federal requirements, citing Voinovich v. Quilter,

507 U.S. 146, 156 (1993).

Plaintiffs also assert defendants' proposed remedial plans could be subject to challenge on the grounds that they are not compact and contiguous. In defendants' Preferred Plan, District 2 is not compact because it is separated by District 1 and joined by a thin sliver of land in the northwestern part of the County. District 2 is also "barely contiguous." In the Alternative Plan, District 3 (including most of Riverton) is entirely separated by District 2, although connected by a highway. Plaintiffs argue if the district is deemed contiguous because separate parts could be reached on a highway, this renders the concept of contiguity meaningless. Although defendants claim this is not required by state law, the Wyoming Constitution requires congressional districts to be contiguous and the districts as compact as may be. Plaintiffs assert this is also the position adopted in the guidelines of the Joint Corporations, Elections and Political Subdivision Interim Committee. Wyo. Stat. § 21-6-207 provides that consolidated school districts should be contiguous; Wyo. Stat. § 22-23-103(a) requires compact wards when a city is divided into wards.

Plaintiffs assert their proposed plans would be acceptable. Both of their proposed plans consist of five single member districts and comply with traditional redistricting criteria including compactness, contiguity, respect for communities of interest, compliance with the one man one vote requirement, and non-dilution of minority voting strength. No census blocs are split and to the extent possible precinct boundary lines are used as borders for districts. District 1 is majority Indian and identical under both plans. It encompasses about 17% of the land area of the County. All six

communities with significant Indian populations are located in District 1 and 3/4 of the Indian population lives in District 1. The District has a population of 7147 and is within 14 person of ideal district size of 7161 for a 5 district plan. District population is 75.14% single race Indian, 70.34% single race voting age population, and 71.37% any part Indian voting age population.

Under both plans proposed by plaintiffs, Districts 2 and 3 are the same. Riverton is split between 3 and 4 under both plans. Riverton is divided because it has a population of 9,300, above the ideal district population size. The main difference between the two plans is that Plan A splits Lander in Districts 4 and 5; Plan B places Lander entirely in District 5. Plaintiffs prefer Plan B because it does not split Lander.

Plaintiffs do not object to maintaining existing staggering of terms of members of the County commission.

Plaintiffs argue that if one of the plaintiffs' plans is adopted, it is a court-ordered plan, rather than a legislative plan subject to stricter standards. Absent a compelling reason for doing otherwise, single member districts are preferred. Plans must also have minor population deviations or variations. If single member districts with minimal population variance cannot be adopted, the court must articulate precisely why they cannot be adopted.

Defendants' Reply to Plaintiffs' Response:

Defendants have asserted that plaintiffs concede the defendants' remedial plan cures the

section 2 violation and does not violate any other federal law or the constitution. The legislative remedial plan does not become a court-ordered plan when it is approved by the Court. Further, defendants assert that a remedial plan to cure a Section 2 violation does not need to comply with state-sanctioned electoral systems. Defendants argue the cases cited by plaintiff do not support the plaintiff's position, because they involve state reapportionment of state legislative or congressional districts and no remedial plans to cure voting rights violations by political subdivisions. (*Voinovich v. Quilter*, 507 U.S. 146 (1993); *White v. Weiser*, 42 U.S. 783 (1973) and *Upham v. Seamon*, 456 U.S. 37 (1982)). Defendants also disagree that the other cases cited by plaintiffs support their position.

Defendants contend that Wyoming state law does not require single member districting to remedy a Section 2 violation. They contend Wyoming law prefers at-large voting and allows the adoption of single member districting only if a county has, by election, opted for five commissioners over the usual three, and then adopted a single member districting scheme in an election approved by the majority of the electorate. Wyoming law is silent and does not address what electoral system a Wyoming must adopt when the existing at-large system is found to violate section 2 and is silent as to hybrid systems in such a case. Consequently, defendants argue Wyo. Stat. § 18-3-501(g) or (h) have no application and do not require single member districting. This is contrasted to the plaintiffs' argument that Wyo. Stat. § 18-3-501 requires a remedial plan consisting of single member districts without holding the referendum election required by that statute.

Discussion

The Supreme Court stated, in *Voinovich v. Quilter*, 507 U.S. 146, 152-153, 113 S.Ct. 1149, 1154-1155 (1993):

Congress enacted § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged ... on account of race, color, or previous condition of servitude," U.S. Const., Amdt. 15. See *NAACP v. New York*, 413 U.S. 345, 350, 93 S.Ct. 2591, 2595, 37 L.Ed.2d 648 (1973). Section 2(a) of the Act prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." Section 2(b), in relevant part, specifies that § 2(a) is violated if:

"[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election*153 in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Section 2 thus prohibits any practice or procedure that, "interact[ing] with social and historical conditions," impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters. *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 2764, 92 L.Ed.2d 25 (1986).

It is equally true that redistricting is a legislative task which federal courts should make every effort not to pre-empt. *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S.Ct. 2493, 2497 (1978). A court should afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. *Id.*

The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. “[A] state’s freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.” *Id.*, at 85, 86 S.Ct., at 1293.

Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the “unwelcome obligation,” *Connor v. Finch*, *supra*, 431 U.S., at 415, 97 S.Ct., at 1833, of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts “will be held to stricter standards . . . than will a state legislature . . .” 431 U.S., at 414, 97 S.Ct., at 1833. Among other requirements, a court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary. *Connor v. Johnson*, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971). We have repeatedly reaffirmed this remedial principle. *Connor v. Williams*, 404 U.S. 549, 551, 92 S.Ct. 656, 658, 30 L.Ed.2d 704 (1972); *Mahan v. Howell*, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320 (1973); *Chapman v. Meier*, *supra*, 420 U.S., at 18, 95 S.Ct., at 761; *East Carroll Parish School Bd. v. Marshall*, *supra*, 424 U.S., at 639, 96 S.Ct., at 1085.

The requirement that federal courts, absent special circumstances, employ single-member districts when they impose remedial plans, reflects recognition of the fact that “the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and over-represent electoral majorities . . .” *Connor v. Finch*, *supra*, 404 U.S., at 415, 97 S.Ct., at 1834. See also *Chapman v. Meier*, *supra*, 420 U.S. at 15-16, 95 S.Ct., at 760-761. Despite these dangers, this Court has declined to hold that state multimember districts are *per se* unconstitutional. See, for example, *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965); *Burns v. Richardson*, *supra*; *Chapman v. Meier*, *supra*, 420 U.S., at 15, 95 S.Ct., at 760. A more stringent standard is applied to judicial reapportionments, however, because a federal court, “lacking the political authoritativeness that the legislature can bring to the task,” must act “circumspectly, and in a manner ‘free from any taint of arbitrariness or discrimination.’” *Connor v. Finch*, *supra*, 431 U.S., at 415, 97 S.Ct., at 1834, quoting from *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449, 1458, 12

L.Ed.2d 620 (1964). [FN5]

FN5. The numerous cases in which this Court has required the use of single-member districts in court-ordered reapportionment plans have all involved apportionment schemes which, unlike the one in this case, were held unconstitutional because they departed from the one-person, one-vote rule of *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny. We are fully persuaded, however, that the same considerations which have induced this Court to express a preference for single-member districts in court-ordered reapportionment plans designed to remedy violations of the one-person, one-vote rule compel a similar rule with regard to court-imposed reapportionments designed to cure the dilution of the voting strength of racial minorities resulting from unconstitutional racial discrimination. Indeed, the Court has justified the preference for single-member districts in judicially imposed reapportionments on the ground that multimember districts “tend to submerge electoral minorities and over-represent electoral majorities . . .,” which is the source of the very violation which the court is seeking to eliminate in racial dilution cases. *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1834 (1977). See *White v. Regester*, 412 U.S. 755, 765-770, 93 S.Ct. 2332, 2339-2341, 37 L.Ed.2d 314 (1973).

The foregoing principles, worked out in the course of reconciling the requirements of the Constitution with the goals of state political policy, are useful guidelines and serve to decide many cases. But, as is true in this case, their application to the facts presented is not always immediately obvious. Furthermore, the distinctive impact of § 5 of the Voting Rights Act of 1965, as amended, 89 Stat. 404, 42 U.S.C. § 1973c (1970 ed., Supp. V), upon the power of the States to reapportion themselves must be observed. Plans imposed by court order are not subject to the requirements of § 5, [FN6] but under that provision, a State or political subdivision subject to the Act may not “enact or seek to administer” any “different” voting qualification or procedure with respect to voting without either obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” or submitting the change to the Attorney General and affording him an appropriate opportunity to object thereto. A new reapportionment plan enacted by a State,

including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered “effective as law,” *Connor v. Finch*, 431 U.S., at 412, 97 S.Ct., 1832; *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 200, 44 L.Ed.2d 486 (1975), until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. *Connor v. Finch*, supra; *Connor v. Waller*, supra. Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans.

FN6. “A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act.” *Connor v. Johnson*, 402 U.S. 690, 691, 91 S.Ct. 1760, 1762 (1971).

Wise v. Lipscomb, 98 S.Ct. at 2497-2498.

Defendants have argued that this Court must defer to its exercise of legislative judgment and approve either the proposed Preferred Plan or Alternative Plan. They also contend that Wyoming law should guide the Court's choices. Defendants assert that once the at-large voting system in Fremont County had been declared unconstitutional, it was free to exercise its legislative powers by enacting its proposed hybrid plan providing for single member voting in District 1 and at-large voting in District 2, with or without a residency requirement. The Board of County Commissioners, following the finding that the previous at-large system was unconstitutional, was permitted to exercise its legislative judgments without following the referendum procedure outlined in Wyo. Stat. § 18-3-501(f) and (g), providing that a referendum shall be held to divide the county into five (5) districts for county commissioner elections. The Board has stated that its Preferred Plan and Alternative Plan, if adopted, would permit it to later submit the issue to the electorate for approval

in a referendum. Plaintiffs agree that the Board was free to exercise legislative judgment in crafting its plans, but suggest that in doing so, defendants were required to adhere as closely as possible to Wyoming law, which does not provide for a hybrid system as has been proposed by defendants.

The Court agrees that the Board is free to exercise its legislative judgment in proposing a plan to replace that stricken by the Court, as reflected in the prior Findings of Fact and Conclusions of Law. However, when doing so, and insofar as possible, the Board is not free to disregard state law.

We have adhered to the view that state legislatures have ‘primary jurisdiction over legislative reapportionment. (citations omitted).

Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment or in choosing among plans, a district court should not pre-empt the legislative task nor ‘intrude upon the state policy any more than necessary.’” (citation omitted).

White v. Weiser, 412 U.S. 743, 93 S.Ct. 2348 ((1973)).

It does appear that districts are the norm for voting in the vast majority of elections in Fremont County and for state legislature. By way of example, municipal governments are elected from wards or districts; school district board members are elected from districts; boards of the fire districts are elected by district, as is the board of the LeClair Irrigation District. The State legislature is entirely elected from single member districts. Further, single member districts are authorized by state law with respect to election of five member county commissioner boards. Wyo. Stat. § 18-3-

501. The Court finds that state law does not authorize mixed at-large/single member hybrid districts; it is an either-or proposition with respect to county commissioners. The defendants have relied heavily on *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D.Mont. 1986) to support the proposition that hybrid districts should be permitted in crafting a legislative plan. However, in that case, Montana state law specifically authorized the creation of hybrid at-large/single member districts.¹ Furthermore, the case did not involve consideration of a specific proposed remedial plan by the defendants.

In *United States v. Dallas County Commission*, 850 F.2d 1433, 1440 (11th Cir. 1988), a hybrid plan proposal was rejected for the reason that it did not comply with Section 2 of the Voting Rights Act. *Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266 (4th Cir. 1993), was a case in which the Town had stipulated that its existing electoral system diluted black voting strength in violation of § 2 of the Voting Rights Act. The proposed remedial plan provided that the town

¹M.C.A. § 7-3-412, entitled “Selection of commission members” provides:

The commission shall be:

- (1) elected at large;
- (2) elected by districts in which candidates must reside and which are apportioned by population;
- (3) elected at large and nominated by a plan of nomination that may not preclude the possibility of the majority of the electors nominating candidates for the majority of the seats on the commission from persons residing in the district or districts where the majority of the electors reside; or
- (4) elected by any combination of districts, in which candidates must reside and which are apportioned by population, and at large.

would be divided into two districts, one majority black and the other majority white and a fifth council member would be elected at-large from the entire population (“the 2-2-1 plan”). That court did not offer any discussion as to whether the proposed plan was inconsistent with state law. It noted:

The mere fact that the district court erred in reducing the size of the Town Council does not, however, end our inquiry. This court must still determine whether Ahoskie's remedial plan “violates anew constitutional or statutory voting rights.” *McGhee*, 860 F.2d at 115. Normally, courts utilize a “results” or “effects” test when analyzing a § 2 challenge to an electoral scheme. S.Rep. No. 97-417, 97th Cong.2d Sess. 27-30, reprinted in 1982 U.S.C.C.A.N. 177, 204-08. This “results” test “supposes the need to consider multiple electoral contests.” *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992). Under this test, when examining past electoral results, courts consider several factors, including:

The extent of past discrimination, racially-polarized voting, election devices which enhanced the opportunity for discrimination, minorities suffering from the effects of discrimination, minorities elected to public office, political campaigns marked by racial appeals and minorities denied access to candidate slating.

James v. City of Sarasota, 611 F. Supp. 25, 31 (D.C.Fla. 1985). However, when the challenged plan has never been implemented, “[a]n analysis of the[se] factors does not aid th[e] court in determining whether the proposed plan meets the requirements of the Act.” *Id.* Therefore, because there are no election results under Ahoskie's proposed plan, applying these factors does not aid us in assessing the validity of the plan.

As part of the appropriate inquiry, we may not use “proportional representation as the ultimate standard for assessing the legal adequacy of a remedial legislative redistricting plan.” *Id.* at 118. Rather, our analysis “must consider whether the protected voting group has a voting opportunity that relates favorably to the group's population in the jurisdiction for which the election is held.” *Smith v. Brunswick County, Va. Bd. of Sup'rs.*, 984 F.2d 1393, 1400 (4th Cir. 1993). See also, *Thornburg v. Gingles*, 478 U.S. 30, 91, 106 S.Ct. 2752, 2787, 92 L.Ed.2d 25 (1986) (O'Connor

J., concurring) (“Th[e] measure of vote dilution ... creates what amounts to a right to usual roughly proportional representation on the part of sizeable, compact, cohesive, minority groups.”). Moreover, our analysis is guided by *McGhee*, 860 F.2d at 118, where this court announced:

If a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible by that means, the dilution proximately caused by that system; it is not to eradicate the dilution by altering other ‘electoral ... structures’ that were not actually challenged by the claims as made.... The maximum extent to which a particular dilution may be remedied by restructuring the districting system is constrained by the size, compactness, and cohesion elements of the dilution concept.

Thus, when evaluating a remedial plan for any potential vote dilution, we must “focus up front on whether there is an effective remedy for the claimed injury.” *McNeil*, 851 F.2d at 942.

That court continued:

Section 2 of the Act proscribes any electoral scheme in which minorities “have less opportunity” to elect representatives of their choice. 42 U.S.C. § 1973(b) (emphasis added). Thus, the purpose of the Act is to ensure that minorities have an “equal opportunity to participate in the political processes and to elect candidates of their choice.” *Gingles*, 478 U.S. at 44, 106 S.Ct. at 2763 (quotation omitted) (emphasis added). Under these principles, “the scheme must not operate to cancel out the voting strength of racial elements of the voting population.” *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 627 (5th Cir. 1990), rev'd on other grounds sub nom., *Houston Lawyers' Assoc. v. Att'y General of Texas*, 501 U.S. 419, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991). In other words, “while a vote must have equal weight, it is not, even if cast by a member of the protected class, entitled to have greater weight than any other vote.” *Brunswick County*, 984 F.2d at 1398. Finally, a legislature may not devise a districting plan solely for the purpose of segregating citizens into separate voting districts on the basis of race without sufficient justification. *Shaw v. Reno*, 509 U.S. 630, ----, 113 S.Ct. 2816, 2832, 125 L.Ed.2d 511 (1993).

In the present case, we believe that the plan proposed by Hines would violate these

principles. Specifically, a plan giving a minority group a majority of the single-member districts would effectively “cancel out the voting strength” of the majority, *Clements*, 914 F.2d at 627, and provide the minority with a vote of greater weight than the majority. Nothing in the Act requires a remedy imposing overproportional representation. Moreover, because Hines acknowledged that the only motivation for such a districting plan would be racial concerns, i.e., providing blacks with another representative on the Town Council, and there is apparently no sufficient justification for such a plan, we believe such a districting plan would violate the equal protection rights of white voters. *Shaw*, 509 U.S. at ---, 113 S.Ct. at 2832. Thus, the district court properly refused to implement Hines' proposed election plan for Ahoskie's Town Council.

Id., 998 F.2d at 1272-1275.

In the instant case, the Court finds that the hybrid plans proposed by the defendants do not withstand scrutiny as they are not consistent with principles governing state law. The two districts proposed in the defendants' plans here are crafted in such a manner that they preserve the racial separation in the county. The plans proposed by defendants perpetuate the separation, isolation, and racial polarization in the County, guaranteeing that the non-Indian majority continues to cancel out the voting strength of the minority. The plans appear to be devised solely for the purpose of segregating citizens into separate voting districts on the basis of race without sufficient justification, contrary to the defendants' assertions.

In considering the defendants' proposed plan(s), it is apparent that they do not remedy the violations discussed in the Findings of Fact and Conclusions of Law. A remedial plan must effect the principle of one person, one vote. Based on the totality of the circumstances, the Court believes the proposed plans of the defendants are not equally open to participation by Native Americans, a

class of citizens protected by Subsection (a) of the Voting Rights Act, in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S.Ct. 1149, 1155 (1993).

Further, the Act prohibits any practice or procedure that interacts with social and historical conditions to impair the ability of a protected class to elect its candidate of choice on an equal basis with other voters. The Supreme Court has also recognized that dilution of racial minority group voting strength may be caused either by the dispersal of a protected class into districts in which they constitute an ineffective minority of voters or concentrating the racial minority into districts where they constitute an excessive majority. *Id.*, 507 U.S. at 154; 113 S.Ct. at 1155. A court must focus on the consequences of apportionment. *Id.*, 507 U.S. at 155; 113 S.Ct. at 1156. Plaintiffs must demonstrate, that under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.* The Court is required to review the three threshold conditions outlined in *Thornburg v. Gingles*, 478 U.S. at 50-51, in considering challenges to vote dilution claims. It must be shown that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; that the minority group is politically cohesive; and that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Voinovich v. Quilter*, 507 U.S. at 157-158; 114 S.Ct. at 1157.

It has already been determined that the three preconditions of *Gingles* have been met and the

proposed plans do not alter that finding. Further, it has been determined that Fremont County does suffer from racially polarized voting and that the white majority tends to vote as a bloc. Interacting with social and historical conditions, the Native American population's opportunity to elect its candidate of choice on an equal basis with other voters is impaired. The Court finds that the defendants' proposed plans suffer from the same deficiencies discussed in the Findings of Fact and Conclusions of Law and tend to perpetuate the isolation and polarization that have existed in the past in Fremont County. Over 78% of the Native American vote is concentrated into the single member District 1; the remainder of the county is majority non-Indian and votes for four commissioners on an at-large basis in District 2, different from that opportunity for voting afforded the Native American population in the defendants' proposed plans providing for single member voting only in District 1. The defendants' Alternative Plan draws residential districts within District 2, but suffers from the same deficiencies as the Preferred Plan in that all voting in District 2 is at-large, and true single member districts have not been proposed.

Thus, in rejecting the defendants' proposed plans, the principles governing court imposed remedial plans must be applied. Although a court must defer to legislative judgments as much as possible, it may not do so when the legislative plan would not meet the special standards of population equality and facial fairness that are applicable to court ordered plans. *Upham v. Seamon*, 456 U.S. 37, 39, 102 S.Ct. 1518, 1520 (1982). As noted earlier, a plan must adhere as closely to state law as possible in creating a plan that ensures minorities have an equal opportunity to

participate in the political processes and elect candidates of their choice. “Under these principles the scheme must not operate to cancel out the voting strength of racial elements of the population.” *Hines*, 998 F.2d at 1274.

The Court agrees with the plaintiffs that Wyoming law does not provide for the type of hybrid system proposed by the defendants. Wyo. Stat. § 18-3-501 provides for either at-large voting or for single member district, but does not suggest that the type of hybrid system proposed by defendants would be a permissible option under Wyoming law. Single member districts are the alternative provided by state law for election of county commissioners if at-large voting is not employed. The use of single member districts will inform the Court’s choices in crafting a court-ordered remedial plan. The Court is also reminded that the defendants’ themselves used the plaintiffs’ proposed plans as a starting point for crafting their proposed remedial plans.

A court is held to stricter standards than a state legislature in devising a legislative plan and “unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts and as well must ordinarily achieve the goal of population equality with little more than de minimis variation.” *Connor v. Finch*, 431 U.S. 407, 414, 97 S.Ct. 1818, 1833 (1977), quoting *Chapman v. Meier*, 420 U.S. at 26-27, 95 S.Ct. at 766.

Because the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities, this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a “singular combination of unique factors” that justifies a different result. . . .

Connor v. Finch, 431 U.S. at 415, 97 S.Ct. at 1834.

The plaintiffs' proposed remedial plans consist of five single member districts that comply with traditional redistricting criteria, including compactness, contiguity, respect for communities of interest, compliance with the one man, one vote requirement, and non-dilution of minority voting strength. Furthermore, census blocs are not split, and to the extent possible, the proposed plans use current precinct boundary lines as borders for the districts. The defendants have acknowledged that the districts proposed by plaintiffs were well designed and balanced between minority Native American population and non-Native American population and that as drawn, met the one man, one vote principle of the 14th Amendment. The defendants' primary objections to the proposal appear to be related to difficulties associated with administration and implementation by the County Clerk and the additional preparation required for the ballot and election process. The defendants' focus on ease of administration is not a compelling reason to deviate from single member districts, as these reasons are applicable to any election held in Fremont County and are not unique to County Commissioner at-large elections.

Upon review, the Court will adopt as its own plan plaintiffs' proposed Illustrative Plan A, as reflected in plaintiffs' exhibit a, attached hereto. This plan has an overall deviation of 1.28%. District 1 is majority Indian and is nearly entirely within the boundaries of the Wind River Indian Reservation, except for an unpopulated area in the northwest. The district encompasses 1,530 square miles. This is approximately 17% of the overall land area of the County. The district also includes

all of the six communities with significant Indian populations in District 1; over 3/4 of the County's Native American population lives in District 1. District 1 has a population of 7,147, which is within 14 persons of the ideal district size of 7,161 for a five district plan. The district population is 75.14% single race Indian and 70.34% single race Indian voting age. The voting age population in the district is 71.37% "any part" Indian.

District 2 as outlined in plaintiffs' Illustrative Plan A will be adopted, rather than as proposed in the defendants' districting plan, as it is clearly contiguous and not merely joined by a highway. District 2 in Illustrative Plan A has a population of 7,148, thirteen persons less than the ideal of 7,161 for a five district system. District 3 has a population of 7,219, 58 more than the ideal of 7,161; District 4 has a population of 7,163, 2 persons more than the ideal; District 5 has a population of 7,127, 34 persons less than ideal of 7,161. Riverton, with a population of 9,300 has been split between Districts 3 and 4. Lander, under Illustrative Plan A is split into Districts 4 and 5 in a north/south fashion.²

Under all of the parties' proposed plans, staggered terms for members of the County Commission are preserved and will continue to be preserved with the Court's adoption of Illustrative Plan A. In accordance with the parties' agreement as to staggered voting, the Court will preserve in its plan the method of staggered voting set out in defendants' Alternative Plan.

The Court hereby adopts the plaintiffs' proposed Illustrative Plan A as its own. It provides

²Plaintiffs indicated their preferred plan would be their proposed Illustrative Plan B, which places Lander entirely within District 5, rather than splitting it between District 4 and 5.

for five single member districts to be drawn along the lines set out in that plan. It provides for a majority Native American district; it implements a plan that contains a de minimis population deviation of 1.28%. The plan is free from any taint of arbitrariness or discrimination, *Roman v. Sincok*, 377 U.S. 695, 710 (1964); meets the special standards of racial fairness, *Upham v. Seamon*, 456 U.S. at 39; and because there is no compelling reason for doing otherwise, uses single member districts, *Chapman v. Meier*, 420 U.S. at 26-27. The voting scheme hereby adopted is designed to facilitate Native American voters' ability to participate in the political process and opportunity to elect representatives of their choice. *Thornburg v. Gingles*, 478 U.S. at 78-79, 106 S.Ct. at 2780-2781. It is not a guarantee of proportional representation on the Board of Fremont County Commissioners.

In accordance with the foregoing, it is hereby **ORDERED** that:

(1) The legislative hybrid plans proposed by the defendants do not satisfy the requirements of Section 2 of the Voting Rights Act and are hereby rejected as a remedy for violations of the Act. Plaintiffs are hereby enjoined from further use of the at-large voting system for the election of Fremont County Commissioners.

(2) The Court hereby adopts as its own, as a remedy for the Section 2 violation, the plaintiffs' proposed Illustrative Plan A and orders that the defendants forthwith take all steps necessary to implement and use the single member five district plan encompassed therein, in order to allow a special election to proceed this year and for years thereafter. Staggered terms for Fremont

County Commissioners are preserved in Illustrative Plan A, the contours of which are outlined in the defendants' Alternative Plan, and the election schedule for County Commissioners should proceed accordingly.

Dated this 10th day of August 2010.

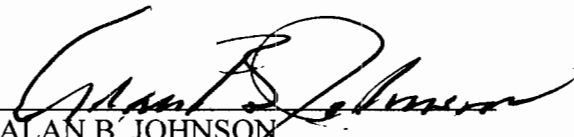

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

Exhibit a

Population Summary Report

Fremont County -- Plan A

District	Population	Deviation	% Deviation	American Indian (Single-race)	% American Indian (Single-race)	18+Pop	18+American Indian (Single-race)	% 18+American Indian (Single-race)	18+Any Part	% 18+Any Part	18+Hispanic (All races)	% 18+Hispanic (All races)
1	7147	-14	-0.20%	5370	75.14%	4467	3142	70.34%	3188	71.37%	127	2.84%
2	7148	-13	-0.18%	255	3.57%	5304	168	3.17%	220	4.15%	129	2.43%
3	7219	58	0.81%	496	6.9%	5439	299	5.50%	356	6.55%	293	5.39%
4	7163	2	0.03%	640	8.9%	5393	379	7.03%	436	8.08%	264	4.90%
5	7127	-34	-0.47%	286	4.0%	5374	176	3.28%	219	4.08%	117	2.18%
Total	35,804		1.28%	7,047	19.68%	25,977	4,164	16.03%	4,419	17.01%	930	3.58%

