

IN THE SUPREME COURT OF THE STATE OF IDAHO

TWIN FALLS COUNTY, a political)
subdivision of the State of Idaho, and the)
BOARD OF TWIN FALLS COUNTY) Supreme Court #39373-2011
COMMISSIONERS, the CITY OF)
TWIN FALLS, the CITY OF HANSEN,)
the CITY OF FILER, the CITY OF BUHL;)
TETON COUNTY, a political subdivision)
of the State of Idaho, and the BOARD OF)
TETON COUNTY COMMISSIONERS;)
OWYHEE COUNTY, a political)
subdivision of the State of Idaho, and the)
BOARD OF OWYHEE COUNTY)
COMMISSIONERS; and KOOTENAI)
COUNTY, a political subdivision of the State)
of Idaho, and the BOARD OF)
KOOTENAI COUNTY COMMISSIONERS)
)
Petitioners,)
vs.)
IDAHO COMMISSION ON)
REDISTRICTING and Ben YSURSA,)
Secretary of State of the State of Idaho)
)
Respondents.)

PETITIONER'S BRIEF
IN SUPPORT OF PETITION CHALLENGING LEGISLATIVE REDISTRICTING,
APPLICATION OF INJUNCTIVE RELIEF, AND APPLICATION FOR WRIT OF
PROHIBITION

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III. INTRODUCTION

Petitioners respectfully reply to Respondent's Brief by refocusing the disagreement on the core of the complaint in the Petition: That the Redistricting Commission impermissibly violated the Idaho Constitution by unnecessarily dividing several Idaho counties in the redistricting plan submitted as Plan L87.

IV. ARGUMENT

A. Petitioners Have Standing to Challenge the Redistricting Commission's Plan

Petitioners have standing to argue that the entirety of Plan L 87 is unconstitutional. As Respondents pointed out, Petitioners must, "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). Respondents then jump from this principle to the conclusion that Petitioners cannot challenge the Commission's actions in legislative districts other than those in which their counties are located.

However, Petitioners are first challenging the entirety of Plan L87 as being unconstitutional, and second, contend that the districts, as pieces of a puzzle, cannot be discussed separately without discussing where all the parts of the plan fail. The failure of the Redistricting Commission to adhere to the Idaho Constitution's prohibition against unnecessarily splitting counties in one area of the state has widespread effects across the length and breadth of Idaho. We cannot address nor correct the damage caused in any one district, or to any one county, without correcting the unconstitutional actions taken by the Commission in other parts of the state. Individual counties and districts cannot be discussed in a vacuum. Petitioners must be

able to challenge what the Redistricting Commission did throughout the state, and how those failures effect Petitioners' counties, cities and citizens. Therefore, Petitioners must be allowed to challenge all the areas where Plan L87 is unconstitutional.

Beyond its flawed analysis of the standing argument, Respondent's Brief mischaracterizes the Petitioners' argument in many key ways.

B. Plan L87 Unconstitutionally Splits Counties

The crux of the Petitioners' argument is that the Commission denigrated the requirement clearly stated in Article III, §5 of the Idaho Constitution and placed it below various statutory and optional considerations, such as those regarding communities of interest, traditional neighborhoods, district compactness, and road connections. Petitioners continue to assert that counties shall not be divided unless required to meet standards of equal protection. Only when counties must be split to achieve the one-person, one-vote mandate, do we look to Idaho Code § 72-1506 for direction as to how to do so. The Commission and Respondents would have us look to § 72-1506 for reasons to split counties.

Respondents incorrectly assert that Petitioners did not address the Commission's justifications for its actions. Precisely the opposite is true. Petitioners addressed in detail the Commission's Findings and Conclusions, and uniformly reject the Commission's justifications as being mere excuses for failing to follow the Idaho Constitution's clear preclusion against unnecessary division of counties. Respondent's arguments are essentially a verbatim restatement of the Commission's justifications. Respondent's argument is basically this:

We started in the North. We decided to divide Kootenai County because we elevated communities of interest, district compactness, and road connection above the Constitution. We did the same thing in Canyon and Gem Counties. Once we split those counties up in violation of the Constitution, we really had no choice but to take an axe to Owyhee County... Once we did *that*, we had to mutilate Twin Falls County... Once we did *that*, we had to mangle Bannock and Bingham Counties...

Essentially, this describes a domino set up, where once the flawed decision is made to split one county based on a skewed analysis which elevates statute above constitution, we are condemned to repeat the process until the entire redistricting plan is an integrated unconstitutional mess. Thus, Respondent can make the otherwise absurd argument that, “Due to Owyhee County’s location, the Commission chose to split Owyhee county between two districts to meet the one-person, one-vote requirement in surrounding districts.” (Respondent’s Brief, p. 13) This argument can only be made once the Commission screws up everything to the North of Owyhee County and has painted itself into a corner.¹

Respondent also erroneously claims that Petitioners’ goal is to “simply substitute their own plan” (Respondent’s Brief, p. 3), “seek to substitute their own judgment” (Respondent’s Brief, p. 4), and to “propose different exercises of discretion regarding county splits.” (Respondent’s Brief, p. 10) This failure to understand Petitioners’ argument causes Respondent to falsely conclude that, “the basis of Petitioners’ challenge is an attempt to elevate their respective counties over the interest of other counties.” (Respondent’s Brief, p. 16, and again on p. 17) Nothing could be further from the truth. In fact, Petitioners’ Plan neither cuts nor

¹ This again highlights the fallacy in Respondent’s standing argument. Clearly, to rectify the unnecessary divisions made in the Petitioners’ County’s, the Court needs to address the errors in other counties, which, when compounded, are presented by Respondent a justification for those divisions.

disadvantages any other county in proposing a constitutional approach to redistricting. It has been the guiding principle of Petitioners' argument that as few counties as possible be divided, and those, "only to the extent it is reasonably determined by statute that it is necessary to create senatorial and representative districts which comply with the constitution of the United States." (Idaho Constitution, Article III, §5)² Petitioners' Plan, in fact, was provided not so much to serve as a template for the Court to simply adopt, as to show in dramatic, concrete terms that the Commission's claims of "necessity" in splitting 11 Idaho Counties are misplaced. If it is really "necessary" to split 11 counties to achieve one-person, one-vote, then it should be difficult to come up with a plan which both achieves a lower divergence and splits half as many counties. Nonetheless, Petitioners' Plan achieves that very result, and does so without shifting any of the disadvantages visited on our counties by the Commission's Plan to others.

Indeed, it is not the Commission's choice among options when counties must be split that Petitioners argue against; rather it is the Commission's arbitrary choice to split counties which, under our Constitution, must not be split, with which Petitioners disagree. It is when the Commission exercised its authority outside the scope of the delegation of power given it by the Idaho Constitution that it loses the "deference" advocated for it by the Respondent. The Commission is due no deference for the exercise of power it does not have.

² Evidence of the Petitioner's desire to avoid visiting misery on its neighbors can be found even before the Commission enacted its plan and this case commenced. Respondent's Appendix A, wherein Attorney for Petitioner was asked during his testimony before the Reapportionment Committee's Public Hearing in Twin Falls on June 29, 2011, which counties he would divide, if not Twin Falls, "Mr. Loeb indicated that he would have to look at the map because he doesn't want to hack up another county any more than he wants his county hacked up." Respondent's Brief, Appendix A, p. 3.

Likewise, the factors listed in I.C. §72-1506, and reiterated by the Court in *Bingham County v. Idaho Com'n for Reapportionment*, 137 Idaho 870, 874, 55 P. 3rd 863, 867 (Idaho 2002) and *Bonneville County v. Ysursa*, 142 Idaho 464,468, 129 P. 3rd 1213, 1217 (Idaho 2005), come into play only when a county must be divided under Article III, §5. The Court has repeatedly made it very clear that counties shall not be split unless it is necessary to meet the standards of equal protection. Other statutory considerations are subordinate. *Id.*

It is not Petitioners' contention that the Commission's Plan L87 is unconstitutional because it has a deviation of nearly 10% (9.92%), but that it has this very high deviation because it unconstitutionally splits counties. Thus, the unconstitutional splitting of counties is the "unconstitutional or irrational state purpose," prohibited by *Karcher v. Daggett*, 462 U.S. 725, 740-44 (1983).

Respondent claims that, "The Counties that were split by the Commission were split in order to comply with the one-person, one-vote requirement, to preserve communities of interest, and to create compact districts in the face of Idaho's geographic challenges." (Respondent's Brief, p. 11.) But, because only divisions which are necessary to comply with the one-person, one-vote mandate of the U.S. Constitution are legal, the other listed considerations are mere excuses. The reasoning in Respondent's Brief falls into the same trap as does the Commission in its Findings and Conclusions when it elevates the statutory language of Idaho Code § 72-1506 to the same (or higher) level as the Idaho Constitution.

Respondents, perhaps tongue-in-cheek, argue that the Petitioners' argument relegates reapportionment to "little more than a mathematical exercise" (Respondent's Brief, p. 10). With

just as much credibility, Petitioners could argue that Respondent’s elevation of “district compactness” to a level on a par with the Constitution’s protection of county integrity would result in 35 differently-sized, identically-populated boxes with no attention paid to county lines at all. Both of these arguments are absurd. The Constitution of the United States, the Constitution of Idaho, the Statutes of the State of Idaho, and the Court’s interpretation of those laws give very clear direction to the Redistricting Commission—and to this Court. The hierarchy is as clear as it can be:

1. Satisfy the U.S. Constitutional requirement for one-person, one-vote. If you must, divide counties to do so.
2. Keep counties whole.
3. If you must divide counties, follow the guidelines in I.C. § 72-1506, as much as possible.

The Commission’s fatal mistake in concocting Plan L87, a mistake echoed in Respondent’s Brief, is that it lost track of this simple hierarchy. By its own admission, the Commission used I.C. § 72-1506 factors to justify dividing counties when no such division was necessary to conform to one-person, one-vote. Because of this blindness to the supremacy of the Idaho Constitution, the Commission’s plan must fail. Because of the Commission’s initial analytical failure, the Respondent’s Brief is forced into tortured logic to defend it.³

³ For example, the justification given on pages 11-13 for the division of Kootenai County into four districts--two of which are joined with other counties: Kootenai County, the Respondents say, is too big to be three districts, being the size of 3.092 districts. The Commission’s Solution: put it in FOUR districts! The result: FOUR districts with an average divergence of 3.4% from ideal, rather than THREE with an average divergence of 3.1%. This makes nonsense of the Idaho Constitution. Using this logic, the ONLY county the Commission would be precluded from

In pages 11-15 of their brief, Respondents essentially just lay out the same argument as the Commission's Findings and Conclusions, painting a fatalistic picture detailing how once the dominoes are set up, all we can do is watch them fall, notwithstanding that the first dominos set up when Kootenai and Canyon Counties were unconstitutionally split can actually be changed, thus saving the rest of the state.

Pages 17-20 of Respondent's Brief are devoted to more justification that splitting counties is mandated by considerations such as preserving traditional neighborhoods and communities of interest, keeping Native American tribes in one district, joining "portions of counties that were connected by major roads and highways," and achieving district compactness. These goals, though desirable, do not trump the requirements of Idaho's Constitution.

Petitioners do not seek to substitute their discretion for that of the Commission, or their plan for Plan L87. Petitioners seek to have the Court instruct the Commission to follow the clear law of the State of Idaho. If Respondents do not like the law as it is, they should seek to change it, but as long as the Idaho Constitution contains a clear prohibition against unnecessary division of counties in reapportionment, the Idaho Redistricting Commission must comply with that prohibition.

V. CONCLUSION


Legislative Plan L87 adopted by the Idaho Redistricting Commission is unconstitutional in that it impermissibly splits a number of counties that did not need to be split to achieve the U.S. Constitution's equal protection requirements. In justifying its actions, Respondents give a

dividing would be one where the population was exactly $44,788 \frac{2}{35}$ or exact multiples thereof.

number of reasons which do not justify dividing those counties, particularly when it is shown that a plan can be developed that complies with all federal and state constitutional and statutory requirements and splits fewer counties and achieves a lower divergence.

For these reasons, Petitioners respectfully ask the Court to declare Legislative Plan L87 unconstitutional and direct the Redistricting Commission to adopt a plan which complies with the United States and Idaho State Constitutions.

Respectfully Submitted this 27th day of December, 2011.



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On behalf of Petitioners, Twin Falls County,
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the City of Filer, the City of Buhl, Teton County,
Owyhee County and Kootenai County