

SUPREME COURT, STATE OF COLORADO

101 W. Colfax Avenue, Suite 800
Denver, Colorado 80202

Original Proceeding Pursuant to the Colorado
Rules for Reapportionment Proceedings

**IN RE REAPPORTIONMENT OF THE
COLORADO GENERAL ASSEMBLY**

Attorneys for Opponents County of Washington,
Colorado acting by and through the Board of
County Commissioners:

Gerald Dahl, #7766
Christopher Price, #37866
Murray Dahl Kuechenmeister and Renaud, LLP
1530 Sixteenth St., Ste 200
Denver, CO 80202
Phone No.: (303) 493-6670
Fax No.: (303) 477-0965
E-mail: gdahl@mdkrlaw.com
cprice@mdkrlaw.com

Peter Lawrence Vana III, #7900
Washington County Attorney
150 Ash Street
Akron, CO 80720
Phone No.: (303) 493-6670
Fax No.: (303) 477-0965
E-mail: lvana@co.washington.co.us

▲ COURT USE ONLY ▲

Case Number: 2011SA282

**STATEMENT OF OPPOSITION AND COMPREHENSIVE
EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM**

TABLE OF CONTENTS

Table of Authorities ii

Certificate of Compliance 1

I. INTRODUCTION AND BACKGROUND2

II. STATEMENT OF OPPOSITION TO THE RESUBMITTED PLAN4

III. COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND
LEGAL SUPPORT OF OPPOSITION4

 A. Standard of Review4

 B. House District 64 Is Not Compact7

 C. The Resubmitted Plan Fails to Account for Communities of Interest 10

 D. The Resubmitted Plan Is Based on Improper Political
 Considerations12

IV. CONCLUSION13

TABLE OF AUTHORITIES

Cases

<i>Acker v. Love</i> , 496 P. 2d 75 (Colo. 1972)	8
<i>Carstens v. Lamm</i> , 543 F. Supp. 68 (U.S. Dist. Colo. 1982)	8, 10
<i>In re Reapportionment 2002</i> , 45 P. 3d 1237 (Colo. 2002)	5, 7
<i>In re Reapportionment 1982</i> , 647 P. 2d 191 (Colo. 1982)	5
<i>In re Reapportionment 1992</i> , 828 P.2d 185 (Colo. 1992)	12
<i>Reynolds v. Sims</i> , 377 U.S. 533, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964)	5

Constitution

Colorado Constitution, art. V, § 46	4, 5, 6, 13
Colorado Constitution, art. V, § 47	4
Colorado Constitution, art. V, § 47(1)	6, 7, 13
Colorado Constitution, art. V, § 47(2)	6
Colorado Constitution, art. V, § 47(3)	6, 10, 13
Colorado Constitution, art. V, § 48(1)(e)	4
U. S. Constitution, Amend. XIV, Equal Protection Clause	6
U.S. Constitution, Amend. XV	6

Other Authorities

Voting Rights Act of 1965, Section 26

CERTIFICATE OF COMPLIANCE

I hereby certify that this STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM complies with C.A.R. 28(g) in that it contains **2,532** words. The STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM complies with C.A.R. 28(k), because it contains under a separate heading: (1) a concise statement of any disagreement with statements of standard of appellate review and preservation for appeal and, as applicable, a correct statement of standard of appellate review and preservation issues with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on (where applicable).

/s/Christopher Price
Christopher Price

I. INTRODUCTION AND BACKGROUND

Opponent the County of Washington, Colorado, acting by and through the Board of County Commissioners ("Washington County"), by and through its attorneys, provides the following as its Statement of Opposition and Comprehensive Explanatory, Descriptive and Legal Memorandum.

Washington County is a statutory county located in northeast Colorado with a population of 4,814 residents. Washington County is 2,518 square miles in size and borders Morgan County, Adams County and Arapahoe County to the west, Logan County to the north, Yuma County to the east and Kit Carson County and Lincoln County to the south. Currently, Washington County is in Colorado House District 63 which also includes the entirety of Cheyenne, Crowley, Kiowa, Kit Carson, Lincoln, Morgan and Yuma Counties and portions of Adams County.

On October 3, 2011, the Reapportionment Commission (the "Commission") submitted a plan for the redistricting of the districts for members of the Colorado General Assembly (the "Initial Plan"). Washington County did not object to that plan because its interests were sufficiently represented. The Court remanded the Initial Plan to the Commission primarily because certain counties had been improperly split.

On December 5, 2011, the Commission submitted a second redistricting plan to the Court (the “Resubmitted Plan”). The Resubmitted Plan places Washington in Senate District 1 and House District 64. In addition to Washington County, Senate District 1 includes the entirety of Cheyenne, Elbert, Kit Carson, Lincoln, Logan, Morgan, Phillips, Sedgwick and Yuma Counties and portions of Weld and Adams Counties. This district is comprised of 26,016.3 square miles within 741.5 perimeter miles. Washington County does not contest the Resubmitted Plan as to Senate District 1.

In addition to Washington County, House District 64 is comprised of the entirety of Baca, Bent, Crowley, Elbert, Kiowa, Las Animas, Lincoln and Prowers Counties. This district is comprised of 20,065.9 square miles and 995.5 perimeter miles. It is the largest house district in the state. Washington County is the northernmost county and Las Animas County is the southernmost county in the proposed House District 64. From the county seat in Washington County (Akron) to the county seat in Las Animas County (Trinidad), a representative would have to travel approximately 262 miles. The trip would take nearly four and one-half hours to complete in good weather.

Washington County files this Statement of Opposition because the Resubmitted Plan does not meet the requirements set forth in federal and state law

as to proposed House District 64. The inclusion of Washington County in House District 64 violates the requirements of Sections 46 and 47 of Article V of the Colorado Constitution. Washington County requests that the Resubmitted Plan be disapproved and the matter remanded to the Commission for reconsideration so that Washington County can be placed in a House District that is more reasonably compact and associated with its communities of interest.

II. STATEMENT OF OPPOSITION TO THE RESUBMITTED PLAN

Washington County opposes the Resubmitted Plan, and more specifically, the inclusion of Washington County within proposed House District 64. This placement violates the requirements set forth in federal and state law regarding compactness of districts, preservation of communities of interest. In addition, this placement is the result of improper political considerations.

III. COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL SUPPORT FOR OPPOSITION

A. Standard of Review

This is an original proceeding under Article V, Section 48(1)(e) of the Colorado Constitution, which requires the Court to review the Resubmitted Plan. Here, the Court's role is limited. The Court "must determine whether the Commission followed the procedures and applied the criteria of federal and Colorado law in adopting its reapportionment plan for Colorado General Assembly

house and senate districts." *In re Reapportionment 2002*, 45 P.3d 1237, 1247 (Colo. 2002). The Court should "uphold the adopted plan if it meets the applicable federal and Colorado standards." *Id.* Alternatively, the Court may not redraw reapportionment maps or choose among alternative plans. *Id.*

Equality of population (often referred to as "one person, one vote") is the most important consideration in any reapportionment proceeding. "Obtaining substantial equality of population among districts ... is the 'paramount criterion for testing the constitutional sufficiency of a reapportionment plan.'" *In re Reapportionment 2002*, 45 P.3d at 1247-1248, citing *In re Reapportionment 1982*, 647 P.2d 191, 193 (Colo. 1982); see *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964). However, perfection is not required. Pursuant to Article V, Section 46 of the Colorado Constitution:

The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Article V, Section 46 specifically allows for a 5% deviation between district populations, i.e. there is allowed a 5% difference between the district with the largest population and the district with smallest population.

In this case, to achieve equality of population, the Commission divided the population of Colorado by the number of Senate seats and the number of House of Representative seats. Commission Memorandum in Support of Adopted Plan, p. 15. As a result, the Commission calculated the ideal Senate District to include 143,691 people and the ideal House District to include 77,372 people.

Although equality of population is a significant criterion, additional federal and state criteria apply and must be used by the Commission in the reapportionment of Colorado House and Senate Districts. These criteria are listed in order of priority as follows:

- (1) The Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment;
- (2) Section 2 of the Voting Rights Act;
- (3) Article V, section 46, Colo. Const. (equality of population of districts of each house);
- (4) Article V, section 47(2), Colo. Const. (districts not to cross county lines except to meet section 46 requirements and the number of cities and towns contained in more than one district minimized);
- (5) Article V, section 47(1), Colo. Const. (each district to be as compact as possible and to consist of contiguous whole general election precincts); and
- (6) Article V, section 47(3), Colo. Const. (preservation of communities of interest within a district).

In re Reapportionment 2002, 45 P.3d at 1247. In adopting a reapportionment plan the Commission must apply all six of the criteria in the order of their stated preference. *Id.* Although the Commission is prohibited from applying the lesser criteria over the greater criteria, it may use the lesser criteria so long as it has satisfied the greater criteria. *Id.* Finally, the Commission must resolve any conflicts by applying the criteria in the order described above and articulate how the reapportionment plan reflects each of the criteria. *Id.*

The Resubmitted Plan fails to comply with criteria 5 because, based on sheer geography alone, it does not achieve compactness for House District 64. In addition, the Resubmitted Plan fails to comply with criteria 6 because Washington County is no longer associated with its communities of interest.

B. House District 64 is Not Compact.

Article V, Section 47(1) of the Colorado Constitution provides:

Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.

Stated another way:

Compactness ... concerns a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered, allowing for variances caused by population density and distribution, census enumeration districts, and reasonable variations necessitated by natural boundaries and by county lines.

Acker v. Love, 496 P.2d 75, 76 (Colo. 1972). The compactness of any district will “be directly affected by the density and distribution of a state's population.” *Carstens v. Lamm*, 543 F. Supp. 68, 84 (Dist. Colo. 1982). The purpose of requiring that a district be compact is to restrain partisan gerrymandering. *Id.* at 87. An additional benefit of compact districts is that they should “reduce electoral costs and increase the opportunities for more effective representation by concentrating a constituency in an easily accessible area.” *Id.* Applying these considerations, House District 64 cannot be considered compact.

Although the Commission applied two different tests to determine compactness, each of them fails to reflect the unreasonable result that is House District 64. A cursory review of the map illustrates the sprawling nature of the proposed district. Compactness cannot be achieved with such a district, where the northernmost portion of the district (Washington County) is over 300 hundred miles away from the southernmost portion, which is located in Las Animas or Baca County. These areas are not easily accessible. The extreme distances to be traveled by any representative of the district would forestall effective representation.

The extreme geographic composition of House District 64 is further exhibited when it is compared to the layout for Senate District 1. With a

population of 144,060 residents, Senate District 1 includes all of the northeastern counties of the state plus portions of Weld and Adams Counties. Yet, the area of Senate District 1, in terms of square miles, is only slightly larger than the area of House District 64 (21,016.3 versus 20,065.9 respectively). In terms of perimeter miles, Senate District 1 is actually comprised of a lower number than the perimeter miles of House District 64 (741.5 versus 995.5 respectively). It defies logic for a Senate District which includes rural counties to be comprised of a greater population yet be smaller than a House District which includes some of the same communities.

Further, Washington County's Senate District should not provide for a better and more efficient opportunity for representation of its interests than its House District. Here, it will take a representative a significant amount of time and money to travel the entirety of House District 64. It is unlikely that representative will spend any significant time in Washington County with its population of 4,814 residents in the northernmost portion of the proposed district, when the population of the district is primarily located in the southeast corner of the state. With House District 64 as proposed, the likelihood that Washington County's interests will be fairly represented in the Colorado House of Representatives is slim.

C. The Resubmitted Plan Fails to Account for Communities of Interest.

The last constitutional criterion for reapportionment requires the preservation of communities of interest wherever possible. The criterion concerns “distinctive units which share common concerns with respect to one or more identifiable features.” *Carstens v. Lamm*, 543 F. Supp. at 91. Communities of interest include, "ethnic, cultural, economic, trade area, geographic, and demographic factors..." Art. V, Section 47(3), Colo. Const.

The Commission heard no testimony that Washington County shares any communities of interest with Las Animas County or Baca County, some 300 miles to the south. There is no evidence to support the Commission adding Washington County to a house district that includes those counties. Although all of these counties share some rural aspects, rural character alone is insufficient to create a community of interest between Washington County and those counties that comprise southeastern Colorado. In fact, Washington County does not share any geographic, economic or trade areas with those counties.

Rather, Washington County is located in northeastern Colorado and shares distinct geographic, economic, political and other relations with its northeastern neighbors. For example, Washington County shares the 13th Judicial District with Kit Carson, Logan, Morgan, Phillips, Sedgwick and Yuma Counties. Washington

County is a member of the Golden Plains Area Extension of the Colorado State University which includes Kit Carson, Yuma, Phillips and Sedgwick Counties. Washington County is also a member of the Northeastern Colorado Association of Local Governments and the Northeast Colorado Health Department along with Logan, Morgan, Phillips, Sedgwick and Yuma Counties. Thus, historically, Washington County has been associated with Kit Carson, Logan, Morgan, Phillips, Sedgwick and Yuma Counties which are all located in the proposed House District 65. Washington County belongs in that district.¹ Instead, it has been placed in a House District with other counties with which it has little, if any, relation. This injustice should not be permitted.

Washington County cannot have a community of interest with Baca County or Las Animas County. These counties are hundreds of miles apart, composed of different environmental conditions, water issues, economic conditions, etc. Instead, it appears that adding Washington County to House District 64 was an afterthought that was simply an attempt to comply with the equality of population requirement or due to improper political considerations. Although equality of population is important, a 5% variance is allowed, and within that variance, population should not drive a result to the detriment of the other constitutional

¹ Under the Initial Plan, Washington County was properly placed in House District 65 along with most of its northeast neighbors. Washington County did not object to the Initial Plan.

criteria. Where the resulting district composition does not comply with other important constitutional considerations, the Commission should consider an alternate composition which falls within the authorized 5% variance.

D. The Resubmitted Plan Is Based on Improper Political Considerations.

The Commission has stated that increasing the number of competitive districts was an important consideration. This type of activity falls outside the six criteria provided by federal and state law and should not be considered. Although political considerations are not improper, they cannot be “allowed an importance equal to or greater than the proper constitutional criteria. . . .” *In re Reapportionment 1992*, 828 P.2d 185, 199 (Colo. 1992).

Most of the documents submitted to the Court for the Initial and Resubmitted Plans concerned party registration and historical voting patterns within the newly created districts. It appears to Washington County that the primary consideration of the Commission was to create highly competitive districts. While creating such type of districts may be a political goal, it may not be accomplished with disregard to the clearly established constitutional requirements for reapportionment. The Commission’s desire to achieve competitiveness should, therefore, not result in Washington County being added to a district which is not compact and with whom it does not share any communities

of interest. To do so would allow the Commission to ignore the constitutional requirements. The Resubmitted Plan should be disapproved.

IV. CONCLUSION

The Court should disapprove the Resubmitted Plan for violations of Article V, Sections 46 and 47(1) and (3) of the Colorado Constitution, as well as on the basis that proposed House District 64 appears to have been created for improper political purposes.

WHEREFORE, Washington County requests that the Court disapprove the Resubmitted Plan and remand the matter to the Commission for the creation of a new reapportionment plan that keeps Washington County in a House District near other counties with whom it shares a common community of interest and in an effort to obtain a more reasonably compact District. Washington County further requests that, if the Court allows for oral argument on the Resubmitted Plan, Washington County's counsel be permitted to appear before the Court to make such an argument.

DATED this 8th day of December, 2011.

MURRAY DAHL
KUECHENMEISTER & RENAUD LLP.

By: /s/Christopher Price
Gerald E. Dahl
Christopher Price
ATTORNEYS FOR COUNTY OF
WASHINGTON, COLORADO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of DECEMBER, 2011, a true and correct copy of the within STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE, AND LEGAL MEMORANDUM was filed and served upon the following via US mail:

David R. Fine
Richard C. Kaufman
Jennette C. Roberts
Joseph G. Martinez
McKenna Long & Aldridge, LLP
1400 Wewatta St., Suite 700
Denver, Colorado 80202

Jeremiah B. Barry
Legislative Legal Services
091 State Capitol
Denver, CO 80203

Jeremiah Barry
Colorado Reapportionment Commission
1313 Sherman Street, Room 122
Denver, Colorado 80203

Kate Meyer
Colorado Reapportionment Commission
1313 Sherman Street, Room 122
Denver, Colorado 80203

Katherine A. Meyer
Office of Legislative Legal Services
State Capital
Room 091
Denver, Colorado 80203

Troy C. Bratton
Office of Legislative Legal Service
State Capitol Bldg., Room 091
1200 E. Colfax Ave.
Denver, Colorado 80203

Troy C. Bratton
Colorado Reapportionment Commission
1313 Sherman Street, Room 122
Denver, Colorado 80203

/s/Farides Bejarano
Farides Bejarano, Legal Assistant