

# Redistricting 2011

## History of Legislative Redistricting in Nebraska

Compared to many other states, Nebraska has enjoyed a rather controversy-free history when it comes to legislative redistricting. Even then, in two out of the past five decades, the state has come up against judicial sanction for enacting plans the courts have deemed to be constitutionally infirm.

A brief examination of the record follows.

### 1934

Voters approve an amendment to the Nebraska Constitution, submitted to them via the initiative process, authorizing the establishment of a unicameral legislature. Legislative terms are two years in length. The Legislature is authorized to redraw district boundaries “from time to time,” but not more often than every 10 years, utilizing population figures from the most recent federal decennial census.

District boundaries are to follow county lines, except that a county can be divided into two or more districts when it “contains population sufficient to entitle it to two or more members of the Legislature”. When a county is divided, the districts are to be “as nearly equal in population as may be and composed of contiguous and compact territory.”

### 1935

Legislation is enacted setting up a 43-district legislative plan to take effect in 1937 (Senate File Nos. 364 and 365). “The 43 districts were rather equitably arranged on the basis of the population census of 1930,” according to an article from the February 1950 issue of the *National Municipal Review*.

### 1937

The unicameral legislature meets for the first time.

### 1961

As the years pass, eastward population shifts within the state result in growing population inequity among the legislative districts created in 1935. “By 1960 the most populous district had a population of 100,826 and the smallest was reported to be 18,824,” according to an article in the Spring 1978 edition of the Nebraska State Historical Society’s journal, *Nebraska History*.

In response to this population disparity and recognizing the need to redraw district boundaries, the 1961 Legislature adopts two proposals relating to redistricting. Both are constitutional amendments to be submitted to the voters at the 1962 general election.

One establishes four-year terms for senators, with one-half of the membership to be elected every two years. The other adds language loosening the county-line requirement. It provides that county lines should be followed *whenever practicable* during redistricting, but that other established lines may be used at the discretion of the Legislature.

Most importantly for those representing areas which were losing residents to the more populous eastern end of the state, one of the proposed constitutional amendments provides that, “In such redistricting, primary emphasis shall be placed on population and not less than twenty percent nor more than thirty percent weight shall be given to area.” “The intent,” according to the previously cited article from the Spring 1978 edition of *Nebraska History*, “was to permit up to a 30 percent population disparity among districts.”

### 1962

The U.S. Supreme Court rules in *Baker v. Carr*, 369 U.S. 186 (1962), that legislative redistricting cases, though political in nature, are subject to judicial review and that plaintiffs may mount a challenge to redistricting plans based on provisions of the U.S. Constitution.

In November, Nebraska voters approve both constitutional amendments adopted by the Legislature in 1961.

### 1963

During the 1963 session, the Legislature enacts its first redistricting plan since 1935, using a formula that enables senators to give 20 percent weight to “area” in establishing legislative district boundaries. The bill also increases the number of legislative districts from 43 to 49.

The plan establishes legislative districts with populations ranging from a high of 35,757 in District 35 (Hall County) to a low of 21,703 in District 43 (Sheridan, Cherry, and Brown Counties).

In August 1963, a lawsuit is filed challenging the constitutionality of the new plan based on the consideration given to “area” in establishing legislative districts. See *League of Nebraska Municipalities v. Marsh* (1964), below.

### 1964

The following June, the U.S. Supreme Court hands down the ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964), the case popularly known as the “one person, one vote” case. The main effect of this ruling is to establish that the 14<sup>th</sup> Amendment to the U.S. Constitution requires the populations of legislative districts to be as equal as is practicable.

In July, the U.S. District Court for the District of Nebraska rules in *League of Nebraska Municipalities v. Marsh*, 232 F.Supp. 411 (1964), that the portion of the 1962 amendment to the Nebraska Constitution allowing the Legislature to give consideration to “area” when redistricting is unconstitutional. The Court holds that the offending provision violates the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and directs the 1965 Legislature to create a new legislative plan using population as a basis, in accordance with *Reynolds v. Sims*.

### 1965

Accordingly, in March 1965, the Legislature enacts a new legislative redistricting plan that increases the number of legislative districts to 50. The largest is still District 35 (Hall County) with a population of 35,757, while the smallest is District 44 (Morrill, Garden, Deuel, Keith, Arthur and Grant Counties) with a population of 22,301. This new plan is submitted to the United States District Court for review.

In May, the court rules in *League of Nebraska Municipalities v. Marsh*, 242 F.Supp. 357 (1965), that the population variance of more than 15 percent between the smallest and largest district runs afoul of the Equal Protection Clause of the 14<sup>th</sup> Amendment.

The court declines to formulate a redistricting plan of its own, stating that the Legislature, before adjournment of its regular 1965 session, must adopt a constitutionally valid reapportionment plan. Otherwise, the court states, all

members of the Legislature will have to be nominated and elected at large during the 1966 elections.

In July 1965, the Legislature adopts a third redistricting plan. The plan creates 49 legislative districts.

In September 1965, Senator Terry Carpenter, acting as a private citizen, files a petition with the Nebraska Supreme Court seeking a declaratory judgment as to the constitutionality of the plan. He argues it is unconstitutional because it crosses county lines in establishing legislative districts. He contends that the U.S. District Court's 1964 ruling that struck down the constitutional provision allowing "area" to be considered in drawing redistricting plans also invalidated the constitutional language that gives the Legislature discretion to cross county lines if following those boundaries is not practicable.

### 1966

In January 1966, the Nebraska Supreme Court unanimously upholds the third legislative plan in *Carpenter v. State of Nebraska*, 179 Neb. 628, 139 N.W.2d 541. The court's decision is based on its holding that the provision of the 1962 amendment to the Nebraska Constitution that permits plans to cross county lines is valid.

In April, the U.S. Court for the District of Nebraska holds the plan constitutional in the context of population deviation. In *League of Nebraska Municipalities v. Marsh*, 253 F.Supp 27 (1966), the court rules that population deviations in the plan are justifiable and do not violate the Equal Protection Clause of the U.S. Constitution.

### 1971

The Legislature passes LB 954, a redistricting plan based on population figures from the 1970 census. There is no constitutional challenge to the bill.

### 1981

The Legislature passes LB 406, a redistricting plan based on population figures from the 1980 census. There is no constitutional challenge to the bill.

### 1991

During the next redistricting session, the Legislature passes LB 614, a legislative plan that, among other things, divides Madison County between two legislative districts, each of which incorporates portions of other counties, as well. Citizens of Madison County challenge the constitutionality of the plan as it pertains to their county, arguing before the Lancaster County District Court and, ultimately, the Nebraska Supreme Court, that the

Nebraska Constitution requires the Legislature to follow county lines when a county has sufficient population to constitute a single legislative district, as is the case with Madison County. See *Day v. Nelson*, below.

### 1992

Primary elections are held in odd-numbered legislative districts in May 1992. Two months later, the Nebraska Supreme Court rules in *Day v. Nelson*, 240 Neb. 997 (1992), that splitting Madison County between two legislative districts violates Article III, Section 5, of the Nebraska Constitution, which states that "county lines shall be followed whenever practicable" during redistricting. The court holds that a county with a population sufficient to constitute a single legislative district must be kept whole.

In response, the Legislature holds an August 1992 special session and enacts LB 7, which reconfigures District 19 to include only Madison County. The non-Madison County portions of the original District 19 are split between two other legislative districts in the region.

As a result of LB 7, the top two vote getters in the May primary for the original District 19 are disqualified from proceeding to the general election because they both reside outside Madison County. One of them petitions the federal district court to enjoin the implementation of LB 7, alleging that the new legislative plan violates her constitutional right to run for public office, as well as the voting rights of her supporters. The court rejects her arguments and denies the injunction, holding that she failed to establish a likelihood of success on the merits of the case. *Carlson v. Nelson*, 1992 WL199864 (D.Neb).

Meanwhile, residents of Madison County gather signatures in order to get their names on the November general election ballot for legislative District 19. In the end, one of the original Madison County plaintiffs, Connie Day, is elected to the Legislature.

A group of residents of southwest Nebraska also files suit in Lancaster County District Court in 1992 seeking to have the 1991 plan declared unconstitutional. Plaintiffs allege a defect in the plan arises from the fact that the Legislature failed to follow county lines in Red Willow County and otherwise failed to follow its own redistricting guidelines. No ruling is issued in the case, which is voluntarily dismissed.

### 1995

In March 1995, the Nebraska Supreme Court considers arguments similar to those the federal district court addressed in the 1992 challenge to LB 7. Plaintiffs include the second of the

two winners of the 1992 District 19 primary election whose residence was drawn out of the district by LB 7, along with a similarly situated voter.

The Nebraska Supreme Court upholds LB 7 as constitutional, rejecting arguments that the bill prevents the plaintiffs from exercising their right to run for elected office and to vote. The court holds that the bill merely *delays* the plaintiffs' ability to vote and run for office in their new district; as such, it does not violate their constitutional rights. *Pick v. Nelson*, 247 Neb. 487 (1995).

The constitutionality of the 1991 legislative redistricting plan is also challenged in *Hlava v. Nelson*, 247 Neb. 482 (1995), on the basis that it impermissibly divides Sheridan County into more than one legislative district. Plaintiff argues that a county cannot be divided unless its population exceeds the ideal district size. The suit also challenges as too restrictive the Legislature's 1991 requirement that districts not deviate more than plus or minus two percent from the ideal district size. The Nebraska Supreme Court upholds the constitutionality of the plan in *Hlava*, on both counts.

### 2001

A new legislative redistricting plan is passed as LB 852 in 2001. One lawsuit is filed (in Lancaster County District Court) seeking to have it overturned.

The plaintiff alleges that the plan violates the county-line requirement in the Nebraska Constitution and the Legislature's own redistricting guidelines in that it unnecessarily creates at least five Douglas County districts that incorporate portions of adjoining counties. The plaintiff also argues that the Legislature acted in an arbitrary and capricious manner in violation of the due process clause of the Nebraska Constitution by violating its own guideline requiring that legislative districts be "compact."

No ruling is issued in the case, which is dismissed without prejudice in 2003.

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**This is the fifth in a series of newsletters to be released by the Legislative Research Office in conjunction with the 2011 redistricting process. The newsletters are designed to provide interested parties with information about the history of and some of the principal legal issues related to redistricting. If you would like additional information, please contact the Legislative Research Office at 402.471.2221.**