

## Opinion 07-02

July 9, 2007

**OPINION OF: GARY K. KING** Attorney General

**BY:** Sally Malavé, Assistant Attorney General

**TO:** The Honorable Antonio "Moe" Maestas, State Representative - District 16, State Capitol Building Room 203B CN, Santa Fe, New Mexico 87501

### QUESTION:

Whether the Legislature in 2008 may enact legislation to require the New Mexico house of representatives to redistrict its membership without conflicting with Subsection D of Article IV, § 3 of the state constitution, given that the court, rather than the Legislature, redistricted the New Mexico house of representatives following the 2000 decennial census?

### CONCLUSION:

The Legislature may not reapportion its membership until after publication of the official report of the 2010 federal census.

### ANALYSIS:

Article IV, Section 3 of the New Mexico Constitution sets forth the number of members in each house of the Legislature and their qualifications and requires the election of senators and representatives from single-member districts. Subsection D of the provision then states:

Once following publication of the official report of each decennial census hereafter conducted, the legislature may by statute reapportion its membership.

N.M. Const. art. IV, § 3(D).

The drafters of the constitution are presumed to give the words they use their plain, natural and usual meaning. See City of Farmington v. Fawcett, 114 N.M. 537, 544 (Ct. App.), cert. quashed, 114 N.M. 532 (1992) (citation omitted). The language of the constitution controls if it is "plain, definite, and free from ambiguity." See id.

The above-quoted constitutional provision is clear. It permits the Legislature to reapportion its membership only once by statute each decade following publication of the official report of a federal decennial census. 1 The purpose and intent of requiring decennial reapportionment is to ensure substantially equal representation based on population. 2 See Reynolds v. Sims, 377 U.S. 533, 579 (1964). State constitutional

framers generally prohibited reapportionment more than once every ten years because they wanted to ensure that State Legislatures could not reapportion themselves periodically for purely partisan reasons. See Bone Shirt v. Hazeltine, 700 N.W.2d 746, 756 (S.D. 2005) (Konenkamp, J., concurring specially). In accordance with this constitutional provision, the New Mexico Legislature reapportioned its membership by statute, albeit partially, in 2002.

Following publication of the official report for the 2000 federal census, the Legislature initiated the legislative process of reapportioning its membership and met in special session from September 4 through September 20, 2001, the 2001 First Special Session of the 45th Legislature. During this special session, the Legislature passed two senate redistricting plans, two house of representative redistricting plans, and various other plans not at issue here. See Redistricting Committee Final Report 2002, Legislative Council Service (April 2002). Then-Governor Gary Johnson vetoed both the senate redistricting plans, House Bill 7, the first house redistricting plan passed by the Legislature during the special session, and House Bill 3, the compromise house redistricting plan subsequently passed by the Legislature in the same session to address the concerns raised by the Governor in his veto message for HB 7. 3 Id. The special session adjourned and no redistricting plans were enacted into law.

While the Legislature was still in special session, various parties filed suit in state and federal court over the lack of new congressional, senate, house, and other redistricting plans. Id. The lack of a valid house redistricting plan was tried in January 2002. See Jepsen v. Vigil-Giron, et al., Nos. D0101 CV 2001-02177, -02178 and 02179 (N.M. 1st Jud. Dist., filed September 13, 2001) (consolidated). In Jepsen, the parties presented six house-redistricting plans, including HB 7 and HB 3, to the district court for its consideration. Even though the Governor had vetoed HB 7 and HB 3, the court noted that neither he nor the Lieutenant Governor had submitted alternative plans for the court's consideration or endorsed any of the plans presented at the trial. 4 FOF No. 37. The Governor's position was that "the court should draw its own plan with a de minimis population deviation." FOF No. 38 (emphasis added).

The court expressly rejected the Governor's position for several reasons. Id. First, the court articulated certain principles that a court should follow when required to redistrict because the Legislature has failed to act, including looking to the last clear expression of state policy and not making radical or partisan changes to the current or proposed house redistricting plan unless required by law. 5 Second, the court believed:

it is appropriate that the Court give thoughtful consideration that HB3 and HB7 are plans developed through a process which reflects the will of the people, expressed through their elected representatives. That HB3 was a compromise plan, which attempted to balance the competing social, economic, geographic and racial interests, which comprise the state.

FOF No. 40. The court was satisfied that HB 3 had been drafted in conformance with certain criteria adopted through the legislative process and the state and federal

constitutions. FOF No. 11. The court concluded that "HB 3 in combination with the plans of the two Nations provides for fair and effective representation of the citizens of New Mexico in compliance with Federal and State Law, and neutral standards adopted by the Legislative Council." 6 COL No. 4. It further stated:

the *Legislative Plan* denominated "HB3," and submitted by Ben Lujan, Speaker of the House of Representatives and Richard Romero, President Pro Tempore of the New Mexico Senate, should be adopted as the redistricting plan for New Mexico's House of Representatives beginning for the 2002 primary and general elections . . . . .

See Final Judgment and Order Adopting New Mexico State House of Representatives Redistricting Plan entered on January 28, 2002 in Jepsen (emphasis added). The court therefore adopted HB 3, subject to certain modifications submitted by the Navajo and Jicarilla Apache Nations for the northwest corner of the plan, in large part because it was a plan drawn by the Legislature. See id.

The Jepsen court's reasoning for ordering the adoption of HB 3 is consistent with the well established principle that reapportionment is a legislative function, subject only to state and federal constitutional standards. Sánchez v. King, 550 F. Supp 13, 14 (D. N.M. 1982); see also Connor v. Finch, 431 U.S. 407 (1977) (a State Legislature is the institution best situated to identify and reconcile traditional state policies within the constitutionally mandated framework of substantial population equality). Judicial relief becomes appropriate only when a State Legislature fails to act, after having had an adequate opportunity to do so. Sánchez, 550 F. Supp. at 15 (citing Reynolds v. Sims, 377 U.S. at 586). The court further recognized that a lawful, legislatively-enacted plan will always be preferable to a court-drawn plan, as Article IV, § 3 vests redistricting responsibilities with the Legislature. Underlying this principle is the assumption that preference for a court-drawn plan to a legislature's replacement is contrary to the ordinary and proper operation of the political process. See League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2608-9 (2006) (Court's decisions have assumed that state legislatures are free to replace court-drawn congressional remedial plans with one of their own; federal constitution contains no explicit prohibition on middecade congressional redistricting).

Once the Legislature has enacted a valid redistricting plan in accordance with Article IV, § 3, no future act may be passed by it until the next regular apportionment period prescribed by the same constitutional provision. See In Re Below, 855 A.2d 459, 471 (N.H. 2004) (citation omitted) (once the legislature has fulfilled its constitutional obligation to reapportion based on the decennial census figures, it has no authority to make another reapportionment until the next federal census). Here, we note that while the current house-redistricting plan may be "court-ordered," it was not one drawn by the court. Rather, HB 3 was passed by both houses of the Legislature and, but for the Governor's veto, would have become the house of representatives redistricting plan following the 2001 special session.

We further note that after the court entered its final order in Jepsen and before the trial on the lack of a senate redistricting plan got under way, a senate subcommittee developed a compromise plan and introduced it during the 2002 Regular Session of the 45th Legislature. The Legislature passed the compromise plan and Governor Johnson signed it into law on March 5, 2002. This plan is codified at NMSA 1978, §§ 2-8D-1 through 2-8D-49 (2002). The house of representatives took no action to replace the Jepsen court-ordered plan with one of its own during this session. As a result, the statutes reflect the house redistricting plan passed in 2001 and ordered by the district court. See NMSA 1978, §2-7D-1 (2002). Effectively, therefore, we believe the Legislature has reapportioned its membership once since the 2000 census "by statute" and may not reapportion again until after publication of the official report of the 2010 census.

GARY K. KING  
Attorney General

SALLY MALAVÉ  
Assistant Attorney General

[1] The state constitution vests the legislative power "in a senate and house of representative which shall be designated the legislature of the state of New Mexico." N.M. Const. art. IV, § 1.

[2] The United States Supreme Court has recognized the legal fiction that decennial census figures remain accurate for the entire ten years between censuses. Georgia v. Ashcroft, 539 U.S. 461, 488 fn.2 (2003). Consequently, according to this legal fiction, when states create same-size districts that adhere to one-person, one-vote standards at the beginning of a decade, these districts remain constitutionally valid on equal population grounds until the next census, even though the states' populations actually shift and change in the intervening years. Id.

[3] Governor Johnson vetoed House Bill 7 on September 15, 2001. The Governor vetoed House Bill 3 on October 3, 2001, after the conclusion of the 2001 first special session.

[4] Citations to findings of fact ("FOF") and conclusions of law ("COL") are taken from the Court's Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting entered on January 24, 2002 in Jepsen v. Vigil-Giron, et al., Nos. D0101 CV 2001-02177, -02178 and 02179 (N.M. 1st Jud. Dist., filed September 13, 2001)(consolidated).

[5] Other principles considered by the court included:

- (a) Shift the population to bring New Mexico into compliance with the one-person one-vote requirement.

- (b) Insure the districts are compact and contiguous to the extent possible and keeping intact to the extent possible county and municipal boundaries.
- (c) Maintain percentages of effective Hispanic and Native American majority districts as in the existing plan subject to Voting Rights Act compliance.
- (d) Try to promote partisan fairness and political competition.

FOF No. 39 (internal citations omitted).

[6] During the course of the trial, the court found that the Legislature had failed to provide adequately for equal Native American electoral access in northwestern New Mexico. Therefore, after finding that the redistricting proposals submitted by the Navajo and Jicarilla Nations for certain districts in that part of the state offered the best remedy for the current plans' equal protection and Voting Rights Act violations, the court combined HB3 with the plans submitted by the two Nations. FOF Nos. 32-35.