

**OPINION
70-115**

October 22, 1970(OPINION)

Mr. Erwin H. Brendel
State's Attorney
Renville County

RE: Counties - Redistricting - Census Figures

This is in reply to your letter of October 15, 1970, with regard to county redistricting as same may affect your county.

Your letter states that you have three commissioner districts in the county and, of course, have every intention of complying with the statute. However, due to the fact that the 1970 census did not break down your county's population by township, it makes it difficult for obvious reasons. You suggest that our office has no doubt had other requests for guidance in this connection and that you would very much appreciate it if we would give you the benefit of our thinking as to how, under the circumstances, the county can be redistricted in strict compliance with the statute.

We recognize the scope of the problem that will effect, redistricting of your county. While, of course, the roots of the problem lie in the one man one vote rule, as established by various federal and other court decisions, we have apparently agreed with the implications of your letter, to the effect that the criteria for such redistricting under this chapter lies in population as determined by the federal decennial census. See xerox copy of opinion of this office of date July 30, 1969, enclosed herewith.

In view of the specific provisions of Chapter 11-07 of the 1969 Supplement to the North Dakota Century Code it would appear action on the matter is due in your county to be completed by December 31, 1971. That such action may probably include actual redistricting, would be indicated by the decision of the Supreme Court of this state in *State v. Cass County*, 158 N.W.2d. 687, which in a very detailed analysis of the situation declared all provisions of the then existent Chapter 11-07 to be constitutionally invalid. While we do not find specific criticism of the existent districting statutes such as Section 11-02-07 and 11-03-09 of the North Dakota Century Code in that decision the criteria applied to Chapter 11-07 would indicate that at least some possible constructions of these statutes would give an unconstitutionally erroneous result, as would, of course, changes in population subsequent to original redistricting. Assuming that following existent legislation would have given erroneous districting in the first instance, and that population change would not have cured such erroneous districting, actual redistricting would appear to be almost essential. Under the provisions of Section 11-07-02 of the 1969 Supplement to the North Dakota Century Code the redistricting board is required to make the necessary determination and to whether actual redistricting is necessary and if appropriate conduct the proceeding for such redistricting.

Under the provisions of said Section 11-07-02 the redistricting board is required to determine the average population per commissioner in the county, determined by dividing the total population of the county at the last federal decennial census by the number of commissioners' districts in the county. This can be easily done in your county's situation, from available information. They are apparently also required to determine if any one district in the county varies more than 10 percent from the average population per commissioner. While we would think the clear implication of this requirement is that this also be determined from the figures shown in the last federal decennial census, the statutory provision does not indicate in any specific terms that this variance is also to be determined from federal decennial figures. If in your instance there is no breakdown of federal decennial census figures as to population in units smaller than the county, quite obviously your board cannot arrive at this conclusion from federal decennial census figures. Federal decennial census figures should be considered authoritative with regard to smaller units, such as cities, enumeration districts, etc. In view of the fact that the statute does not in specific terms require that this determination of variance be made only from federal decennial census figures, the fact that there are no

federal decennial census figures, would not excuse the redistricting board from also making this determination.

In these circumstances, we would assume the redistricting board must make their determination as to the variance figure of figures from whatever evidence is available. Tax rolls, voting records, similar materials, school census, telephone directories, other censuses, other population figures, etc., might well tend to indicate variances, though the figure the board is required to arrive at in its final conclusions is not electors, or taxpayers, but is population which necessarily includes nonvoters such as persons under voting age, and nonproperty owning and taxpaying individuals. Perhaps individual witnesses could give testimony to the board as to actual population of the various commissioner's districts, or individual townships, or other units, though we do not believe the purpose or intent of the amended Chapter 11-07 is to require the redistricting board to conduct their own local census.

We recognize the difficult position this situation places the redistricting board of your county, in. Looking, however, to the basic purposes of Chapter 11-07 of the North Dakota Century Code as amended to date, we would assume that if the determination of the county redistricting board is made on the basis of all evidence that might be available to individuals who might wish to attack the validity of the county's redistricting and appropriate conclusions are made therefrom, the county's districting would probably not be subject or subjected to attack on the basis of such evidence.

We might also mention, of course, that the county does have the alternative of electing commissioners at large. This might well be a simpler solution to the entire problem, though the question of whether such a solution is desirable would depend on the situation of the county as recognized therein.

HELGI JOHANNESON
Attorney General