



# ELECTION INTEGRITY COMMISSION 2015 ANNUAL REPORT

January 2016

## ELECTION INTEGRITY COMMISSION MISSION STATEMENT

*To provide independent oversight of the County election process and to review and make recommendations to the Board regarding election information technology systems as well as technical and procedural matters.*

### **I. INTRODUCTION**

The Pima County Election Integrity Commission (EIC) was created on July 1, 2008 by Board of Supervisors' direction. The ten voting members are appointed in the following manner: One member appointed by each of the five sitting Board of Supervisors members for a total of five; one member appointed by the County Administrator; one member appointed by each political party with party recognition in Pima County for a total of four. In addition to the ten voting members, one non-voting *ex officio* staff member is appointed by Pima County.

The Election Integrity Commission posts schedules, agendas and minutes for all meetings on its website:

[www.pima.gov/commission/ElectionIntegrity.shtml](http://www.pima.gov/commission/ElectionIntegrity.shtml)

The Election Integrity Commission Annual report is a publication filed at the close of the calendar year. It is intended to keep Commission stakeholders, County executives/officials, and representatives apprised of important activities, election updates and other relevant information for those unable to attend monthly EIC meetings. The Annual Report will be distributed to the Board of Supervisors and Political Party officials via email, and posted on the EIC website.

## II. EIC MEMBERS

Members are appointed to a term of two years from the date ratified by the Board of Supervisors.

NAME	OFFICE	APPOINTING AUTHORITY	TERM EXPIRES
Bill Beard		BOS District 1	November 17, 2016
Jeffrey Rogers		BOS District 2	January 6, 2017
Tom Ryan	Chair	BOS District 3	July 31, 2016
Beth Borozan		BOS District 4	December 4, 2016
Barbara Tellman	Vice-Chair	BOS District 5	September 30, 2016
Arnold B. Urken		County Administrator	July 31, 2016
Brian Bickel		Democratic Party	May 7, 2017
Matt Smith		Green Party	February 28, 2016
Christopher D. Cole		Libertarian Party	May 14, 2017
Benny White		Republican Party	Resigned January 13, 2015
Karen Schutte		Republican Party	December 7, 2016
Brad Nelson		<i>Ex officio</i>	

## III. 2015 MEETING SCHEDULE

Meetings were held at the Herbert K. Abrams Building, 6550 South Country Club Road in Tucson on the following dates:

- Friday, January 23, 2015
- Friday, February 20, 2015
- Friday, March 20, 2015
- Friday, April 17, 2015
- Friday, May 15, 2015
- Friday, June 26, 2015
- Friday, July 17, 2015
- Friday, August 21, 2015
- Friday, September 25, 2015
- Friday, October 16, 2015
- Friday, November 20, 2015
- Friday, December 18, 2015

## IV. 2015 ELECTIONS CONDUCTED BY PIMA COUNTY

- May 19, 2015 City of South Tucson Recall Election
- November 3, 2015 Consolidated Election

## V. IMPORTANT ISSUES IN 2015

- Pima County's New Central Count System

The Pima County Elections Department replaced its aging election tabulation system with equipment and software from the vendor Election Systems and Software (ES&S), version EVS 5.2.0.0. Pima now has four central count ballot scanners (DS850 units) but has eliminated all of the polling-place scanners. Voters at polling places now drop their ballots into a box and all precinct-cast ballots are counted at central count on Election Night.

The new system was used for the first time in the November 2015 election that included countywide, municipal and school district questions. A total of 190,173 ballots were cast with 157,797 as early ballots (83%). Members of the Republican and Democratic parties conducted a hand count audit of a few randomly selected contests and precincts. The hand count results agreed with system results.

Although the new scanners are substantially faster and more reliable than their predecessors, problems arose in a couple of areas. First, the ballot feeding mechanism failed in one scanner, causing a number of ballots to be crumpled. Two other scanners also exhibited problems. Technicians from ES&S arrived on site and were able to repair the machines by upgrading drive belts and replacing other parts. At least 10 hours of scanning were lost due to these problems. In order to maintain warranty, the scanners must be serviced by ES&S technicians. Previously, staff did all the maintenance. Each time a repair is made, a logic and accuracy test must be run on the repaired machine, adding to the delay time.

Second, the process of saving ballot images turned out to be time consuming, causing long waits (~90 minutes) at the end of counting each day. In addition, the ballot images were causing the server disk to fill due to an incorrect partitioning of the storage drives. As a result, ballot image saving was turned off after storing approximately 90,000 ballot images. In discussions with the vendor, there are potential solutions to the image storage problem that are being pursued by Elections Department staff and the EIC.

Several EIC members observed counting of ballots on the new equipment. Although the equipment is capable of very high speed ballot counting, we observed that a small portion of the ballots, perhaps 10%, were not read on the first scan and had to be stacked up and run through the machines a second or third time. According to the vendor, this is most likely caused by indeterminate ballot marks or skewing of the ballot as it moves through the scanner. In addition, the ballot feeders occasionally pulled in too many ballots at once, causing the machine to jam. In this case, ballots had to be removed and the process restarted. These problems reduce the efficiency of the tabulation process. The advertised scanning rate is between 250 and 300 ballots per minute, depending on ballot size. The vendor provides a rough

estimate of 165 ballots per minute when ballot handling and paperwork tasks are included. One the EIC members estimated that the ballots were actually processed at an average rate of 7,700 ballots per hour using all four scanners. This figure translates to an average throughput of 32 ballots per minute per scanner, significantly lower than expected. The Elections Department staff and the EIC will be looking for ways to improve efficiency. Even with these problems, ballot processing was more efficient than it had been with the old system.

- Use of Ballot Images for Hand Count Audit

Arizona audits a random selection of both precinct-cast ballots and early ballots (mail-ins). Early ballots are more problematic to audit because they are not sorted by precinct or polling place, so it is not possible to hand count the early ballots from a given precinct. Instead, we select random batches of mixed-precinct early ballots as they are about to be scanned in central count. In order to determine the official vote count totals for these batches, we have to print before-batch and after-batch election summaries, hidden from view, that are then placed in a marked audit box containing the ballot batch. After Election Day, some of these batches are hand counted and compared to the difference between the after-batch and before-batch vote totals.

This process of selecting random batches and printing reports interrupts the flow of processing and might be avoided by using scanner images of early ballots, electronically sorted by precinct and printed. This would allow the auditing of early ballots to be more consistent with the audit of precinct-cast ballots.

The Commission issued a recommendation to the Board of Supervisors to conduct a pilot study that would evaluate the use of images for auditing. Unfortunately, the proposed pilot study is on hold because of problems that arose during the November election in which ballot images filled the server disk to such an extent that the saving of ballot images had to be suspended. This problem will need to be solved prior to initiating the proposed pilot study. In discussions with the system vendor, we think there may be a solution to this problem using image storage options that were not used in the November election.

- Hand Count Audit of Local Contested Races

The November election did not include any of the races that are specifically listed in ARS §16-602, the hand count statute. As a result, there was originally no plan to do any hand count auditing for this election. For several reasons, the Commission recommended that the hand counts be done for selected races (see Attachment 2). The County Attorney and County Administrator took the position that the proposed hand count would violate

state law (see Attachment 3). The Board agreed to the hand count subject to approval by the Attorney General. Both the Attorney General and Secretary of State concluded that there was no violation of state law to conduct a hand count that goes beyond the audit criteria specified in law (see Attachments 4 and 5). Both the City of Tucson and Oro Valley were invited to have their elections included in the hand count. The City of Tucson agreed to participate, but Oro Valley specified conditions that the County Attorney and the Elections Department could not accept and was therefore excluded from the hand count.

The hand count was conducted after the election for selected races and precincts as requested by the Commission. All the hand counts confirmed tabulation results provided by the ES&S system.

- Meetings with Arizona Secretary of State

Arizona Secretary of State Michelle Reagan and State Election Director Eric Spencer attended two EIC meetings in 2015. These meetings provided a forum for discussion on a variety of topics, including revisions to the *Elections Procedures Manual*, potential revisions to election law, policy on the use of ballot images, ballot “selfies,” vendor warranties, the possibility of Election Integrity Commissions in other counties, uniformity in election reporting, funding for the Presidential Preference Election, and certification requirements for election equipment.

The Secretary of State had promised a series of public meetings to discuss potential changes to the *Election Procedures Manual*, but these meetings never took place. The Secretary of State and the State Elections Director have also provided very little information regarding their plans for changes to election law, despite requests from the EIC. They did express interest in revising ARS §16-602, the hand count law, with the goal of simplifying the language. EIC members have been asked to make recommendations.

- Compliance with Arizona’s Open Meeting Laws

The Election Integrity Commission has adopted a policy of yearly refresher training on Arizona’s Open Meeting Laws for all Commission members during a regularly scheduled meeting. This training was conducted by the Pima County Attorney’s office on April 17, 2015.

## **VI. RECOMMENDATIONS TO PIMA COUNTY BOARD OF SUPERVISORS**

1. April 17, 2015: Memo to the Board recommending that the Board direct the Elections Department to conduct a Pilot Study on the use of ballot images to enhance the integrity of post-election hand count audits. (See Attachment 1)

The Board received the recommendation but the recommendation has not yet been brought forward for discussion and/or vote at a public meeting due to issues with the storage of ballot images on the new central count system.

2. September 28, 2015: Memo to the Board recommending a hand count audit of the November 3, 2015 Consolidated Election. (See Attachment 2) The recommendation was unanimously approved contingent upon opinions by the Arizona Attorney General and the Arizona Secretary of State.

## **VII. INPUT FROM PUBLIC**

While not a requirement under Arizona's Open Meeting Laws, the Election Integrity Commission follows best practices by allowing members of the public to address the Commission during the Call to the Public segment of meetings. To accommodate a request made by some members of the public, the EIC moved the Call to the Public from the end of each meeting to closer to the beginning. In 2015, the EIC heard from a variety of speakers from the public:

- October 16, 2015: An email from the public was read aloud, commending the Commission for the recommendation for the hand count audit of the November 3, 2015 Consolidated Election.
- November 20, 2015: Speakers were heard concerning the Commission's recommendation for a hand count audit of the November 3, 2015 Consolidated Election, and the County's response to the recommendation.

EIC members are prohibited by Arizona's Open Meeting Laws from responding substantially to speakers' issues unless they are noticed on the meeting agenda. However, the Commission encourages public attendance and participation.

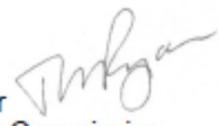
## **VIII. ATTACHMENTS**

- Attachment 1: April 17, 2015 Memo to the Board recommending Ballot Image Pilot Study
- Attachment 2: September 28, 2015 Memo to the Board recommending Hand Count Audit of local races
- Attachment 3: October 8, 2015 County Administrator's opinion to the Board suggesting the hand count of local races would violate state law. Also included are his letters to Attorney General's Office and Secretary of State's Office on Hand Count Audit of local races
- Attachment 4: October 19, 2015 Opinion from Attorney General's Office on Hand Count Audit of local races

Attachment 5: October 19, 2015 Opinion from Secretary of State's Office on Hand Count Audit of local races

**ELECTION INTEGRITY COMMISSION**

Pima County, Arizona

TO: Honorable Chair and Members  
Pima County Board of SupervisorsFROM: Tom Ryan, Chair   
Election Integrity Commission

DATE: April 17, 2015

RE: Recommendation to Use Ballot Images to Enhance Early Ballot Audit

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The Pima County Election Integrity Commission (EIC) recommends that the Board direct the County Elections Department to conduct a **Pilot Study** on the use of ballot images to enhance the integrity of the post-election hand count for early ballots. Ballot images will be available in future elections with the recently purchased central count tabulation equipment. This will make it possible to hand count early ballots from selected precincts in the same manner as the hand count of precinct-cast ballots. Ideally, the pilot study would be conducted as part of a relatively uncomplicated election such as the 2016 Presidential Preference Election in which there is a small number of races and ballot styles.

**Why? The Current Early Ballot Audit is Insufficient.**

The existing procedure for hand count of early (mailed) ballots differs significantly from that of precinct-cast ballots. For precinct-cast ballots, the audit is "end-to-end," meaning that the hand count tally for the audited races can be compared to figures that appear in the final canvass, or Statement of Votes Cast. In contrast, the hand count of early ballots, which make up more than 70% of the ballots, is done on batches of mixed-precinct ballots and produces tallies that do not appear in any official election results. The result is that the existing early ballot audit only confirms that ballot batches are correctly scanned, but all subsequent data processing, including accumulation of batch totals, sorting and reporting of results, is ignored and remains unaudited. This is a significant shortcoming. The pilot study will evaluate a procedure that would make the early ballot audit equivalent to the precinct-cast ballot audit.

**How? Our New Tabulation Equipment Provides the Technology to Improve Our Election Audits.**

The recently purchased ES&S central count tabulation system includes the capability to create digital images of each and every paper ballot. Once all the ballots are scanned, the database of ballot images can be sorted, by software, into precincts or voting areas. The ballot images associated with selected precincts can then be printed. These printed images can then serve as proxies for the actual paper ballots and can be hand counted in the same manner currently used for the precinct-cast ballots. In order to conduct the same type of audit with actual paper ballots, the ballots would have to be physically sorted by precinct, a labor-intensive job that election officials have been unwilling to do. The ballot images make it possible to avoid physical sorting.

Honorable Chair and Members  
Pima County Board of Supervisors  
April 17, 2015  
Page 2

### **What? A Pilot Study to Evaluate the Use of Digital Images of Ballots in Election Auditing**

The Commission recommends the implementation of a pilot study that will use digital images of ballots as input to the hand count of early ballots. For the study, this would be done in addition to the existing procedures specified in A.R.S. §16-602. The study will produce a report that will contain recommendations as to the efficacy of the approach. Our hope is that the use of ballot images can eventually replace the current early ballot batch method that requires interruption of the central count process to select random audit batches. It may even be possible that all of the auditing could be done with ballot images.

### **Cost? Minimal**

The cost for the pilot study is only the cost of printing the ballot images for a few precincts. The paid hand counters will require some additional time for the study, but since they receive a flat daily rate of pay, there will be no additional cost to the County for their labor. We also recommend conducting the pilot study during a relatively simple election, such as the Presidential Preference Election, in which there is a small number of races and a small number of ballot styles. This will keep the auditing time to a minimum.

### **Better Audits and Less Handling of Paper Ballots**

If the study is successful, the Commission will recommend a change in state law that would explicitly allow the use of ballot images in election hand counts *as an option* to the current methods specified in statute. Any county with the enabling technology could take advantage of the option to use digital images for auditing. We do not believe that there are any legal barriers to this pilot study. It is simply an enhancement of the existing audit process, and Pima County already goes beyond the legal requirements and enhances the audit by adding additional precincts to the hand count. Eventually, the use of ballot images for auditing will reduce or eliminate ballot handling and chain of custody concerns associated with the hand count audit.

### **Summary**

The proposed use of ballot images for auditing has three potential benefits:

- The early ballot audit will be end-to-end, consistent with the audit of precinct-cast ballots.
- The selection of random early ballot batches, which occurs as early ballots are scanned, could eventually be eliminated.
- Conducting hand counts with printed images would eliminate additional handling of paper ballots currently required to support audits.

A pilot study is needed to validate the efficacy of the proposed auditing process, and identify any potential roadblocks. The EIC sincerely hopes that the Board will accept this recommendation.

ATTACHMENT 2

**ELECTION INTEGRITY COMMISSION**  
Pima County, Arizona

TO: Honorable Sharon Bronson, Chair  
Pima County Board of Supervisors

FROM: Tom Ryan, Chair   
Election Integrity Commission

DATE: September 28, 2015

RE: Recommendation for Hand Count Audit Following November County Bond  
and City Election

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The upcoming November 3 election, to be conducted by Pima County Elections, combines county bond issues with City of Tucson Mayor and council races and city propositions. Currently there is no plan to do a post-election hand count for any of these issues and races since the state law on hand count audits for elections does not apply to non-partisan and local elections.

The Pima County Election Integrity Commission recommends, by a unanimous vote, that a post-election hand count be performed for this election. The Commission recommends this hand count audit for three reasons:

1. Pima County has recently purchased new election equipment and this is the first election that will employ that equipment. Since we have no track record with this equipment, we need to establish the integrity of the tabulation process. This will also provide a better opportunity to become familiar with the new system and its peculiarities.
2. The proposed hand count is consistent with the City of Tucson's standard practice of doing a limited hand count for their elections. The City conducted a hand count for the primary election.
3. We wish to avoid or at least reduce the likelihood of expensive legal proceedings that might arise from distrust of the election system. We recall the cases arising from the 2006 RTA bond election and do not wish a recurrence.

There is nothing in state law to preclude the County from doing a voluntary hand count.

The hand count we recommend would follow the prescription provided in state law and the Secretary of State's Election Procedures Manual, modified as needed for this election's unique circumstances. In this case we would hand count one bond issue, one city council race, and one city proposition, selected randomly. The selected races would be hand counted for ballots cast in 4% of the precincts (about 8) and 1% of the early ballots selected randomly in the manner used in previous elections. As with regular audited elections, the hand count will occur only if a sufficient number of volunteers are available. These hand counters will be paid the usual stipend of \$75. The total cost has been estimated at \$4,500.

Please add this topic to the agenda for the October 6, 2015 Board meeting for discussion and action.

cc: Chuck Huckelberry, Pima County Administrator  
Robin Brigode, Clerk of the Board  
Roger Randolph, City Clerk



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# MEMORANDUM

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Date: October 8, 2015

To: The Honorable Chair and Members  
Pima County Board of Supervisors

From: C.H. Huckelberry  
County Administrator *CHH*

Re: **Hand Count Audit - November 3, 2015 Election Results for the Pima County Bond Propositions**

As directed by the Board of Supervisors, I have asked that Arizona Attorney General Mark Brnovich provide clarification of State law regarding a hand count audit of the November 3, 2015 County Bond Election (Attachment 1). I have corresponded with the Arizona Secretary of State regarding this same subject (Attachment 2).

These letters request timely clarification regarding whether conducting a hand count audit of County bond election results would be a violation of State law and subject county officials to criminal penalties if conducted. As can be seen in the letter to Mr. Brnovich, I have attached a previous County Attorney Legal Opinion regarding same that indicates such is, in their opinion, precluded. This opinion dates from 2008 therefore this is not a new issue.

I have asked the County Attorney and the Clerk of the Board to place this item on the October 20, 2015 Board of Supervisors agenda, since that is the last Board meeting to occur before the November 3, 2015 election and will be the last opportunity to provide direction to staff on conducting a hand count audit of the County bond election results.

Staff would like to proceed with a hand count audit; however, we do not wish to subject the Board to a violation of State law and associated exposure to criminal penalties.

I do not recommend a hand count audit of the County bond election results unless it is clear the Board and the County will not be subject to prosecution and/or penalties for any violation of State law.

CHH/anc

#### Attachments

c: Thomas Weaver, Chief Civil Deputy County Attorney  
Ellen Wheeler, Assistant County Administrator  
Brad Nelson, Director, Elections Department  
Chair and Members Election Integrity Commission

**COUNTY ADMINISTRATOR'S OFFICE**

PIMA COUNTY GOVERNMENTAL CENTER  
130 W. CONGRESS, FLOOR 10, TUCSON, AZ 85701-1317  
(520) 724-8661 FAX (520) 724-8171

C.H. HUCKELBERRY  
County Administrator

October 6, 2015

The Honorable Mark Brnovich  
Arizona Attorney General  
1275 W. Washington Street  
Phoenix, Arizona 85701-1367

**Re: Request for Legal Opinion Regarding Hand Count of Local Elections**

Dear General Brnovich:

The Pima County Board of Supervisors met today and requested an opinion from the Attorney General regarding the permissibility of a hand count audit of the County's November 3, 2015 Bond Election, as well as mayor and council races for the City of Tucson (a charter city) and the Town of Oro Valley recall election. If the County were to conduct this hand count, would Pima County be in violation of A.R.S. § 16-602(B)(2)(f)? That statute states in part:

*"If there are no contested races as prescribed by this paragraph, a hand count shall not be conducted for that precinct for that election."*

As you know, Pima County is not a charter county. We are a political subdivision and as such can take only those actions authorized by State law. See attached Pima County Attorney Opinion 08-03. A.R.S. § 16-602(B) and the referenced procedures established by the Secretary of State are silent regarding conducting a hand for local elections; however, a reading of Paragraph F cited above could be construed to preclude such. A violation of this section of State law could constitute a Class 6 felony, A.R.S. § 16-1010, and a violation of the Arizona Elections Procedures Manual could constitute a Class 2 misdemeanor, A.R.S. § 16-452(C). Accordingly, we will not proceed with a hand count audit of the local elections without guidance from your office.

The Honorable Mark Brnovich  
Re: Request for Legal Opinion Regarding Hand Count of Local Elections  
October 6, 2015  
Page 2

We have also requested guidance from the Arizona Secretary of State concerning the Arizona Elections Procedures Manual. The Arizona Elections Procedures Manual also appears silent on such and prescribes hand count audits only for national or state elections, not local elections. Ariz. Sec'y of State, *Arizona Elections Procedures Manual*, at 189 (2014). However, it also states, "If there are no contested races in any of the designated categories, no hand count will take place." *Id.* at 193.

Pima County has an Election Integrity Commission (EIC), and the EIC's recommendation to the Board of Supervisors is attached for your information. We are in agreement with the EIC recommendation, provided we can conduct such a hand count audit without violating State law. Our elected officials need to be sure they will not be prosecuted for a hand count audit of the local elections.

We ask for your expedited review of this matter so we may plan for the hand count audit following the November 3, 2015 election.

Sincerely,



C.H. Huckelberry  
County Administrator

CHH/anc

Enclosure

c: The Honorable Chair and Members, Pima County Board of Supervisors  
The Honorable Barbara LaWall, Pima County Attorney  
Thomas Weaver, Chief Civil Deputy Pima County Attorney  
Chair and Members, Pima County Election Integrity Commission



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**Civil Division**  
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**Barbara LaWall**  
 PIMA COUNTY ATTORNEY

**OPINION NO. 08-03**

To: C.H. Huckelberry, County Administrator

From: Christopher Straub, Chief Civil Deputy County Attorney  
 Daniel Jurkowitz, Deputy County Attorney

Date: October 24, 2008

Subject: *Hand Count Audit Requirements.*

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Arizona counties use computerized elections systems for counting ballots. In 2006, the Legislature amended A.R.S. § 16-602 to establish a hand count audit procedure "[f]or each countywide primary, general and presidential preference election" to ensure the integrity of the electronic vote tabulating process. 2006 Ariz. Sess. Laws, ch. 394, § 5. You have asked six specific questions relating to the hand count audit of election results authorized by A.R.S. § 16-602. This Opinion will set forth each of your questions and the answers thereto in the order you have presented them.

**1. Can local contested races be subject to the hand count audit, for example, contested races for the Board of Supervisors or any other local office that may be on the General Election Ballot?**

The hand count audit procedures are set forth in detail in A.R.S. § 16-602. Subsection (C)(2) of that statute specifies the races that are subject to the hand count audit:

2. The races to be counted on the ballots from the precincts that were selected pursuant to paragraph 1 of this subsection for each primary and general election shall include up to five contested races. After the county recorder or other officer in charge of elections separates the primary ballots by political party, the races to be counted shall be determined by selecting by lot without the use of a computer from those ballots as follows:

- (a) For a general election, one statewide ballot measure, unless there are no measures on the ballot.
- (b) One contested statewide race for statewide office.

(c) One contested race for federal office, either United States senate or United States House of Representatives. If the United States House of Representatives race is selected, the names of the candidates may vary among the sampled precincts.

(d) One contested race for state legislative office, either state house of representatives or state senate. In either case, the names of the candidates may vary among the sampled precincts.

(e) If there are fewer than four contested races resulting from the selections made pursuant to subdivisions (a) through (d) and if there are additional contested federal, statewide or legislative races or ballot measures, additional contested races shall be selected by lot not using a computer until four races have been selected or until no additional contested federal, statewide or legislative races or ballot measures are available for selection.

(f) If there are no contested races as prescribed by this paragraph, a hand count shall not be conducted for that precinct for that election.

In addition to the four races described above, Subsection (C)(5) states: “[i]n elections in which there are candidates for president, the presidential race shall be added to the four categories of hand counted races.”

Generally, “[t]he only powers possessed by boards of supervisors are those expressly conferred by statute or necessarily implied therefrom.” *Bd. of Supervisors of Apache County v. Udall*, 38 Ariz. 497, 506, 1 P.2d 343, 347 (1931); *Hounshell v. White*, 522 Ariz. Adv. Rep. 27, ¶ 19, 175 P.3d 65, 69 (App. 2008). This is particularly true regarding election matters. See *Barrera v. Superior Court*, 117 Ariz. 528, 573 P.2d 923 (App. 1977) (There is no authority to recount an election absent a specific statute authorizing such recount.)

In this case, there is no express statutory authority enabling the Board of Supervisors to audit a local race, nor is there anything to indicate that this might be an implied power. Rather, the Legislature’s decision to include in A.R.S. § 16-602 only certain specific races demonstrates the Legislature’s intent to exclude all other races from the hand count audit. *In re Estate of Agans*, 196 Ariz. 367, 370, ¶ 16, 998 P.2d 449, 452 (App. 1999). (“[t]he expression of one or more items in a class generally indicates an intent to exclude all items of the same class that are not expressed.”) Here the Legislature’s intent to exclude local races is reinforced by the prohibition in Subsection (C)(2)(f) on hand counts for a particular precinct “[i]f there are no contested races as prescribed by this paragraph.” (Emphasis added.)

Pursuant to A.R.S. § 16-452(A),<sup>1</sup> the Secretary of State has adopted an Election

<sup>1</sup> This statute reads in pertinent part: “A. After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the

Procedures Manual ("the Manual") which has been approved by the Governor and the Attorney General pursuant to A.R.S. § 16-452(B). Failure to comply with the Manual is a class 2 misdemeanor. A.R.S. § 16-452(C). The Manual provides additional detail regarding the manner in which the hand count audit is to be performed. Pages 217-242 of the Manual describe the selection of races to be hand counted from the randomly selected precincts. The Manual specifically provides:

**"1. Determine the race categories available for this election.** The possible race categories shall be Presidential Elector, Statewide Candidate, Federal Candidate, State Legislative, and Ballot Measure."

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 221 (Oct. 2007) (emphasis supplied).

The Secretary of State's interpretation would be entitled to deference by a court. See *Kahn v. Thompson*, 185 Ariz. 408, 916 P.2d 1124 (App. 1995) (the interpretation given to a statute by the officers charged with its implementation should be given great weight and deference). Therefore, local races are not included in the possible race categories for a hand count audit.

Arizona is a "covered jurisdiction" under Section 5 of the federal Voting Rights Act. A change to any "...practice or procedure with respect to voting..." first must be "precleared" by the U.S. Department of Justice under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c. A change would specifically include any change concerning counting of votes or in the method of determining the outcome of an election. 28 C.F.R. § 51.13 (2008).<sup>2</sup> Both A.R.S. § 16-602 and the Manual have already been submitted to and precleared by the Department of Justice. Because the results of a hand count audit could constitute the official count for a race, A.R.S. § 16-602(F), any change to the existing hand count procedure as specified in either statute or in the Manual would require additional preclearance from the Department of Justice.

- 2. What [is] the proper number of precincts to be audited, and can the Board of Supervisors, by administrative directive or approved motion, require that twice the number of precincts allowed by state law be subject to hand count audit?**

"At least two per cent of the precincts in that county..." shall be subject to the hand count

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maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots . . . .

B. Such rules shall be prescribed in an official instructions and procedures manual to be issued not later than thirty days prior to each election. Prior to its issuance, the manual shall be approved by the governor and the attorney general. . . .

C. A person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor."

<sup>2</sup> Violations of the Voting Rights Act are enforceable by the U.S. Attorney General and may result in both civil and criminal sanctions. 42 U.S.C. § 1973j.

audit. A.R.S. § 16-602(C)(1). Two per cent is the minimum number of precincts that must be audited. The Board of Supervisors, however, has authority to audit more than two percent of precincts and could require that four per cent of precincts be audited in the hand count.

The Board of Supervisors, pursuant to A.R.S. § 16-411, has established 417 precincts in Pima County. Two percent of 417 would be 8.34 and four percent would equal 16.68. The Secretary of State's Election Procedures Manual states:

At least two per cent of the precincts in the county...shall be selected at random from a lot consisting of every precinct in that county. A county shall round to the nearest whole number for the number of precincts to hand count.

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 219 (Oct. 2007).

Applying this provision of the Manual to Pima County's 417 established precincts yields the following results: two percent of the precincts equal 8 precincts and four percent of precincts equal 17.

The Manual, however, further provides:

For any election where there are consolidated polling locations, the amount of precincts to hand count will be based on the number of active polling locations for that election. . . . Precincts without any registered voters shall be excluded from the pool of available precincts in the county.

*Id.* at 219-220. While there are 417 designated precincts in Pima County, there is one precinct without registered voters and only 373 actual polling locations. Two per cent of the resulting number is 7.44. Rounding to the nearest whole number, the Secretary of State would require that the County audit at least 7 precincts, but the County could choose to audit more. In fact, the Board of Supervisors has decided that four percent of precincts shall be audited for each election. This being the case, 15 precincts would be subject to the hand count audit.

Because the number of polling locations in Pima County is less than the number of precincts, the number of precincts to be audited will be different depending upon whether the dictates of A.R.S. § 16-602(C)(1) are followed or whether the Manual's directives are followed. The officer in charge of elections could rely on the statute alone in calculating the minimum number of precincts to audit because the County can always choose to audit more than the minimum number of precincts, regardless of how that number is calculated. Using the lower minimum number of precincts as required by the Manual, however, makes it more likely that a hand count audit will go forward. This is because it is more likely that the resulting lower number of necessary Hand Count Board members, as discussed in the next section of this Opinion, will in fact "arrive to perform the hand count," A.R.S. § 16-602(C)(7). It would also eliminate the possibility of selecting precincts with no voters.

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<sup>3</sup> On July 1, 2008, the Board of Supervisors approved the County Administrator's recommendation to "double the number of precincts for hand counting verification over the minimum prescribed by law."

3. **What specific number of Party designated hand count auditors are required to conduct the hand count audit for precincts selected, and does the law prohibit the discretion of the Parties regarding conducting the hand count audit with fewer Party representatives than specified, even though there is agreement and consensus among the Parties to conduct the audit?**
4. **If the specified number of party observers fail[s] to appear for the hand count audit, can the hand count audit be conducted?**

These questions concern the same subject matter and therefore merit a single response. The minimum number of hand count auditors required to complete the hand count audit is set forth in A.R.S. § 16-602(C)(7) which states in pertinent part:

For each precinct that is to be audited, the county chairmen shall designate at least two board workers... If there are less than two persons for each audited precinct available to participate on behalf of each recognized political party, the recorder or officer in charge of elections, with the approval of at least two county party chairpersons in the county in which the shortfall occurs, shall substitute additional individual electors who are provided by any political party from anywhere in the state without regard to party designation to conduct the hand count... If the total number of board workers provided by all parties is less than four times the number of precincts to be audited, the recorder or officer in charge of elections shall notify the parties of the shortage by 9:00 a.m. on the Wednesday preceding the election. The hand count shall not proceed unless the political parties provide the recorder or officer in charge of elections, in writing, a sufficient number of persons by 5:00 p.m. on the Thursday preceding the election and a sufficient number of persons, pursuant to § 16-602, subsection C, paragraph 7, arrive to perform the hand count.

The Manual similarly provides:

For each precinct that is to be audited, the County Political Party Chairmen shall designate in writing at least two Hand Count Board members to the County Officer no later than 5:00 p.m. on the Tuesday preceding the election. The County Political Party Chairman shall also designate an appropriate number of alternative Hand Count Board members.

If the total number of Hand Count Board members provided on the lists from all the County Political Party Chairmen is less than four times the number of precincts to be audited, the Election Official shall notify the parties of the shortage by 9:00 a.m. on the Wednesday preceding the election.

The hand count shall not proceed unless the political parties provide the County Officer, in writing, a sufficient number of persons by 5:00 p.m. on the Thursday preceding the election.

The hand count may not proceed unless the County Political Party Chairmen from two different recognized political parties participate in the hand count. For the hand count to proceed, no more than 75 per cent of the persons performing the hand count shall be from the same political party.

\* \* \*

If less than four Hand Count Board members per precinct fail to appear to perform the Precinct Hand Count and Early Ballot Audit, no hand count will be conducted and the electronic tabulation is deemed the official count. [A.R.S. § 16-602(C)].

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 226 – 227 (Oct. 2007).

Therefore, according to both the applicable statute and the Manual, the minimum number of hand count auditors must equal four times the number of precincts to be audited. Moreover, the hand count audit cannot proceed absent the minimum number of hand count auditors prescribed by both the statute and the Manual.

With one possible exception, these mandates may not be altered by agreement of the political parties. As previously noted in response to Question 1, there is no authority allowing the officer in charge of elections to deviate from the statutory scheme, particularly with respect to the counting of ballots. *Barrera v. Superior Court*, 117 Ariz. 528, 573 P.2d 923 (App. 1977).<sup>4</sup> And, we are unaware of any attempt by the Division of Elections to obtain preclearance from the Department of Justice under Section 5 of the Voting Rights Act for any alternative procedures with respect to the hand count audit.

The only exception to this rule would be in those cases where the Board of Supervisors has authorized *more* than two per cent of precincts to be audited, but only a number of hand count auditors equal to at least four times the number of those required to audit two percent of precincts “arrive to perform the hand count.” A.R.S. § 16-602(C)(7). This is because A.R.S. § 16-602(C), read in its entirety, appears to mandate that a hand count of two percent of precincts must go forward if the minimum prerequisites are met.

**5. Can other precincts be selected for hand counting after the drawing of selected precincts if those precincts are found to have some form of defect such as a seal that has been changed or does not match other documentation?**

<sup>4</sup> It should also be noted that a failure to comply with elections statutes subjects the officer in charge of elections to potential criminal penalties. See, e.g., A.R.S. §§ 16-452(C) (violation of a rule contained in the Secretary of State’s procedures manual constitutes a class 2 misdemeanor), 16-1009 (knowingly failing to perform a duty in the manner prescribed by law constitutes a class 3 misdemeanor), 16-1010 (knowingly failing to perform a duty or violating a provision of election law constitutes a class 6 felony unless a different punishment for such act is prescribed by law).

The manner in which precincts are to be selected for the hand count audit is set forth in A.R.S. § 16-602(C)(1) which states:

1. At least two per cent of the precincts in that county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in that county. The county political party chairman for each political party that is entitled to continued representation on the state ballot or the chairman's designee shall conduct the selection of the precincts to be hand counted. The precincts shall be selected by lot without the use of a computer, and the order of selection by the county political party chairmen shall also be by lot. The selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center. The unofficial vote totals from all precincts shall be made public before selecting the precincts to be hand counted. Only the ballots cast in the polling places and ballots from direct recording electronic machines shall be included in the hand counts conducted pursuant to this section. Provisional ballots, conditional provisional ballots and write-in votes shall not be included in the hand counts and the early ballots shall be grouped separately by the officer in charge of elections for purposes of a separate manual audit pursuant to subsection G of this section. (Emphasis added.)

The Manual similarly provides:

The County Political Party Chairmen shall conduct the selection of the precincts to be hand counted. *The precincts shall be selected by lot* without the use of a computer and the order of selection by the County Political Party Chairmen shall also be by lot. The County Officer and the County Political Party Chairmen shall agree to the lot method.

The selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center. The unofficial vote totals from all precincts shall be made public before selecting the precincts to be hand counted. The selection of precincts shall occur prior to the selection of the races to be counted.

At least two percent of the precincts in the county or two precincts, whichever is greater, shall be selected at random from a lot consisting of every precinct in that county. A county shall round to the nearest whole number for the number of precincts to hand count.

For any election where there are consolidated polling locations, the amount of precincts to hand count will be based on the number of active polling locations for that election.

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 219 (Oct. 2007) (emphasis added).

The specified procedure for selecting precincts is as follows:

The process for selecting the precincts for Primary and General Elections is:

1. **Determine Selection Order.** Select by lot the order in which the County Political Party Chairman shall choose. The selection order will apply for the entire hand count process.
2. **Create Lot.** Create a lot containing all precincts.
3. **Select Precincts.** Draw the required two per cent or two precincts to be counted *among a lot containing every precinct in the county*. Precincts without any registered voters shall be excluded from the pool of available precincts in the county. The County Political Party Chairmen shall alternate selecting precincts based on the order defined in step one from the lot until the required number of precincts is selected.
4. **Record Precincts.** The County Officer shall record the precincts to be hand counted in Section A of the Master Precinct and Race Selection Worksheet. The precincts shall be listed in order selected. The order of the precincts shall be used when selecting the contested races in section VI of this procedure.

ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 219-220 (Oct. 2007)  
(emphasis added.)

As the emphasized language indicates, every eligible precinct must be included in the lot of precincts subject to the random selection. If the Legislature had intended a different result, it could have specifically provided that precincts with certain anomalies would not be included in the hand count audit. The fact that such exclusions do not appear in the statute is consistent with the Legislature's intent to ensure the ballots from all precincts are subject to random inspection. Otherwise, the very purpose of the random audit might be defeated because those persons intent on tampering with election results would have an incentive to cause the disqualifying anomalies in certain precincts, thereby preventing the hand counting of ballots cast in those precincts.

6. **What is the authority of the Elections Director to conduct the hand count process and maintain order and control of the process to ensure that it is accomplished in an accurate manner?**

The officer in charge of elections, currently in Pima County the Elections Director, has authority to "...prohibit persons from participating in the hand count if they are taking actions to disrupt the count or are unable to perform the duties as assigned." A.R.S. § 16-602(C)(7). The Secretary of State's Election Procedures Manual expands this authority:

The County Officer has the right to remove any Hand Count Board member they deem to be disruptive to the hand count process. The County Officer may prohibit persons from participating in the hand count if they are taking actions to disrupt the count or are unable to perform the duties as assigned.

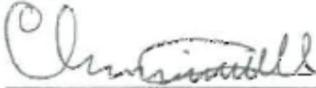
ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 227 (Oct. 2007).

**Conclusion.**

The questions you have presented have been clearly addressed in the statutes and in the Secretary of State's Election Procedures Manual. It is the unambiguous intent of the Legislature that elections are to be conducted with "the maximum degree of correctness, impartiality, uniformity and efficiency." See, e.g., A.R.S. §16-452(A). Deviation from the statutes and the Manual, for whatever reason, that contravene that intent or that result in procedures that have not been precleared by the Department of Justice are generally impermissible.

Please let us know if you have any additional questions or concerns regarding this matter.

Respectfully,



Christopher Straub  
Chief Civil Deputy County Attorney



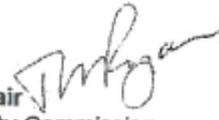
Daniel Furkowitz  
Deputy County Attorney

cc: Barbara LaWall, Pima County Attorney  
Amelia Cramer, Chief Deputy County Attorney  
Brad Nelson, Director, Division of Elections

**ELECTION INTEGRITY COMMISSION**  
Pima County, Arizona

**TO:** Honorable Sharon Bronson, Chair  
Pima County Board of Supervisors

**FROM:** Tom Ryan, Chair  
Election Integrity Commission



**DATE:** September 28, 2015

**RE:** Recommendation for Hand Count Audit Following November County Bond and City Election

The upcoming November 3 election, to be conducted by Pima County Elections, combines county bond issues with City of Tucson Mayor and council races and city propositions. Currently there is no plan to do a post-election hand count for any of these issues and races since the state law on hand count audits for elections does not apply to non-partisan and local elections.

The Pima County Election Integrity Commission recommends, by a unanimous vote, that a post-election hand count be performed for this election. The Commission recommends this hand count audit for three reasons:

1. Pima County has recently purchased new election equipment and this is the first election that will employ that equipment. Since we have no track record with this equipment, we need to establish the integrity of the tabulation process. This will also provide a better opportunity to become familiar with the new system and its peculiarities.
2. The proposed hand count is consistent with the City of Tucson's standard practice of doing a limited hand count for their elections. The City conducted a hand count for the primary election.
3. We wish to avoid or at least reduce the likelihood of expensive legal proceedings that might arise from distrust of the election system. We recall the cases arising from the 2006 RTA bond election and do not wish a recurrence.

There is nothing in state law to preclude the County from doing a voluntary hand count.

The hand count we recommend would follow the prescription provided in state law and the Secretary of State's Election Procedures Manual, modified as needed for this election's unique circumstances. In this case we would hand count one bond issue, one city council race, and one city proposition, selected randomly. The selected races would be hand counted for ballots cast in 4% of the precincts (about 8) and 1% of the early ballots selected randomly in the manner used in previous elections. As with regular audited elections, the hand count will occur only if a sufficient number of volunteers are available. These hand counters will be paid the usual stipend of \$75. The total cost has been estimated at \$4,500.

Please add this topic to the agenda for the October 6, 2015 Board meeting for discussion and action.

cc: Chuck Huckelberry, Pima County Administrator  
Robin Brigode, Clerk of the Board  
Roger Randolph, City Clerk

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**COUNTY ADMINISTRATOR'S OFFICE**

PIMA COUNTY GOVERNMENTAL CENTER  
130 W. CONGRESS, FLOOR 10, TUCSON, AZ 85701-1317  
(520) 724-8661 FAX (520) 724-8171

C.H. HUCKELBERRY  
County Administrator

October 6, 2015

The Honorable Michele Reagan  
Arizona Secretary of State  
1700 W. Washington Street, Floor 7  
Phoenix, Arizona 85007

**Re: Request for Legal Opinion Regarding Hand Count of Local Elections**

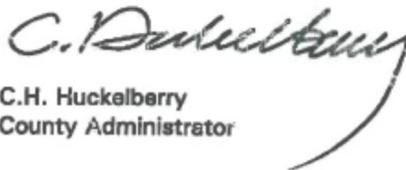
Dear Secretary Reagan:

Please find enclosed my October 6, 2015 request of Attorney General Mark Brnovich for a legal opinion regarding the permissibility of a hand count of local elections.

The Pima County Board of Supervisors is also requesting your office's review and guidance regarding this subject, as the Arizona Elections Procedures Manual prescribes hand count audits only for national or state elections, not local elections.

We would appreciate receiving your guidance as soon as possible to facilitate planning for a hand count audit.

Sincerely,



C.H. Huckelberry  
County Administrator

CHH/mjk

Enclosure



## OFFICE OF THE ARIZONA ATTORNEY GENERAL

October 19, 2015

C.H. Huckelberry  
County Administrator  
Pima County Governmental Center  
130 W. Congress, Floor 10  
Tucson, AZ 85701-1317

Dear Mr. Huckelberry,

You requested a formal opinion from this Office, asking whether it would violate A.R.S. § 16-602(B)(2)(f) to conduct a hand count of Pima County's November 3, 2015 bond election, the City of Tucson's mayor and city council elections, and the Town of Oro Valley's recall election. As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. We understand time is of the essence regarding your request, at least in part because the Pima County Board of Supervisors is holding its final pre-election meeting this week and would like to consider this office's opinion on the question presented. For these reasons, we offer the following informal opinion regarding the applicability of A.R.S. § 16-602(B)(2)(f) to the upcoming elections: Pima County would not violate A.R.S. § 16-602(B)(2)(f) if it were to conduct a hand count of the races in question because (1) any hand count of these races would be outside the scope of A.R.S. § 16-602 and (2) A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside the scope of the statute.

A.R.S. § 16-602(B) applies to "*countywide* primary, special, general and presidential preference election[s]." (Emphasis added). Further, as part of the triggered A.R.S. § 16-602 hand count, the county official in charge of elections is instructed to count selections from the following categories of contested races: statewide ballot measures, races for statewide office, races for federal office, and races for statewide legislative office.<sup>1</sup> A.R.S. § 16-602(B)(a)-(e). If

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<sup>1</sup> Although it is possible to read ambiguity into whether A.R.S. § 16-602(B) intends to include only statewide ballot measures or statewide and local ballot measures, we believe the context of A.R.S. § 16-602(B) counsels in favor of the statewide ballot measure interpretation. The structure of A.R.S. § 16-602(B)(2) suggests that ballot measure in A.R.S. § 16-602(B)(2)(c) refers to the statewide ballot measures in A.R.S. § 16-602(B)(2)(a), as does the use of the modifier "additional" in A.R.S. § 16-602(B)(2)(e). This approach is also consistent with the approach taken in the Election Procedures Manual. See State of Arizona's Election Procedures Manual at 193 (2014); see also A.R.S. § 16-602(B) ("The hand count shall be conducted as prescribed by this section and in accordance with hand count

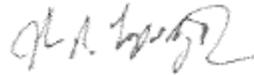
C.H. Huckelberry  
County Administrator  
October 19, 2015  
Page 2

there are no contested races from these categories in a particular precinct, A.R.S. § 16-602(B)(2)(f) instructs the county official in charge of elections not to conduct an A.R.S. § 16-602 hand count in that precinct. Under this analysis, none of the elections at issue would trigger a full A.R.S. § 16-602 hand count.

Further, A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside of A.R.S. § 16-602. That section only provides instructions for the county official in charge of elections on what races to count in an A.R.S. § 16-602 hand count. *See* A.R.S. § 16-602 (“The hand count shall be conducted in the following order”); A.R.S. § 16-602(B)(2) (“The races to be counted on the ballots from the precincts that were selected . . . shall include up to five contested races . . . as follows”); A.R.S. § 16-602(B)(2)(f) (“If there are no contested races as prescribed by this paragraph, a hand count shall not be conducted *for that precinct* for that election.”) (emphasis added).

Please note this informal opinion does not address any of the following issues: (1) the source of Pima County’s authority, if any, for a hand count outside the scope of A.R.S. § 16-602 for the races in question, (2) the procedures the County should use for any hand count since A.R.S. § 16-602 would not apply, and (3) what effect, if any, a hand count outside of A.R.S. § 16-602 would have on the official outcome of the election.

Sincerely,



John R. Lopez IV  
Solicitor General

JRL/bg

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procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.”).



**MICHELE REAGAN**  
*Secretary of State*  
*State of Arizona*

October 19, 2015

C.H. Huckelberry  
County Administrator, Pima County  
130 W. Congress, Floor 10  
Tucson, AZ 85701-1317

Re: Response to Request for Legal Opinion Regarding Hand Count of Local Elections

Dear Mr. Huckelberry:

The Secretary of State received your letter dated October 6, 2015, which requested the Secretary's guidance on the permissibility of conducting a hand count audit pursuant to A.R.S. § 16-602 with respect to a local election. The Secretary has concluded there is no legal prohibition on conducting a hand count of local races.<sup>1</sup> While the results of that local hand count will be purely advisory,<sup>2</sup> and therefore have no effect on the official election results, the Secretary agrees that additional scrutiny of voting equipment is healthy for the electoral process and concurs with the Board of Supervisors' unanimous vote authorizing the hand count.

#### **Statutory Authorization for Hand Count of Local Races**

A.R.S. § 16-602, along with Chapter 12 of the Secretary of State's Election Procedures Manual ("Manual"), require that a precinct hand count and early ballot audit (collectively, a "hand count") be conducted following each primary, special, general and presidential preference election. *See e.g.* A.R.S. § 16-602(B); Manual at 189.<sup>3</sup> No more than five contested races may be hand-counted. A.R.S. § 16-602(B)(2); Manual at 193. A "contested race" includes a ballot measure election, and is not limited to candidate races. *See* A.R.S. § 16-602(B)(2)(a) & (e) (classifying a statewide ballot measure as a "contested race").

However, the statute contemplates that only federal, statewide and legislative races are subject to the official hand count prescribed by A.R.S. § 16-602. *See* A.R.S. § 16-602(B)(2)(a)-

<sup>1</sup> The Secretary of State has no prosecutorial jurisdiction and therefore expresses no opinion as to the applicability of the criminal provisions in A.R.S. § 16-452(C) and § 16-1010. Enforcement is solely the province of the Arizona Attorney General and Pima County Attorney.

<sup>2</sup> *See* EIC Memo to Pima County Board of Supervisors, September 28, 2015 (requesting the County conduct "a voluntary hand count").

<sup>3</sup> The hand count "shall be conducted as prescribed by [§ 16-602] and in accordance with hand count procedures established by the Secretary of State in the official instructions and procedures manual[.]" A.R.S. § 16-602(B).



**MICHELE REAGAN**  
*Secretary of State*  
*State of Arizona*

(d) and (B)(5); Manual at 193-194. If there is a shortfall in any category, the statute does not contemplate the substitution of local races; rather, the officer in charge of elections must select “additional contested federal, statewide or legislative races” to conduct the hand count. A.R.S. § 16-602(B)(2)(e); Manual at 193, 195-196. If there are no contested federal, statewide or legislative races on the ballot, “a hand count *shall not be conducted* for that precinct for that election.” A.R.S. § 16-602(B)(2)(f) (emphasis added); Manual at 193 (“If there are no contested races in any of the designated [federal, statewide or legislative] categories, *no hand count* will take place.”) (emphasis added); *see also* A.R.S. § 16-602(F) (requiring the corresponding early ballot audit to encompass “the same races that are being hand counted pursuant to subsection B”). Accordingly, local contested races have no place in the statutorily-prescribed process for conducting a post-election hand count.

#### **Applicability of Existing Statutory Scheme**

Since A.R.S. § 16-602 excludes local races from consideration, any voluntary hand count conducted by Pima County officials will have no effect on the official election results. In particular, the following hand count provisions will have no applicability to Pima County’s intended course of action:

- A.R.S. §§ 16-602(C)-(E) require successively larger hand counts to be conducted in the event of significant difference between the electronic tabulation results and hand count results in a particular race. In extreme cases, when a jurisdiction-wide hand count is required, the precinct hand count constitutes the official count for the contested race in question, in lieu of the original electronic tabulation results. *See* A.R.S. § 16-602(E). Since local races have no place in this statutory scheme, the electronic tabulation results shall constitute the official count in the Pima County races notwithstanding any divergences in the hand count results.
- A.R.S. § 16-602(I) states that “[t]he hand counts prescribed by this section . . . shall be completed before the canvassing of the election for that county.” *See also* Manual at 190 (“The Precinct Hand Count and Early Ballot Audit . . . shall be completed before the canvassing of the election for the county.”). Since a local hand count is not prescribed in statute, the County need not complete this voluntary hand count prior to canvassing the election. Indeed, under no circumstances shall the canvass be delayed on account of the local hand count.
- A.R.S. § 16-602(I) further provides that “[t]he results of those hand counts shall be provided to the Secretary of State, who shall make those results publicly available on the Secretary of State’s website.” *See also* Manual at 191. This has no applicability and therefore Pima County need not provide local hand count results to the Secretary of State. Nor is the Secretary of State required to post these local hand count results in accordance with the statute.



**MICHELE REAGAN**  
*Secretary of State*  
*State of Arizona*

- A.R.S. § 16-602(J) provides that when “a hand count has been expanded to all precincts in a jurisdiction, the Secretary of State shall make available the escrowed source code for that county to the Superior Court[,] [who] shall appoint a special master to review the computer software . . . [and] issue a public report to the court[.]” Here, in the event that Pima County’s voluntary local hand count extends to all precincts, the special master provision will not be triggered.
- Pages 202-203 of the Manual require that hand count results be aggregated on the Hand Count Cumulative Sheet. *See also* Manual at 371-372 (sample “Aggregate – Precinct Hand Count Report” and “Aggregate – Early Ballot Audit”). The County must also prepare a “Hand Count / Early Ballot Audit Report” in the specified format. *See* Manual at 373. Collectively, these reports document the official results from the hand count process. Since Pima County’s proposed local hand count is purely advisory, the County should not include the local hand count results in these reports.

#### **Propriety of Conducting the Local Hand Count**

Notwithstanding the legal restrictions triggered by Pima County’s proposal, the Secretary of State encourages this voluntary exercise and believes that expanded hand counts represent good public policy.<sup>4</sup> Indeed, the Secretary recognizes that Pima County—along with the Election Integrity Commission and members of the general public—merely seek to improve the electoral process by ensuring the voting equipment is accurate and secure. This is especially important in light of the fact Pima County is using new central count equipment this election. The Secretary strongly encourages such efforts, and trusts that Pima County voters will be reassured through this process.

Very truly yours,

Eric Spencer  
State Election Director  
Arizona Secretary of State Michele Reagan  
[espencer@azsos.gov](mailto:espencer@azsos.gov)  
602.542.8683

cc: James Driscoll-MacEachron  
Assistant Attorney General

<sup>4</sup> The Secretary of State assumes that any additional costs for the proposed local hand count will be borne by its proponents.