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.[1] While the results of that local hand count will be purely advisory,[2] 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.[3] 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)-

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[1] 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.

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

[3] 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).

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(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.

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- 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.[4] 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
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cc: James Driscoll-MacEachron
Assistant Attorney General

[4] The Secretary of State assumes that any additional costs for the proposed local hand count will be borne by its proponents.