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# MEMORANDUM

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Date: April 22, 2016

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

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

Re: **Notice of Appeal and Request for Formal Evidentiary Hearing Regarding the Decision of the Property Tax Oversight Commission to Assess Full Additional State Aid to Education Liability to Pima County**

Today, we filed a Notice of Appeal and Request for Hearing with the Property Tax Oversight Commission (PTOC) regarding their arbitrary and capricious decision to assign the full approximate \$15.8 million liability of additional State Aid to Education to Pima County, despite there being four classes of governmental jurisdictions levying primary property taxes in Pima County. The allocation of this liability is much more complex and detailed than the arbitrary decisions made by the PTOC wherein they targeted Pima County to pay the full liability.

There are also a number of other reasons why this decision is incorrect and should be reversed. These reasons are outlined in the attached Notice of Appeal and Request for Hearing.

CHH/lab

Attachment

c: Thomas Weaver, Chief Civil Deputy County Attorney  
Regina Nassen, Deputy County Attorney  
Joseph Kanefield, Ballard Spahr, LLP  
Michael Racy, Racy Associates, Inc.

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April 22, 2016

*Via Fax, Hand Delivery & Email*

Ms. Darlene Teller  
Property Tax Oversight Commission  
c/o Arizona Department of Revenue  
1600 W. Monroe Street  
Phoenix, Arizona 85007  
Fax: (602) 716-7991  
[dteller@azdor.gov](mailto:dteller@azdor.gov)

Re: Notice of Appeal and Request for Formal Evidentiary Hearing In the Matter of March 14, 2016 Transfer to School Districts Pursuant to A.R.S. § 15-972(K)

Dear Ms. Teller,

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.03(B), and your March 24, 2016 letter, Pima County hereby files a notice of appeal and requests a hearing with the agency. Below is the information requested by A.R.S. § 41-1092.03.

**Party and Party's Address:**

Pima County  
c/o Joseph Kanefield and Heather Todd Horrocks  
Ballard Spahr LLP  
1 E. Washington Street, Suite 2300  
Phoenix, Arizona 85004  
Telephone: (602) 798-5400  
Email: [kanefieldj@ballardspahr.com](mailto:kanefieldj@ballardspahr.com)

Please be advised that Pima County is represented by counsel Ballard Spahr LLP in this matter. All correspondence and communication regarding this matter should be directed to the address listed above. In addition, the Pima County Board of Supervisors' address is 130 W. Congress Street, 11<sup>th</sup> Floor Tucson, Arizona 85701.

DMWEST #11795155 v1

**Agency and Action Being Appealed or Contested:**

The Agency is the Property Tax Oversight Commission (the "Commission"). The action being appealed or contested is the Commission's March 14, 2016 determination that Pima County must transfer a total of \$15,804,052.83 to seven school districts in fiscal year 2016 in order to compensate the school districts for Pima County's pro rata share of the reduction in Additional State Aid for Education ("ASAE") funding pursuant to A.R.S. § 15-972(K). This agency action was outlined in the letter from the Commission dated March 24, 2016 ("March 24 Letter") and sent on or about that date. A copy of the Commission's March 24 Letter is attached.

**Concise Statement of the Reasons for the Appeal and Request for Hearing:**

Pima County appeals and requests a hearing because the Commission's determination as set forth in its March 24 Letter is unlawful for these reasons:

1. The Commission's methodology for determining Pima County's liability under A.R.S. § 15-972(K) was arbitrary and capricious;
2. The Commission failed to follow the rulemaking procedure set forth in Arizona's Administrative Procedure Act ("APA") before enforcing A.R.S. § 15-972(K); and
3. The Commission lacks jurisdiction because A.R.S. § 15-972(K) is unconstitutional.

Pima County reserves the right to supplement the factual and legal bases for its appeal prior to the evidentiary hearing and notes that § 41-1092.03(B) merely requires a "concise" statement.

**1. Arbitrary and Capricious Action.**

The Commission abused its discretion in making its determination as set forth in its March 24 Letter because its determination was arbitrary and capricious. An administrative agency abuses its discretion by acting in an arbitrary and capricious manner when the record establishes that there has been "unreasonable action, without consideration and in disregard for facts and circumstances." *Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (Ct. App. 1981) (citation omitted).

The Commission's action in assessing the ASAE for Pima County to pay to seven different school districts disregarded the facts and circumstances surrounding the Commission's determination. First, as discussed below, the statute on which the Commission based its actions, A.R.S. § 15-972(K), is unconstitutional, and is the subject of litigation in *Pima County v. State of Arizona, et al.* CV 2015-009739. Second, as discussed below, in order to implement A.R.S. § 15-972(K), the Commission was required to promulgate a rule pursuant to the APA. By disregarding A.R.S. § 15-972(K)'s constitutional deficiencies and failing to promulgate a rule prior to determining Pima County's liability under the statute, the Commission acted in an "unreasonable" manner.

## **2. Failure to Follow the APA Procedure for Enacting a Rule.**

The Commission's determination as set forth in its March 24 letter is invalid because the Commission did not adopt a rule as required by the APA, which defines a "rule" as:

an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. Rule includes prescribing fees or the amendment or repeal of a prior rule but does not include intraagency memoranda that are not delegation agreements.

A.R.S. § 41-1001(19); *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 250, 349 P.3d 220, 224 (Ct. App. 2015).

Such rules must be adopted following the rulemaking procedure provided in the APA. *Ariz. Bd. of Regents*, 237 Ariz. at 250, 349 P.3d at 224. The recent decision in *Arizona State University ex rel. Arizona Board of Regents v. Arizona State Retirement Systems* is instructive. There the Court addressed whether the Arizona State Retirement System ("ASRS") was required to adopt a rule before enforcing a policy and charging Arizona State University for an actuarial unfunded liability as set forth in A.R.S. § 38-749. *Id.* at 247-48, 349 P.3d at 221-22. The Court found that ASRS's "policy" was in fact a rule because it was generally applicable and implemented and interpreted Arizona statutes. *Id.* at 250-51, 349 P.3d at 224-25.

The court reasoned that the statute ASRS was interpreting, A.R.S. § 38-749, left open questions such as "how to determine if a termination incentive program 'results in an actuarial unfunded liability'; how to calculate the amount of an unfunded liability; and whether to charge employers if members elect more expensive benefit options. . . ." *Id.* at 251, 349 P.3d at 225. Those open-ended questions created ambiguity and therefore required ASRS to first promulgate a rule interpreting A.R.S. § 38-749, which it failed to do.

Similarly, the actions taken by the Commission to determine the amount each "taxing jurisdiction" must pay towards the unfunded ASAE, clearly constitutes a "rule" as defined in A.R.S. § 41-1001(19). The Commission's determinations of liability are "generally applicable" and the Commission was implementing A.R.S. § 15-972(K). Just as in *Arizona Board of Regents*, A.R.S. § 15-972(K) also has open ended questions such as how to "determine the proportion of the violation . . . that is attributable to each taxing jurisdiction within the affected school district," which require the Commission to exercise its discretion in creating a policy. Section 15-972(K) provides no objective, verifiable standard for making this allocation other than to state that a jurisdiction with a tax rate of "equal to or less than the tax rate of peer jurisdictions" is exempt. Peer jurisdiction is also not defined. Thus, the Commission's interpretation of the amount of "violation" Pima County must pay to the school districts is clearly a rule that was not promulgated in accordance with the requirements of the APA.

To the extent the Commission argues that it is just using “simple arithmetic” to implement A.R.S. § 15-972(K), its argument fails because its methods are subjective and require complex calculations. This argument was rejected in *Carondelet Health Services v. Arizona Health Care Cost Containment Systems Administration*, 182 Ariz. 221, 227, 895 P.2d 133, 139 (Ct. App. 1994). There the agency argued that the calculations were “simple arithmetic” and there was no need to adopt a rule. The court recognized:

the method for determining each hospital's reimbursement amount, however, is not a universally recognized formula that enables each party to independently verify the result. Rather, the AHCCCS methodology involves a complex calculation with subjective components whose inclusion, or even definition, have a significant effect on the reimbursement amounts. The parties' many disputes over these substantive components highlight the subjectivity of AHCCCS' approach.

*Id.* The exact same situation is present here. The Commission took broad, subjective criteria and fashioned an outcome based on its own interpretation of “peer jurisdictions” and “proportion of the violation.” The very fact that these terms are disputed highlights “the subjectivity of [the Commission's] approach.”

Given that the Commission's policy decision is in fact a “rule,” it should have been adopted following the rulemaking procedure provided in the APA. That did not occur here, and for that reason, the Commission's rule is “invalid.” See *Arizona Board of Regents*, 237 Ariz. at 253-54, 349 P.3d at 227-28 (“A rule is invalid unless it is made and approved in substantial compliance with [the APA], unless otherwise provided by law.”) (quoting A.R.S. § 41-1030(A)).

### **3. The Commission has no jurisdiction to implement an unconstitutional statute.**

It is axiomatic that the legislature only has the power to enact laws in “absence of an expressed or inferential prohibition by the provisions of the United States or the state of Arizona.” *Roberts v. Spray*, 71 Ariz. 60, 69, 223 P.2d 808, 814 (1950). If the legislature has no power to enact a law, a commission has no power to enforce it.

In its Motion for Summary Judgment filed in the companion case, *Pima County v. State of Arizona, et al.* CV 2015-009739, Pima County noted that A.R.S. § 15-972(K) is unconstitutional for four different reasons. First, Subsection K violates the separation of powers doctrine as set forth in Article 3 of the Arizona Constitution. It improperly delegates legislative taxing authority to the Commission without providing sufficiently clear guidance. See Ariz. Const. art. 4, pt. 1, § 1(1). Alternatively, the legislature unconstitutionally executes Subsection K through the appointment and control of the Commission's majority. Second, Subsection K violates equal protection, due process, and private property rights by levying a tax on property owners in one jurisdiction for the support of another. Through this it also violates the property tax uniformity clause of Article 9, Section 1 of the Arizona Constitution. Third, Subsection K violates the Arizona Constitution's requirement in Article 9, Section 22 that a new tax or reallocation of taxes among the state and counties must receive a two-

Ms. Darlene Teller  
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thirds supermajority vote in the Arizona legislature, which A.R.S. § 15-972(K) did not receive. Fourth, Senate Bill 1476, which amended A.R.S. § 15-972 and added Subsection K, violates the single subject rule and title requirement of the Arizona Constitution in Article 4, Part 2, Section 13 because it addresses multiple subjects that are unrelated to one another, and which were not properly reflected in its title.

Given these constitutional infirmities, the Commission has no power to enforce or interpret A.R.S. § 15-972(K).

### **Conclusion**

As is clearly set forth above, the Commission's determination of the amount of money owed by Pima County to compensate for the reduction of the ASAE should be overturned because the action is arbitrary, was done without first promulgating a rule, and was done without the proper authority. Pima County thus respectfully requests an appeal of the Commission's action and requests an evidentiary hearing regarding the same.

However, pursuant to A.R.S. § 41-1092.05(C), Pima County respectfully requests a stay of this appeal pending the final outcome in the litigation pending in Maricopa County Superior Court, which as discussed, asserts the same jurisdictional arguments set forth above. *See Pima County v. State of Arizona, et al.* CV 2015-009739, pending in the Tax Division of Maricopa County Superior Court (The Honorable Christopher Whitten). An outcome favorable to Pima County in this case will moot this administrative appeal and therefore good cause exists to stay this matter until this litigation is concluded so as not to incur unnecessary expenditures by both parties and ultimately the taxpayers of the State of Arizona and Pima County.

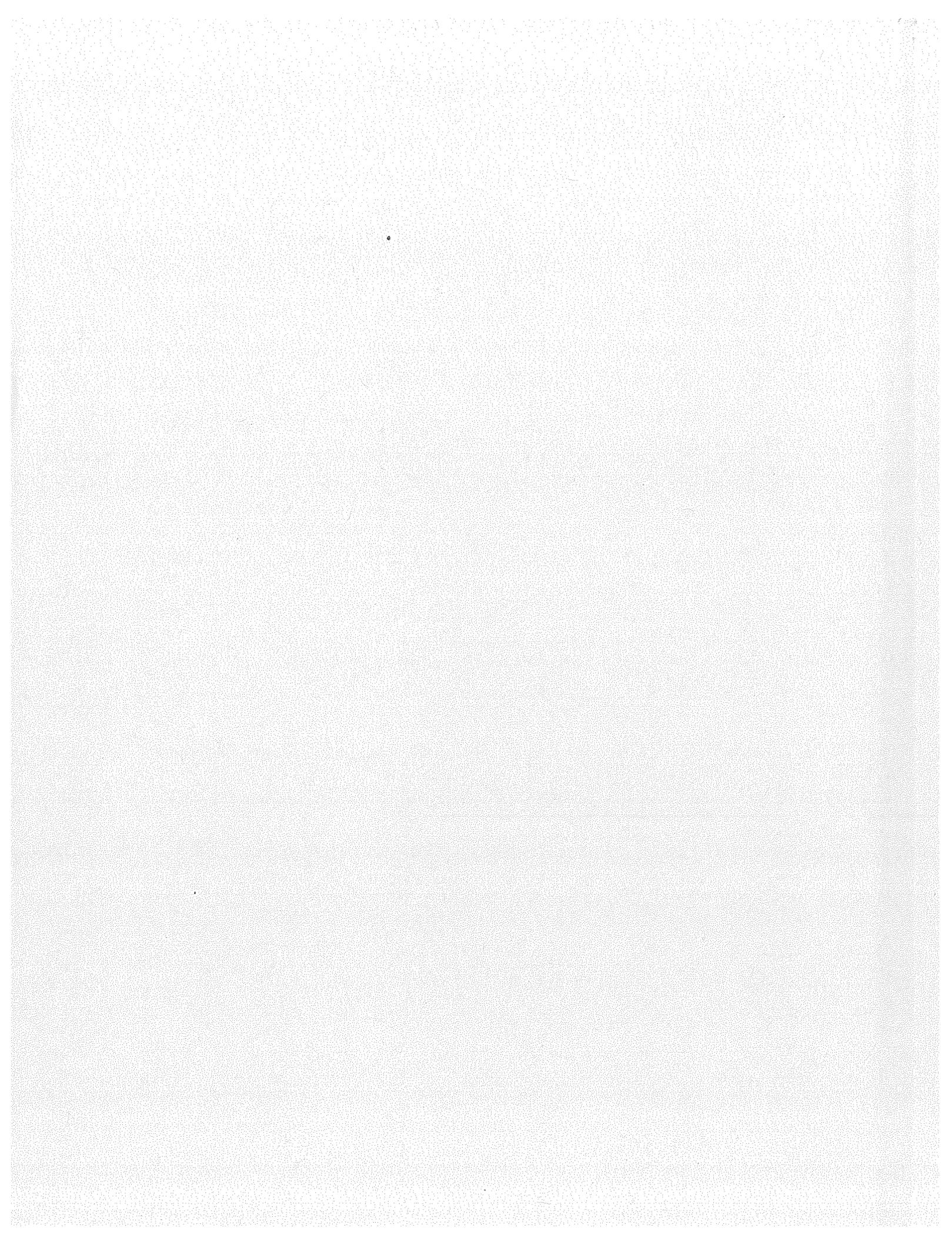
Sincerely,



Joseph A. Kanefield

JAK/lb

Enclosure  
cc: Karen Hartman-Tellez



# PROPERTY TAX OVERSIGHT COMMISSION

Arizona Department of Revenue Building



March 24, 2016

Douglas A. Ducey  
Governor

David Briant  
Chairman

The Honorable Sharon Bronson, Chairman  
Pima County Board of Supervisors  
130 W. Congress Street, 11<sup>th</sup> Floor  
Tucson, AZ 85701

Jim Brodnax      Kevin McCarthy  
Member            Member  
Jeff Lindsey      Chris Kelling  
Member            Member

*RE: Transfer to School Districts pursuant to A.R.S. § 15-972(K)*

Dear Supervisor Bronson:

On March 14, 2016, the Property Tax Oversight Commission met to review and approve amounts that certain taxing jurisdictions are required to transfer to certain school districts for any county with school districts that collectively would receive more than \$1 million in Additional State Aid for Education (ASAE) pursuant to A.R.S. § 15-972(K).

The total ASAE due to the 1% Constitutional limit pursuant to Article IX, Section 18 for Pima County is \$16,804,052.83. Pima County's primary tax rate of \$4.3877 is higher than the county average tax rate of \$2.2568. All other taxing jurisdictions in Pima County for the affected school districts are equal to or less than the tax rate of their peer jurisdictions and are not required to transfer funds. Therefore, the Commission determined Pima County is required to transfer a total of \$15,804,052.83 to seven school districts in FY 2016 in order to compensate the school districts for Pima County's pro rata share of the reduction in ASAE funding. The amounts by school district are:

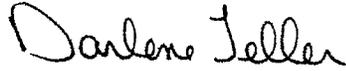
- 1) Tucson Unified School District #1 - \$15,716,829.31,
- 2) Marana Unified School District #6 - \$8,916.42,
- 3) Amphitheater Unified School District #10 - \$23,959.33,
- 4) Vail Unified School District #20 - \$215.98,
- 5) Sahuarita Unified School District #30 - \$913.50,
- 6) San Fernando Elementary School District #35 - \$190.55 and
- 7) Altar Valley Elementary School District #51 - \$53,027.74.

You have a right to request an evidentiary hearing pursuant to A.R.S. § 41-1092.03 by filing a written notice of appeal with the Property Tax Oversight within 30 days of receipt of this notice. If you request an evidentiary hearing, you may also request an informal settlement conference pursuant to A.R.S. § 41-1092.06. If a hearing is not requested within the time provided by A.R.S. § 41-1092.03(B), this determination by the Property Tax Oversight Commission will stand.

Attached are copies of the allocation worksheets and the implementation procedures for your reference. If you have any questions, please feel free to contact me at (602) 716-6436. Thank you for your cooperation with the Commission.

Property Tax Oversight Commission  
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Sincerely,



Darlene Teller  
Property Tax Oversight Commission Staff

Attachments: Implementation Procedures for A.R.S. §15-972(K) with Exhibits for Pima County

cc: C. H. Huckelberry, Administrator, Pima County  
Keith Dommer, Finance Director, Pima County  
Craig Horn, Finance Analyst Supervisor, Pima County  
Yousef Awwad, Chief Financial Officer, Tucson Unified District  
Dan Contorno, Business Manager, Marana Unified District  
Scott Little, Chief Financial Officer, Amphitheater Unified District  
Lisa Cervantez, Business Manager, Vail Unified District  
Charlotte Gates, Business Manager, Sahuarita Unified District  
Ricardo Hernandez, Business Manager, San Fernando Elementary District  
Tamie Jewell, Business Manager, Altar Valley Elementary District