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8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF PIMA**

11 PIMA COUNTY,

12 Plaintiff,

13 vs.

14 ARIZONA STATE LAND DEPARTMENT;
15 CALIFORNIA PORTLAND CEMENT
16 COMPANY, a California corporation,

17 Defendants.

Case No. C20070829

**PIMA COUNTY'S RESPONSE TO
THE ARIZONA STATE LAND
DEPARTMENT'S MOTION TO
DISMISS**

Assigned to: Hon. John Davis

18
19 Pima County, through undersigned counsel, respectfully requests that the Court deny the
20 Arizona State Land Department's Motion to Dismiss.¹ This response is supported by the
21 following Memorandum of Points and Authorities.
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¹ As part of this response, Pima County will also address the arguments and authorities raised in the California Portland Cement Company's Joinder in Motion to Dismiss.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pima County brought the present action pursuant to A.R.S. § 12-901 *et seq.*, to appeal the
4 Arizona State Land Department’s Decision and Order, No. 134-2006/2007, granting Defendant
5 California Portland Cement Company (“CalPort”) mineral leases to mine calcium carbonate on
6 State Trust lands located in Pima County in the area of the Cienega Creek watershed and
7 Davidson Canyon. Prior to bringing this action, Pima County had filed an administrative appeal
8 with the State Land Department (“Department”) pursuant to the administrative appeals
9 procedures, A.R.S. § 41-1092 *et seq.*, which the Department summarily rejected, thus depriving
10 Pima County of opportunity to obtain review of the Department’s decision that is contrary to the
11 Department’s enabling legislation and the best interests of the State Trust. The Department is
12 now claiming that the County may not challenge its decision in this Court, asserting that the right
13 to a judicial appeal of its administrative decision does not extend to Pima County because the
14 County was not authorized to file an administrative appeal, and, in the alternative, because its
15 decision to issue the leases is not appealable under A.R.S. § 12-901 *et seq.*, the statutes
16 governing judicial review of administrative decisions.² In essence, the Department seeks to
17 preclude any review of its decisions to issue leases on State Trust lands, as the only entity who in
18 the Department’s view has the right to appeal—the applicant for the lease—would naturally
19 never have any reason to do so where it receives the lease for which it applies. Such a position is
20 contrary to the laws governing the Department’s responsibilities in administering the State Trust
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25 ² The Department also argues that Pima County lacks standing to proceed with this appeal and that this Court lacks
26 jurisdiction to entertain this matter, and asserts lack of standing and jurisdiction as the basis for its request for relief.
However, both of these arguments are wholly based on the Department’s erroneous assertion that the County does
not have a right to appeal under the applicable law. They therefore add nothing to the Department’s argument and
will be addressed as part of the discussion on the County’s right to proceed with this appeal.

1 lands, which specifically give the County the right to participate in the lease approval decision.³
2 As shown below, the Department’s arguments are without merit, as both A.R.S. § 12-901 *et seq.*,
3 governing the appeals to this Court, and A.R.S. § 41-1092 *et seq.*, governing administrative
4 appeals, specifically authorize this action.
5

6 **II. ARGUMENT**

7 It is a well-established principle of law that “[m]otions to dismiss for failure to state a
8 claim are not favored and should not be granted unless it appears that the plaintiff should be
9 denied relief as a matter of law given the facts alleged.” *Logan v. Forever Living Products Int’l,*
10 *Inc.*, 203 Ariz. 191, 193, 52 P.3d 760, 762 (2002). In other words, the motion to dismiss must be
11 denied if the County’s complaint states a cause of action under the applicable law, which is the
12 case here.
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14 **A. Pima County’s Appeal is Specifically Authorized by the Applicable Law**

15 A.R.S. § 12-904 authorizes actions to review final administrative decisions to be
16 commenced in this Court by filing a complaint within thirty five days of the decision being
17 appealed.⁴ The right to appeal to this Court pursuant to section 12-904 is specifically authorized
18 by A.R.S. § 41-1092.08(H), which provides, in relevant part, that “[a] party may appeal a final
19 administrative decision pursuant to title 12, chapter 7, article 6, [A.R.S. § 12-901 *et seq.*] ...
20 except that if a party has not requested a hearing upon receipt of a notice of appealable agency
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22 _____
23 ³ Moreover, adopting the Department’s position would remove any means of enforcing the Department’s statutory
24 obligation to administer the State Trust lands in the best interests of the Trust—so long as the Department simply
25 grants the leases, it may do so for any arbitrary reason, since no one but the grantee can challenge the Department’s
26 decision.

⁴ A.R.S. § 12-901(2) provides that “[i]n all cases in which a statute or a rule of the administrative agency requires or
permits an application for a rehearing or other method of administrative review, and an application for a rehearing or
review is made, no administrative decision of such agency is final as to the party applying for the rehearing or
review until the rehearing or review is denied or the decision on rehearing or review is rendered.” Pima County
timely appealed after its request for a review was denied by the Department.

1 action pursuant to section 41-1092.03, the appealable agency action is not subject to judicial
2 review.”⁵ Pima County did request a hearing pursuant to section 41-1092.03, which was rejected
3 by the Department, and the County was therefore entitled to appeal to this Court as provided in
4 section 41-1092.08(H).

5
6 The Department contends that “judicial review of administrative action is only a right if it
7 is authorized by law,” citing in support *Arizona Department of Economic Security v. Holland*,
8 120 Ariz. 371, 586 P.2d 216 (1978), and *County of Pima v. Dept. of Revenue, Division of*
9 *Property and Special Taxes*, 114 Ariz. 275, 560 P.2d 793 (1977), and that Pima County’s action
10 is not so authorized. Defendant CalPort, in its joinder, makes the same assertion, citing in
11 support *McLeod v. Chilton*, 132 Ariz. 9, 643 P.2d 712 (App. 1981). None of these cases is
12 relevant to the present situation. In *Holland*, the Court of Appeals held that where an appellant
13 filed his appeal pursuant to section 12-904 outside the 35 day limitation period, the court was
14 without jurisdiction to entertain the appeal, thus upholding the well-established principle that
15 where an appeal is authorized by statute, “jurisdictional requirements prescribed by statute must
16 be strictly complied with to achieve entrance to appellate review.” 120 Ariz. at 372, 586 P.2d at
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20 ⁵ The use of the administrative appeals procedures, A.R.S. § 41-1092 *et seq.*, for appeals from the decisions of the
21 Department is specifically authorized by A.R.S. § 37-133, which states:
22 “ A. Decisions rendered by the [State Land] commissioner pursuant to the powers and duties conferred upon him by
23 law, whether relating to the administration of state lands or other departments or agencies of state under his
24 jurisdiction, shall be in writing and filed of record in his office.
B. Notice of the decisions shall be given by the commissioner to any person in interest of record in the department
by notifying the person in interest by certified mail, return receipt requested, addressed to the last known post office
address of record in the department.
C. If no appeal is taken by any person in interest as provided in title 41, chapter 6, article 10 [A.R.S. § 1092 *et seq.*],
the decision of the commissioner shall be final and conclusive.”

25 Pima County agrees with the Department that the term “person in interest of record,” which is not specifically
26 defined anywhere in the statutes, should be defined by reference to title 41, chapter 6, article 10, [A.R.S. §41-1092 *et seq.*] which specifies the entities entitled to appeal. In other words, section 37-133 allows appeals by anyone who may appeal under A.R.S. § 1092 *et seq.*

1 217. In *McLeod*, the plaintiff, who was dismissed from his position with the State Livestock
2 Sanitary Board, argued that because he was foreclosed from seeking judicial review under the
3 Personnel Board statutes, which govern review of employment actions such as dismissals, he
4 was entitled to appeal under the Administrative Review Act [A.R.S. § 12-901 *et seq.*]. 132 Ariz.
5 at 17, 643 P.2d at 720. The court rejected plaintiff’s argument, relying on A.R.S. § 12-902(A),
6 which delineates the scope of the Administrative Review Act and states, in relevant part: “[t]his
7 article applies to and governs: 1. Every action to review judicially a final decision of an
8 administrative agency except ... if the act creating or conferring power on an agency or a
9 separate act provides for judicial review of the agency decisions and prescribes a definite
10 procedure for the review.” The court concluded that the Personnel Board statutes constituted
11 such a separate act governing judicial review of the Livestock Board decisions, and since
12 plaintiff was not entitled to judicial review under the Personnel Board Statutes, he was not
13 entitled to an appeal under the Administrative Review Act. *Id.* at 18, 643 P.2d at 721. Similarly,
14 in *Pima County v. Dept. of Revenue*, a case dealing with an appeal of the valuation of real
15 property, the court applied A.R.S. § 12-902(A) to conclude that where the act which created the
16 administrative agency involved (here, the State Board of Tax Appeals) also provided for judicial
17 review of its decisions, the Administrative Review Act was not applicable. 114 Ariz. at 278, 560
18 P.2d at 796.
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22 In contrast to *McLeod* and *Pima County v. Dept. of Revenue*, in the present case the
23 separate act providing for judicial review of the Department’s decisions and prescribing a
24 definite procedure for the review, A.R.S. § 41-1092 *et seq.*, in section 41-1092.08(H) specifically
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1 authorizes appeals under the Administrative Review Act by persons who had previously
2 requested review under 41-1092.03.⁶

3 The Department, and CalPort, nevertheless contend that Pima County is not entitled to
4 proceed with this appeal because it had no right to request an administrative hearing under 41-
5 1092.03, which, under 41-1092.08(H), is a prerequisite to filing an appeal in this Court. In
6 support, the Department claims that its decision to issue the leases was not an appealable agency
7 action as that term is defined in the administrative appeals procedures statutes, and that Pima
8 County does not fall within the scope of 41-1092.03 as either a party whose legal rights were
9 determined by the appealable agency action or as a party who exercised a right provided by law
10 to comment on the action being appealed. In its request for joinder, CalPort reasserts only the
11 latter argument. As shown below, the Department’s and CalPort’s unsupported assertions are
12 erroneous.
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- 15 i. The Department’s decision to issue leases to CalPort is an appealable
16 agency action under the administrative appeals procedures of A.R.S. §
17 41-1092 et seq.

18 The Department first contends that its decision to issue the leases to CalPort is not an
19 appealable agency action under the definition provided in A.R.S. § 41-1092(3). Section 41-
20 1092(3) states, in relevant part: “ ‘Appealable agency action’ means an action that determines the
21 legal rights, duties or privileges of a party.” The Department appears to argue that because Pima
22 County’s rights, duties or privileges were not affected by the decision to issue the leases, the
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25 ⁶ Thus, CalPort’s assertion that “[n]o statute specifically gives Pima County...the right to bring this action” is simply
26 incorrect. While 41-1092.08(H) does not give the right to a judicial appeal to Pima County by name, it clearly
allows judicial appeals by any entity that has followed the procedures specified in that statute.

1 decision is not an appealable agency action. This argument, however, is contrary to the plain
2 language of the statute, which nowhere indicates that in order for an agency decision to
3 constitute an “appealable agency action,” it must determine the legal rights and duties of the
4 person appealing. In fact, the use of the indefinite article “a” before the word “party” indicates
5 that an agency action is an “appealable agency action” as long as it determines the rights, duties
6 or privileges of any party. There is no dispute that the Department’s decision to grant CalPort
7 the leases determined the rights and privileges of CalPort.
8

9 More importantly, the Department’s interpretation of the term “appealable agency action”
10 directly conflicts with the language of A.R.S. § 41-1091.03, which specifies who may obtain a
11 hearing on an appealable agency action. Subsection B of that section provides, in relevant part:
12

13 A party may obtain a hearing on an appealable agency action or contested case by filing a
14 notice of appeal or request for a hearing with the agency within thirty days after receiving
15 the notice prescribed in subsection A of this section. The notice of appeal or request for a
16 hearing may be filed by a party whose legal rights, duties or privileges were determined
17 by the appealable agency action or contested case. A notice of appeal or request for a
18 hearing also may be filed by a party who will be adversely affected by the appealable
19 agency action or contested case and who exercised any right provided by law to comment
20 on the action being appealed or contested, provided that the grounds for the notice of
21 appeal or request for a hearing are limited to issues raised in that party's comments.
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23 Thus, under 41-1092.03 a hearing on an appealable agency action may be obtained by two
24 categories of parties: (1) those whose legal rights, duties or privileges were determined by the
25 appealable agency action, or (2) those who will be adversely affected by the appealable agency
26 action and who exercised any right provided by law to comment on the action. Each term in a
statute must be given meaning. *State v. Hoggatt*, 199 Ariz. 440, 443, 18 P.3d 1239, 1242 (App.
2001) (stating that where the legislature used the terms “licensed facility” and “medical facility”
in the same statute, it is assumed the legislature did not intend the terms to be synonymous). The

1 distinction in 41-1092.03(B) thus necessarily means that the two categories of parties entitled to
2 obtain a hearing must be distinct, and the parties “adversely affected by the appealable agency
3 action” are not the same as those whose “legal rights, duties or privileges were determined by the
4 appealable agency action.” If, however, the term “appealable agency action” includes only the
5 actions that determine “the legal rights, duties or privileges” of the appealing party, as the
6 Department contends, then the second prong of 41-1092.03(B), allowing appeals by parties
7 “adversely affected by the appealable agency action,” would be rendered meaningless and
8 superfluous, since these parties would still have to establish that their “legal rights, duties or
9 privileges” were determined by the agency action, a condition already required by the first prong
10 of 41-1092.03(B). A court must interpret statutes so that no provision is rendered meaningless,
11 insignificant, or void. *Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006).
12 Therefore, the Department’s argument cannot be accepted, and its decision to issue the leases
13 constituted an appealable agency action, as it determined the rights and privileges of CalPort.
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16 Lastly, the Department’s contention that it did not identify its decision as an appealable
17 agency action or treated it as such is completely irrelevant. This argument not only contradicts
18 the plain language of 41-1092(3), which makes no reference to the Department’s opinion of the
19 nature of its action, but would completely eviscerate that statute by substituting the Department’s
20 self-serving opinion for the requirements of the statute. Since the Department’s decision
21 constituted an appealable agency action, Pima County was entitled to appeal it pursuant to 41-
22 1092.03.
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ii. Pima County was entitled to seek review of the Department’s decision pursuant to A.R.S. § 41-1092.03 as a party who exercised its right to comment⁷

The Department further contends that the County was not entitled to seek an administrative review of its decision because it had no right provided by law to comment on the action it sought to appeal.⁸ CalPort joins in this argument. However, neither the Department nor CalPort provide any support for this assertion. While the Department cites A.R.S. § 11-830(A)(2) in support of its argument, that statute, which deals with the scope of county zoning and planning regulations, simply precludes counties from issuing ordinances which regulate the use of land for mining (among other uses), and even this restriction is limited to land that is five or more acres in size. This statute says nothing about the County’s right to comment on the Department’s decision to issue leases, and is therefore not relevant here.

In fact, the Department was statutorily obligated to obtain and consider the County’s input on its decision to issue the leases, as evidenced by at least two statutory provisions, A.R.S. § 37-281.02 and A.R.S. § 37-132. Section 37-281.02 deals with leases of state lands for

⁷ Although both the Department and CalPort also assert that the County was not entitled to an administrative appeal because it is not a party whose legal rights, duties or privileges were determined by the appealable agency action, the County is not claiming that it falls within this prong of 41-1092.03(B). Nor does it need to do so, as the second prong, covering adversely affected parties who exercised their right to comment, provided the County with independent basis for seeking an administrative appeal of the Department’s decision. To that end, the statement in the Department’s brief that the County was not entitled to appeal under the second prong of 41-1092.03(B) because it had “no right, duty or privilege adversely affected by the [Department’s] decision” indicates at best a confusion of the issues. As discussed in the previous section, the “rights, duties or privileges” language cannot apply to the parties who seek administrative review under the second prong of 41-1092.03(B).

⁸ This prong of 41-1092.03(B) also requires that the party appealing be adversely affected by the appealable agency action. However, neither the Department nor CalPort is contending that the County was not adversely affected, and therefore this statutory requirement is not at issue. In any case, whether or not the County was adversely affected by the Department’s decision is a fact issue, and cannot serve as a basis for a motion to dismiss. Moreover, the County’s complaint in the present action provides more than sufficient information to show that the Department’s decision adversely affected the County.

1 commercial purposes for more than ten years, precisely the type of leases at issue here.
2 Subsection A of this section provides, in relevant part:

3 For commercial leases of state land more than three miles outside the boundaries of
4 incorporated cities and towns having a population of ten thousand persons or less or more
5 than five miles outside the boundaries of incorporated cities and towns having a
6 population in excess of ten thousand persons, the department shall cooperate with the
county or counties in which the land to be leased is located in considering the intended
uses.⁹

7 The language of the statute is mandatory, requiring the Department to cooperate with the county
8 in which the land is located—in other words, to consider the county’s input on the issue of the
9 intended use of the land. The Department essentially acknowledged this obligation by its
10 actions, as it requested Pima County to submit its comments on CalPort’s applications for the
11 mining leases. Pima County’s comments, which were submitted in response to the Department’s
12 request, addressed precisely the proposed use of the land (i.e. calcium carbonate mining) and the
13 effect this use would have both on the mined land and the surrounding area, thus constituting an
14 exercise of the County’s right to comment pursuant to 37-281.02.
15

16 Furthermore, section 37-132 requires the State Land Commissioner (and therefore the
17 Department) to “make long-range plans for the future use of state lands in cooperation with other
18 state agencies, local planning authorities and political subdivisions.” This obligation to
19 cooperate must necessarily entail the ability of the enumerated entities to submit comments to the
20 Department, since, as a matter of logic, there can be no cooperation between two parties if one of
21 them does not have a right to provide input.¹⁰ Therefore, Pima County’s comments, which
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25 ⁹ The land at issue here is located more than five miles away from Tucson, which is the closest incorporated
municipality, thus making this provision applicable. While the County does not believe that this point is disputed, if
it is, and the Court finds it to be dispositive, then the Department’s motion must be converted to one for summary
judgment to allow the County to provide the Court with the necessary supporting information.

26 ¹⁰ Notably, in *California Portland Cement Company v. Arizona State Land Department*, LC2006-000178-001, an
action brought by CalPort in the Maricopa County Superior Court to force the Department to issue the decision at

1 addressed both the immediate and long-term impact of the proposed mining, were authorized
2 under this statute as well.

3 Since the County’s comments were made in the exercise of its rights pursuant to specific
4 statutory authority, the County was entitled to request an administrative review of the
5 Department’s decision under the second prong of A.R.S. § 41-1092.03(B). Since the County
6 was authorized to file an administrative appeal under 41-1092.03(B), it was in turn entitled to file
7 the present action pursuant to A.R.S. § 41-1092.08(H), which authorizes such actions for parties
8 who properly requested an administrative appeal.
9

10 **B. The Department’s Decision and Order Granting Calport Mining Leases**
11 **Is a Decision Appealable Under A.R.S. § 12-901 *et seq.***

12 The Department argues that its Decision and Order granting CalPort mining leases is not
13 a decision for purposes of A.R.S. § 12-901 *et seq.*, and is therefore not appealable. In support of
14 its argument the Department seems to be making four separate assertions: (1) that the County
15 was not a party to the decision, (2) that the County’s “rights, duties or privileges” were not
16 affected by the decision, (3) that the decision was not adverse, and (4) that the decision is not a
17 decision within the meaning of section 12-901 because the leases have not yet been issued. All
18 of these contentions are either irrelevant or incorrect, and therefore cannot serve as a basis for
19 dismissal.
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21 A.R.S. § 12-901 defines what constitutes a decision, appealable under 12-904, as follows:
22 “ ‘Administrative decision’ or ‘decision’ means any decision, order or determination of an
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25 issue in this case, the Department itself took the position that the section 37-132 requirement that it cooperate with
26 local jurisdiction in its planning efforts applied to the comments submitted by Pima County. *See* State Land
Department’s Response to the Motion for Summary Judgment, p. 6. These are the same comments that the
Department is now claiming the County had no right to make.

1 administrative agency that is rendered in a case, that affects the legal rights, duties or privileges
2 of persons and that terminates the proceeding before the administrative agency.” On the face of
3 the statute, any decision that affects the rights, duties or privileges of any person is one falling
4 within the statutory definition. The statute neither defines a “decision” in terms of the party
5 appealing, nor in terms of the rights and privileges of the party appealing. *See Denton v.*
6 *Superior Court*, 190 Ariz. 152, 157, 945 P.2d 1283, 1288 (1997) (holding that where statute is
7 clear and unambiguous, there is no need to delve into the rules of statutory construction).
8 Therefore, under the statutory definition of “decision,” the County need not have been a party to
9 the Department’s decision, nor did it need to have its rights and privileges affected by that
10 decision in order to appeal that decision in this Court.
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12 It is also instructive to compare the definition of “decision” in 12-901 to the definition of
13 “appealable agency action” in 41-1092(3). The two definitions are strikingly similar, but the
14 former is even broader than the latter, by including any decision that “affects” the rights and
15 privileges “of persons,” as opposed to decisions that “determine” the rights and privileges “of a
16 party” covered by 41-1092(3). Yet, as discussed earlier in this brief, the definition of
17 “appealable agency action” in 41-1092(3) is not limited to actions that determine the rights and
18 duties of the party appealing, but includes actions that determine the rights and duties of any
19 party. Since both statutes relate to appeals of administrative decisions, albeit at different stages
20 in the process, it would be at least anomalous to construe the statute with the broader language,
21 12-901, more narrowly than the statute with the narrower language.
22

23 More importantly, if the definition of “decision” in 12-901 is construed as the
24 Department contends, to be limited to the decisions that affect the rights and privileges of the
25 appellant, then 12-901 would have the effect of taking away the appeal rights of parties
26

1 specifically authorized to pursue a judicial appeal by 41-1092.08(H). Thus, section 41-
2 1092.08(H) authorizes judicial appeals pursuant to A.R.S. § 12-901 *et seq.* by parties who
3 requested administrative review under 42-1092.03. This includes not only parties whose rights
4 and privileges were determined by the administrative decision, but also those who were
5 adversely affected by the action but exercised their right to comment. However, the
6 Department's interpretation of 12-901 would necessarily exclude the latter group from pursuing
7 a judicial appeal, since they would not qualify as parties whose rights or privileges were affected
8 by the decision being appealed. Such an interpretation, which would create a conflict between
9 12-901 and 41-1092.08(H), must be avoided, *see Mejak v. Granville*, 212 Ariz. at 557, 136 P.3d
10 at 876, especially where, as here, it would also require disregarding the clear language of both
11 statutes. Therefore, neither the fact that the County was not a named party to the Department's
12 Decision and Order, nor the fact that the decision may not have affected its legal rights, duties or
13 privileges, has any relevance to whether the Department's decision is a decision within the
14 meaning of 12-901.

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17 The Department's contention that its decision does not fall within the definition of 12-
18 901 because it was not adverse to either the County or to CalPort is similarly unavailing. First, it
19 is based on the erroneous premise that the decision must adversely affect the rights, duties and
20 privileges of the person appealing, which, as shown above, cannot be true, since the person
21 appealing need not be the one whose rights or privileges were affected. To the extent the
22 Department contends that a decision must adversely affect the appellant in some form in order to
23 be appealable (even if not affecting the appellant's rights and privileges), that must be true as a
24 matter of logic, since a party who was not adversely affected in any way would have no reason to
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1 appeal. This would be similar to the requirement in 41-1092.03(B) that a party who requests an
2 administrative review based on its comments must show that it will be adversely affected.

3 The Department’s only support for the contention that the decision must be adverse in
4 order to fall within the definition of 12-901 is a one-sentence reference in *Southwestern Paint &*
5 *Varnish Co. v. Arizona Dept. of Environmental Quality*, 191 Ariz. 40, 951 P.2d 1232 (App.
6 1997). There, the court was faced with an appeal by Southwestern Paint of the ADEQ’s denial
7 of its claim for cleanup costs. The question before the court was whether the appellant was
8 required to apply for a rehearing after having gone through an administrative appeal before
9 availing itself of the procedures of A.R.S. § 12-901 *et seq.* As part of a preliminary discussion,
10 the court noted in passing that “judicial review is only available when a party has received an
11 adverse final administrative decision and has exhausted all available administrative remedies.”
12 *Id.* at 41, 951 P.2d at 1233. The court made no other references to an adversity requirement, and
13 the substantive discussion focused on the issue of exhaustion. It is clear from the context of the
14 court’s statement that it was referencing the situation with which it was dealing, where the
15 judicial appeal is taken by the very party who initially requested relief from the administrative
16 agency, which was denied. The court obviously was not contemplating a situation where the
17 judicial appeal is taken by a party who had gone through the administrative appeal stage under
18 the second prong of 41-1092.03(B), as a party who commented on the agency’s action. If the
19 court’s passing comment is interpreted literally, as the Department advocates, it would not only
20 contradict the plain language of 12-901, which nowhere requires that a decision be adverse, but,
21 by requiring that the party “receive” an adverse administrative decision, would also preclude
22 judicial appeals by any party who obtained a right to appeal judicially by first filing an
23 administrative appeal under the second prong of 41-1092.03(B). As discussed earlier in this
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1 section, such an interpretation would negate the plain language of 41-1092.08, and would create
2 irreconcilable conflict between that statute and 12-901.

3 Lastly, the Department argues that its decision was not a “decision” under 12-901
4 because it has not yet issued the leases. The Department cites no authority whatsoever for this
5 remarkable assertion, which is particularly odd given that the Department’s decision being
6 appealed is a formal Decision and Order of the Commissioner ordering that CalPort be granted
7 the mining leases at issue. Section 12-901 plainly defines a decision as one that affects the legal
8 right, duties or privileges of a party. The Department cannot claim (and certainly CalPort would
9 be surprised to find out) that the order granting CalPort the leases in question did not give
10 CalPort any rights or privileges in the leases. Therefore, the fact that the leases have not yet been
11 issued is immaterial to whether the Department’s decision falls within the definition in 12-901.

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14 The Department’s decision is a decision within the meaning of section 12-901, as it
15 affected the rights, duties or privileges of CalPort. That decision is therefore appealable pursuant
16 to section 12-904.

17 **III. CONCLUSION**

18 Pima County properly instituted this judicial appeal to appeal the Department’s decision
19 to issue mining leases to CalPort. Pima County therefore has standing to proceed with this
20 matter, and the Court has jurisdiction to hear it. Therefore, and for the reasons stated above,
21 Pima County respectfully requests that the Court deny the Department’s Motion to Dismiss.

22
23 BARBARA LAWALL
PIMA COUNTY ATTORNEY

24
25 By: _____
German Yusufov
Deputy County Attorney
Attorney for Pima County

BARBARA L WALL
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32 N. Stone Avenue, #2100
Tucson, AZ 85701
(520)740-5750

1 Original of the foregoing filed
2 with the Clerk of the Superior Court
3 this 13th day of April, 2007.

4 A copy of the foregoing hand-delivered to:

5 Hon. John Davis
6 Superior Court in Pima County
7 110 W. Congress
8 Tucson, AZ 85701

9 A copy of the foregoing mailed
10 this 13th day of December 2008 to:

11 Theresa M. Craig
12 Office of the Attorney General
13 1275 W. Washington
14 Phoenix, Arizona 85007
15 Attorney for Arizona State Land Department

16 John C. Lacy
17 DeConcini McDonald Yetwin & Lacy, P.C.
18 2525 East Broadway Blvd., Suite 200
19 Tucson, AZ 85716
20 Attorneys for Defendant California Portland Cement Company

21 By: _____
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