

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

<p>JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,</p> <p align="right">Plaintiff,</p> <p align="center">-vs-</p> <p>DONALD COX and CATHERINE COX, husband and wife,</p> <p align="right">Defendant.</p>	<p>Case No. P1300CV20030399</p> <p align="center">UNDER ADVISEMENT RULING</p>	<p align="center">FILED MAY 07 2010</p> <p>DATE: <u>8</u> O'Clock <u>A</u>.M. ✓</p> <p align="center">JEANNE HICKS, CLERK</p> <p>BY: <u>SHEETAL PATEL</u> Deputy</p>
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<p>HONORABLE DAVID L. MACKEY</p> <p>DIVISION 1</p>	<p>BY: Cheryl Wagster Judicial Assistant</p> <p>DATE: May 6, 2010</p>
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After oral argument on March 15, 2010, the Court took under advisement the pending motions regarding the certification of this case as a class action. The Court has now fully considered the arguments presented.

The Court first considers the factors set forth in Rule 23(a), *Ariz. R. Civ. P.* The Court has previously found that although there are numerous parties that must be joined, joinder of the numerous parties is feasible. The Court declines to change that prior ruling. Consistent with the prior rulings of this Court, the Court finds that the Plaintiffs have not established that “joinder of all members is impracticable.”

The Court finds that although there are questions of law and fact common to the class, the claims of the representative parties are not typical of the claims of the class. Specifically, the Court is aware from its involvement in this case that there is a substantial likelihood that some parties may favor the abandonment of the Declaration of Restrictions relative to the business or commercial use of their property while others will oppose the abandonment of such restrictions. There is simply not one class of landowners, and it is likely that upon receiving notice of these proceedings some landowners will choose to join in on the Plaintiffs’ side while others may choose to join in on the Defendants’ side.

The Court finds that given the substantial likelihood of the divergent positions of landowners, Plaintiffs’ cannot fairly protect the interest of all parties within the class. That is not an indication by the Court of the competence of Plaintiffs’ counsel as the Court finds that Plaintiffs’ counsel is competent to represent the position of the current Plaintiffs and those landowners who agree with Plaintiffs’ position. However, Plaintiffs’ counsel will not be able to adequately represent the interests of all members of the class when those interests are diametrically opposed to each other.

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Therefore, the Court finds that Plaintiffs have not established that they meet the prerequisites of class action certification pursuant to Rule 23(a), *Ariz.R.Civ.P.*

Although that determination is dispositive of the request for class action certification, the Court finds that a discussion of additional issues is appropriate. Specifically, the Court finds that if a class action were maintainable pursuant to Rule 23(b)(1) or (2), *Ariz.R.Civ.P.* members of the class could not request exclusion from the class pursuant to Rule 23(c)(2), *Ariz.R.Civ.P.* Under such circumstances, landowners who do not agree with the Plaintiffs' position could not seek exclusion from the class. On the other hand, if the Court finds that a class action was maintainable pursuant to Rule 23(b)(3), *Ariz.R.Civ.P.* members of the class could request exclusion from the class pursuant to Rule 23(c)(2), *Ariz.R.Civ.P.* The first option will not permit landowners to align themselves on the side they may choose. The second option would allow landowners to remove themselves from this case and not be bound by the decision of the Court. That would defeat the very purpose of the Court of Appeals ruling that joinder is necessary. Neither option is appropriate.

For all of those reasons, the Court declines to certify this action as a class action.

IT IS ORDERED the Plaintiffs' Cross Motion For Determination That Action May Proceed As Class Action is **DENIED**.

IT IS ORDERED the Defendants' Motion For Order Denying Class Action Classification and Certification and Motion For Order Re: Compliance With Order Re: Joinder is **GRANTED**.

IT IS ORDERED the Court's Order of July 15, 2009 granting Plaintiffs leave to file the Second Amended Complaint is **VACATED** and it is **ORDERED** this case shall proceed on the Plaintiffs' First Amended Complaint filed March 18, 2004 and the Defendants' Answer To Plaintiffs' First Amended Complaint filed May 21, 2004.

IT IS ORDERED that in the event the Plaintiffs do not take substantial steps to join all necessary and indispensable parties within the next **one hundred twenty (120) days**, this matter will be dismissed.

IT IS ORDERED the caption of this case shall not be amended until after service is substantially accomplished and the Court can determine whether to join a landowner who files a responsive pleading as a Plaintiff or Defendant.

IT IS ORDERED at the time Plaintiffs request the Clerk of the Court to issue Summons to be served upon the additional parties, the Plaintiffs **shall** file an Excel spreadsheet in paper **and** electronic form that lists the Assessor's Parcel Number in numerical order in column A, starting with row 1 as well as name(s) and mailing address of the current owner of each parcel in column B, in the row number corresponding to the Assessor's Parcel Number.

IT IS ORDERED the Plaintiffs shall serve each property owner subject to the Declaration of Restrictions with a Notice as well as a Summons and Plaintiffs' First Amended Complaint. The Notice shall be approved by the Court in the manner set forth below.

IT IS ORDERED the Plaintiffs may accomplish service in the following manner:

1. The Plaintiffs first may attempt to obtain an Acceptance of Service from all property owners.
2. For those property owners who will not sign an Acceptance of Service, the Court authorizes alternative service by mail as provided in Rule 4.2(c), *Ariz.R.Civ.P.* whether the property owner(s) are located within Arizona or outside the State.
3. For those property owners who will not sign a return receipt, the Plaintiffs shall make reasonable attempts to obtain personal service.
4. For those property owners who are not served in the ways set forth above, the Court will consider Plaintiffs' request for other forms of alternative service.

IT IS ORDERED by May 31, 2010 or at the time of filing an initial pleading or motion with the Court, whichever is sooner, all parties and attorneys appearing in this case **SHALL** designate and maintain an e-mail address with the Clerk of the Court **and** the other parties. The e-mail address will be used to electronically distribute any document, including minute entries and other orders, rulings, and notices described in Rule 125, *Rules of the Supreme Court* by e-mail or electronic link in lieu of distribution of paper versions by regular mail. The e-mail address shall be designated on each document filed. In the event that a party's e-mail address changes, that change shall immediately be brought to the attention of the Clerk of Superior Court and included on subsequent filings and pleadings.

IT IS ORDERED that the Clerk of the Superior Court is authorized to electronically distribute any document, including minute entries and other orders, rulings, and notices described in Rule 125, *Rules of the Supreme Court* by e-mail or electronic link in lieu of distribution of paper versions by regular mail.

IT IS ORDERED, after initial service of the Summons, Notice and Plaintiffs' First Amended Complaint and with the exception that originals of all documents must be filed with the Clerk of the Court in traditional paper format, all parties are authorized to transmit documents to all other parties in electronic format and shall attach to the original document filed with Clerk of Court a notice that the document was transmitted electronically to the other parties along with a list of the names of the parties and e-mail addresses to which electronic transmission was sent.

IT IS ORDERED any party who declines to provide the Clerk of the Court and the other parties with an e-mail address **SHALL** be assessed the actual cost of mailing.

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IT IS ORDERED the Clerk of Court is authorized to establish a high profile case web site for public access to this case file.

The Court has prepared and attached to this Ruling a draft of a Notice to be served upon all landowners together with a Summons and Plaintiffs' First Amended Complaint. Counsel shall be given an opportunity for input into the form of Notice as follows.

IT IS ORDERED counsel for both sides shall have until May 31, 2010 to file objections and proposals for the Notice.

cc: J. Jeffrey Coughlin – 114 S. Pleasant Street, Prescott, AZ 86303
Jeffrey Adams – Adams & Mull, P.O. Box 1031, Prescott, AZ 86302

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

<p>JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-VS-</p> <p>DONALD COX and CATHERINE COX, husband and wife,</p> <p style="text-align: right;">Defendant.</p>	<p>Case No. P1300CV20030399</p> <p>NOTICE</p>	<p style="text-align: center;">FILED</p> <p>DATE: _____ _____ O'Clock _____ M.</p> <p style="text-align: center;">JEANNE HICKS, CLERK</p> <p>BY: _____ Deputy</p>
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<p>HONORABLE DAVID L. MACKEY</p> <p>DIVISION 1</p>	<p>BY: Cheryl Wagster Judicial Assistant</p> <p>DATE:</p>
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**THIS LAWSUIT MAY AFFECT YOUR COYOTE SPRINGS RANCH
PROPERTY RIGHTS.**

You have been served as party in this lawsuit based upon your interest in real property subject to the Declaration of Restrictions for Coyote Springs Ranch so that you can decide what action you wish to take regarding this pending lawsuit. A copy of the Declaration of Restrictions for Coyote Springs Ranch is attached to the Plaintiffs' First Amended Complaint that is being served upon you along with this Notice.

This lawsuit involves claims by the Plaintiffs that the Defendants are violating the terms of the Declaration of Restrictions for Coyote Springs Ranch. The Defendants have denied the Plaintiffs' claims and are seeking an Order from this Court that certain terms of the Declaration of Restrictions for Coyote Springs Ranch have been abandoned.

If you wish to obtain additional information regarding this case, you may access the Clerk of the Yavapai County Superior Court's high profile case web site to review the file in this case at <http://www.co.yavapai/az/us/clerksupct.aspx>

In the event you chose to file a responsive pleading in this case you must do so within the time set forth in the Summons. The Court will determine by your response whether you should be joined with the Plaintiffs or Defendants.

In the event you chose to do nothing after being served with this lawsuit, you will be bound by the decisions of this Court regarding the validity of the Declaration of Restrictions for Coyote Springs Ranch.

Since you have been served with this lawsuit, you must comply with the Orders of this Court as follows:

IT IS ORDERED if you no longer own an interest in real property that is subject to the Declaration of Restrictions for Coyote Springs Ranch you should provide written notice to the Court and the other parties to this lawsuit that you no longer own an interest in the property and the notice shall include your Assessor's Parcel Number together with the name, address and phone number of the new owner.

IT IS ORDERED in the event you sell your interest in the property while this case is pending you shall provide the purchaser with a copy of this Notice and the Plaintiffs' First Amended Complaint no later than the close of escrow.

IT IS ORDERED in the event you sell your interest in the property you shall notify the Court in writing immediately and the notice shall include your Assessor's Parcel Number together with the name, address and phone number of the buyer.

IT IS ORDERED by May 31, 2010 or at the time of filing an initial pleading or motion with the Court, whichever is sooner, all parties and attorneys appearing in this case **SHALL** designate and maintain an e-mail address with the Clerk of the Court **and** the other parties. The e-mail address will be used to electronically distribute any document, including minute entries and other orders, rulings, and notices described in Rule 125, *Rules of the Supreme Court* by e-mail or electronic link in lieu of distribution of paper versions by regular mail. The e-mail address shall be designated on each document filed. In the event that a party's e-mail address changes, that change shall immediately be brought to the attention of the Clerk of Superior Court and included on subsequent filings and pleadings.

IT IS ORDERED any party who declines to provide the Clerk of the Court and the other parties with an e-mail address **SHALL** be assessed the actual cost of mailing.

DATED THIS _____ DAY OF JUNE, 2010

Honorable David L. Mackey