

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA  
2013 MAY 20 PM 3:54  
SANDRA K. HARRIS, CLERK  
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10 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF YAVAPAI**

12 JOHN B. CUNDIFF and BARBARA C.  
13 CUNDIFF, husband and wife; BECKY  
14 NASH, a married woman dealing with her  
15 separate property; KENNETH PAGE and  
16 KATHRYN PAGE, as Trustee of the Kenneth  
17 Page and Catherine Page Trust,  
18  
19 Plaintiffs,  
20  
21 v.  
22 DONALD COX and CATHERINE COX,  
23 husband and wife, et al., et ux.,  
24  
25 Defendants.

Case No. P1300CV 2003-0399  
Division No. 4  
**REPLY TO RESPONSE TO MOTION  
TO DISMISS FILED BY PLAINTIFFS  
CUNDIFF, NASH AND PAGE**  
(Assigned to the Honorable Kenton D. Jones)

26 Defendants, through undersigned counsel, hereby files this Reply to the Response to Defendants' Motion to Dismiss filed by Plaintiffs Cundiff, Nash and Page. Said Plaintiffs' sole arguments in Response to Defendants' Motion to Dismiss is twofold. First, they believe that they have fully complied with the Court's prior order requiring them to join all indispensable parties and therefore dismissal is inappropriate. Second, they argue that because the deadline for filing of

1 dispositive motions has expired, the Court may not consider it. However, Plaintiffs' arguments both  
2 lack merit.

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4 As Plaintiff Varilek has acknowledged already, a multitude of dispensable Coyote Springs  
5 Ranch property owners that the Court has Ordered be joined have not been joined. That is the case  
6 despite the fact that Plaintiffs were Ordered to complete joinder more than five years ago. As a result,  
7 this case cannot proceed and it should be dismissed given the monumental opportunities Plaintiffs  
8 have been given to complete joinder.

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10 With respect to Plaintiffs' argument that Defendants are time-barred from moving to dismiss,  
11 their conclusion is erroneous under Arizona law. Rule 12(h), Ariz. R. Civ. P., states as follows:

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13 A party waives all defenses and objections which that party does not  
14 present either by motion as hereinbefore provided, or, if that party has  
15 made no motion, in that party's answer or reply, *except* (2) ... a defense  
16 of failure to join a party indispensable under Rule 19... may be made  
17 in any pleading permitted or ordered under Rule 7(a), or by motion for  
18 judgment on the pleadings, or at the trial on the merits.

19  
20 The Rule contains no time limit. *See e.g., Riley v. Cochise County*, 10 Ariz.App. 55, FN3, 455 P.2d  
21 1005, FN 3 (Ct.App. 1969) ("In this jurisdiction, failure to join an 'indispensable' party has been  
22 regarded as so fundamental that it can be noted for the first time on appeal.) *citing Siler v. Superior  
23 Court In and For Coconino*, 83 Ariz. 49, 54, 316 P.2d 296 (1957). In this regard, the Arizona Civil  
24 Rules Handbook, Vol. 2B, Daniel J. McAulliffe, at 216 (2012 ed.), states:

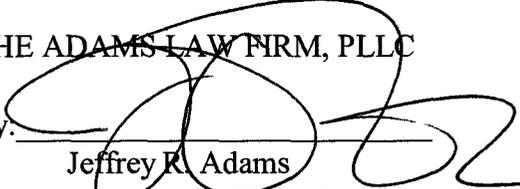
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26 The defense of failure to join a party under Rule 19 may be asserted by  
motion under Rule 12 or preserved in the responsive pleading. It is  
never waived and can be raised for the first time on appeal. .... Where  
a "party under Rule 19" has not been joined in the action, and is subject

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of the Court's jurisdiction, then joinder of that party should be ordered rather than dismissal.

*Citing Riley v. Cochise County*, 10 Ariz.App. 55, 455 P.2d 1005 (Ct.App. 1969); and *City of Flagstaff v. Babbitt*, 8 Ariz.App. 123, 43 P.2d 938 (Ct.App. 1968). Thus, Plaintiffs' argument that the deadline for Defendants to move to dismiss under Rule 19 has not expired. And because Plaintiffs have failed to join all of the Coyote Springs Ranch property owners subject to the Declaration of Restrictions as Ordered by the Court, this Court has no choice but to dismiss this case. Therefore, the Court should grant the pending Motion to Dismiss.

Dated this 70 day of May, 2013

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By:   
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COPY of the foregoing mailed this 10 day of May, 2013, to:

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