

2004 SEP 23 PM 4: 06

JEANNE HICKS, CLERK ✓

BY: J. S. Whiteley

1 Mark W. Drutz, Esq., # 006772  
Jeffrey R. Adams, #018959  
2 **MUSGROVE, DRUTZ & KACK, P.C.**  
1135 Iron Springs Road  
3 Prescott, Arizona 86305  
(928) 445-5935

4 Attorneys for Defendants  
5

6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 JOHN B. CUNDIFF and BARBARA C. )  
CUNDIFF, husband and wife; ELIZABETH )  
9 NASH, a married woman dealing with her )  
separate property; KENNETH PAGE and )  
10 KATHRYN PAGE, as Trustee of the Kenneth )  
Page and Catherine Page Trust, )

11 Plaintiffs, )

12 v. )

13 DONALD COX and CATHERINE COX, )  
14 husband and wife, )

15 Defendants. )  
16

CASE NO. CV 2003-0399 ✓

DIVISION 1

**RESPONSE TO PLAINTIFFS' MOTION  
IN LIMINE TO PRECLUDE  
DEFENDANTS' INTRODUCTION OF  
LAY WITNESS OPINION TESTIMONY**

(Assigned to the Hon. David L. Mackey)

(Oral Argument Requested)

17  
18 Defendants, by and through undersigned counsel, hereby respond to Plaintiffs' Motion In  
19 Limine to Preclude Defendants' Introduction of Lay Witness Opinion Testimony ("Motion *in*  
20 *Limine*"), which seeks to preclude the following individuals from testifying: Christin Bowra, Jeff  
21 Westra, Mychel Westra, Wendy Ditterman, Bill Jensen, Kevin Eickleberry, Charles Hildebrandt and  
22 Sheila Cahill. Not only is Plaintiffs' motion premature, it completely misstates and misrepresents and  
23 mischaracterizes the expected testimony of the foregoing individuals. The fact is, the testimony of  
24 the foregoing individuals will not violate any provision of the Arizona Rules of Evidence including  
25 Rules 601 and 702 as each person will testify (i) pursuant to their own personal knowledge, (ii) on  
26 the basis rationally based upon their own perceptions, (iii) in a manner that is helpful to a clear  
27 understanding of their own testimony and (iv) in a manner that will assist in the determination of facts  
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**DIV. 1**

SEP 24 2004

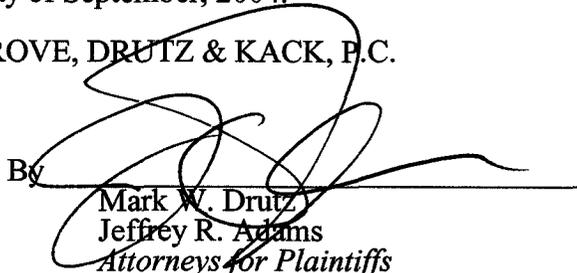
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1 at issue in this case including, but not limited to, the uses of other properties in Coyote Springs Ranch,  
2 which uses are directly relevant to Defendants' defenses.

3 This motion is supported by the following Memorandum of Points and Authorities and the  
4 record on file herein.

5 RESPECTFULLY SUBMITTED this 23 day of September, 2004.

6 MUSGROVE, DRUTZ & KACK, P.C.

7  
8 By   
9 Mark W. Drutz  
Jeffrey R. Adams  
10 Attorneys for Plaintiffs

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 The sole basis for Plaintiffs' motion is that Christin Bowra, Jeff Westra, Mychel Westra,  
13 Wendy Ditterman, Bill Jensen, Kevin Eickleberry, Charles Hildebrandt and Sheila Cahill allegedly  
14 lack personal knowledge regarding the matters to which they will testify and that their testimony  
15 allegedly will be "premised upon inadmissible hearsay" and will be "to an ultimate issue and  
16 conclusion of law" in violation of Rules 602, 701 and 702, Ariz. R. Evid. Not only is Plaintiffs'  
17 argument premature, it lacks merit and is unsupported by any evidence to suggest that the foregoing  
18 witnesses' testimony will violate any rule of evidence.

19 Plaintiffs admit in their motion that one of Defendants' defenses is that the June 13, 1974,  
20 Declaration of Restrictions at issue in this case has been abandoned. Over 50 years ago the Arizona  
21 Supreme Court adopted the legal principal that restrictive covenants are not enforceable and will be  
22 considered abandoned where frequent violations historically have been permitted. See e.g., O'Malley  
23 v. Cent. Methodist Church, 67 Ariz. 245, 257, 194 P.2d 444 (1948) citing De Gray v. Monmouth  
24 Beach Club Co., 24 A. 388 (\_\_\_\_). While Plaintiffs admit that abandonment of the Declaration of  
25 Restrictions is one of Defendants' defenses, they have refused to acknowledge that substantial  
26 evidence exists to support Defendants' defense in this regard. Now, as they did in their request for  
27

1 the Court's site inspection, they wish for the Court to disregard the evidence supporting and  
2 substantiating Defendants' abandonment defense despite its relevance and propriety in this case.

3           However, the evidence in Defendants' possession shows, unequivocally, that Christin Bowra,  
4 Jeff Westra, Mychel Westra, Wendy Ditterman, Bill Jensen, Kevin Eickleberry and Charles  
5 Hildebrandt are competent, viable witnesses whose testimony will be based upon personal knowledge  
6 as required under Rule 602, Ariz. R. Civ. P., and that their testimony will go directly to, and will have  
7 a direct bearing upon, Defendants' abandonment defense as is required by Rules 701 and 702, Ariz.  
8 R. Evid. By way of example, prior to Defendants' identification of Christin Bowra, Jeff Westra,  
9 Mychel Westra, and Charles Hildebrandt as witnesses, those individuals sent Defendants and/or  
10 undersigned documentation demonstrating that their testimony will be based upon personal  
11 knowledge, is relevant to the issues in this case, and will satisfy the mandates of Rules 602, 701 and  
12 702, Ariz. R. Evid. That documentation is attached hereto as Exhibit "1" and was provided to  
13 Plaintiffs both during Plaintiffs' depositions and in Defendants' Initial Rule 26.1 Disclosure  
14 Statement.

15           With respect to Wendy Ditterman, Bill Jensen, Kevin Eickleberry, all three are residents of  
16 the portion Coyote Springs Ranch that is at issue in this case. Those three individuals called  
17 undersigned and spoke at length regarding the issues in this lawsuit and their knowledge regarding  
18 other Coyote Springs Ranch property owners' uses of their properties, their knowledge of numerous  
19 violations of the Declarations of Restrictions, their knowledge of other business and commercial  
20 activities being conducted by owners of Coyote Springs Ranch properties on their properties in Coyote  
21 Springs Ranch and the historical lack of enforcement of the Declaration of Restrictions. During those  
22 lengthy conversations, none of which were either solicited nor initiated by undersigned, those  
23 witnesses each demonstrated that their testimony would satisfy the requirements of Rules 602, 701  
24 and 702.

25           What should be obvious to Plaintiffs and this Court is that by virtue of being residents of the  
26 portion of Coyote Springs Ranch governed by the Declaration of Restrictions that is at issue in this  
27 case, and by virtue of having had the opportunity to (i) observe other Coyote Springs Ranch property  
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1 owners and the use of their properties and (ii) interact and transact business with those property  
2 owners on their properties in Coyote Springs Ranch, Christin Bowra, Jeff Westra, Mychel Westra,  
3 Wendy Ditterman, Bill Jensen, Kevin Eickleberry, Charles Hildebrandt will be able to testify with  
4 personal knowledge regarding whether frequent violations of the Declaration of Restrictions have been  
5 permitted, which clearly is a fact at issue in this case. Those individuals therefore are proper  
6 witnesses in this case and the Motion *in Limine* should be denied.

7 Furthermore, while Sheila Cahill does not live in Coyote Springs Ranch, her testimony will  
8 satisfy the mandates of Rules 602, 701 and 702, Ariz. R. Evid. Sheila Cahill is a licensed private  
9 investigator who was employed by the Defendants to conduct an investigation of the properties located  
10 in Coyote Springs Ranch subject to the Declaration of Restrictions at issue in this case.<sup>1</sup> Her  
11 investigation included personal observations of properties located in Coyote Springs Ranch for  
12 purposes of identifying potential violations of the Declaration of Restrictions and taking photographs  
13 of those properties. Ms. Cahill also inspected the County records in search of Transaction Privilege  
14 Tax Licenses being owned by people transacting business on their properties located in Coyote  
15 Springs Ranch. Ms. Cahill further inspected the records on file with the Arizona Corporation  
16 Commission to identify Coyote Springs Ranch property owners who have formed partnerships, limited  
17 liability companies and corporations for the transaction of business and commercial activities within  
18 Coyote Springs Ranch. Ms. Cahill also inspected the Secretary of State records to identify property  
19 owners in Coyote Springs Ranch that own, *inter alia*, trade names and trademarks for businesses being  
20 conducted on their properties in Coyote Springs Ranch. Based upon the foregoing, Ms. Cahill has the  
21 requisite personal knowledge and competence to testify regarding her observations of the condition  
22 of properties in Coyote Springs Ranch as well as evidence of business and commercial activities being  
23 conducted in Coyote Springs Ranch, testimony which will be directly germane and relevant to the  
24 issue of whether frequent violations of the Declaration of Restrictions have been permitted. Further,  
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26 <sup>1</sup>Defendants intend to shortly deliver to Plaintiffs a supplemental disclosure statement  
27 identifying Ms. Cahill as an expert witness as opposed to a lay witness.

1 her testimony regarding her inspections of Coyote Springs Ranch and the results of her inspections  
2 of County and State records certainly will be helpful to a clear determination of a fact in issue and will  
3 satisfy the requirements of Rules 602, 701 and 702, Ariz. R. Evid..

4 Interestingly, Defendants are uncertain as to how Plaintiffs reached their unsupported  
5 conclusions that Christin Bowra, Jeff Westra, Mychel Westra, Wendy Ditterman, Bill Jensen, Kevin  
6 Eickleberry, Charles Hildebrandt or Sheila Cahill lacked personal knowledge regarding their expected  
7 testimony or that they would be testifying solely based upon hearsay. Significantly, none of the  
8 foregoing individuals have been deposed and, based upon conversations with the foregoing witnesses,  
9 none of them have even been contacted, either in writing or by telephone, by the Plaintiffs or their  
10 counsel. Simply put, there is no basis for Plaintiffs' Motion *in Limine* at this posture of the litigation  
11 and it should be denied.

12 At trial, if Plaintiffs wish to object to the testimony of Defendants' witnesses on the grounds  
13 that their testimony violates Rules 602, 701 or 702, they can make their foundation objections during  
14 trial for each witness and if Defendants are unable to lay appropriate foundation, the Court then can  
15 preclude the witness from testifying. However, until it is actually shown that there is a legal or factual  
16 basis upon which to preclude the testimony of Christin Bowra, Jeff Westra, Mychel Westra, Wendy  
17 Ditterman, Bill Jensen, Kevin Eickleberry, Charles Hildebrandt or Sheila Cahill, those witnesses  
18 should be allowed to testify in this case. For the foregoing reasons, the Motion *in Limine* should be  
19 denied.

20 DATED this 23 day of September, 2004.

21  
22 MUSGROVE, DRUTZ & KACK, P.C.

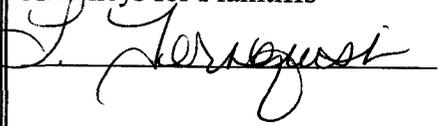
23  
24 By \_\_\_\_\_

25 Mark W. Drutz  
26 Jeffrey R. Adams  
27 Attorneys for Defendants  
28

1 A copy of the foregoing was  
hand-delivered this 23<sup>rd</sup> day of  
2 September, 2004 to:

3 The Honorable David L. Mackey  
Yavapai County Superior Court  
4 Division 1  
Yavapai County Courthouse  
5 Prescott, Arizona

6 David K. Wilhelmsen  
Marguerite M. Kirk  
7 FAVOUR, MOORE & WILHELMSSEN, P.A.  
Post Office Box 1391  
8 Prescott, Arizona 86302-1391  
Attorneys for Plaintiffs

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July 27, 2004

Musgrove, Drutz & Kack, P.C.  
Jeff Adams  
1135 Iron Springs Road  
Prescott, AZ 86305

Dear Jeff,

I am writing in support of the tree farm on Coyote Springs Road. First of all, I think it is an abomination that someone should be able to sue because they feel that this beautiful set of trees and greenery causes "irreparable harm in the destruction of the rural and residential nature of the real property". I find this to be absurd. Anyone driving by sees a great deal of natural greenery and a very clean well presented piece of property.

Secondly, the lawsuit mentions that this is a "commercial enterprise". To my knowledge, there are NO sales that are occurring on the property. The owners live on the property and grow trees that they relocate to their actual business in Prescott Valley. How is this any different from someone who builds gates for a living and builds them at home to deliver to the site they are working? Or a business owner who has items delivered to their home to be taken to the business they own? Or the person who has a booth at the Flea Market and houses their product at home between weekend sales. The examples are endless and include many individuals in our neighborhood.

With respect to the breach regarding two households on one property, I have no idea where this is coming from either. Our covenants allow for a second residence if it is a "guest house" or "service quarters". In addition, there are multiple homes in the neighborhood that have second houses on their property. Are the plaintiffs planning on suing all neighbors who have two residences and if so, under what premise?

We have a beautiful green entrance to our neighborhood that adds color to an otherwise sparse set of parcels. I think this law suit is frivolous and offensive to those of us who live in this community.

If I can provide any assistance in helping the Cox's stop this hideous legal attack, please let me know.

Sincerely,



Karrie Decker  
10800 Coyote Springs Road  
Prescott Valley, AZ 86314  
(928) 775-0946

MUSGROVE DRUTZ & KACK  
JUL 30 2004  
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July 30, 2004

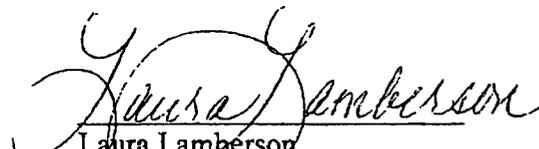
Musgrove, Drutz & Kack, P.C.  
Attn: Mr. Jeff Adams  
1135 Iron Springs Road  
Prescott, AZ 86305

Dear Mr. Adams:

We are very much in favor of the tree farm and would like it to stay. It is good for our environment and a thing of beauty after a long day. Please let us know how we can show our support. May we send you some money to help defray their legal fees?

Sincerely,

  
Frank Lamberson

  
Laura Lamberson  
8920 Easy Street  
Prescott Valley, AZ 86314

Mike and Karen Wargo  
9200 E. Spurr Lane  
Prescott Valley, AZ 86314  
(928) 772-5915 Home (928) 772-3210 Work

July 6, 2004

VIA FACSIMILE 445-5980

Jeff Adams, Esq.  
Musgrove, Drutz & Kack, P.C.  
1135 Iron Springs Road  
Prescott, AZ 86302

Re: *Donald and Catherine Cox adv. Cundiff and Page, et al.*

Dear Mr. Adams:

We are residents of Coyote Springs Subdivision. Like many of our neighbors, we have a home office; therefore, we have a personal interest in the outcome of the above referenced matter. We would also like you to note that we find the Defendants' property very pleasing to the eye and, in no way, believe it diminishes the "rural and residential nature of the real property subject to the recorded covenants and restrictions." We would be so lucky to have all Coyote Springs Residents take care of their properties as well as the Defendants and bring such beauty to this dry and desolate terrain.

Insofar as the merits of the case, I'm sure you are already aware of the fact that over 95% of the residents in Coyote Springs have failed to adhere to the "Declaration of Restrictions". The most common violation is the visible above-ground "bottled gas tanks" which are allegedly prohibited according to paragraph 16 of the Restrictions. In fact, the resident and attorney who first attempted to litigate this matter has an above-ground propane tank visible from Spurr Lane. In addition, he has a private garage for more than (3) cars, which is a violation of Restriction 7(c).

The next most violated Restriction is visible garbage and trash containers. Again, just about everyone in Coyote Springs has a trash receptacle on their property which is not enclosed. We have also noted several travel trailers on Coyote Springs Road which reside permanently on the property. This is a violation of Restriction 7 (c). On Far Away Place you have violations of Restrictions 9 and 10

Furthermore, to our knowledge the following types of businesses are currently operating in Coyote Springs:

- 1 - Plumbing Contractor;
- 1 - Grading and Excavating Contractor;
- 2 - Concrete Contractors;

Musgrove, Drutz & Kack, P.C.  
Attn: Jeff Adams, Esq.  
Donald and Catherine Cox adv. Cundliff and Page  
July 6, 2004  
Page 2

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2 - Landscape Contractors;  
1 - General Contractor;  
1 - Dog Kennel;  
1 - Automotive Repair;  
Multiple alpaca and llama farms;  
Multiple horse stables (boarding) and riding arenas; and  
1 - Church.

When we first learned of the above referenced litigation, we couldn't understand why the Church wouldn't also be a target if the Plaintiffs are truly concerned about preserving the rural and residential nature of the area, especially since the Church's property is adjacent to the property in question. The Church is a non-profit business exempt from federal taxes, but not immune from zoning laws or CCR's

Our position is simple. We do not want to see the Church close its doors anymore than we want to see the Defendants denied the right to grow and maintain those beautiful trees. We feel it would be prejudicial to prevent the Defendants from maintaining their operations, but allow the church to continue its business. In fact, aside from the obvious violation of Restriction 2, the church is in violation of Restrictions 8 and 16 with the size of its signs, visible propane tank and non-enclosed trash dumpster.

In short, despite purchasing our property over 10 years ago, we didn't move to Coyote Springs until last year after we noticed the Church, the nursery and other businesses move into the area, because we too wanted to operate a small business from our home. We relied upon the fact that no enforcement of the restrictions occurred over the past 10 years, therefore, we believed the restrictions did not renew or were abandoned.

Since we are not privy to all the specifics of the case or its status, I don't know if our testimony would be of help. However, if you feel we could somehow help support your clients' defense, please feel free to contact us.

Thank you for your time and consideration.

Sincerely,

Karen L. Wargo

C. Bowra  
9000 E Tuttle Rock Rd.  
Prescott Valle, AZ 86314-7948

928 775-3344

**Tarheel Towing** 928 775-6212

**From:** "Christin" <Christin30@myexcel.com>  
**To:** "Christin" <christin30@myexcel.com>; "Mychel Tarheel Towing" <towing@northlink.com>  
**Sent:** Tuesday, July 27, 2004 10:24 AM  
**Subject:** DRAFT/ Donald and Catherine Cox adv. Cundiff and Page, et al.

Dear Mr. Adams,

We became residents of Coyote Springs in 1993, after purchasing and rezoning 40 acres as Agricultural land. We brought 37 llamas here from a former ranch to continue the family side business.

Like many of our neighbors, we have a home office and operate in a manner that would not be possible in town on regular residential property.

We have a personal interest in the outcome of the case above. We are pleased to have the wholesale nursery in the community. We would rather have the nursery next door than various other neighbors, with a count of 26 vehicles within site on one property. Old, unkept mobile homes that are above the height allowed in the CC&Rs and numerous other unsightly violations.

We are surprised that the Attorney originating this matter has visible violations at his residence in Coyote Springs. His LP Gas tank is visible from the road on Spurr Lane amongst other violations.

There are many businesses operating in Coyote Springs, twenty that we know of, probably more.

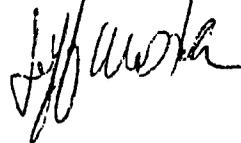
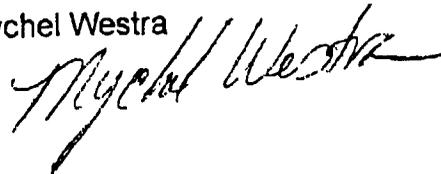
Having lived here 11 years we are very surprised and unhappy that this type of action would occur.

We are very much in favour of the Nursery business in our community and neighborhood. If we can be of any we want you to know that we support your clients defense and you may call on us. *Wrip*

Christin L. Bowra

Jeff Westra

Mychel Westra

To whom it may concern:

R.E. P.V. Growers;

As Residents of Coyote Spring  
we support P.V. Growers.

Their property is neat and clean  
and looks more like landscaping.

There are other businesses in Coyote  
Spring that are not clean and  
neat - but are unattractive.

So why single out the one?

MISGROVE DRUTZ & KAY  
AUG 16 2004

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Notary Public State of Arizona  
Yavapai County  
Charlene Maldonado  
Expires August 19, 2008

Ferry Ferry  
8-10-2004  
Charlene Maldonado

Musgrove-Drut -Katk P.C.  
1135 Iron Springs Road  
Prescott, AZ. 86305

Aug 07, 2004

To Whom It May Concern:

I'm the owner of 10 acres, up Coyote Spring and off of Turtle Rock Rd... Had the property since 1992 and have seen many new people migrate in and for the most part, no problems.

I'm an Electrical Contractor and use my home as an office and a small bit of property to store materials.

We've just about had meters on all wells that were good producers. We've been previously threatened about Home Owners Associations ect,ect. Lawyers have talked people into believing their could be no road without all parties paying their part, only to have it taken so they could set other future plans into action sooner at our expense. Thanks I needed that. I didn't have anything to spend the extra money on.

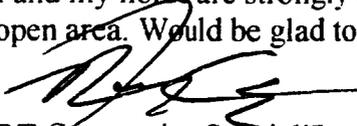
I won't mention any others but most, like me conduct business in and out of our homes. I believe we all came here with one intent, to work and live unhampered by others saying what we can or can't do at our homes.

I've got a great deal of respect for my neighbors. To the fact that I don't cross the line I try to make sure I keep my place presentable and pleasing to all concerned.

It's not as tidy as the Tree Farm but I try. I support the Tree Farm because it's needed. Trees produce oxygen and cut down on the dust lest we forget. I smoke but sure am glad to know I still can get fresh air when I sleep. Aside green foliage brings in more moisture believe it or not. If its not the case then the scientists in the Rainforest have been lying. Less Rainforest less rain. Has to be something to it. You've all lived in the city to long. Well go back if you don't like greenery, you can stay in that smoggy concert jungle. It seems to me you're jealous. So be it.

When I drive in from work or pleasure, the Tree Farm is a welcome sight.

I and my home are strongly in favor of the Tree Farm. I've got water and still a lot of open area. Would be glad to set some trees here for raising. Be glad for the birds.



RT Contracting Specialists, LLC

10555 N. Orion Way

Prescott Valley, AZ. 86314

R T Contracting Specialists LLC  
10555 N Orion Way  
Prescott Valley, AZ. 86314

August 23, 2004

Musgrove, Drutz & Kack, P.C.  
Attorneys At Law  
P.O. Box 2720 , Prescott, AZ. 86302-2720

File # 9449-1

Dear Mr. Adams;

Please be aware that communications to the neighbors that I in advertently mentioned are now and or will be submitting documentations in way of letters to the fact, that they support the Tree Farm. Conversations with these people are positive to the fact.

Most, after conversations know the letter ramifications others believe it will pass. I've not tolerance for ignorance. Believe that I do promote the actions in all ways.

This is just short of them coming at me, which has been tried numerous times before.

If there is anything else I can do for Mr. & Mrs. Cox and Jim please let me know, I am always here for them.

Please contact me at 928-772-6838 home or 928-273-2703 cell

Sincerely,

  
Robert Taylor

MUSGROVE DRUTZ & KACK  
AUG 26 2004  
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CHARLES A. HILDEBRANT

8/16/04

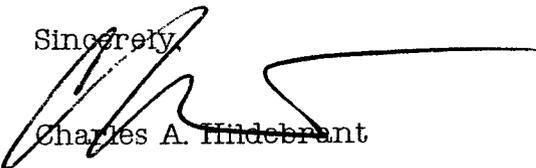
To Whom it may concern,

As a long-time resident and property owner in Coyote Springs, I am in complete support of Mr. and Mrs. Cox and their Tree Farm operation. Many of us in Coyote Springs feel that the use of our land for agricultural and horticultural purposes is not only appropriate, but has been normal and accepted for many years. There are horse farms, nurseries, vegetable growing operations, and even llama and alpaca businesses here. The Tree Farm has conformed to the Arizona Water Resources requirements and Yavapai County's agricultural zoning rules. Like many other families in Coyote Springs, we also use our land for agriculture. We have been happy and proud to grow horticultural products here for over 9 years.

Nurseries are clean, quiet, and beautiful to look at. We live in Coyote Springs because it has always offered a sense of country and agriculture. Nursery growing is as much a part of that as orchards and cows.

The Tree Farm Mr. and Mrs. Cox have worked so hard to make beautiful is an asset to our community and I support it completely.

Sincerely,

  
Charles A. Hildebrant

8420 PRONGHORN LANE  
PRESCOTT VALLEY,  
ARIZONA

86314