

2005 SEP -7 PM 4:01

JEANNE HICKS, CLERK

**R. ROEHE**

BY: \_\_\_\_\_

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4 **MUSGROVE, DRUTZ & KACK, P.C.**  
5 1135 Iron Springs Road  
6 Prescott, Arizona 86305  
7 (928) 445-5935

8 *Attorneys for Defendants*

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

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

11 JOHN B. CUNDIFF and BARBARA C.  
12 CUNDIFF, husband and wife; BECKY  
13 NASH, a married woman dealing with her  
14 separate property; KENNETH PAGE and  
15 KATHRYN PAGE, as Trustee of the Kenneth  
16 Page and Catherine Page Trust,

17 **Plaintiffs,**

18 v.

19 DONALD COX and CATHERINE COX,  
20 husband and wife,

21 **Defendants.**

Case No. CV 2003-0399

Division No. 1

**RESPONSE TO PLAINTIFFS'  
OBJECTION TO DEFENDANTS' FORM  
OF PARTIAL FINAL JUDGMENT**

(Assigned to the Honorable David L.  
Mackey)

22 Defendants Donald and Catherine Cox (hereafter "Cox"), by and through undersigned  
23 counsel, hereby respond to Plaintiffs' Objection to Defendants' Form of Partial Final Judgment.  
24 This Response is supported by the following Memorandum of Points and Authorities and the record  
25 on file herein.  
26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs first objection is that, “the precatory language of the form of order<sup>1</sup> proposed by  
3 Defendants fails to set forth that this Court had reviewed Defendants’ Motion as well as Plaintiffs’  
4 response, in addition to hearing oral argument on the issue.” This objection is unmeritorious as it  
5 is not necessary for the Judgment to include every pleading and/or exhibit which the Court reviewed  
6 in reaching its decision in this matter. “A judgment shall not contain a recital of pleadings.” Ariz.  
7 R. Civ. Proc. 54(a). In fact, in granting Cox’s Motion for Summary Judgment Re: Agricultural  
8 Activities, the Court acknowledged that it had considered the Statement of Facts that had been  
9 submitted in conjunction with other motions, the Statement of Facts that had been submitted by both  
10 parties with respect to the Motion for Summary Judgment, the entire Declaration of Restrictions and  
11 the relevant case law. (Hearing on Motion for Summary Judgment, p. 18, lns. 15-25, p. 19, lns. 1-  
12 11).

13  
14  
15  
16 Plaintiffs’ objection to the legal description attached to the proposed form of Partial Final  
17 Judgment is similarly unmeritorious. Plaintiffs have a copy of the Cox’s Deed to the Subject  
18 Property and the real description attached as Exhibit “A” is identical to the legal description of the  
19 Subject Property which is attached as Exhibit “1” to the proposed Partial Final Judgment. Attached  
20 as Exhibit “1” hereto is a copy of the Cox’s Deed with the relevant legal description attached thereto  
21 as Exhibit “A” for the Court’s comparison.  
22  
23  
24  
25

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26  
27 <sup>1</sup>It is a proposed judgment lodged pursuant to this Court’s order and Arizona Rules of Civil  
28 Procedure, Rule 54. “Judgment includes a decree and an order from which an appeal lies.” *Id.* at  
54(a).

1 As to Plaintiffs' objection to paragraph 2 of the proposed Partial Final Judgment, Cox agrees  
2 to substitute the following language:

3  
4 2. The Court finds as a matter of law that the conduct of Defendants on  
5 the Subject Property does not violate paragraph 2 of the Declaration as it is not a  
6 trade, business, profession or any other type of commercial or industrial activity  
7 initiated or maintained within said property or any portion thereof.

8 This is consistent with the Court's express findings on July 26, 2005.<sup>2</sup> (Hearing on Motion  
9 for Summary Judgment, p. 19, Ins. 14-18).

10 Finally, Plaintiffs' objection that the "proposed form of partial final judgment must set forth  
11 that Counts II and III of Plaintiffs' first amended complaint, as well as the declaratory and injunctive  
12 relief requested based on those counts, is held in abeyance pending appellate review of the partial  
13 final judgment. Consequently, the order must also reflect that the trial in this matter was vacated"  
14 also is unmeritorious. Once the Court of Appeals has affirmed the Court's granting of Cox's Motion  
15 for Summary Judgment, the proposed Partial Final Judgment should not be burdened with this  
16 unnecessary language. The proposed Partial Final Judgment includes Rule 54(b), Ariz. R. Civ.  
17 Proc., language which is utilized when there has been a resolution "as to one or more but fewer than  
18 all of the claims or parties." Consequently, it is not necessary for the Partial Final Judgment to  
19 address claims which have not been resolved.  
20  
21

22 The Court's minute entry order dated July 26, 2005 provides that Counts II and III of  
23 Plaintiffs' First Amended Complaint as well as the declaratory relief and injunctive relief requested  
24 based upon those counts is held in abeyance pending appellate review of the Court's decision  
25

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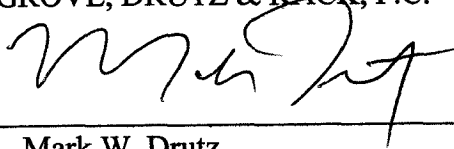
26  
27 <sup>2</sup>The language initially utilized by Cox in paragraph 2 of the proposed Partial Final Judgment  
28 came from the Court's minute entry order dated July 26, 2005.

1 regarding Count I of the First Amended Complaint and vacates the trial presently set. Any concerns  
2 which Plaintiffs may have as to their subsequent prosecution of Counts II and III of their First  
3 Amended Complaint are protected by the Court's July 26, 2005 minute entry order.  
4

5 For the foregoing reasons, Cox requests that the Court overrule Plaintiffs' objections other  
6 than the revised paragraph 2 submitted by Cox.

7 RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September, 2005.

8  
9 MUSGROVE, DRUTZ & KACK, P.C.

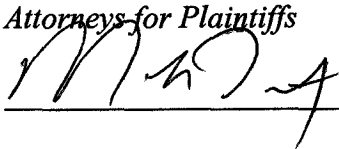
10  
11 By 

12 Mark W. Drutz  
13 Jeffrey R. Adams  
14 Sharon Sargent-Flack  
15 *Attorneys for Defendants*

16 COPY of the foregoing hand-delivered  
17 this 7<sup>th</sup> day of September, 2005 to:

18 Honorable David L. Mackey  
19 Yavapai County Superior Court  
20 Division 1  
21 Yavapai County Courthouse  
22 Prescott, Arizona 86301

23 David K. Wilhelmsen, Esq.  
24 Marguerite M. Kirk, Esq.  
25 Favour, Moore & Wilhelmsen, P.A.  
26 1580 Plaza West Drive  
27 Post Office Box 1391  
28 Prescott, Arizona 86302-1391  
*Attorneys for Plaintiffs*



Recorded at the request of Capital Title Agency

3037269 BK 3568 PG 863  
Yavapai County  
Patsy Jenney-Colon Recorder  
05/06/1998 04:28P PAGE 1 OF 3  
CAPITAL TITLE AGENCY  
RECORDING FEE 7.00  
SURCHARGE 4.00  
POSTAGE 1.00

when recorded mail to:  
DONALD COX  
CATHERINE COX  
12423 E. DOUBLETREE RANCH RD.,  
SCOTTSDALE, AZ 85259  
124897 LMF  
103-01-069B

## Warranty Deed

For the consideration of Ten Dollars, and other valuable considerations, I or we,

RAY C. MASSNER and ILSE M. MASSNER, Husband and Wife as Joint  
Tenants With Right of Survivorship

do hereby convey to

DONALD COX and CATHERINE COX, Husband and Wife

the following real property situated in YAVAPAI County, Arizona:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

10

BK	3568
PAGE	863
MAP	34
POL	85
	81
	82

6

SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations, and liabilities as may appear of record.

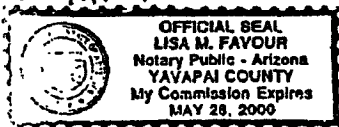
And I or we do warrant the title against all persons whomsoever subject to the matters set forth.

Dated this 21 Day of April, 1998

Ray C. Massner  
RAY C. MASSNER

Ilse M. Massner  
ILSE M. MASSNER

STATE OF ARIZONA )  
                          ) ss  
County of YAVAPAI )



This instrument was acknowledged before me  
this 24th day of APRIL, 1998 by

RAY C. MASSNER and ILSE M. MASSNER

Lisa M Favour  
Notary Public

STATE OF )  
                  ) ss  
County of )

My commission will expire  
This instrument was acknowledged before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_ by

**ACCEPTANCE  
(COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP)**

WE, the grantees, hereby declare our intention to accept this deed and hold title to the Real Property not as Tenants in Common, and not as Joint Tenants, but as Community Property with Right of Survivorship.

Dated this 24 day of April, 1998

Donald Cox  
DONALD COX

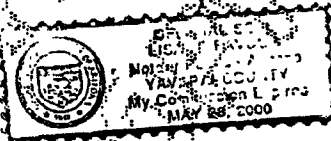
Catherine Cox  
CATHERINE COX

STATE OF ARIZONA )  
                          ) ss  
County of            )

This instrument was acknowledged before me this 27 day of April, 1998 by  
DONALD COX and CATHERINE COX

Ricce M. Lauer  
Notary Public

My Commission Expires



UNRECORDED COPY

SCHEDULE A

PAGE 3 OF 3  
BK 3568 PG 863 FEE#1037299

EXHIBIT "A"

All that portion of Section 25, Township 15 North, Range 1 West of the Gila and Salt River Base and Meridian, Yavapai County, Arizona, described as follows:

BEGINNING at the East quarter corner of Section 25 marked with a GLO brass cap monument;

Thence South 00 degrees, 04 minutes, 15 seconds East, 660.28 feet along the East line of Section 25 to a one half inch rebar and the TRUE POINT OF BEGINNING;

Thence South 00 degrees, 04 minutes, 15 seconds East, 660.28 feet to a one half inch rebar;

Thence North 89 degrees, 59 minutes, 02 seconds West, 1321.37 feet;

Thence North 00 degrees, 03 minutes, 08 seconds West, 660.32 feet;

Thence South 89 degrees, 58 minutes, 54 seconds East, 1321.15 feet to the TRUE POINT OF BEGINNING.

EXCEPT all oil, gas, coal and minerals as set forth in instrument recorded in Book 192 of Deeds, Page 415.

UNOFFICIAL COPY