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JEANNE HONG, CLERK ✓

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7 **IN THE SUPERIOR COURT OF ARIZONA**  
8 **COUNTY OF YAVAPAI**

9 **JOHN B. CUNDIFF** and **BARBARA C. )**  
10 **CUNDIFF**, husband and wife; **BECKY NASH,** )  
11 a married woman dealing with her separate )  
12 property; **KENNETH PAGE** and **KATHRYN )**  
13 **PAGE**, as Trustee of the Kenneth Page and )  
14 Kathryn Page Trust, )  
15 Plaintiffs, )  
16 vs. )  
17 **DONALD COX** and **CATHERINE COX,** )  
18 husband and wife, )  
19 Defendants. )

Case No. CV 2003-0399  
Division 1 ✓

**PLAINTIFFS' REPLY IN RESPONSE  
TO LEGAL MEMORANDUM RE  
JOINDER UNDER RULE 19 OF ALL  
COYOTE SPRINGS RANCH  
PROPERTY OWNERS SUBJECT TO  
RECORDED COVENANTS, JUNE 13,  
1974**

17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and Kenneth and Kathryn Page (hereinafter  
18 collectively referred to as "Cundiff"), by and through undersigned counsel, hereby replies to Defendants  
19 Cox's (hereinafter "Cox") response to Cundiff's Legal Memorandum re Joinder.

20 This reply is supported by the following memorandum of points and authorities, as well as the  
21 entire record in this proceeding.

22 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of November, 2007.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Cox (hereinafter collectively referred to in the singular as “Cox”) have engrafted  
3 their own interpretation<sup>1</sup> on the decision rendered by the Court of Appeals in an obvious attempt to  
4 persuade this Court that Plaintiffs (hereinafter referred to collectively in the singular as “Cundiff”) have  
5 failed to meet a burden that has not been imposed upon them. Cox then extrapolates their argument  
6 that having failed to meet a burden of persuasion on the issue of joinder, Cundiff’s complaint must be  
7 dismissed under Rule 19, Ariz.R.Civ.Proc.

8 Cox’s unilateral shifting of the burden of persuasion to Cundiff as to the characterization of any  
9 of the other landowners<sup>2</sup> as “indispensable” parties is misplaced. Nowhere in the appellate  
10 memorandum decision does that language appear. Indeed, the Court of Appeals merely states that the  
11 “trial court must determine on remand whether these parties are also indispensable under Rule 19(b)”  
12 *Cundiff v Cox, 1 CA-CV 06-0165, Memorandum Decision, May 24, 2007 at p 21, ¶36* Rule 19,  
13 Ariz.R.Civ.Proc., does not expressly place the burden on the party opposing a motion for joinder to  
14 establish that a “necessary” party is not otherwise an “indispensable” party. The very counter-  
15 intuitiveness of Cox’s proposition is obvious. Insofar as Cox moved to have all other property owners  
16 joined, at a minimum, Cox bears the burden of establishing to this Court’s satisfaction that the other  
17 area landowners subject to the restrictive covenants must be named parties to this action in order for  
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20 By way of example only, and not by way of limitation, Cox boldly claims: “There is  
21 no question that the Court of Appeals already has determined that a judgment rendered in  
22 Defendants’ favor would, without question, result in prejudice, harm and a loss of substantive  
23 real property rights by all other Affected Owners.” While this may be Cox’s rendition of the  
24 import of the Court of Appeals memorandum decision, this language is not supported by the  
25 decision itself and noticeably absent from Cox’s response is any citation to the memorandum  
26 decision in support of their contention.

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25 Cundiff continues to object to Cox’s use of the term “Affected Owners” as it  
26 mischaracterizes the nature and extent of the other property owners interest in this litigation.

1 the Court to render a just decision on the merits. That this Court may have earlier provided that  
2 Cundiff bore the burden of establishing that joinder is not feasible, bearing in mind that Cox have  
3 presented the argument that joinder is necessary, Cundiff requests that this Court reconsider its earlier  
4 ruling on its allocation of the burden under Rule 19.

5 Turning to the merits of Cox's argument that all other area landowners subject to the restrictive  
6 covenants are indispensable and must be made parties to this action, Cox fails to appreciate that  
7 appropriate orders can be entered in this matter without joinder of all sub-division property owners.  
8 Cox's pivotal argument is that because abandonment remains an available affirmative defense to them  
9 at trial, that absent joinder of all subdivision property owners, they remain subject to a multitude of  
10 subsequent litigation from the non-joined individuals. But Cox's argument is premised upon a  
11 misunderstanding of Rule 19. Cox's argument that they may face other litigation from other  
12 landowners is an argument that has been soundly rejected by federal courts in other cases.

13 In their memorandum, Cundiff presented well-reasoned, articulate decisions from the federal  
14 courts interpreting Rule 19 and the test of a party's indispensability to an action. "The 'complete relief'  
15 prescribed in ... Rule [19] only relates to those persons already party to the action; it does not concern  
16 any subsequent relief that could be later obtained from the absent party." *General Council of*  
17 *Assemblies of God v. Fraternidad de Iglesia de Asamblea de Dios Autonomo Hispana, Inc.*, 382 F.2d  
18 *Supp 2d 315, 320 (D. Puerto Rico 2005) citing Bedel v Thompson, 103 F.R.D 78 (D.C Ohio 1984)*  
19 *(which in turn cited Morgan Guaranty Trust Co. of N.Y. v Martin, 466 F.2d 593 (7<sup>th</sup> Cir. 1972); other*  
20 *internal citations omitted.* Cox has not advanced any relevant and material case law that provides to  
21 the contrary. Rather, Cox's only argument is that there may be a patchwork of decisions in the future  
22 interpreting the restrictive covenants if this Court does not order the joinder of all subdivision property  
23 owners. This misses the point. Under Rule 19, the issue is not whether the Court can render a just  
24 decision with regard to the entire world as conceivably every decision between litigants affects  
25 individuals and entities who are not parties to the litigation. Rather, the issue under Rule 19 and a  
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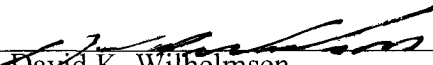
1 court's assessment of a party's indispensability to an action is whether the court can enter a just  
2 determination as between the parties currently before it. Cox's hypothesis of a potential patchwork  
3 of restrictions is as persuasive as the often advanced by litigants, much rejected by courts "floodgates  
4 of litigation" argument.

5 Again, this Court can adjudicate Cundiff's claim advanced in their complaint that Cox's  
6 agricultural business use of the property violates the recorded covenants. Similarly, this Court can  
7 adjudicate whether the restrictive covenants have been so thoroughly disregarded that there has been  
8 a legal abandonment of the covenants as Cox claims. Cox has never established that they are subject  
9 to credible threats of other litigation for their use of the land. If so, then the appropriate remedy is  
10 joinder of the cases, not the joinder of all disinterested subdivision property owners.

11 Furthermore, it is because Cox cannot substantiate their claim that they have actually been  
12 threatened with other litigation concerning their use of the land in violation of the restrictive covenants  
13 that, when coupled with the eleventh-hour timing of their initial request, compels a finding that Cox  
14 have interposed Rule 19 not in the interests of this Court entering a just determination between the  
15 parties currently before it, but rather (and obviously) more in the interests of increasing the cost and  
16 burden of litigation to Cundiff and this Court by the unnecessary inclusion of approximately 400 other  
17 individuals. To the extent that Cox attempts to fashion themselves in this litigation as champions and  
18 protectors of "valuable property rights," *see, Cox's Response at p 6*, then the appropriate method of  
19 doing so is by class action in accordance with Rule 23, not joinder under Rule 19.

20 DATED this 15<sup>th</sup> day of November, 2007.

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1 Original of the foregoing filed  
this 15<sup>th</sup> of November, 2007, with:

2 Clerk, Superior Court of Arizona  
3 Yavapai County  
120 S. Cortez Street  
4 Prescott, Arizona 86302

5 A copy of the foregoing  
hand-delivered this 15<sup>th</sup> day  
6 of November, 2007, to:

7 Honorable David L. Mackey  
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