

11-15-2012

## Guzman v. Piercy Clerk's Record v. 2 Dckt. 39708

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

### Recommended Citation

"Guzman v. Piercy Clerk's Record v. 2 Dckt. 39708" (2012). *Idaho Supreme Court Records & Briefs*. 1472.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/1472](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1472)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law.

(VOLUME 2)

2 7  
LAW CLERK

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

---

---

**LUIS JESUS GUZMAN, individually,**

**Plaintiff-Defendant-  
Respondent-Cross Appellant,**

**-vs-**

**DALE PIERCY, individually,**

**Defendant-Plaintiff-  
Appellant-Cross Respondent,**

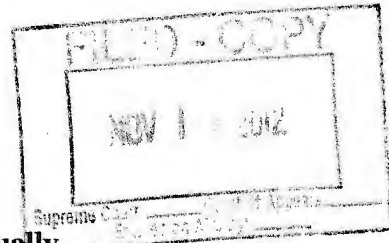
**-vs-**

**CANYON COUNTY,**

**Defendant-Respondent,  
And**

**JENNIFER L. SUTTON, individually,**

**Defendant-Respondent-  
Cross Appellant.**



---

---

**Appealed from the District of the Third Judicial District  
for the State of Idaho, in and for Canyon County**

Honorable BRADLY S. FORD, District Judge

---

---

Rodney R. Saetrum and Ryan B. Peck  
SAETRUM LAW OFFICES  
Attorneys for Appellant

Joshua S. Evett and Meghan Sullivan Conrad  
ELAM & BURKE, PA.  
Andrew M Chasan and Timothy C. Walton  
CHASAN & WALTON, LLC.  
Attorneys for Respondents (Sutton and Guzman)

Carlton R. Ericson  
Canyon County Deputy Prosecutor  
Attorney for Respondent (Canyon County)

**39708**

IN THE SUPREME COURT OF THE  
STATE OF IDAHO

LUIS JESUS GUZMAN, individually, )  
 )  
 Plaintiff-Defendant-Respondent- )  
 Cross Appellant, )  
 ) Supreme Court No. 39708-2012  
 -vs- )  
 )  
 DALE PIERCY, individually, )  
 )  
 Defendant-Plaintiff-Appellant- )  
 Cross Respondent, )  
 )  
 -vs- )  
 )  
 CANYON COUNTY, )  
 )  
 Defendant-Respondent, )  
 And )  
 )  
 JENNIFER L. SUTTON, individually, )  
 )  
 Defendant-Respondent- )  
 Cross Appellant. )

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE BRADLY S. FORD, Presiding

Rodney R. Saetrum and Ryan B. Peck, SAETRUM LAW OFFICES,  
3046 S. Bown Way, Boise, ID 83706

Attorneys for Appellant

Joshua S. Evett and Meghan Sullivan Conrad, ELAM & BURKE, PA.,  
P O Box 1539, Boise, ID 83701

Attorneys for Respondents

## TABLE OF CONTENTS

	Page No.	Vol. No.
Register of Actions	1 – 19	1
Complaint and Demand for Jury Trial, filed 5-10-05	20 – 22	1
Amended Complaint and Demand for Jury Trial, filed 5-19-05	23 – 25	1
Answer and Demand for Jury Trial, filed 6-20-05	26 – 31	1
Second Amended Complaint and Demand for Jury Trial, filed 8-30-05	32 – 35	1
Answer to Plaintiffs' Second Amended Complaint and Demand For Jury Trial, filed 9-15-05	36 – 41	1
Answer to Complaint and Demand for Jury Trial, filed 10-11-05	42 – 45	1
Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-2-07	46 – 74	1
Affidavit of Ryan B. Peck, filed 5-2-07	75 – 85	1
Affidavit of Michael A. Pope, filed 5-2-07	86 – 113	1
Defendant Piercy's Motion for Summary Judgment, filed 5-2-07	114 – 115	1
Affidavit of Jerry Deal, filed 5-16-07	116 – 118	1
Affidavit of Dennis Sorrell, filed 5-16-07	119 – 121	1
Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-16-07	122 – 125	1
Affidavit of Dale Piercy, filed 5-17-07	126 – 128	1
Third Amended Complaint and Demand for Jury Trial, Filed 6-6-07	129 – 133	1
Affidavit of Glenn Koch, filed 7-9-07	134 – 136	1
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-9-07	137 – 145	1
Affidavit of Linda Hansen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	146 – 156	1

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of Don Allen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	157 – 168	1
Affidavit of Bill A. Staker in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	169 – 171	1
Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	172 – 174	1
Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	175 – 177	1
Affidavit of Rosemary Thomas in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	178 – 182	1
Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	183 – 211	2
Affidavit of Timothy C. Walton in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	212 – 271	2
Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment, filed 7-24-07	272 – 290	2
Affidavit of Jennifer Sutton, filed 7-24-07	291 – 293	2
Affidavit of Dawn McClure, filed 7-31-07	294 – 306	2
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-31-07	307 – 329	2
Second Affidavit of Dale Piercy, filed 7-31-07	330 – 332	2
Second Affidavit of Ryan B. Peck, filed 7-31-07	333 – 344	2
Amended Notice of Hearing, filed 8-2-07	345 – 346	2
Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	347 – 354	2
Third Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	355 – 357	2
Defendant Sutton's Answer to Third Amended Complaint and Demand for Jury Trial, filed 8-13-07	358 – 362	2

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Answer to Plaintiffs' Third Amended Complaint and Demand For Jury Trial, filed 8-17-07	363 – 368	2
Memorandum in Support of Defendant Piercy's Motion to Strike, filed 8-23-07	369 – 378	2
Plaintiffs' Motion to Strike and Notice of Hearing, filed 8-24-07	379 – 381	3
Affidavit of Deborah Schrecongost in Support of Plaintiffs' Motion to Strike, file 8-24-07	382 – 393	3
Defendant Sutton's Supplemental Brief in Opposition to New Arguments and Facts Raised by Piercy, filed 8-28-07	394 – 404	3
Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment, filed 8-28-07	405 – 417	3
Reply to Plaintiffs' and Co-Defendant's Responding Memorandums and Motion to Strike Co-Defendant's Supplemental Brief, filed 8-30-07	418 – 444	3
Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved, filed 10-9-07	445 – 469	3
Action for Declaratory Judgment, filed 10-15-07	470 – 502	3
Notice of Hearing on Plaintiffs' Motion to Reconsider, Filed 11-8-07	503 – 504	3
Plaintiffs' Memorandum in Support of Motion to Reconsider, Filed 11-8-07	505 – 523	3
Answer to Third Party Defendant Canyon County, Idaho, Filed 11-8-07	524 – 529	3
Defendant Jennifer Sutton's Response and Joinder in Plaintiffs' Motion to Reconsider, filed 11-27-07	530 – 539	3
Defendant Piercy's Objection to Plaintiffs' Motion to Reconsider, filed 12-3-07	540 – 548	3
Order for Dismissal with Prejudice, filed 2-12-08	549	3

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Order for Dismissal with Prejudice of Claims by Erika Rivera Only, filed 2-19-08	550 – 551	3
Order from Scheduling Conference Setting Bench Trial on Challenge to Canyon County Herd Districts, filed 3-27-08	552 – 556	3
Plaintiff's Motion to Reconsider, filed 3-27-08	557 – 559	3
Response to Plaintiff's Motion for a Ruling on Plaintiff's Motion To Reconsider, filed 3-28-08	560 – 562	3
Order on Plaintiff's Motion to Reconsider, filed 4-3-08	563 – 565	3
Plaintiff's Supplemental Memorandum in Support of Motion For Reconsideration, filed 4-21-08	566 – 571	3
Order on Motion to Reconsider, filed 4-30-08	572 – 592	4
Order of Clarification, filed 8-1-08	593 – 595	4
Plaintiff's Memorandum in Opposition to Piercy's Motion to Reconsider, filed 8-27-08	596 – 598	4
Third Party Defendant Canyon County's Pretrial Statement, Filed 8-27-08	599 – 602	4
Pretrial Memorandum, filed 8-27-08	603 – 611	4
Plaintiff's Pretrial Conference Statement, filed 8-28-08	612 – 644	4
Third Party Defendant Canyon County's First Amended Pretrial Statement, filed 8-29-08	645 – 647	4
Defendant Jennifer Sutton's Pretrial Memorandum, Filed 9-2-08	648 – 661	4
Stipulation to Amend Pleadings and Scheduling, filed 9-4-08	662 – 670	4
Order to Amend Pleadings and Scheduling, filed 9-5-08	671 – 677	4
Amended Action for Declaratory Relief, filed 9-11-08	678 – 699	4
Plaintiff Luis Guzman's Answer to Amended Action for Declaratory Relief, filed 9-19-08	700 – 704	4

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Order Denying Defendant Piercy's Motion to Reconsider, Filed 9-23-08	705 – 714	4
Third Party Defendant Jennifer Sutton's Answer to Amended Action for Declaratory Relief, filed 9-23-08	715 – 720	4
Supplemental Pretrial Memorandum, filed 9-23-08	721 – 722	4
Third Party Defendant Canyon County's Answer to Plaintiff Piercy's Amended Action for Declaratory Relief, filed 9-24-08	723 – 728	4
Third Party Defendant Canyon County's Third Amended Pretrial Statement, filed 10-3-08	729 – 732	4
Third Party Defendant Canyon County's Fourth Amended Pretrial Statement, filed 10-6-08	733 – 736	4
Third Party Defendant Canyon County's Fifth Amended Pretrial Statement, filed 10-7-08	737 – 740	4
Stipulation Regarding Exhibits Undisputed Facts and Witnesses, filed 10-8-08	741 – 746	4
Defendant Piercy's Closing Memorandum, filed 11-17-08	747 – 768	4
Plaintiff Guzman's Post Trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District, filed 11-28-08	769 – 879	5
Defendant Canyon County's Closing Argument and Post Trial Brief, filed 12-1-08	880 – 906	5
Post-Trial Memorandum, filed 12-3-08	907 – 939	5
Defendant Piercy's Reply Brief, filed 12-15-08	940 – 958	5
Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial, filed 1-21-09	959 – 971	6
Defendant Piercy's Second Motion for Summary Judgment, Filed 5-5-09	972 – 974	6
Memorandum in Support of Defendant Piercy's Second Motion For Summary Judgment, filed 5-5-09	975 – 980	6



TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 5-5-09	981 – 987	6
Plaintiff Guzman’s Memorandum in Opposition to Defendant Piercy’s Second Motion for Summary Judgment, filed 5-22-09	988 – 994	6
Defendant Sutton’s Memorandum in Opposition to Defendant Piercy’s Second Motion for Summary Judgment, filed 5-22-09	995 – 1006	6
Defendant Jennifer Sutton’s Motion for Reconsideration, Filed 7-30-09	1007 – 1009	6
Affidavit of Joshua S. Evett in Support of Defendant Sutton’s Motion for Reconsideration, filed 7-30-09	1010 – 1071	6
Memorandum in Support of Defendant Jennifer Sutton’s Motion for Reconsideration, filed 7-30-09	1072 – 1100	6
Second Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 8-6-09	1101 – 1104	6
Reply to Plaintiff’s and Co-Defendant Sutton’s Objections to Defendant Piercy’s Second Motion for Summary Judgment, Filed 8-6-09	1105 – 1113	6
Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions, filed 8-7-09	1114 – 1128	6
Plaintiff/Defendant, Luis J. Guzman’s Motion for Reconsideration, filed 8-11-09	1129 – 1131	6
Reply Brief in Support of Defendant Sutton’s Motion for Reconsideration, filed 8-12-09	1132 – 1140	6
Order on Motion to Reconsider, filed 12-7-09	1141 – 1150	6
Plaintiff/Defendant Luis J. Guzman’s Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1151 – 1153	6
Memorandum in Support of Plaintiff/Defendant Luis J. Guzman’s Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1154 – 1178	7
Affidavit of Timothy C Walton in Support of Plaintiff/Defendant Luis J Guzman’s Motion for Reconsideration and to Dismiss, filed 5-26-10	1179 – 1273	7

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Jennifer Sutton's Brief Regarding Defenses on Reconsideration, Filed 6-2-10	1274 – 1298	7
Affidavit of Ryan B Peck, filed 6-8-10	1299 – 1322	7
Response to Motion to Reconsider, filed 6-8-10	1323 – 1342	7
Jennifer Sutton's Reply to Dale Piercy's Response to Motions To Reconsider, filed 6-10-10	1343 – 1356	8
Affidavit of Joshua S Evett in Support of Jennifer Sutton's Reply to Dale Piercy's Response to Motions to Reconsider, Filed 6-10-10	1357 – 1370	8
Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, filed 7-30-10	1370A – 1370JJ	8
Jennifer Sutton's Memorandum in Response to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, filed 8-6-10	1371 – 1387	8
Plaintiff's Reply Memorandum in Support of Motion to Dismiss And for Reconsideration, filed 8-9-10	1388 – 1392	8
Written Order Memorializing Oral Ruling on Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Jennifer Suttons Motion for Reconsideration, filed 10-5-11	1393 – 1418	8
Stipulation to Allow a IRCP 54(b) Certification, filed 1-11-12	1419 – 1423	8
Final Judgment and IRCP 54(b) Certificate, filed 1-13-12	1424 – 1425	8
Notice of Appeal, filed 2-23-12	1426 – 1436	8
Amended Notice of Appeal, filed 3-13-12	1437 – 1447	8
Defendants Luis Guzman and Jennifer Sutton's Notice of Cross-Appeal, filed 3-14-12	1448 – 1452	8
Request for Additional Record, filed 3-22-12	1453 – 1458	8
Certificate of Exhibits	1459 – 1461	8
Certificate of Clerk	1462 – 1463	8
Certificate of Service	1464 – 1465	8

## INDEX

	Page No.	Vol. No.
Action for Declaratory Judgment, filed 10-15-07	470 – 502	3
Affidavit of Bill A. Staker in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	169 – 171	1
Affidavit of Dale Piercy, filed 5-17-07	126 – 128	1
Affidavit of Dawn McClure, filed 7-31-07	294 – 306	2
Affidavit of Deborah Schrecongost in Support of Plaintiffs' Motion to Strike, file 8-24-07	382 – 393	3
Affidavit of Dennis Sorrell, filed 5-16-07	119 – 121	1
Affidavit of Don Allen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	157 – 168	1
Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	175 – 177	1
Affidavit of Glenn Koch, filed 7-9-07	134 – 136	1
Affidavit of Jennifer Sutton, filed 7-24-07	291 – 293	2
Affidavit of Jerry Deal, filed 5-16-07	116 – 118	1
Affidavit of Joshua S Evett in Support of Jennifer Sutton's Reply to Dale Piercy's Response to Motions to Reconsider, Filed 6-10-10	1357 – 1370	8
Affidavit of Joshua S. Evett in Support of Defendant Sutton's Motion for Reconsideration, filed 7-30-09	1010 – 1071	6
Affidavit of Linda Hansen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	146 – 156	1
Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	172 – 174	1
Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment, filed 8-28-07	405 – 417	3
Affidavit of Michael A. Pope, filed 5-2-07	86 – 113	1

INDEX, Continued

	Page No.	Vol. No.
Affidavit of Rosemary Thomas in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	178 – 182	1
Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-16-07	122 – 125	1
Affidavit of Ryan B Peck, filed 6-8-10	1299 – 1322	7
Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 5-5-09	981 – 987	6
Affidavit of Ryan B. Peck, filed 5-2-07	75 – 85	1
Affidavit of Timothy C Walton in Support of Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and to Dismiss, filed 5-26-10	1179 – 1273	7
Affidavit of Timothy C. Walton in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	212 – 271	2
Amended Action for Declaratory Relief, filed 9-11-08	678 – 699	4
Amended Complaint and Demand for Jury Trial, filed 5-19-05	23 – 25	1
Amended Notice of Appeal, filed 3-13-12	1437 – 1447	8
Amended Notice of Hearing, filed 8-2-07	345 – 346	2
Answer and Demand for Jury Trial, filed 6-20-05	26 – 31	1
Answer to Complaint and Demand for Jury Trial, filed 10-11-05	42 – 45	1
Answer to Plaintiffs' Second Amended Complaint and Demand For Jury Trial, filed 9-15-05	36 – 41	1
Answer to Plaintiffs' Third Amended Complaint and Demand For Jury Trial, filed 8-17-07	363 – 368	2
Answer to Third Party Defendant Canyon County, Idaho, Filed 11-8-07	524 – 529	3
Certificate of Clerk	1462 – 1463	8
Certificate of Exhibits	1459 – 1461	8
Certificate of Service	1464 – 1465	8

INDEX, Continued

	Page No.	Vol. No.
Complaint and Demand for Jury Trial, filed 5-10-05	20 – 22	1
Defendant Canyon County’s Closing Argument and Post Trial Brief, filed 12-1-08	880 – 906	5
Defendant Jennifer Sutton’s Motion for Reconsideration, Filed 7-30-09	1007 – 1009	6
Defendant Jennifer Sutton’s Opposition to Defendant Dale Piercy’s Motion for Summary Judgment, filed 7-24-07	272 – 290	2
Defendant Jennifer Sutton’s Pretrial Memorandum, Filed 9-2-08	648 – 661	4
Defendant Jennifer Sutton’s Response and Joinder in Plaintiffs’ Motion to Reconsider, filed 11-27-07	530 – 539	3
Defendant Piercy’s Closing Memorandum, filed 11-17-08	747 – 768	4
Defendant Piercy’s Motion for Summary Judgment, filed 5-2-07	114 – 115	1
Defendant Piercy’s Objection to Plaintiffs’ Motion to Reconsider, filed 12-3-07	540 – 548	3
Defendant Piercy’s Reply Brief, filed 12-15-08	940 – 958	5
Defendant Piercy’s Second Motion for Summary Judgment, Filed 5-5-09	972 – 974	6
Defendant Sutton’s Answer to Third Amended Complaint and Demand for Jury Trial, filed 8-13-07	358 – 362	2
Defendant Sutton’s Memorandum in Opposition to Defendant Piercy’s Second Motion for Summary Judgment, filed 5-22-09	995 – 1006	6
Defendant Sutton’s Supplemental Brief in Opposition to New Arguments and Facts Raised by Piercy, filed 8-28-07	394 – 404	3
Defendants Luis Guzman and Jennifer Sutton’s Notice of Cross-Appeal, filed 3-14-12	1448 – 1452	8
Defendant Piercy’s Memorandum in Objection to Plaintiff’s Motion to Dismiss and for Reconsideration, filed 7-30-10	1370A – 1370JJ	8

INDEX, Continued

	Page No.	Vol. No.
Final Judgment and IRCP 54(b) Certificate, filed 1-13-12	1424 – 1425	8
Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial, filed 1-21-09	959 – 971	6
Jennifer Sutton’s Brief Regarding Defenses on Reconsideration, Filed 6-2-10	1274 – 1298	7
Jennifer Sutton’s Memorandum in Response to Defendant Piercy’s Memorandum in Objection to Plaintiff’s Motion to Dismiss and for Reconsideration, filed 8-6-10	1371 – 1387	8
Jennifer Sutton’s Reply to Dale Piercy’s Response to Motions To Reconsider, filed 6-10-10	1343 – 1356	8
Memorandum in Support of Defendant Jennifer Sutton’s Motion for Reconsideration, filed 7-30-09	1072 – 1100	6
Memorandum in Support of Defendant Piercy’s Motion for Summary Judgment, filed 5-2-07	46 – 74	1
Memorandum in Support of Defendant Piercy’s Motion to Strike, filed 8-23-07	369 – 378	2
Memorandum in Support of Defendant Piercy’s Second Motion For Summary Judgment, filed 5-5-09	975 – 980	6
Memorandum in Support of Plaintiff/Defendant Luis J. Guzman’s Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1154 – 1178	7
Notice of Appeal, filed 2-23-12	1426 – 1436	8
Notice of Hearing on Plaintiffs’ Motion to Reconsider, Filed 11-8-07	503 – 504	3
Order Denying Defendant Piercy’s Motion for Summary Judgment, Joining Canyon County and Holding All Other Motions in Abeyance Until the Herd District’s Validity is Resolved, filed 10-9-07	445 – 469	3
Order Denying Defendant Piercy’s Motion to Reconsider, Filed 9-23-08	705 – 714	4
Order for Dismissal with Prejudice of Claims by Erika Rivera Only, filed 2-19-08	550 – 551	3

INDEX, Continued

	Page No.	Vol. No.
Order for Dismissal with Prejudice, filed 2-12-08	549	3
Order from Scheduling Conference Setting Bench Trial on Challenge to Canyon County Herd Districts, filed 3-27-08	552 – 556	3
Order of Clarification, filed 8-1-08	593 – 595	4
Order on Motion to Reconsider, filed 12-7-09	1141 – 1150	6
Order on Motion to Reconsider, filed 4-30-08	572 – 592	4
Order on Plaintiff's Motion to Reconsider, filed 4-3-08	563 – 565	3
Order to Amend Pleadings and Scheduling, filed 9-5-08	671 – 677	4
Plaintiff Guzman's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment, filed 5-22-09	988 – 994	6
Plaintiff Guzman's Post Trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District, filed 11-28-08	769 – 879	5
Plaintiff Luis Guzman's Answer to Amended Action for Declaratory Relief, filed 9-19-08	700 – 704	4
Plaintiff/Defendant Luis J. Guzman's Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1151 – 1153	6
Plaintiff/Defendant, Luis J. Guzman's Motion for Reconsideration, filed 8-11-09	1129 – 1131	6
Plaintiff's Memorandum in Opposition to Piercy's Motion to Reconsider, filed 8-27-08	596 – 598	4
Plaintiff's Motion to Reconsider, filed 3-27-08	557 – 559	3
Plaintiff's Pretrial Conference Statement, filed 8-28-08	612 – 644	4
Plaintiff's Reply Memorandum in Support of Motion to Dismiss And for Reconsideration, filed 8-9-10	1388 – 1392	8
Plaintiff's Supplemental Memorandum in Support of Motion For Reconsideration, filed 4-21-08	566 – 571	3
Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	183 – 211	2

INDEX, Continued

	Page No.	Vol. No.
Plaintiffs' Memorandum in Support of Motion to Reconsider, Filed 11-8-07	505 – 523	3
Plaintiffs' Motion to Strike and Notice of Hearing, filed 8-24-07	379 – 381	3
Post-Trial Memorandum, filed 12-3-08	907 – 939	5
Pretrial Memorandum, filed 8-27-08	603 – 611	4
Register of Actions	1 – 19	1
Reply Brief in Support of Defendant Sutton's Motion for Reconsideration, filed 8-12-09	1132 – 1140	6
Reply to Plaintiff's and Co-Defendant Sutton's Objections to Defendant Piercy's Second Motion for Summary Judgment, Filed 8-6-09	1105 – 1113	6
Reply to Plaintiffs' and Co-Defendant's Responding Memorandums and Motion to Strike Co-Defendant's Supplemental Brief, filed 8-30-07	418 – 444	3
Request for Additional Record, filed 3-22-12	1453 – 1458	8
Response to Motion to Reconsider, filed 6-8-10	1323 – 1342	7
Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions, filed 8-7-09	1114 – 1128	6
Response to Plaintiff's Motion for a Ruling on Plaintiff's Motion To Reconsider, filed 3-28-08	560 – 562	3
Second Affidavit of Dale Piercy, filed 7-31-07	330 – 332	2
Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	347 – 354	2
Second Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 8-6-09	1101 – 1104	6
Second Affidavit of Ryan B. Peck, filed 7-31-07	333 – 344	2
Second Amended Complaint and Demand for Jury Trial, filed 8-30-05	32 – 35	1



INDEX, Continued

	Page No.	Vol. No.
Stipulation to Allow a IRCP 54(b) Certification, filed 1-11-12	1419 – 1423	8
Stipulation to Amend Pleadings and Scheduling, filed 9-4-08	662 – 670	4
Stipulation Regarding Exhibits Undisputed Facts and Witnesses, filed 10-8-08	741 – 746	4
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-9-07	137 – 145	1
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-31-07	307 – 329	2
Supplemental Pretrial Memorandum, filed 9-23-08	721 – 722	4
Third Amended Complaint and Demand for Jury Trial, Filed 6-6-07	129 – 133	1
Third Party Defendant Canyon County's Answer to Plaintiff Piercy's Amended Action for Declaratory Relief, filed 9-24-08	723 – 728	4
Third Party Defendant Canyon County's Fifth Amended Pretrial Statement, filed 10-7-08	737 – 740	4
Third Party Defendant Canyon County's First Amended Pretrial Statement, filed 8-29-08	645 – 647	4
Third Party Defendant Canyon County's Fourth Amended Pretrial Statement, filed 10-6-08	733 – 736	4
Third Party Defendant Canyon County's Pretrial Statement, Filed 8-27-08	599 – 602	4
Third Party Defendant Canyon County's Third Amended Pretrial Statement, filed 10-3-08	729 – 732	4
Third Party Defendant Jennifer Sutton's Answer to Amended Action for Declaratory Relief, filed 9-23-08	715 – 720	4
Third Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	355 – 357	2
Written Order Memorializing Oral Ruling on Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Jennifer Suttons Motion for Reconsideration, filed 10-5-11	1393 – 1418	8

Timothy C. Walton ISB #2170  
CHASAN & WALTON LLC  
Park Center Pointe  
1459 Tyrell Lane  
Post Office Box 1069  
Boise, Idaho 83701-1069  
Telephone: (208) 345-3760  
Facsimile: (208) 345-0288

Stephen E. Blackburn ISB #6717  
BLACKBURN LAW, P.C.  
660 E. Franklin Rd., Suite 255  
Meridian, Idaho 83642  
Telephone: (208) 898-3442  
Facsimile: (208) 898-9443

FILED  
8:30 A.M. P.M.

JUL 20 2007

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

Attorneys for Plaintiffs Erika L. Rivera and Luis J. Guzman

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through )  
LOREE RIVERA her mother and )  
natural guardian, AND LUIS J. GUZMAN) )  
by and through BALLARDO GUZMAN )  
his father and natural guardian, )  
 )  
Plaintiffs, )  
vs. )  
 )  
DALE W. PIERCY, individually and )  
JENNIFER SUTTON individually, )  
 )  
Defendants. )  
 )

Case No: CV05-4848

Judge: Gordon W. Petrie

PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
PIERCY'S MOTION FOR  
SUMMARY JUDGMENT

July 20, 2007

INTRODUCTION

As noted by Defendant Piercy (hereafter "Piercy") in his memorandum in support of his motion for summary judgment, Plaintiffs Rivera and Guzman suffered severe bodily injury on March 20, 2005 when the vehicle in which they rode as passengers

ORIGINAL

collided with a bull owned by Piercy on Wamstad Road, just south of the Boise River, in Canyon County, Idaho. Luis Guzman sustained a subdural hematoma (bleeding on the brain). Erika Rivera's injuries include permanent partial paralysis of the left side of her body.

Piercy also correctly notes that in 1982, by Order of the Canyon County Commissioners, the land in Canyon County that had not been previously incorporated into a herd district was designated a herd district. See Exhibit 2, Affidavit of Michael Pope. See also Exhibit 3 to Pope Affidavit, "Order Establishing Herd District". Most of Canyon County has been herd district since the early 1900s. In fact, with the exception of the herd district created pursuant to the 1982 Order of the County Commissioners, and a single herd district created in 1967, all of Canyon County's herd districts were created between 1908 and 1925. Pope Affidavit, Exhibit 4.

Piercy notes that the pasture from which his bull escaped was within the lands designated a herd district by the County Commissioners' 1982 Order. Piercy's Memorandum in Support of Motion for Summary Judgment, p. 11. As can be seen on Exhibit "A" attached to Piercy's memorandum, the red bordered area that includes the enclosed pasture from which Piercy's bull escaped is completely encircled by other herd districts.

Piercy admits that the accident occurred in a herd district that was created in 1908. Piercy's Memorandum in Support of Motion for Summary Judgment, p. 12.<sup>1</sup> The boundary between the herd district where the bull was pastured and the herd district

---

<sup>1</sup> See also Exhibit "B", depo testimony Canyon County Sherriff Sloan ( 24:17-25:13), who described the point of impact as being just south of the Boise River bridge, which clearly puts the accident site south of the Boise River and within the herd district created in 1908. See also exhibit "B", depo testimony of Piercy, 21:15-22:3, where Piercy testified the accident occurred just south of the Boise River.

where the accident occurred is the middle of the Boise River. See Exhibit 4 to Pope Affidavit.<sup>2</sup> The bull's pasture is a few hundred yards north of the accident site.

Piercy testified that not only was the pasture from which his bull escaped enclosed, but **all** of Piercy's livestock in Canyon County, and in fact **all** of the cattle in Canyon County are contained in enclosed fields; and Piercy testified that he intends for his cattle to be contained in their pastures. Exhibit "B", deposition of Dale Piercy 15:11-15; 40:18-24; 41:8-45:5, and especially 44:17-45:5.

Piercy's farming and ranching operations in Canyon County encompass some 1,100 acres of land. Piercy farms on about 750 acres of land (450 of which he owns, and another 300 acres he leases). His ranching (cattle) operations are carried out on some 340 acres of Canyon County land (140 of which he owns, and 200 acres which he leases). His ranching operation includes about 260 cows, 20 bulls, and another 30 horses and mules. 34:19-37:3; 49:2-17.

Mr. Piercy would know that **all** livestock in Canyon County is contained in enclosed pasture land, since he has been a farmer and rancher in Canyon County for the last 30 to 50 years. Affidavit of Dale Piercy; depo of Dale Piercy, 41:4-7.

/

/

/

/

/

/

---

<sup>2</sup> The legal description contained in the Commissioners' Minutes in Book 3, page 375 for this herd district describes the middle of the Boise River as the northern boundary for said herd district.

As Piercy's testimony makes clear, there are no "unenclosed lands" within Canyon County "upon which by custom, license, or otherwise, livestock, excepting swine, are grazed or permitted to roam" per IC 25-2402(3). Thus, there is no "open range" in Canyon County, as that term is defined in IC 25-2402(3).<sup>3</sup> This makes sense, since almost all of Canyon County has been subject to herd district status since the 1920s, and 100% of Canyon County has been subject to herd district status since 1982.

Nonetheless, Piercy argues that the County failed to follow the statutory procedures for the establishment of a herd district when the County Commissioners issued their 1982 Order. Piercy argues that the County's failure to follow proper procedures invalidates the herd district created in 1982, that his bull was pastured in land that was made herd district in 1982, and that therefore his bull was pastured in open range on March 20, 2005.

Piercy is therefore arguing that because of a technicality, a herd district that has been the rule of law relied upon by the citizens of Canyon County for twenty-five years is invalid, that the herd district laws do not apply to him, and that he is immune from civil liability for paralyzing seventeen year old Erika Rivera and severely injuring sixteen year old Luis Guzman.

---

<sup>3</sup> Piercy argues that per Moreland v. Adams, 152 P.3d 558 (ID 2007), and Adamson v. Blanchard, 133 ID 602 (1999), land in Idaho is either open range or herd district. However, as the Idaho Supreme Court noted in Maguire v. Yanke, 99 ID 829 (1979), since the 1963 amendment to the herd district statutes, herd districts may no longer be created in open range areas, though "herd districts may still be created in any area not within "open range" as defined in IC 25-2402". 99 ID at 836. Maguire was cited with approval in Moreland. It is impossible to understand, if Piercy's interpretation of Moreland and Adamson is correct, and all land in Idaho is either open range or herd district, how any new herd districts can ever be created in Idaho, since doing so would be transforming open range into herd district, which the court in Maguire said could not be done. Since the interpretation urged by Piercy effectively nullifies the herd district statutes, such an interpretation must not be correct. It is worth noting that the accident in Adamson occurred in land that was, without question, open range, and that the Supreme Court's ruling in Moreland was limited to the specific facts of that case, the Idaho Supreme Court stating that, "On the uncontroverted facts presented by this case, the district court was correct in determining that the land in question was open range". 152 P. 3d, at 561.

In this memorandum Plaintiffs will demonstrate that Piercy's motion must fail, and that Piercy is subject to civil liability to Plaintiffs because:

1. All of Canyon County's herd districts were created prior to 1983, and by the express language of IC 25-2402, herd districts created **prior** to 1983 "shall remain in full force and effect", and are valid, even if they contain state or federal lands upon which the grazing of livestock has historically been permitted;
2. Assuming, arguendo, that the inclusion of state or federal lands upon which livestock has historically grazed does invalidate a herd district created prior to 1983, Piercy has failed to establish that the herd districts at issue in this case contain state or federal lands upon which livestock has **historically** been permitted to graze;
3. Per the express language of IC 31-857, a presumption exists as a matter of law that the Canyon County Commissioners undertook all necessary proceedings and jurisdictional steps required to warrant the 1982 Order establishing the herd district where Piercy's bull was pastured, and Piercy has offered nothing but conjecture and speculation to rebut that legal presumption;
4. Piercy's motion is grounded in unsubstantiated factual allegations;
5. Irrespective of the status of the herd districts in question, Piercy violated Canyon County law, is negligent per se, and is subject to civil liability to Plaintiffs;

6. Assuming, arguendo, that Piercy's bull was pastured in open range, because the accident occurred in a herd district, Piercy is subject to herd district liability.
7. The doctrine of quasi estoppel precludes Piercy from contesting the validity of the herd districts at issue.
8. While Plaintiffs believe the herd districts at issue are valid as a matter of law, at the very least **questions of fact exist which preclude granting summary judgment to Piercy. These questions of fact include:**
  - (a) whether a proper petition to establish the herd district was presented to the County Commissioners prior to the 1982 Order;
  - (b) whether the land where Piercy's bull was pastured was "open range", and if it was,
  - (c) whether: (1) the herd district where the accident occurred was fenced, and whether  
(2) cattle guards "were needed" between that open range and the herd district where the accident occurred.
  - (d) whether livestock has **historically** been permitted to graze on governmental lands that exist within the herd districts at issue.<sup>4</sup>
  - (e) whether the doctrine of quasi estoppel precludes Piercy from contesting the validity of the herd districts at issue.

---

<sup>4</sup> Questions of fact (b), (c) and (d) above are moot if the Court concludes, as Plaintiffs urge, that the herd districts at issue are valid as a matter of law.

## ARGUMENT

It is presumed the Court needs no legal authority for the standard to be applied to Piercy's motion. In short, Piercy has the burden of proving that there is no genuine issue as to any material fact. Piercy also has the burden of proving that he is entitled to judgment as a matter of law. IRCP 56(c).

**IT IS THE STATUTE IN EFFECT AT THE TIME A HERD DISTRICT IS CREATED THAT CONTROLS WHETHER THE HERD DISTRICT WAS PROPERLY CREATED; THUS THE HERD DISTRICT WHERE THE ACCIDENT OCCURRED IS VALID EVEN THOUGH IT ENCOMPASSES GOVERNMENT LANDS UPON WHICH CATTLE HAVE HISTORICALLY BEEN PERMITTED TO GRAZE.**

At the outset it is worth noting that Piercy cites the wrong statute in support of his motion. It would appear that Piercy cites the court to the current version of I.C. 25-2402(1), last amended in 1996.<sup>5</sup> However, it is not the current version of IC 25-2402 that applies to this analysis. Rather, for the reasons set forth below, it is the version of IC 25-2402 that was in effect at the time the Canyon County Commissioners created the herd district that is material to Piercy's motion.

A brief history of I.C. 25-2402 is in order. The first known version of this statute was enacted in 1907, with amendments in 1919, 1935, 1947, 1953, 1963, 1983, 1985, 1990 and 1996. See Idaho Code Annotated, Section 25-2402.

In 1982 the Canyon County Commissioners issued their Order designating the Canyon County land that was not already within a herd district, a herd district. Walton Affidavit. Exhibit "I". The statute in effect in 1982 was the 1963 version of I.C. 25-2402. A copy of the 1963 version of the statute is attached to the Affidavit of Tim Walton as

---

<sup>5</sup> Piercy's brief also left out a portion of I.C. 25-2402(1); that is, the phrase "internal fencing requirements upon their approval of a proposed district" was omitted by Piercy, thereby changing the apparent meaning of the statute.



Exhibit "C".

In 1983 the Idaho legislature amended IC 25-2402, and for the first time the statute provided that no herd district shall contain BLM lands "upon which grazing by livestock has been historically permitted". Significantly, the 1983 version of the statute also said. **"Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404."** See 1983 amendment to IC 25-2402, Exhibit "D" to Tim Walton's Affidavit.

Thus, the 1983 amendment to IC 25-2402 specifically provided that any herd district in existence prior to 1983 would retain its "identity, geographic location, and remain in full force and effect", notwithstanding the amendment to the statute precluding certain BLM lands from being included within a herd district.

Since all of Canyon County's herd districts were created prior to 1983, all of Canyon County's herd districts retained their identity, geographic location and remained in full force and effect, notwithstanding the 1983 amendment to the statute.

Significantly, the 1985, 1990 and 1996 amendments to IC 25-2402 all provided that, "any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404". See Exhibits "E" (1985 version of the statute), "F" (1990 version)<sup>6</sup> and "G" (1996 version), Affidavit of Tim Walton.

In short, the statutory scheme has consistently and expressly provided that herd districts already in existence would not be invalidated by later amendments to IC 25-

---

<sup>6</sup> Prior to 1990 only certain federal lands were precluded from herd districts; with the 1990 amendment to the statute, state lands upon which the grazing of livestock has historically been permitted were also precluded from herd districts.

2402, even though a herd district as originally created would not be a valid herd district under later versions of IC 25-2402.

Thus, Piercy's argument that the herd district where the accident occurred (which herd district was created in 1908) is invalid because it purportedly contains certain governmental lands upon which livestock have been historically permitted to graze, must fail. There was no statutory prohibition against including such governmental lands within a herd district at the time the Canyon County herd districts were created, and the later amendments to the statute, per the specific language of those later statutes, do not invalidate the earlier created herd districts.

Piercy cites Miller v. Miller, 113 ID 415 (1987), in support of his argument that herd districts created prior to 1983 are invalid if they contain certain governmental lands upon which livestock has historically been permitted to graze.<sup>7</sup>

Piercy's reliance on Miller is misplaced. The herd district in question in that case was created in 1984 and included certain federal lands precluded from herd districts by the 1983 amendment to IC 25-2402. Thus the herd district in Miller could not be "grand-fathered" in under the statutory language that provided that any herd district in existence prior to 1983 would "retain its identity, geographic definition, and remain in full force and effect".

Since all of Canyon County's herd districts existed prior to 1983, those herd

---

<sup>7</sup> Piercy argues that the 1982 Order created a single herd district encompassing the entire county. Plaintiffs read that Order more narrowly, and suggest that the 1982 Order only designated the land that was not previously within a herd district, a herd district. The 1982 Order expressly says that "... a herd district be established in the three remaining open range areas in Canyon County as shown on the attached survey map (marked in black), to the end that the entire land area of Canyon County be placed in herd district status". See Pope Affidavit, exhibit 2. Secondly, there appears to be state land, but no BLM land, in the herd district where the accident occurred.

districts remain in full force and effect whether or not they include state or federal land upon which livestock has historically been permitted to graze. To hold otherwise would not only invalidate countless herd districts throughout the state; it would also render meaningless the statutory language that provides, “...**any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect...**”. IC 25-2402.

Further, Piercy’s argument that the court should apply the 1996 version of IC 25-2402 to determine the validity of herd districts created prior to 1983 is an attempt by Piercy to make the current version of IC 25-2402 retroactive, in violation of IC 73-101, which states that the statutes of Idaho are not “retroactive, unless expressly so declared”. As the Idaho Supreme Court stated in Gailey v. Jerome County, 113 ID 430 (1987), “[A] statute is not applied retroactively unless there is clear legislative intent to that effect”. 113 ID, at 432.

In view of the language in IC 25-2402 that “...any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect...”, the legislature has clearly indicated that it did not intend for previously valid herd districts to be rendered invalid, retroactively, by subsequent amendments to the statute.

Thus, as a matter of law, the herd district at issue is not invalid even if it does contain state or federal lands upon which the grazing of livestock has historically been permitted.

AS A MATTER OF LAW, PIERCY HAS FAILED TO PROVE THAT A HERD DISTRICT AT ISSUE CONTAINS LANDS OWNED BY THE STATE OR FEDERAL GOVERNMENTS UPON WHICH LIVESTOCK HAS HISTORICALLY BEEN PERMITTED TO GRAZE; AT THE VERY LEAST THERE IS A QUESTION OF FACT ON THAT ISSUE.

Even if IC 25-2402 did not expressly provide that herd districts created before 1983 remain in full force and effect even if they include certain governmental lands upon which livestock has historically been permitted to graze, Piercy's motion fails because Piercy has failed to prove that livestock **historically** grazed on the governmental lands at issue.

As is noted herein (footnote 7), there are no lands of the United States within the herd district where the accident occurred, and there is no proof that there are federal lands within the herd district created in 1982. Thus the portion of IC 25-2402 precluding certain federal lands from herd districts is simply inapplicable to this case. While there may be state lands within the herd district where the accident occurred, as is noted below, there is no evidence of record that livestock has "**historically**" been permitted to graze upon such state lands. Thus, it is irrelevant whether that herd district includes state lands, since Piercy offers no proof that livestock has "**historically**" been permitted to graze upon such state lands. Finally, Piercy offers no proof that the herd district created by the County Commissioners' 1982 Order contains any state lands.

Specifically, the Affidavits of Mr. Deal, Ms. Thomas and Mr. Sorrell fail to prove that any herd district at issue contains lands owned by the state or federal governments "upon which the grazing of livestock has been **historically** permitted", per IC 25-2402.

At best, the Deal Affidavit merely alleges that from about 1983 until 2003 cattle were being grazed on state lands within the herd district where the accident occurred, which herd district was created in 1908.

The Deal Affidavit provides no proof that livestock were “historically” permitted to graze upon those alleged state lands within that herd district. Rather, the Deal Affidavit suggests merely that long after the formation of the herd district where the accident occurred, the state allowed a Mr. Ragain to graze cattle on state lands, from about 1983 until about 2003; that such grazing ceased some two years prior to this accident; and that a Mr. Sorrell is “authorized” to graze cattle on certain state lands within the herd district where the accident occurred (Mr. Deal makes no mention of how long Sorrell’s cattle have been permitted to graze). There is a complete absence of evidence in the Deal Affidavit that livestock has “**historically**” been permitted to graze on such state lands.

In the context of IC 25-2402, the word “historically” must mean from the early days of livestock ranching in Idaho, and “historically” certainly requires that the grazing be from a time pre-dating the formation of the herd district in question. The Deal Affidavit provides no evidence that cattle grazed on those state lands prior to 1908. Rather, the Deal Affidavit shows only that in the very recent past cattle have grazed on such state lands.

Similarly, the Sorrell Affidavit fails to establish that livestock have historically grazed on state lands within the herd district created in 1908; rather, the Sorrell Affidavit merely alleges that livestock have grazed there for “over fifteen years”. Thus, per the Sorrell Affidavit, livestock have grazed on those state lands since about 1992, which is some eighty-four years after the formation of the herd district that encompasses those state lands. This is hardly proof that livestock have “historically” grazed on those lands.

Finally, the Thomas affidavit submitted by Piercy adds little to the discussion at bar. Plaintiffs have also submitted an affidavit from Ms. Thomas. That affidavit establishes: there is no BLM (federal) land upon which livestock have historically been permitted to graze within the herd district where the subject accident occurred.

It is impossible to determine, from the present state of the record, whether there is BLM land within the herd district created per the 1982 Order.

Ms. Thomas' affidavit establishes there is no documented grazing of cattle on BLM land in Canyon County prior to 1981. Ms. Thomas has no personal knowledge of when cattle may have commenced grazing on BLM land in Canyon County. Thus there is no proof that cattle were "**historically**" permitted to graze on BLM lands in Canyon County. See Rosie Thomas affidavit submitted by Plaintiffs.

Since there is no proof that livestock have "historically" been permitted to graze upon BLM lands in Canyon County, or that there are any BLM lands within the herd districts at issue in this case, Ms. Thomas' affidavits do not advance Piercy's Motion for Summary Judgment.

**Finally, while Plaintiffs believe that Piercy has failed, as a matter of law, to prove that the herd districts in question contain state or federal lands upon which the grazing of livestock has historically been permitted, there are, at the very least, questions of fact on these issues which preclude the granting of summary judgment to Piercy.**

BY STATUTE, HERD DISTRICTS ARE PRESUMED TO BE VALID; THE RECORD IN THIS CASE ESTABLISHES AS A MATTER OF LAW THAT THE HERD DISTRICTS AT ISSUE ARE VALID; AT THE VERY LEAST, THERE IS A QUESTION OF FACT ON THAT ISSUE.

Turning now to Piercy's claim that the herd district created by the Canyon County Commissioners' 1982 Order is invalid because the County Commissioners allegedly failed to follow proper procedure, the Court should first review IC Section 31-857 which provides as follows:

POWERS AND DUTIES OF BOARD  
OF COMMISSIONERS

31-857. SCHOOL, ROAD, HERD AND OTHER DISTRICTS -- **PRESUMPTION OF VALIDITY OF CREATION OR DISSOLUTION.** Whenever any school district, road district, herd district, or other district has heretofore been, or shall hereafter be, declared to be created, established, disestablished, dissolved, or modified, by an order of the board of county commissioners in any county of the State of Idaho, *a legal prima facie presumption is hereby declared to exist, after a lapse of two (2) years from the date of such order, that all proceedings and jurisdictional steps preceding the making of such order have been properly and regularly taken so as to warrant said board in making said order, and the burden of proof shall rest upon the party who shall deny, dispute, or question the validity of said order to show that any of such preceding proceedings or jurisdictional steps were not properly or regularly taken; and such prima facie presumption shall be a rule of evidence in all courts in the State of Idaho.* (Emphasis added)

In summary, this statute provides in relevant part that there is a prima facie presumption that the Canyon County Commissioners properly and regularly undertook all necessary proceedings and jurisdictional steps required to warrant the board to make the 1982 Order creating the herd district, and that the burden of proof is on Piercy to prove otherwise. Moreover, this prima facie presumption is a rule of evidence that will apply in this case.

Against this presumption that the herd district was properly created we have only Piercy's speculative argument that it was not properly created because the "Order

Establishing Herd District” (Exhibit 2 to Michael Pope Affidavit) fails to mention a petition submitted by certain landowners of the county. However, Piercy offers no proof that the County Commissioners were not presented with such a petition. Rather, Piercy offers only surmise and conjecture. Piercy first argues the petition was not presented to the County Commissioners based upon Piercy’s reading of the “Order” in question. Since the Order fails to mention a petition, Piercy argues, it must be that no such petition ever was presented to the Commissioners.

It appears from reviewing the 1982 Order that this was a topic the County Commissioners had been dealing with for some time, since the Order recites that, “The Board has **again** reviewed the complexity of the Herd District Boundaries...” (emphasis added). (Exhibit 2, Pope Affidavit). **The record offered by Piercy is just as consistent with the notion that the Commissioners had wrestled with the issue of creating the subject herd district, pursuant to a proper petition, for months, or even years, prior to the 1982 Order, and IC 31-857 requires the Court to presume such.**

In *Garrett Transfer & Storage Co. v. Pfost*, 54 Idaho 576, 33 P.2d 743 (1933), Garrett attempted to argue (just as Piercy argues here) that there were procedural irregularities in the enactment of a statute, and that the statute was therefore unenforceable. The Idaho Supreme Court identified Garrett’s allegations, and resolved such issues as follows:

The appellant claims that the law was not read on three separate days in each house prior to final vote; that no emergency existed warranting dispensing with such provision; it contained no emergency clause; was not read section by section; and no vote was taken by yeas and nays thereon;

In re Drainage District No. 1, 26 Idaho, 311, 143 P. 299, L. R. A. 1915A,



1210, announces the rule that it will not be presumed in any case from the mere silence of the journals that either house has exceeded its authority or disregarded a constitutional requirement in the passage of a legislative act, unless the Constitution has expressly required the journal to show the actions taken, as, for instance, where it requires the yeas and nays to be entered. 33 P.2d at 746.

Garrett teaches that it will not be presumed that a legislative body exceeded its authority or disregarded a procedural step in the promulgation of a law, merely because the records of that legislative body are silent as to whether such procedure was followed by the legislative body. Thus, Piercy's arguments to the contrary notwithstanding, this Court should draw no conclusions from the failure of the County Commissioners' records to mention a petition for a herd district.

In light of the statutory presumption that the herd district is valid, in light of the fact that Piercy has the burden of proving it was not valid, and in light of the fact that the mere failure to mention a herd district petition in the County Commissioners' records does not constitute any proof whatsoever that proper procedure was not followed in the enactment of the herd district in 1982, Piercy has failed, as a matter of law, to establish that the herd district was not properly created. Rather, the record in this case, combined with the statutory presumption that the herd district is valid, establishes that **the herd district is valid as a matter of law. At the very least, there is a genuine issue of fact on that issue, which precludes entry of summary judgment against Plaintiffs.**

Piercy raises other issues with regard to the 1982 Order. Thus, Piercy argues, the herd district is invalid because it is not described in metes and bounds. Piercy cites no case authority for the proposition that a herd district is invalid if the Order establishing the herd district fails to describe the herd district in metes and bounds.

Further, IC 25-2402, as it existed in 1963, at best only required the **petition** to describe the area in metes and bounds.<sup>8</sup> There is no statutory requirement that the **order** describe the herd district in metes and bounds.

Moreover, the County Commissioners' 1982 Order effectively made the entire county subject to herd district status, and the county **is** statutorily described by metes and bounds. See IC 31-116, a copy of which is attached hereto as Exhibit "H". The statutory metes and bounds description of Canyon County contained in IC 31-116, together with the effective designation in the County Commissioners' 1982 Order of the entire county as subject to herd district status, does provide a metes and bounds description of the area in Canyon County subject to herd district law.

Similarly, Piercy argues the herd district is invalid because the 1982 Order fails to specify a certain time when it will take effect. Piercy cites no case law for the proposition that this alleged defect strikes a fatal blow to the herd district's survival. Piercy can not argue that he had no notice of the herd district's existence (which is the clear reason why the statute requires a date certain for the herd district to take effect). The herd district had been in existence for twenty-three years prior to this accident.

Further, Piercy's livestock escaped their pasture on October 5, 2001 and were involved in two other motor vehicle accidents on that date, north of the Boise River on Wamstad Road, 1/4 mile south of Hexon Road. Affidavits of Tim Walton, Linda Hansen and Don Allen. In other words, these 2001 cattle/motor vehicle accidents occurred on

---

<sup>8</sup> The way the 1963 version IC 25-2402 was drafted makes it uncertain whether even the petition needed to describe the proposed herd district in metes and bounds, since the statute says the "petition shall describe the boundaries of the said proposed herd district". Also, not to nitpick, but Piercy is incorrect when he says on page 7 of his brief that the Order creating the herd district must be in accord with the petition. At least since 1963 IC 25-2404 has always provided that that the commissioners shall make an order creating the herd district in accord with the petition, "or with such modifications as it may choose to make".

the same road as the Rivera/Guzman accident, except the 2001 accidents occurred just north of the Boise River, a few hundred yards north of the Rivera/Guzman accidents.

The 2001 accidents therefore appear to have occurred within land designated herd district per the 1982 Order; land which Piercy now argues is "open range". Piercy's insurer paid the damages caused by those animal/automobile collisions. Affidavits of Don Allen and Linda Hansen. The claims were paid because the accidents occurred in a herd district. Had the 2001 accidents occurred in open range, the insurers for the automobiles would have paid Piercy for the loss of his animals. IC 25-2118; 25-2119.

In light of the 2001 accidents involving Piercy's cattle and two different automobiles, and in light of the fact that Piercy (or his insurer) paid the automobile owners for the damages caused by those accidents, it is clear that Piercy was well aware, long before this accident occurred, that the land where the bull was pastured was within the boundaries of a valid herd district. Piercy cannot now claim he did not have notice of the existence of the herd district because of a technical error that allegedly occurred in specifying the date in 1982 that the herd district would go into effect.

Nonetheless, it appears that the County Commissioners did indeed specify a date certain when the entirety of Canyon County would become subject to herd district status. See Exhibit "I", Walton Affidavit, which are County Commissioner records titled "SEVENTEENTH DAY OF NOVEMBER TERM, A.D. 1982, CALDWELL, IDAHO, DECEMBER 2 1982", which records note that the Canyon County Board of Commissioners issued an order "designating all of Canyon County to be a herd district

**as of December 14, 1982**". (Emphasis added).

Finally, in a supplemental submission Piercy provides the Affidavit of Glenn Koch one of the Canyon County Commissioners in 1982, who states that "Affiant does not recall that a petition of landowners was presented to the commissioners. . ." Mr. Koch signed his affidavit on July 3, 2007. Plaintiffs have also submitted an Affidavit of Glenn Koch which was obtained approximately one month before defendant's affidavit. In it Mr. Koch states that "Because it has been 25 years, I cannot recall whether this order was entered pursuant to a petition. It has been too many years, and I simply cannot recall the details that lead up to the entry of that order." In addition, plaintiffs have also submitted the Affidavit of Bill Staker who was the clerk of the District Court in Canyon County in 1982. His recollection of whether or not a petition was submitted in conjunction with the 1982 order is the same as Mr. Koch's. Mr. Staker states in his affidavit that "Because it has been 25 years, I cannot recall whether that order was made as a result of a petition submitted for the creation of a herd district. It has simply been too many years to recall those details."

**Accordingly, and at the very least, there is a question of fact on the issue as to whether a Petition was ever filed.**

In summary, by express statutory language, the herd districts at issue are presumed to be valid. Piercy has offered no proof to overcome the presumption, or to meet his burden of proving said herd districts are invalid. As a matter of law, the herd districts at issue are valid. At the very least there are genuine issues of material fact as to the validity of the herd districts at issue, and whether a petition was filed in conjunction with the order made in 1982.

**THE DOCTRINE OF QUASI ESTOPPEL PRECLUDES PIERCY FROM CHALLENGING THE VALIDITY OF THE HERD DISTRICTS AT ISSUE.**

Piercy could have challenged the validity of the herd districts at issue prior to this accident. He did not. He accepted the benefits of ranching in a herd district for at least twenty-three years prior to this accident. These benefits included having all livestock in the county contained in enclosed pastures, so that his herd would not be mingled with other ranchers' herds. Because herd districts rely upon the 'fence in' rule, he enjoyed the benefit of not having his farm lands and ranch lands trampled by other ranchers' livestock, since all ranchers were required by the herd district laws to contain their livestock in enclosed pastures.

Moreover, Piercy acquiesced in, or ratified the validity of Canyon County's herd districts generally, and the 1982 herd district specifically, when he (through his insurer) paid Ms. Hansen and Mr. Allen for the damages caused by Piercy's cattle being on the road, in violation of the herd district laws. Had that land been open range, as Piercy now contends, the insurers of those two automobiles would have paid Piercy for the loss of his cattle.

Similarly, Erika Rivera and Luis Guzman believed that it was illegal for a rancher to allow his cattle upon the roads of Canyon County. They relied upon the protection that rule of law provided, and they traveled the roads of the county believing such to be the case. See Affidavits of Erika Rivera and Luis Guzman.

Under these facts, the doctrine of quasi estoppel prevents Piercy from challenging, **after the fact**, the herd district's validity. The law does not permit Piercy to effectively lay in wait, cause terrible injuries to two children who rightfully relied upon the protection the herd district law provided them, and then argue the law of the land does

not apply to him because of an alleged procedural error some twenty-three years earlier. If Piercy believed the herd districts were invalid, he should have challenged their validity before this horrible accident, not after.

Idaho case law holds that a party can not acquiesce in, or ratify the validity of governmental conduct, and then later, when it suits that party, challenge the validity of that same governmental conduct.

In KTVB, Inc. v. Boise City, 94 ID 279 (1971), Boise and other cities set up a procedure for the awarding of a cable television franchise. KTVB attempted to obtain the franchise, and submitted its bid for the franchise per the procedure set up by the governmental entities. When it was denied the franchise, KTVB filed suit, alleging that the procedure established for the awarding of the franchise was invalid, much as Piercy now alleges the procedure for establishing the herd district in 1982 was invalid.

The Idaho Supreme Court ruled that the doctrine of quasi estoppel estopped KTVB from contesting the validity of the governmental action. The Court noted that under quasi estoppel (unlike estoppel), there is no requirement that the party to be estopped be guilty of concealment or misrepresentation, nor must the party alleging quasi estoppel prove detrimental reliance. 94 ID, at 281. Rather, the Idaho Court ruled,

“The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.” 94 ID, at 281.

Piercy acquiesced in, ratified and accepted the benefits of ranching in a herd district for at least twenty-three years prior to injuring the Plaintiffs. It would be

unconscionable to allow him to complain, **after the fact**, that the herd district is invalid, and that he is immune from liability for paralyzing Erika Rivera.

The case of Wong v. Public Util. Comm., 33 Haw. 813 (1936), was cited with approval by the Idaho Court in KTVB, supra. In that case, Wong, a common carrier, applied for and received a certificate issued by the governmental entity to operate as a common carrier. The certificate was required by statute. Later, that certificate was revoked, and Wong sued, alleging that the statute that required Wong to obtain the certificate was invalid, much as Piercy argues here. The Hawaii court held that the doctrine of quasi estoppel precluded Wong from contesting the validity of the statute. In so holding, the court said:

To permit the appellee to voluntarily invoke the regulatory provisions of law and to enjoy the benefits and privileges thereof and, after the violation by him of the terms and conditions attached to such benefits and privileges, to attack such law as invalid upon the grounds urged would be to countenance juridical gymnastics with which this court has little sympathy...

The option lay with the appellee to conform to the law and to secure a certificate of convenience and necessity with its attendant benefits or insist upon the invalidity of the statute and stand upon the constitutional and statutory rights and privileges which he believed the statute invaded. He chose the former course. By such voluntary acceptance of benefit he is now estopped from assailing the validity of the statute. 33 Haw., at 813-814.

For at least twenty-three years (and for perhaps as long as 50 years), Piercy has enjoyed the benefits, protections and acquiesced in the validity of Canyon County's herd districts. He, like all of the ranchers of Canyon County, attempted at all times to contain his livestock, and keep them off of the roads of Canyon County. When presented with an opportunity to contest the validity of the herd districts in 2001, when his cattle escaped and damaged others' vehicles, he (through his insurer) ratified the

validity of the herd districts and paid the damages caused by his livestock, as required under herd district law. Had open range law applied, as Piercy now contends, the insurers for the cars would have paid Piercy for the loss of Piercy's cattle.

Erika and Luis relied upon the protection of the herd district law to protect them as they traveled the roads of Canyon County. It would clearly be unconscionable to allow Piercy to immunize himself from the herd district law under which he has farmed and ranched for at least twenty-three (or 50) years, to the detriment of Erika and Luis, who have suffered severe (and in Erika's case), life-altering injuries. Piercy is barred by the doctrine of quasi estoppel from contesting, **after the fact**, the validity of the herd district law. At the very least, a genuine issue of material fact exists as to whether quasi estoppel bars Piercy from challenging the validity of the statute.

**PIERCY'S MOTION IS GROUNDED ON UNSUBSTANTIATED FACTUAL ALLEGATIONS.**

To the extent Piercy's motion is grounded on the Affidavit of defense counsel, the motion must fail. Ryan Peck, defense counsel for Mr. Piercy, attests in his Affidavit that a certain area of a map copied from Canyon County's records (which area is outlined in red and striped in blue on the map attached as Exhibit "A" to Mr. Peck's memorandum of law) accurately depicts an area not included in any herd districts prior to the 1982 Order, as such districts are described in the Canyon County records; that the map contains lands (outlined in blue) owned by the state (Roswell Marsh Wildlife Habitat) upon which cattle are currently permitted to graze, and that said map depicts the Fort Boise Wildlife Management Area.

There is no foundational showing that Mr. Peck is competent to locate on a map land within the county that was, or was not, within a metes and bounds description of



Canyon County's herd districts prior to 1982; there is no foundational showing that Mr. Peck has knowledge of who owns the area of land he identifies as the Roswell Marsh Wildlife Habitat, or that he has personal knowledge that cattle are, or are not, currently permitted to graze there; there is no foundational showing that Mr. Peck is competent to identify where on the map the Fort Boise Wildlife Management Area is.

**IRRESPECTIVE OF THE STATUS OF THE HERD DISTRICTS IN QUESTION, PIERCY VIOLATED CANYON COUNTY LAW, AND IS NEGLIGENT PER SE.**

Canyon County ordinance 03-05-17 provides in relevant part as follows:

**03-05-17: RUNNING AT LARGE PROHIBITED:**

(2) Livestock: A. Prohibited: It shall be unlawful for any person to allow livestock which he owns, keeps or harbors to be at large upon the roads, streets or alleys of the county or upon any premises other than his own.

(4) Animals At Large: It shall be unlawful for any animal(s) (except felines, domestic or feral), owned or possessed by an individual to be at large upon the roads, streets or alleys of the county or any public place of the county or upon any premises other than his own. Waterfowl in county parks are exempt from this section.

Plaintiffs have alleged in their complaints that, "defendant Piercy was guilty of negligence per se in that defendant Dale W. Piercy allowed his livestock to run at large in violation of Idaho Code Section 25-2408 and other applicable laws and statutes".

Piercy violated Canyon County Ordinance 03-05-17 by allowing his bull to escape its pasture and be upon a road of the county, and/or because his bull was at large at the time of the accident. Thus, regardless of the status of the herd districts in question, Piercy was negligent per se, and is subject to civil liability for the injuries caused to these two children. Such an ordinance is a valid exercise of a county's

legislative authority. Benewah County Cattlemen's Ass'n v Board of County Commissioners, 105 ID 209 (1983).

**IRRESPECTIVE OF THE VALIDITY OF THE 1982 ORDER, PIERCY IS LIABLE TO PLAINTIFFS.**

Piercy argues that because his bull escaped from a fenced pasture in "open range", he is immune from liability notwithstanding the fact that the accident occurred in the adjacent herd district established in 1908. In support of that argument, Piercy submitted affidavits to the effect that there are no "cattle guards" on Wamstad Road between the herd district created in 1908 (where the accident occurred) and the herd district created in 1982 (where the bull was pastured). Piercy then cites IC 25-2402(1) as authority for the proposition that Piercy is immunized from liability under such a factual scenario. Piercy misreads the herd district statutes, however.

Per IC 25-2402, if the bull was pastured in open range and the accident occurred in a herd district, Piercy is subject to herd district liability if the herd district is enclosed by fences, and if the road penetrating the herd district has cattle guards "as needed", to prevent livestock from roaming from the open range into the herd district. IC 25-2402.

Piercy has testified that all livestock in Canyon County is contained in enclosed pastures. Thus the land where Piercy's bull was pastured was not open range, as that term is defined in IC 25-2402.

Moreover, since all livestock in Canyon County is contained in enclosed pastures, per IC 25-2402, the herd district where the accident occurred is enclosed by fences.

Thus, the question is whether cattle guards are “needed” on Wamstad Road between the alleged “open range” where Piercy’s bull was pastured, and the herd district where the accident occurred.

Per IC 25-2402, if cattle guards were not “needed”, Piercy is subject to liability under the herd district statutes, and is not immunized from liability, even if his bull did roam into the herd district from “open range”.

Because this accident occurred in a herd district, because the land that Piercy alleges was “open range” was completely encircled by herd districts of Canyon County, and because all of the cattle in Canyon County (including the cattle in the areas Piercy argues are “open range”) are contained in enclosed pastures, there is no “need” for cattle guards on Wamstad Road to prevent livestock from roaming from the land where Piercy’s bull was pastured (the 1982 herd district) into the herd district created in 1908, and Piercy is therefore subject to the rules of liability that apply to livestock in herd districts, notwithstanding the status of the land where Piercy’s bull was pastured. At the very least, there is a question of fact as to whether cattle guards were “needed” on Wamstad Road between the herd district created in 1908 and the herd district created in 1982.

This interpretation of IC 25-2402 is supported by the statute’s legislative history. The “as needed” language applicable to cattle guards was not added to IC 25-2402 until the 1990 amendment to the statute. It is a black letter rule of statutory construction that amendments to a statute be given meaning. The only logical meaning that can apply to the “as needed” language added to IC 25-2402 is that a livestock owner is subject to herd district liability where his livestock roams into a fenced herd district from open

range and causes an accident, even in the absence of cattle guards in the road leading into the herd district from open range, unless the livestock owner can prove that cattle guards were “needed”.

Finally, IC 25-2402 does not define “cattle guard”. While a “cattle guard” would certainly include grating in the road, it would also include any object (such as a fence, river, cliff, or the like) that would “guard” against livestock from entering a herd district. If all of the cattle of Canyon County are contained within enclosed pastures, as Piercy testified, the herd district where the accident occurred was in fact protected by “cattle guards”. Again, at the very least, there is a question of fact on this issue.

In short, notwithstanding the status of the land where the bull was pastured, Piercy is subject to civil liability for this accident because it occurred within a herd district enclosed by fences, the alleged “open range” where the bull was pastured was completely encircled by herd districts and fenced lands, and cattle guards either were not “needed”, or such cattle guards existed in the form of fences and other methods of containment so as to prevent livestock from roaming into said herd district from the alleged “open range”.

At the very least there are questions of fact that preclude summary judgment: was the herd district where the accident occurred fenced; were cattle guards “needed” between the land where Piercy’s bull was pastured and the herd district where the accident occurred; and, was the land where Piercy’s bull was pastured “open range” as that term is defined in IC 25-2402?

## CONCLUSION

Because Canyon County's herd districts all existed before 1983, the inclusion of state or federal lands upon which livestock have historically been permitted to graze does not render Canyon County's herd districts invalid; and even if it did, Piercy hasn't proved that livestock has historically grazed upon those lands.

By express statutory language, it is presumed that the herd districts were properly created, and Piercy offers nothing but conjecture and speculation to rebut that presumption.

Because the accident occurred in a herd district, Piercy is liable under herd district law, under the facts of this case.

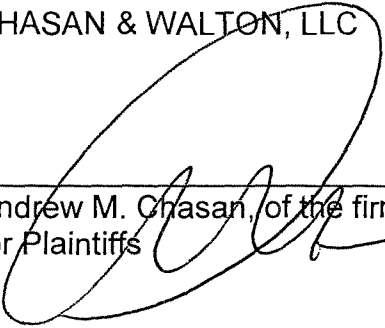
The doctrine of quasi estoppel precludes Piercy from challenging the validity of the herd districts at issue.

There are numerous genuine issues of material fact that preclude the granting of Piercy's motion.

For the reasons set forth herein, Plaintiffs respectfully ask this Court to uphold the law of Canyon County and find as a matter of law that the herd districts at issue in this case are valid, and that the law of the land applies to Mr. Piercy. Alternatively, Plaintiffs request that the Court rule that questions of fact exist with regard to the herd districts in question, and that the jury resolve those questions of fact. In either event, Plaintiffs respectfully request that the Court deny Mr. Piercy's motion for summary judgment.

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

CHASAN & WALTON, LLC

  
\_\_\_\_\_  
Andrew M. Chasan, of the firm, attorneys  
for Plaintiffs

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 20<sup>th</sup> day of July, 2007, a true and correct copy  
of the above and foregoing document was served upon by:

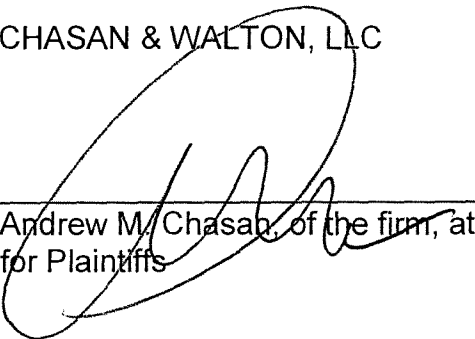
Joshua S. Evett  
Elam, Burke  
251 E. Front St., No. 300  
P.O. Box 1539  
Boise, ID 83701-1539  
Attorney for Jennifer Sutton

- U.S. Mail
- Hand Delivery
- Overnight Courier
- Facsimile to 384-5844

Ryan Peck  
Rodney R. Saetrum  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd., Suite 1800  
P.O. Box 1539  
Boise, ID 83701  
Attorney for Dale W. Piercy

- U.S. Mail
- Hand Delivery
- Overnight Courier
- Facsimile to 336-0448

CHASAN & WALTON, LLC

  
\_\_\_\_\_  
Andrew M. Chasan, of the firm, attorneys  
for Plaintiffs

Timothy C. Walton ISB #2170  
 CHASAN & WALTON LLC  
 Park Center Pointe  
 1459 Tyrell Lane  
 Post Office Box 1069  
 Boise, Idaho 83701-1069  
 Telephone: (208) 345-3760  
 Facsimile: (208) 345-0288

**FILED**  
 83<sup>0</sup> A.M. P.M.

JUL 20 2007

CANYON COUNTY CLERK  
 T. CRAWFORD, DEPUTY

**ORIGINAL**

Stephen E. Blackburn ISB #6717  
 BLACKBURN LAW, P.C.  
 660 E. Franklin Rd., Suite 255  
 Meridian, Idaho 83642  
 Telephone: (208) 898-3442  
 Facsimile: (208) 898-9443

Attorneys for Plaintiffs Erika L. Rivera and Luis J. Guzman

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through )  
 LOREE RIVERA her mother and )  
 natural guardian, AND LUIS J. GUZMAN )  
 by and through BALLARDO GUZMAN )  
 his father and natural guardian, )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 DALE W. PIERCY, individually and )  
 JENNIFER SUTTON individually, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No: CV05-4848

Judge: Gordon W. Petrie

**AFFIDAVIT OF TIMOTHY C.  
 WALTON IN OPPOSITION TO  
 DEFENDANT PIERCY'S  
 MOTION FOR SUMMARY  
 JUDGMENT**

July 20, 2007

STATE OF IDAHO )  
 ) ss  
 COUNTY OF ADA )

COMES NOW Timothy C. Walton, being first being duly sworn upon oath,  
and deposes and says as follows:

1. I am one of plaintiffs' attorneys in the above matter and the statements contained herein are made from my own personal knowledge.

2. Based upon my investigation and research of Canyon County herd districts, I concur with the representation of Ryan Peck in his affidavit in support of Piercy's motion for summary judgment that the orange boundary depicted on Piercy's Exhibit "A" accurately portrays a portion of the boundaries of a herd district created by the Canyon County Commissioners in 1908 as described in Book 3, page 375 of the records of the Canyon County Commissioners. Further, based upon my investigation and the testimony of Mr. Piercy and the Canyon County sheriff officers who investigated this accident, the impact occurred in this herd district created in 1908.

3. Exhibit "A" (attached hereto) is deposition testimony of Canyon County Sheriff Sloan cited in Plaintiffs' Memorandum in Opposition to the Summary Judgment Motion and Exhibit "B" (attached hereto) is deposition testimony of defendant Dale Piercy, cited in Plaintiffs' Memorandum in Opposition to the Summary Judgment Motion.

4. Exhibit "C" (attached hereto) is Idaho Code Section 25-2402 as amended in 1963, which statute was in effect in 1982 at the time the Canyon County Commissioner's issued their order designating any lands in Canyon County that were not herd district, herd district.



5. Attached hereto as Exhibit "D" is Idaho Code Section 25-2402, as amended in 1983.

6. Attached hereto as Exhibit "E" is Idaho Code Section 25-2402, as amended in 1985.

7. Attached hereto as Exhibit "F" is Idaho Code Section 25-2402, as amended in 1990.

8. Attached hereto as Exhibit "G" is Idaho Code Section 25-2402, as amended in 1996.

9. Attached hereto as Exhibit "H" is a copy of Idaho Code Section 31-116.

10. Attached as Exhibits to the Affidavits of Linda Hansen and Don Allen are police reports describing two October 5, 2001 accidents that occurred on Wamstad Road, just north of the Boise River, and south of Hexon Road. As those police reports describe, a vehicle driven by Jaime Hansen collided with two head of cattle owned by Dale Piercy at about 11:00 p.m. About ten minutes later, after Jaime Hansen had gone for help, a vehicle driven by Don Allen struck one of Piercy's cattle that had been previously hit and killed by Jaime Hansen's vehicle. These two accidents appear to have occurred in land that Piercy now claims is open range. As noted by Mrs. Hansen and Mr. Allen in their Affidavits, Dale Piercy's insurance company paid for the damages caused by those collisions.

11. Attached hereto as Exhibit "I" is a copy of a letter received from Canyon County prosecuting attorney Scott Spears pursuant to which Mr. Spears

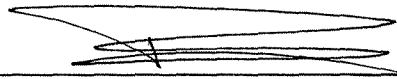
forwarded to my office the complete minutes and attachments of the Canyon County Commissioners' December 1982 meeting. I have not attached all of the Minutes of that meeting, but I have attached two pages of those Minutes. Specifically I have attached as part of Exhibit "I" the two pages of the Minutes of the December 1982 meeting of the Canyon County Commissioners dealing with the herd district order issued by the Canyon County Commissioners in December 1982. Also attached as part of Exhibit "I" is a certified copy of the Order signed by the three county commissioners establishing a herd district in the areas of Canyon County that were not previously herd district.

12. My research and investigation indicates that Exhibit "1" attached to the Pope Affidavit is not a copy of the map referred to in the Canyon County Commissioners' 1982 Order. Specifically the "Order Establishing Herd District" describes a map that was at one time attached to the order. The Order describes "three remaining open range areas in Canyon County as shown on the attached survey map (marked in black)" which the County Commissioners designated as herd district in their December 1982 order, "to the end that the entire land area of Canyon County be placed in Herd District status." Exhibit "1" to the Pope Affidavit does not appear to have areas "marked in black" on them. My research and investigation leads me to conclude that Exhibit "1" to the Pope Affidavit was prepared by Canyon County at some later date after the 1982 order was entered, and that the map that was originally attached to the 1982 order has since gone missing.

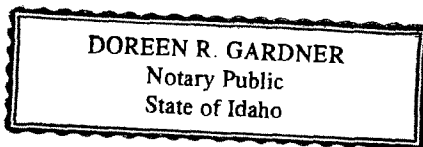
13. Additionally, my research and investigation into Canyon County's herd districts reveals that there are at least 5 more herd districts in Canyon County in addition to the 13 herd districts identified in the legend on Exhibit "1" to the Pope affidavit. These include herd districts described in the Canyon County Commissioners' Minutes in Book 4, page 352, Book 4, page 432, Book 7, page 439, Book 5, page 236 and Book 7 page 287, and copies of said pages from said books are included in Exhibit "4" to the Pope Affidavit. Of Course, Canyon County's herd districts also include the herd district formed in 1982 per the Order of the County Commissioners, which Order designated any area within the county not already within a herd district, a herd district.

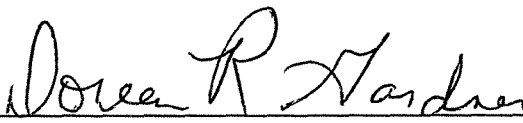
Further your Affiant saith not.

DATED this 25th day of June, 2007.

By   
Timothy C. Walton

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 25th day of June, 2007.



  
Notary Public for Idaho  
Residing at: Boise, Idaho  
Commission Expires: 2/23/2012

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 20th day of July, 2007, a true and correct copy of the above and foregoing document was served upon by:

Joshua S. Evett  
Elam, Burke  
251 E. Front St., No. 300  
P.O. Box 1539  
Boise, ID 83701-1539  
Attorney for Jennifer Sutton

U.S. Mail  
 Hand Delivery  
 Overnight Courier  
 Facsimile to 384-5844

Ryan Peck  
Rodney R. Saetrum  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd., Suite 1800  
P.O. Box 1539  
Boise, ID 83701  
Attorney for Dale W. Piercy

U.S. Mail  
 Hand Delivery  
 Overnight Courier  
 Facsimile to 336-0448

CHASAN & WALTON, LLC

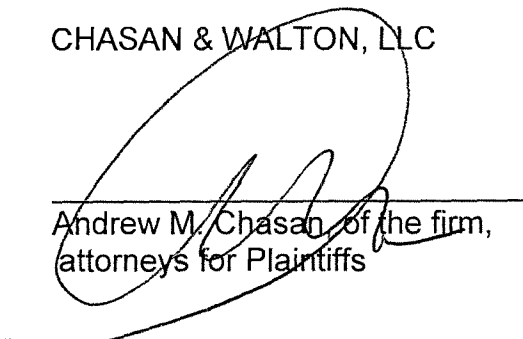
  
\_\_\_\_\_  
Andrew M. Chasan, of the firm,  
attorneys for Plaintiffs

Exhibit "A"  
Deposition Testimony of Canyon County Sheriff Sloan cited in  
Plaintiffs' Memorandum in Opposition to the Summary Judgment  
Motion

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA, by and through )  
LOREE RIVERA, her mother and )  
natural guardian; and LUIS J. )  
GUZMAN, by and through BALLARDO )  
GUZMAN, his father and natural ) Case No. CV05-4848  
guardian, )  
Plaintiffs, )  
vs. )  
DALE PIERCY, individually and )  
JENNIFER SUTTON, individually, )  
Defendants. )  
\_\_\_\_\_ )

DEPOSITION OF DEPUTY ERON SLOAN

August 10, 2006

REPORTED BY:

BEVERLY A. BENJAMIN, CSR No. 710, RPR

Notary Public

1 scene?

2 A. Yes, all over the place.

3 Q. Are you able to locate any of that  
4 debris today for me?

5 A. Out at the scene?

6 Q. No. Are you able to tell me today  
7 where the debris was that you observed?

8 A. Yes.

9 Q. Tell me.

10 A. Not all the debris, but what I remember  
11 is where the initial impact was, which would be  
12 on the southern portion. If I could point that  
13 out, it's easier for you guys to see that when I  
14 talk.

15 Q. You know what would be easy is if we  
16 just -- do you want to mark on Exhibit 3 the  
17 debris that you recall? What were you going to  
18 mark, point of impact?

19 A. Yes.

20 Q. And how did you locate point of impact?

21 A. Well, we had the initial skid marks, we  
22 knew the beginning to end. So we had the end  
23 point of those skid marks which was roughly the  
24 impact site.

25 Q. So, actually, I don't need to have you

1 draw that on this Exhibit 3, correct, because  
2 that would be just at the end point of the skid  
3 marks that you've already identified in the lower  
4 right-hand corner of Exhibit 3?

5 MS. MEIKLE: Objection to form.

6 THE WITNESS: Roughly, yes.

7 Q. (BY MR. WALTON) Tell me where the  
8 point of impact was so we can correct the  
9 objection to form, Deputy.

10 A. What I remember at the accident scene  
11 was it would be in the northbound lane south of  
12 the bridge, just prior to the bridge, but there  
13 was debris scattered everywhere.

14 Q. Are you able to tell me where the  
15 debris was and what you observed?

16 A. Not exactly where the debris was. I  
17 just remember it was scattered throughout the  
18 scene and it continued on. We knew -- it was  
19 obvious where the path of the vehicle went after  
20 impact. So there is debris scattered everywhere  
21 from point of impact throughout.

22 Q. The debris that you are talking about,  
23 was that -- what was that debris?

24 A. Well, the cow, parts of the car, oil,  
25 water, radiator fluid, everything. I just



Exhibit "B"  
Deposition Testimony of defendant Dale Piercy as cited in Plaintiffs'  
Memorandum in Opposition to the Summary Judgment Motion.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA, by and through )  
LOREE RIVERA her mother and natural )  
guardian, et al., )

Plaintiffs, )

vs. )

No. CV05-4848 )

DALE W. PIERCY, individually, and )  
JENNIFER SUTTON, individually, )

Defendants. )

DEPOSITION OF DALE W. PIERCY

MAY 10, 2006

REPORTED BY:

DEANN MORRIS, CSR No. 747, RPR

Notary Public

1 Q. How old?

2 A. Approximately two years.

3 Q. How long had you owned that bull?

4 A. Two years.

5 Q. Do you know if this bull had ever escaped  
6 before?

7 A. He had not.

8 Q. How did the bull escape?

9 MS. MEIKLE: Objection to the form.

10 THE WITNESS: I don't know.

11 Q. (BY MR. WALTON): Did you find -- I assume the  
12 land from which this bull escaped was enclosed.

13 A. Yes.

14 Q. By a fence?

15 A. Yes.

16 Q. That you built and maintained?

17 A. I didn't build it, but I maintained it.

18 Q. Was it built by someone at your request?

19 A. Yes.

20 Q. Did you find the place through which you  
21 believed the bull escaped?

22 A. Yes.

23 Q. What did you find?

24 A. The steel post and wires had been -- one wire  
25 had been broken.

1 a shot -- the point where the break was in the fence  
2 that you discussed earlier today.

3 A. (Indicating.)

4 Q. Make an "X" there, if you would.

5 You made part of that "X"; make the other part of  
6 it.

7 A. (Indicating.)

8 Q. Okay. Thank you.

9 Do you have an understanding of where the cow and  
10 the car collided?

11 A. I have what the police thought that evening.

12 Q. Do you have any reason to disbelieve what they  
13 think?

14 A. No.

15 Q. Make another "X" on Wamstad Road where you  
16 believe -- or where you understand the accident to have  
17 occurred.

18 A. (Indicating.)

19 Q. Which you believe is then north of the river?

20 A. South of the river.

21 Q. Well, that's why I'm asking you --

22 A. Oh, I see.

23 Q. Because I think that is north of the river,  
24 isn't it?

25 A. Yes, it is.

1 Q. Do you believe the accident occurred there, or  
2 do you believe it occurred south?

3 A. No. It was south.

4 Q. Yeah, okay.

5 A. (Indicating.)

6 Q. Okay. So now we've got three "Xs" on there.  
7 The middle "X" shouldn't be there; correct?

8 A. Correct.

9 Q. Okay. Fair enough.

10 And I'm referring to Exhibit 2. Correct?

11 A. Correct.

12 Q. All right.

13 So how many head of cattle were in that pasture  
14 that you've identified on Exhibit 2?

15 A. I'm not completely certain, but I think nine.

16 Q. What kind of cattle were in there?

17 A. Angus bulls.

18 Q. So you had nine bulls in there?

19 A. Yes.

20 Q. How long had they been pastured there?

21 A. I would put them in probably the 10th or the  
22 12th of December. So however many days that was.

23 Q. Okay. That was kind of what I was trying to  
24 figure out.

25 A. The first part of December.

1 Q. And you know your numbering system, which is  
2 probably different from the next guy's?

3 A. Yes.

4 Q. The lands upon which you kept livestock in  
5 Canyon County were all enclosed by fences; correct?

6 A. Correct.

7 Q. The lands upon which you kept livestock in  
8 Canyon County were not lands upon which cattle were  
9 permitted to roam by custom, license, lease, or permit;  
10 correct?

11 MS. MEIKLE: Objection to the form of the question.  
12 And it calls for a legal conclusion.

13 Are you asking, Counsel, for him to come to a legal  
14 conclusion?

15 MR. WALTON: I'm asking just what I asked.

16 THE WITNESS: I don't understand.

17 Q. (BY MR. WALTON): Yeah, let me ask it again.

18 The lands upon which your cattle were pastured were  
19 all enclosed, as we've established; correct?

20 A. Yes.

21 Q. By fences.

22 A. Yes.

23 Q. And none of those lands were lands upon which  
24 cattle were permitted to roam free; correct?

25 MS. MEIKLE: Objection to the form.

1 Q. (BY MR. WALTON): In other words, outside of the  
2 enclosures.

3 A. I try to keep my cattle in the pasture.

4 Q. It's accurate to say, is it not, that you've  
5 been a cattleman in Canyon County for -- what did you  
6 tell me -- 50 years; right?

7 A. Yes.

8 Q. \*\*As of March 20th, 2005, all lands upon which  
9 livestock are pastured in Canyon County are lands which  
10 are enclosed by fences; correct?

11 MS. MEIKLE: Objection to the form of the question  
12 and calls for a legal conclusion.

13 Counsel, if you're asking him all lands in Canyon  
14 County, you're asking for a legal conclusion. And I'm  
15 going to object --

16 MR. WALTON: Go ahead. Have at it.

17 MS. MEIKLE: -- and ask him not to respond.

18 MR. WALTON: Well, you're going to take a risk  
19 because I'm going to take this before the Court.

20 So you're instructing him not to respond?

21 MS. MEIKLE: I'm objecting to --

22 MR. WALTON: You're free to object.

23 MS. MEIKLE: It calls for a legal conclusion.

24 MR. WALTON: It actually doesn't. It's a factual  
25 question.

1 Q. \*\*To your knowledge are all lands upon which  
2 livestock are pastured in Canyon County enclosed by  
3 fences? It's that simple.

4 MS. MEIKLE: Objection to the form of the question.  
5 And I'm instructing him not to answer. It calls for a  
6 legal conclusion.

7 MR. WALTON: Okay.

8 Q. Mr. Piercy, are you aware of any lands in  
9 Canyon County where livestock is pastured that is not  
10 enclosed by a fence?

11 MS. MEIKLE: Objection to the form of the question.  
12 Again, it calls for a legal conclusion.

13 MR. WALTON: Whether or not there are lands that  
14 livestock are pastured that is not enclosed by a fence  
15 in Canyon County is a legal conclusion? That's a  
16 factual issue.

17 MS. MEIKLE: It depends on the definition of each  
18 one of those words. "Enclosed" -- you're asking for  
19 Mr. Piercy to --

20 MR. WALTON: Okay. Let me rephrase. Let me  
21 rephrase.

22 Q. \*\*To your knowledge, is there any livestock in  
23 Canyon County that is not enclosed inside of a fence?

24 MS. MEIKLE: Objection to the form of the question.

25 Q. (BY MR. WALTON): Go ahead and answer.



1 MS. MEIKLE: And it calls for a legal conclusion,  
2 "enclosed."

3 Q. (BY MR. WALTON): Go ahead and answer.

4 A. Should I answer?

5 MS. MEIKLE: And, again, I'm going to instruct you  
6 not to, because I think you're asking for a legal  
7 conclusion as to enclosed -- if the livestock are  
8 enclosed within Ada County.

9 MR. WALTON: First of all, it's Canyon County.

10 MS. MEIKLE: Canyon County, I'm sorry.

11 MR. WALTON: I think "enclosed by a fence" is  
12 something a third-grader understands, Sandra. It's a  
13 factual issue, and I'll ask the Court to rule on this.

14 We can come back another day, Mr. Piercy, and I'm  
15 sorry we'll have to do it. But that's fine.

16 MS. MEIKLE: Are you asking a different question  
17 than the one you asked before?

18 MR. WALTON: I asked what I asked. You objected.  
19 You instructed him not to answer. I'm moving on.

20 MS. MEIKLE: Well, I'm asking you to clarify your  
21 question.

22 MR. WALTON: What was difficult about it, Sandra?  
23 Really, honestly, what was difficult about that?

24 MS. MEIKLE: You're asking Mr. Piercy --

25 Q. (BY MR. WALTON): Mr. Piercy, let me ask you

1 this question.

2 All the cattle in Canyon County are fenced in,  
3 aren't they?

4 MS. MEIKLE: Objection to the form of the question.

5 THE WITNESS: Should I answer?

6 MS. MEIKLE: Do you know the answer to the  
7 question?

8 THE WITNESS: No.

9 Q. (BY MR. WALTON): What cattle are not fenced in?

10 A. There's different boundaries and fences on  
11 other different ranches.

12 Q. Well, when you say "not fenced in," you mean  
13 like there's sometimes rivers that keep the cattle in;  
14 right?

15 A. Yes.

16 Q. Let's rephrase it then.

17 You're not aware of any cattle in Canyon County  
18 that roam free, are you?

19 MS. MEIKLE: Objection to the form of the question.

20 THE WITNESS: I don't understand what you mean by  
21 "roam free." Where?

22 Q. (BY MR. WALTON): Outside of boundaries such as  
23 fences, rivers, or natural barriers that contain the  
24 livestock.

25 MS. MEIKLE: Objection to the form of the question.

1 You can answer if you understand.

2 THE WITNESS: No.

3 Q. (BY MR. WALTON): What do you mean "no"?

4 A. Everything is contained.

5 Q. Okay. That's what I thought. Thanks.

6 MR. EVETT: Would this be a good time to take a  
7 break?

8 MS. MEIKLE: I'd like to take one.

9 MR. WALTON: Fine by me.

10 (Recess taken.)

11 MR. WALTON: Let's go on the record.

12 Would you mark that as an exhibit for me.

13 (Exhibit 8 marked.)

14 Q. (BY MR. WALTON): Mr. Piercy, I'm handing you  
15 Exhibit 8. On Exhibit 8 there is a road going down the  
16 middle of the photograph that's colored in orange that  
17 is Wamstad Road; correct?

18 A. Correct.

19 Q. And then there's a road colored in yellow that  
20 is Lee Lane; correct?

21 A. Correct.

22 Q. And you have been kind enough to color in for  
23 me some lands both to the east and to the west of  
24 Wamstad Road and north of the Boise River; correct?

25 A. Correct.

Exhibit "C"  
Idaho Code Section 25-2402 as amended in 1963

be placed in the public school fund of the county. [1911, ch. 175, § 1, p. 569; C. L., § 1301a; C. S., § 2009; I. C. A., § 24-2014.]

Collateral References.

3 C.J.S., Animals, § 87.

4 Am. Jur. 2d, Animals, § 46.

25-2315. Duties of municipal police.—All the foregoing sections of this chapter shall apply and regulate estrays in incorporated villages and cities; and the duties imposed on sheriffs and constables herein shall apply and regulate in a like manner the police force of all incorporated cities and villages; provided, that nothing in this chapter shall be construed as prohibiting any incorporated city or village from regulating the running at large of said estrays within any incorporated city or village. [1919, ch. 177, § 5, p. 555; C. S., § 2010; am. 1921, ch. 120, § 1, p. 294; I. C. A., § 24-2015.]

CHAPTER 24

HERD DISTRICTS

SECTION.

- 25-2401. Commissioners may create herd districts.
- 25-2402. Petition for district.
- 25-2403. Notice of hearing petition.
- 25-2404. Order creating district.
- 25-2405. Fences on agricultural lands adjacent to public domain—Cattle guards.

SECTION.

- 25-2406. Limitation on powers of commissioners.
- 25-2407. Violation of commissioners' order—Criminal liability.
- 25-2408. Civil liability.
- 25-2409. Trespassing animals may be taken up.

25-2401. Commissioners may create herd districts.—The board of county commissioners of each county in the state shall have power to create herd districts within such county as hereinafter provided; and when such district is so created, the provisions of this chapter shall apply and be enforceable therein. [1907, p. 126, § 1; reen. R. C. & C. L., § 1302; C. S., § 2011; I. C. A., § 24-2101.]

Cross ref. Barbed wire, careless exposure unlawful, notice to owner, civil and criminal liability, §§ 35-301—35-305.

Establishment, modification or dissolution of herd districts, presumption of validity, § 31-857.

Forest, wildlife and range experiment station, to conduct cooperative investigation and research with the state livestock commission, § 38-703; to conduct investigations and research into the production, protection, utilization and management for continuous use of all forage and range resources on the wild and forest lands, § 38-710.

David Thompson game preserve, § 36-3405.

Lawful fences, §§ 35-101, 35-102.

Limitation on powers of commissioners, § 25-2406.

Partition fences, §§ 35-103—35-112.

Quartz mills, fencing of reservoirs and

dumps, liability for failure to inclose, §§ 35-201, 35-202.

Reforestation land, use for grazing, § 38-210.

Seeding of burned-over areas to range grasses and legumes, § 38-501 et seq.

Comp. leg. Mont. Rev. Codes 1947, §§ 46-1501—46-1507, 46-1601—46-1607.

Ore. Rev. Stat., §§ 607.005-607.990.

Wash. Rev. Code, §§ 16.24.010-16.24.090.

Wyo. Stat. 1957, §§ 11-600—11-608.

Sec. to sec. ref. This section is referred to in § 25-2406.

Cited in: Soran v. Schoessler (1964), 87 Idaho 425, 394 P.2d 160.

Collateral References.

4 Am. Jur. 2d, Animals, §§ 40-45.

3 C.J.S., Animals, §§ 109-111.

25-2402. Petition for district.—A majority of the landowners in any area or district described by metes and bounds not including open range

and who are a may petition such area a h of the said pr the species o: it is desired t animals from and shall desig livestock, exce range into the fences and cat vent livestock, open range int during which i large, or being heretofore esta and remain in : as provided by

Open range upon which by are grazed or p § 1303; am. 191 am. 1935, ch. 9 ch. 118, § 1, p. 1

Compiler's note. 1953, ch. 118, is § 25-2404.

25-2403. Not board of county a date for heari by posting notic posed herd distr said hearing in posed herd distr: § 2013; I. C. A.,

Cross ref. Publ: § 60-109.

Post card notice,

Notice Required.

Herd district cre: notices required by

25-2404. Orde a majority of th of the land in s qualified electors of the herd law t the board of cor district, in accor modifications as i tain time at whi thirty (30) days continue in force,

and who are also resident in, and qualified electors of, the state of Idaho may petition the board of county commissioners in writing to create such area a herd district. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such district; and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code, as amended.

Open range means all uninclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam. [1907, p. 126, § 2, reen. R. C. & C. L., § 1303; am. 1919, ch. 184, § 1, p. 565; C. S., § 2012; I. C. A., § 24-2102; am. 1935, ch. 90, § 1, p. 171; am. 1947, ch. 75, § 1, p. 120; am. 1953, ch. 118, § 1, p. 172; am. 1963, ch. 264, § 1, p. 674.]

Compiler's note. Section 2 of S. L. Collateral Reference. 1953, ch. 118, is compiled herein as § 3 C.J.S., Animals, §§ 112-129. § 25-2404.

**25-2403. Notice of hearing petition.**—It shall be the duty of the board of county commissioners, after such petition has been filed, to set a date for hearing said petition, notice of which hearing shall be given by posting notices thereof in three (3) conspicuous places in the proposed herd district, and by publication for two (2) weeks previous to said hearing in a newspaper published in the county nearest the proposed herd district. [1907, p. 126, § 3; reen. R. C. & C. L., § 1304; C. S., § 2013; I. C. A., § 24-2103.]

Cross ref. Publication requirements, § 60-109.

valid. State v. Catlin (1921), 33 Idaho 437, 195 P. 628.

Post card notice, § 31-863.

Collateral Reference.

3 C.J.S., Animals, § 115.

Notice Required.

Herd district created without posting notices required by this section is in-

**25-2404. Order creating district.**—At such hearing, if satisfied that a majority of the landowners owning more than fifty per cent (50%) of the land in said proposed herd district who are resident in, and qualified electors of, the state of Idaho are in favor of the enforcement of the herd law therein, and that it would be beneficial to such district, the board of commissioners shall make an order creating such herd district, in accordance with the prayer of the petition, or with such modifications as it may choose to make. Such order shall specify a certain time at which it shall take effect, which time shall be at least thirty (30) days after the making of said order; and said order shall continue in force, according to the terms thereof, until the same shall

be vacated or modified by the board of commissioners, upon the petition of a majority of the landowners owning more than fifty per cent (50%) of the land in said district who are resident in, and qualified electors of, the state of Idaho. [1907, p. 126, § 4; reen. R. C. & C. L., § 1305; C. S., § 2014; I. C. A., § 24-2104; am. 1947, ch. 75, § 2; p. 120; am. 1953, ch. 118, § 2, p. 172.]

Compiler's note. Section 1 of S. L. 1953, ch. 118, is compiled herein as § 25-2402. Sec. to sec. ref. This section is referred to in §§ 25-2402, 25-2407, 25-2408.

**25-2405. Fences on agricultural lands adjacent to public domain—Cattle guards.**—The board of county commissioners may provide as a condition in any order creating a herd district which may hereafter be made that any agricultural lands in the proximity of public domain where cattle, horses or mules are grazed, shall be inclosed by a lawful fence and that any road extending from agricultural area to such public domain shall contain cattle guards or gates at such places and of such nature as the board shall prescribe. The board of county commissioners may make its herd district orders inapplicable to cattle, horses or mules straying from such public domain or along roads leading to such public domain until such agricultural lands are inclosed by lawful fence and such cattle guards or gates are installed. [I. C. A., § 24-2104A, as added by 1947, ch. 74, § 1, p. 119.]

Cross ref. Cattle guards across roads in grazing country, landowners may erect, §§ 40-306, 40-307.

Driving livestock over regular public highway in violation of order of county commissioners, § 40-703.

Fences along railroads, public utilities commission may require, § 62-1201 et seq.

Fences generally, § 35-101 et seq.

Gates on public highways, § 40-906.

Passageways for stock under highways, § 40-924.

Removal of fences when highway altered or new highway opened, § 40-709.

Trails for livestock, county commissioners to lay out, § 40-702.

Sec. to sec. ref. This section is referred to in § 25-2406.

**25-2406. Limitation on powers of commissioners.**—The provisions of sections 25-2401 and 25-2405 shall not be construed to confer upon the board of county commissioners any jurisdiction over animals otherwise prohibited from running at large under existing laws. [1907, p. 126, § 5; reen. R. C. & C. L., § 1306; C. S., § 2015; I. C. A., § 24-2105.]

Cross ref. Civil liability for trespass, § 25-2408; penalty for violation of commissioner's order, § 25-2407.

**25-2407. Violation of commissioners' order—Criminal liability.**—Any person who shall, in violation of any order made pursuant to the provisions of section 25-2404, permit or allow any of the animals designated in such order, owned by him or under his control, to run at large in such herd district, or to be herded on the said highway, shall be deemed guilty of a misdemeanor. The pendency of any such action shall not prevent nor prejudice the bringing of another action against the same party for a violation of such order committed after the commencement of such pending action. [1907, p. 126, § 6; reen. R. C. & C. L., § 1307; am. 1919, ch. 184, § 1, p. 565; C. S., § 2016; I. C. A., § 24-2106.]

Sec. to sec. ref. This section is referred to in § 25-2408.

Collateral Reference.

3 C.J.S., Animals, §§ 140, 141.

petition (50%) factors of, 1953, ch.

tion is re- 7, 25-2408.

domain— vide as a eafter be e domain a lawful ch public d of such missioners or mules ch public fence and as added

§ 40-906. nder high- ighway al- l, § 40-709. ty commis-

tion is re-

visions of upon the otherwise . 126, § 5;

liability.— ant to the als design- n at large , shall be ction shall gainst the commence- . & C. L., § 24-2106.]

141.

25-2408. Civil liability.—The owner of animals permitted or allowed to run at large, or herded in violation of any order made in accordance with the provisions of section 25-2404, shall be liable to any person who shall suffer damage from the depredations or trespasses of such animals, without regard to the condition of his fence; and the person so damaged shall have a lien upon said animals for the amount of damage done, and the cost of the proceedings to recover the same, and may take the animals into custody until all such damages are paid: provided, that the person so taking said animals into custody shall not have the right to retain the same for more than five (5) days without commencing an action against the owner thereof for such damages. Said damages may be recovered by a civil action before any court of competent jurisdiction, and no such action shall be defeated or affected by reason of any criminal action commenced or prosecuted against the same party under the provisions of the preceding section. [1907, p. 126, § 7; reen. R. C. & C. L., § 1308; am. 1919, ch. 184, § 1, p. 566; C. S., § 2017; I. C. A., § 24-2107.]

Burden of Proof. Where the presence of animal on highway in herd district resulted in injury, owner of animal was liable therefor unless he could satisfactorily explain the animal's presence on the highway. Corthell v. Pearson (1965), 88 Idaho 295, 399 P.2d 266.

25-2409. Trespassing animals may be taken up.—Any person may take into custody any of the animals specified in the said order of the board of commissioners that may be about to commit a trespass upon the premises owned, occupied or in charge of such person, and retain the same until all reasonable charges for keeping said animals are paid: provided, that it shall be the duty of the person so taking said animals into custody to notify the owner or person in charge of the same within five (5) days thereafter, and if the owner or person in charge of them shall not be known to the person so taking said animals into custody, and cannot be found after diligent search and inquiry, he may proceed in the manner provided for the taking up and disposal of estrays. [1907, p. 126, § 8; reen. R. C. & C. L., § 1309; C. S., § 2018; I. C. A., § 24-2108.]

Cross ref. Taking up and disposal of estrays, § 25-2301. Collateral Reference. 3 C.J.S., Animals, §§ 133-136.

CHAPTER 25

STATE PREDATORY ANIMAL BOARD

SECTION. 25-2501—25-2508. [Repealed.]

25-2501—25-2508. [Repealed.]

Compiler's note. These sections which comprised S. L. 1927, ch. 250, §§ 1-8, p. 413; I. C. A., §§ 24-2201—24-2208; am. 1937, ch. 105, §§ 1, 2, p. 157; am. 1945, ch. 13, §§ 1, 2, p. 17, were repealed by S. L. 1950 (1st E. S.), ch. 50, § 26, p. 61, and S. L. 1951, ch. 250, § 27, p. 527.

CHAPTER 26

EXTERMINATION OF WILD ANIMALS AND PESTS IN COUNTIES

SECTION. 25-2601—25-2617. [Repealed.]

25-2618. Extermination of pests—Powers of county commissioners.

SECTION. 25-2619. Levy of taxes—Appropriation—Pest fund.



Exhibit "D"  
Idaho Code Section 25-2402, as amended in 1983.

1983

Deregulation and 94 Stat. 132), to s, and advances V, Part A - Mort- Depository Insti- 1980 (Public Law to loans, mort-

(3) The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least one hundred (100) persons yearly, or may reasonably be expected to receive at least one hundred (100) new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than seventy-five per cent (75%) of the new entrants become insured. The policy may exclude from the classes eligible for insurance classes of debtors determined by age.

ters and sections pters 31, 32, 33, 103, 28-22-105, 10, 28-22-111, and

(4) The amount of insurance on the life of a debtor shall at no time exceed the amount owed by him to the creditor, or twenty ~~seventy-five thousand dollars (\$275,000), whichever is less. The amount--of--twenty-five--thousand--dollars--(\$25,000)--in--this--section--is--subject--to--the--provision--on--adjustment--of--dollar--amounts--contained--in--section--28-31-106;--Idaho--Code;~~

provision of this re provisions of enacted or as it

(5) The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.

Approved March 31, 1983.

, and the same is

CHAPTER 120 (H.B. No. 150, As Amended)

of individuals may to a trustee or editors, who shall creditor, subject

AN ACT

RELATING TO HERD DISTRICTS; AMENDING SECTION 25-2402, IDAHO CODE, TO PROVIDE THAT A HERD DISTRICT SHALL NOT CONTAIN ANY LANDS OWNED BY THE UNITED STATES AND MANAGED BY THE BUREAU OF LAND MANAGEMENT, WHERE THE GRAZING OF LIVESTOCK HAS HISTORICALLY BEEN PERMITTED, AND TO PROVIDE THAT THE ESTABLISHMENT OF A HERD DISTRICT SHALL NOT RESULT IN A HIGHWAY DISTRICT BEING HELD LIABLE IN CERTAIN ACTIONS RESULTING FROM LIVESTOCK BEING WITHIN THE PUBLIC RIGHT-OF-WAY OF THE HIGHWAY DISTRICT.

e policy shall be y class or classes ndebtedness or to policy may provide one or more sub- re affiliated cor- ss of the policy- ietors or partner- ip, contract, or

Be It Enacted by the Legislature of the State of Idaho:

r the policyholder, collected from the t or all of the he insured debtors ebtors shall not ble for insurance, of issue without t seventy-five per pay the required m is to be derived t insure all eli- lence of individual

SECTION 1. That Section 25-2402, Idaho Code, be, and the same is hereby amended to read as follows:

25-2402. PETITION AND REQUIREMENTS FOR DISTRICT. (1) A majority of the landowners in any area or district described by metes and bounds not including open range and who are also resident in, and qualified electors of, the state of Idaho may petition the board of county commissioners in writing to create such area a herd district. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such district; and shall designate that the herd district shall not apply to nor cover livestock, excepting

swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code, as amended.

(2) Notwithstanding any other provision of law to the contrary, no herd district established before or after July 1, 1983, shall:

(a) Contain any lands owned by the United States of America, and managed by the department of interior, bureau of land management, or its successor agency, upon which lands the grazing of livestock has historically been permitted.

(b) Result in a highway district being held liable for personal injury, wrongful death or property damage resulting from livestock within the public right-of-way of the highway district.

(3) Open range means all uninclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam.

Approved April 1, 1983.

CHAPTER 121  
(H.B. No. 217)

AN ACT

RELATING TO LAND USE PLANNING; AMENDING SECTION 67-6511, IDAHO CODE, TO STABILIZE A ZONING CLASSIFICATION FOR FOUR YEARS AFTER IT IS OBTAINED BY A PROPERTY OWNER; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 67-6511, Idaho Code, be, and the same is hereby amended to read as follows:

67-6511. ZONING ORDINANCE. Each governing board shall, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the adopted plan.

Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population;

and the location shall be uniform district, but t in another dist Ordinances

laws:  
(a) Request submitted to t evaluate the re ment requested.

(b) If th zoning or plann ering board notice and hear provided that i tional notice dents within th the external tional area tha by the commis more property o would provide a lieu of mailed

(c) If th the request sha commission or, shall recommenc ment to the p section 67-6509 zoning ordinare 67-6511(b), Ida

(d) If a g to a request b hensive plan ar subsequently r sification of s rent property c governing board zoning classif action or other during the al owner's consent standing in s sions of this s

SECTION 2. hereby declare on and after it

Approved April

Exhibit "E"  
Idaho Code Section 25-2402, as amended in 1985.

CHAPTER 23

ESTRAYS

SECTION.

25-2311. Sale by brand inspector.

25-2301. Stray or estray defined.

Sec. to sec. ref. This chapter is referred to in §§ 25-2201, 25-2204, 25-2206 and 25-2207.

25-2311. Sale by brand inspector. — If the estray livestock is sold by a brand inspector, he shall immediately advise the state brand inspector of all the particulars of the matter and account for the proceeds and forward the net proceeds of the sale to the state brand inspector to be placed in the unclaimed livestock account, to be handled as provided for by sections 25-1173 ad 25-1174, Idaho Code, and the rules and regulations of the state brand board. The previous owner of the animal may make claim for the net proceeds as provided for by sections 25-1173 and 25-1174, Idaho Code. [I.C., § 25-2311; as added by 1976, ch. 88, § 2, p. 299; am. 1988, ch. 75, § 42, p. 111.]

Compiler's notes. Section 41 of S.L. 1988, ch. 75, is compiled as § 25-1736.

CHAPTER 24

HERD DISTRICTS

SECTION.

25-2402. Petition and requirements for district.

25-2401. Commissioners may create herd districts.

ANALYSIS

- Creation by ordinance.
- De facto herd district forbidden.
- Local livestock regulation.
- Modification by court.
- Purpose.

Creation by Ordinance.

Creation of a herd district by ordinance is within the power of the county commissioners. Miller v. Miller, 113 Idaho 415, 745 P.2d 294 (1987).

De Facto Herd District Forbidden.

The trial court erred in restricting the right of livestock owners to roam stock to only those areas where by custom, license, or permit livestock are grazed or permitted to roam, since the adoption of such a rule creates de facto herd districts in areas where by custom livestock have not been permitted to

roam and thereby render § 25-2401 et seq. unnecessary; the trial court, in effect, applied herd district rules relating to liability for roaming livestock to these areas without requiring the creation of a herd district. Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1978).

Local Livestock Regulation.

The herd district statutes were not intended to preempt, and do not preempt, the field of livestock regulation so as to preclude local regulation; herd district statutes which by their own terms are inapplicable to "open range" areas do not preempt the field of livestock control in such areas. Benewah County Cattlemen's Ass'n v. Board of County Comm'rs, 105 Idaho 209, 668 P.2d 85 (1983).

Even if it be assumed for the purpose of discussion that the herd district statutes in some degree addressed the same problems as

s. — If the owner of the he owner of the livestock st him within thirty (30) livestock may be sold in 25, Idaho Code. The state r the amount of damages m the proceeds of any sale of any proceedings under ance remaining after the nown, or held as provided e 25, Idaho Code. [I.C., 366.]

The livestock shall not be s to be found without the upon court order. [I.C., 366.]

e person claiming the lien ny civil action in court in " proceedings taken under the court may require an hooses to do so, and may e the matter on to trial de as added by 1978, ch. 168,

ock from the custody of the e livestock for the sheriff or charges or costs that have lemeanor and the livestock for by this chapter by the y either of them to hold the ch. 168, § 2, p. 366.]

viewers provided for by this appointing that viewer by in the second degree under .C., § 25-2211, as added by

those addressed by a county ordinance prohibiting livestock from roaming, local enactments which merely extend the state law by way of additional restrictions or limitations are not invalid. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

The legislature contemplated a process whereby a majority of the landowners in an area could compel the county to create herd districts and thereby place upon livestock owners within such districts the duty to fence in their stock; there is nothing in that statutory scheme indicating counties may not exercise their police power to control roaming livestock, but rather must ignore any problem and wait until action is forced upon the county by the presentation of a petition for the formation of a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

**25-2402. Petition and requirements for district.** — (1) A majority of the landowners in any area or district described by metes and bounds not including open range and who are also resident in, and qualified electors of, the state of Idaho may petition the board of county commissioners in writing to create such area a herd district. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such district; and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code.

(2) Notwithstanding any other provision of law to the contrary, no herd district established before or after July 1, 1983, shall:

- (a) Contain any lands owned by the United States of America, and managed by the department of interior, bureau of land management, or its successor agency, upon which lands the grazing of livestock has historically been permitted.
- (b) Result in a highway district being held liable for personal injury, wrongful death or property damage resulting from livestock within the public right-of-way of the highway district.
- (c) Prohibit trailing or driving of livestock from one location to another on public roads or recognized livestock trails.

#### Modification by Court.

The district court's modification of the herd district boundaries by exclusion of federal lands was improper as an exercise of a legislative function by the court; the district court properly should have simply ruled that the herd district was invalid due to the inclusion of federal land. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

#### Purpose.

The intent of the legislature in enacting § 25-2401 et seq. was that for areas where the historical use has been one of enclosed lands, the landowners in that area must petition and vote to designate that area a herd district in order to change the Idaho law regarding liability for damage by roaming livestock. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

(3) Open range means upon which by custom, grazed or permitted to: am. 1919, ch. 184, § 1, 190, § 1, p. 171; am. 194 am. 1963, ch. 264, § 1, 56, § 1, p. 109.]

Cited in: *Nelson v. Holdaway Co.*, 107 Idaho 550, 691 P.2d 1984.

#### ANALYSIS

Alternative to fencing.  
County police power.  
Creation of herd districts.  
—Inclusion of federal land.  
—Modification by court.  
Effect of creation of herd district.  
Enclosure of district by fence.  
Open range.  
Purpose.  
Trailed or driven.

#### Alternative to Fencing.

A herd district provides an area where landowners who wish to protect their land from damage caused by roaming livestock, or cannot afford, to fence their land. *Easley v. Lee*, 111 Idaho 115 (1986).

#### County Police Power.

The legislature contemplated a process whereby a majority of the landowners in an area could compel the county to create herd districts and thereby place upon livestock owners within such districts the duty to fence in their stock; there is nothing in that statutory scheme indicating counties may not exercise their police power to control roaming livestock, but rather must ignore any problem and wait until action is forced upon the county by the presentation of a petition for the formation of a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

#### Creation of Herd Districts.

Herd districts may still be created in an area not within "open range" as defined in this section. *Maguire v. Yanke*, 99 P.2d 85 (1978).

Herd districts may not be created by a county but only by petition of a majority of the landowners within a certain area and the herd district imposes civil liability on livestock owners when their stock damages the land of another; county ordinance prohibiting livestock from running at large on the other hand, expressly provided

by Court.

court's modification of the herd boundaries by exclusion of federal land as an exercise of a legislative function; the district court has simply ruled that the ordinance was invalid due to the inclusion of federal land. *Miller v. Miller*, 113 Idaho 294 (1987).

If the legislature in enacting the ordinance was that for areas where there has been one of enclosed lands, owners in that area must petition to designate that area a herd district to change the Idaho law regarding liability for damage by roaming livestock. *Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

**District.** — (1) A majority of the qualified electors of the county, by ordinance, shall describe the boundaries and shall designate what animals, swine, sheep and goats are prohibited from such district; and shall provide for the enclosure of such district, and shall provide for the removal of livestock, except as provided in the ordinance, from the district which it is desired to be herded on the district. The ordinance shall retain its force and effect, until amended by the legislature. Section 25-2404, Idaho Code. To the contrary, no herd district shall:

be created for the purpose of management, or its purpose for livestock has historically been for personal injury, or to prevent livestock from moving from one location to another

(3) Open range means all uninclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam. [1907, p. 126, § 2, reen. R.C. & C.L., § 1303; am. 1919, ch. 184, § 1, p. 565; C.S., § 2012; I.C.A., § 24-2102; am. 1935, ch. 90, § 1, p. 171; am. 1947, ch. 75, § 1, p. 120; am. 1953, ch. 118, § 1, p. 172; am. 1963, ch. 264, § 1, p. 674; am. 1983, ch. 120, § 1, p. 313; am. 1985, ch. 56, § 1, p. 109.]

Cited in: *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

#### ANALYSIS

Alternative to fencing.  
County police power.  
Creation of herd districts.  
—Inclusion of federal land.  
—Modification by court.  
Effect of creation of herd district.  
Enclosure of district by fences.  
Open range.  
Purpose.  
Trailed or driven.

#### Alternative to Fencing.

A herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### County Police Power.

The legislature contemplated a process whereby a majority of the landowners in an area could compel the county to create herd districts and thereby place upon livestock owners within such districts the duty to fence in their stock; there is nothing in that statutory scheme indicating counties may not exercise their police power to control roaming livestock, but rather must ignore any problems and wait until action is forced upon the county by the presentation of a petition for the formation of a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

#### Creation of Herd Districts.

Herd districts may still be created in any area not within "open range" as defined in this section. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

Herd districts may not be created sua sponte by a county but only in response to a petition of a majority of the landowners within a certain area and the creation of a herd district imposes civil liability upon livestock owners when their stock trespasses on the land of another; county ordinance prohibiting livestock from running at large, on the other hand, expressly provided that it should

not apply to the resolution of any civil liability and, hence, the purpose and effect of the ordinance in question were different from the purpose and effect of a herd district and the ordinance did not constitute the de facto creation of a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

The requirement of this section, requiring a herd district to be enclosed by a lawful fence, could not under the provisions of § 25-2404, be removed in the county commissioners' order forming the herd district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

Creation of a herd district by ordinance is within the power of the county commissioners. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

#### —Inclusion of Federal Land.

Where the county commissioners by ordinance purported to create a herd district which contained parcels of federal land within its boundaries, the ordinance conflicted with subdivision (2)(a) of this section, and a valid herd district was not created. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

#### —Modification by Court.

The district court's modification of the herd district boundaries by exclusion of federal lands was improper as an exercise of a legislative function by the court; the district court properly should have simply ruled that the herd district was invalid due to the inclusion of federal land. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

#### Effect of Creation of Herd District.

The creation of a herd district in Idaho reinstates the English common law within that district, placing a duty on the livestock owner to fence in his stock and holding him liable for damages caused if his stock escapes onto another's land, regardless of whether that land is fenced or not. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

Once a herd district is created, the rule of fencing out, which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in

a herd district is guilty of a misdemeanor, and additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the landowner's fence. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Enclosure of District by Fences.

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Open Range.

The unenclosed lands within a county but outside cities and villages clearly fell within the definition of "open range" and, hence, the county had no authority to create a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

#### Purpose.

The passage of this section and § 25-2118,

with their accompanying definition of "open range" in terms of historical use, was not intended to and does not change the law of this State that with the exception of cities, villages, and herd districts, livestock may run at large and graze upon unenclosed lands in this State. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

The purpose of the herd district statutes is to provide an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not desire, or are unable, to afford fencing out stray cattle. *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 740 P.2d 57 (1987).

#### Trailed or Driven.

Where the sheep were in a shoulder-to-shoulder, close formation under the direction of several drivers, the sheep were not being "herded" upon the highway, but instead were being "trailed" or "driven" by the men in charge of the move. *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 740 P.2d 57 (1987).

### 25-2403. Notice of hearing petition.

**Cited in:** *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

### 25-2404. Order creating district.

#### Enclosure of District by Fence.

The requirement of § 25-2402, requiring a herd district to be enclosed by a lawful fence, could not under the provisions of this section,

be removed in the county commissioners' order forming the herd district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

### 25-2407. Violation of commissioners' order — Criminal liability.

#### ANALYSIS

Effect of creation of district.  
Enclosure of district by fences.

#### Effect of Creation of District.

Once a herd district is created, the rule of fencing is out which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in a herd district is guilty of a misdemeanor, and additional civil liability is imposed for damage caused by trespasses of such animals

without regard to the condition of the landowner's fences. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Enclosure of District by Fences.

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

### 25-2408. Civil li:

#### ANAL

Alternative to fencing.  
Cost for care of livestock  
Damages.

Effect of creation of di  
Enclosure of district by  
Evidence.

Hearing.  
Presumption of negligence

#### Alternative to Fencing

A herd district providing  
landowners who wish to  
form damage caused by  
not wish, or cannot afford  
*Easley v. Lee*, 111 Idaho  
(1986).

#### Cost for Care of Livestock

Pursuant to this section  
recover the reasonable cost  
livestock lawfully retained  
period. *Nelson v. Holdaway  
Co.*, 107 Idaho 550, 691  
1984).

#### Damages.

The district court did  
nominal damages for  
previous trespass where  
to prove actual damages  
*Land & Cattle Co.*, 111  
1098 (Ct. App. 1986).

#### Effect of Creation of District

Once a herd district is  
fencing out which requires  
keep out another's livestock  
of a fence no longer applies  
of stock who allows animals  
a herd district is guilty of  
and additional civil liability  
damage caused by trespasses  
without regard to the condition  
owner's fence. *Easley v. Lee*,  
721 P.2d 215 (1986).

#### SECTION.

25-2501. Board created  
25-2502. Officers — Members  
25-2503. Definitions.  
25-2504. Powers and duties  
25-2505. Assessments -



## 25-2408. Civil liability.

### ANALYSIS

Alternative to fencing.  
 Cost for care of livestock.  
 Damages.  
 Effect of creation of district.  
 Enclosure of district by fences.  
 Evidence.  
 Hearing.  
 Presumption of negligence.

#### Alternative to Fencing.

A herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Cost for Care of Livestock.

Pursuant to this section, the plaintiff can recover the reasonable costs of caring for the livestock lawfully retained for a reasonable period. *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

#### Damages.

The district court did not err in awarding nominal damages for damages caused by a previous trespass where the landowner failed to prove actual damages. *Nelson v. Holdaway Land & Cattle Co.*, 111 Idaho 1035, 729 P.2d 1098 (Ct. App. 1986).

#### Effect of Creation of District.

Once a herd district is created, the rule of fencing out which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in a herd district is guilty of a misdemeanor, and additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the landowner's fence. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Enclosure of District by Fences.

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Evidence.

A finding is not clearly erroneous if it is supported by substantial and competent, though conflicting, evidence; thus, where the testimony and exhibits revealed a wheat field heavily infested with weeds, and one or more of several causes, all supported by the record, could have brought the weeds to the field including farm equipment, wild animals, other livestock, and plaintiff's own farming practices, and testimony at trial indicated that factors other than the weeds, such as the late harvest, contributed to the reduced yield, the trial court's findings that plaintiff's field was in poor condition before the cattle trespassed and that other factors could have caused the weed infestation was not clearly erroneous. *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

#### Hearing.

The court did not abuse its discretion in refusing to allow an evidentiary hearing in place of the requested written proposals as an aid in determining damages caused by livestock trespassing onto plaintiff's field. *Nelson v. Holdaway Land & Cattle Co.*, 111 Idaho 1035, 729 P.2d 1098 (Ct. App. 1986).

#### Presumption of Negligence.

Where defendant's horse was upon the roadway in a herd district, there was a presumption of negligence in letting the horse run free, which the defendant, who could offer no explanation of freedom of his horse, did not overcome. *Cunningham v. Bundy*, 100 Idaho 456, 600 P.2d 132 (1979).

## CHAPTER 25

### IDAHO HORSE BOARD

#### SECTION.

25-2501. Board created.  
 25-2502. Officers — Meetings — Expenses.  
 25-2503. Definitions.  
 25-2504. Powers and duties.  
 25-2505. Assessments — Collection.

#### SECTION.

25-2506. Deposit and disbursement of funds.  
 25-2507. Bonding — Records — Audits.  
 25-2508. Assessment liens.  
 25-2509. Assessment is mandatory.

Exhibit "F"  
Idaho Code Section 25-2402, as amended in 1990.

shall be forfeited to the school district where said animal or animals were taken up and shall, by the county treasurer, be turned over to such school district for the use of the school district. [I.C., § 25-2312, as added by 1976, ch. 88, § 2, p. 299.]

Compiler's notes. For repeal of former section see compiler's notes to § 25-2301.

## CHAPTER 24

## HERD DISTRICTS

SECTION.		SECTION.	
25-2401.	Commissioners may create herd districts.	25-2406.	Limitation on powers of commissioners.
25-2402.	Petition and requirements for district.	25-2407.	Violation of commissioners' order — Civil liability.
25-2403.	Notice of hearing petition.	25-2408.	Civil liability.
25-2404.	Order creating district.	25-2409.	Trespassing animals may be taken up.
25-2405.	Fences on agricultural lands adjacent to public domain — Cattle guards.		

**25-2401. Commissioners may create herd districts.** — (1) The board of county commissioners of each county in the state shall have power to create, modify or eliminate herd districts within such county as hereinafter provided; and when such district is so created, modified or eliminated, the provisions of this chapter shall apply and be enforceable therein. On and after January 1, 1990, no county shall regulate or otherwise control the running at large of horses, mules, asses, cattle, sheep or goats within the unincorporated areas of the county unless such regulation or control is provided by the creation of a herd district pursuant to the provisions of this chapter, except as provided by subsection (2) of this section. The provisions of this chapter shall not apply to any herd district or herd ordinance in full force and effect prior to January 1, 1990, but shall apply to any modification thereof.

(2) A panel of five (5) members may be created in a county, the members of which shall be appointed as follows: two (2) members by appointment of the board of county commissioners; two (2) members by appointment of a local, county or state livestock association or associations; and the fifth member, by concurrent appointment of the first four (4) appointees. Only if a majority of said panel, after a public hearing held with notice as prescribed by law, concludes that the creation, modification or elimination of a herd district is insufficient to control or otherwise regulate the movement of livestock in an area, the board of county commissioners shall have power to establish such control by ordinance, provided that the cost of construction and maintenance of any fencing or cattle guards required by said ordinance shall be paid by the county current expense fund. Notwithstanding any provision of law to the contrary, a county shall have the authority to levy an annual property tax of not to exceed two hundredths percent (.02%) of market value for assessment purposes on taxable real property within the county, and the revenues derived therefrom shall not be used for

any other purpose. Such special levy shall be exempt from the limitation imposed by section 63-923(1), Idaho Code. [1907, p. 126, § 1; reen. R.C. & C.L., § 1302; C.S., § 2011; I.C.A., § 24-2101; am. 1990, ch. 222, § 1, p. 589.]

**Cross ref.** Barbed wire, careless exposure unlawful, notice to owner, civil and criminal liability, §§ 35-301 — 35-305.

**Establishment, modification or dissolution of herd districts, presumption of validity, § 31-857.**

**Forest, wildlife and range experiment station, to conduct cooperative investigation and research with the state livestock commission, § 38-703; to conduct investigations and research into the production, protection, utilization and management for continuous use of all forage and range resources on the wild and forest lands, § 38-710.**

**Lawful fences, §§ 35-101, 35-102.**

**Limitation on powers of commissioners, § 25-2406.**

**Partition fences, §§ 35-103 — 35-112.**

**Quartz mills, fencing of reservoirs and dumps, liability for failure to inclose, §§ 35-201, 35-202.**

**Reforestation land, use for grazing, § 38-210.**

**Seeding of burned-over areas to range grasses and legumes, § 38-501 et seq.**

**Sec. to sec. ref.** This section is referred to in § 25-2406.

**Cited in:** Soran v. Schoessler, 87 Idaho 425, 394 P.2d 160 (1964); Nottingham v. McCormick, 95 Idaho 188, 505 P.2d 1260 (1973).

#### ANALYSIS

Creation by ordinance.  
De facto herd district forbidden.  
Local livestock regulation.  
Modification by court.  
Purpose.

#### Creation by Ordinance.

Creation of a herd district by ordinance is within the power of the county commissioners. Miller v. Miller, 113 Idaho 415, 745 P.2d 294 (1987).

#### De Facto Herd District Forbidden.

The trial court erred in restricting the right of livestock owners to roam stock to only those areas where by custom, license, or permit livestock are grazed or permitted to roam, since the adoption of such a rule creates de facto herd districts in areas where by custom livestock have not been permitted to roam and thereby render § 25-2401 et seq. unnecessary; the trial court, in effect, applied herd district rules relating to liability for roaming livestock to these areas without requiring the creation of a herd district.

Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1978).

#### Local Livestock Regulation.

The herd district statutes were not intended to preempt, and do not preempt, the field of livestock regulation so as to preclude local regulation; herd district statutes which by their own terms are inapplicable to "open range" areas do not preempt the field of livestock control in such areas. Benewah County Cattlemen's Ass'n v. Board of County Comm'rs, 105 Idaho 209, 668 P.2d 85 (1983).

Even if it be assumed for the purpose of discussion that the herd district statutes in some degree addressed the same problems as those addressed by a county ordinance prohibiting livestock from roaming, local enactments which merely extend the state law by way of additional restrictions or limitations are not invalid. Benewah County Cattlemen's Ass'n v. Board of County Comm'rs, 105 Idaho 209, 668 P.2d 85 (1983).

The legislature contemplated a process whereby a majority of the landowners in an area could compel the county to create herd districts and thereby place upon livestock owners within such districts the duty to fence in their stock; there is nothing in that statutory scheme indicating counties may not exercise their police power to control roaming livestock, but rather must ignore any problem and wait until action is forced upon the county by the presentation of a petition for the formation of a herd district. Benewah County Cattlemen's Ass'n v. Board of County Comm'rs, 105 Idaho 209, 668 P.2d 85 (1983).

#### Modification by Court.

The district court's modification of the herd district boundaries by exclusion of federal lands was improper as an exercise of a legislative function by the court; the district court properly should have simply ruled that the herd district was invalid due to the inclusion of federal land. Miller v. Miller, 113 Idaho 415, 745 P.2d 294 (1987).

#### Purpose.

The intent of the legislature in enacting § 25-2401 et seq. was that for areas where the historical use has been one of enclosed lands, the landowners in that area must petition and vote to designate that area a herd district in order to change the Idaho law regarding liability for damage by roaming livestock. Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1978).

Collat  
imals, §§  
3A C.J.

25-24  
the ovr  
district  
resident  
sioners  
area; pr  
an exist  
open ran  
herd dis  
mules, &  
running  
public h  
shall no  
drift or  
inclosed  
the distr  
ing or st  
period of  
running  
state the  
fences an  
large of l  
if such p  
guards, t  
lish such  
district. I  
identity,  
vacated o  
(2) Not  
district sl  
(a) Con  
state of  
permitt  
(b) Resu  
liable fo  
from liv  
(c) Proh  
on publ  
(3) Oper  
upon whic  
grazed or  
(4) The  
(a) Pay  
taining ]

Collateral References. 4 Am. Jur. 2d, Animals, §§ 40-45.  
3A C.J.S., Animals, § 139.

**25-2402. Petition and requirements for district.** — (1) A majority of the owners of taxable real property, including corporations, in any area or district described by metes and bounds and who are also domiciled and resident in the state of Idaho; may petition the board of county commissioners in writing to create, modify or eliminate a herd district in such area; provided, that in the case of a petition for the purpose of eliminating an existing district or any portion thereof, said area must be contiguous to open range. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such district; and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards as needed in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Such petition may also state the conditions and location(s), if any, for the construction of legal fences and cattle guards which may be required to prohibit the running at large of livestock within the interior of the proposed district; provided, that if such petition does not address the issue of interior fencing and cattle guards, the board of county commissioners shall have the power to establish such internal fencing requirements upon their approval of a proposed district. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code.

(2) Notwithstanding any other provision of law to the contrary, no herd district shall:

(a) Contain any lands owned by the United States of America or the state of Idaho, upon which the grazing of livestock has historically been permitted.

(b) Result in the state, a county, a city or a highway district being held liable for personal injury, wrongful death or property damage resulting from livestock within the public right-of-way.

(c) Prohibit trailing or driving of livestock from one location to another on public roads or recognized livestock trails.

(3) Open range means all uninclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam.

(4) The owners of taxable real property within the herd district shall:

(a) Pay the costs, including on private land, of constructing and maintaining legal fences as required on the district's border with open range

so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district.

(b) Pay the costs, including on private land, of constructing and maintaining cattle guards as required on the district's border with open range so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; except that the costs of maintaining a cattle guard located on a public right-of-way shall thereafter be paid by the state, county, city or highway district responsible for maintaining said right-of-way.

(c) Pay seventy-five percent (75%) of the costs, including on private land, of constructing legal fences required, at the time of the creation or modification of the district only, to control livestock within the interior of the district; provided that (i) the costs of maintaining such fences shall thereafter be paid by the owner(s) of the land on which the fencing is constructed as prescribed by chapter 1, title 35, Idaho Code, and that (ii) the costs of constructing and maintaining fences on livestock operations which come into existence after the creation or modification of the district shall be paid by owner(s) of the land on which the fencing is constructed as prescribed by chapter 1, title 35, Idaho Code.

(d) Pay seventy-five percent (75%) of the costs, including on private land, of constructing legal cattle guards required, at the time of the creation or modification of the district only, to control livestock within the interior of the district; provided that (i) the costs of maintaining a cattle guard located on a public right-of-way shall thereafter be paid by the state, county, city or highway district responsible for maintaining the public right-of-way on which the cattle guard is located, or, in the case of a cattle guard located on private land, by the owner(s) of the land on which the cattle guard is constructed as prescribed by chapter 1, title 35, Idaho Code, and that (ii) the costs of constructing and maintaining cattle guards on livestock operations which come into existence after the creation or modification of the district shall be paid by the owner(s) of the land on which the cattle guard is constructed as prescribed by chapter 1, title 35, Idaho Code.

(e) In the case of a new herd district created contiguous to an existing herd district, there shall be no obligation to maintain a legal fence or cattle guards on the border between the new district and the existing district, except to the extent that said fence or cattle guards, or any portion thereof, may be required to control movement of livestock on the interior of the district. In the case of a modification of an existing herd district which alters its borders with open range, there shall be no obligation to maintain a legal fence or cattle guards on its previous border with open range, except to the extent that said fence or cattle guards, or any portion thereof, may be required to control movement of livestock on the interior of the district.

(5) In the case of interior fencing and cattle guards as described in subsections (4)(c) and (d), the owner(s) of private land on which such fencing or cattle guards are constructed shall pay twenty-five percent (25%) of the total cost of their construction, provided that the share of that total cost to

be pa  
title

(6)

have  
six hu  
taxab.  
maint  
modifi  
or aft  
such a  
may n  
from tl  
a new  
apply,  
by the  
the nev  
quired  
taxable  
district  
§ 1303;  
1935, cl  
§ 1, p. 1  
am. 198

Compil  
ch. 118 is  
Section  
as § 25-24  
Cited in  
tle Co., 107  
1984).

Alternative  
County pol  
Creation of  
—Inclusion  
—Modificat  
Effect of cr  
Enclosure o  
Open range  
Purpose.  
Trailed or c

Alternative  
A herd di  
landowners  
from damage  
not wish, or c  
Easley v. L  
(1986).

County Poli  
The legisl  
whereby a m  
area could co

ng, drifting or  
ing and main-  
ith open range  
ng, drifting or  
costs of main-  
ll thereafter be  
sible for main-  
n private land,  
ation or modi-  
interior of the  
es shall there-  
fencing is con-  
nd that (ii) the  
ock operations  
ion of the dis-  
fencing is con-  
le.  
n private land,  
the creation or  
the interior of  
a cattle guard  
l by the state,  
ing the public  
the case of a  
land on which  
title 35, Idaho  
taining cattle  
after the cre-  
wner(s) of the  
l by chapter 1,  
to an existing  
legal fence or  
l the existing  
uards, or any  
vestock on the  
existing herd  
l be no obliga-  
is border with  
uards, or any  
vestock on the  
cribed in sub-  
ch fencing or  
(25%) of the  
t total cost to

be paid by each individual landowner shall be as prescribed by chapter 1, title 35, Idaho Code.

(6) Notwithstanding any provision of law to the contrary, a county shall have the authority to and shall levy an annual property tax not to exceed six hundredths percent (.06%) of market value for assessment purposes on taxable real property within the district for the costs of constructing and maintaining the legal fencing and cattle guards required by the creation or modification of such a herd district; provided that a herd district created on or after January 1, 1990, shall have no force and effect unless and until such a levy is approved, and provided that the revenues derived therefrom may not be used for any other purpose. Such special levy shall be exempt from the limitation imposed by section 63-923(1), Idaho Code. In the case of a new herd district contiguous to an existing herd district, said levy shall apply, for purposes of constructing legal fences and cattle guards required by the new district, only to owners of taxable real property residing within the new district; but for purposes of maintaining thereafter fences as required on the district's border with open range, shall apply to owners of taxable real property residing within both the new district and the existing district to which it is contiguous. [1907, p. 126, § 2, reen. R.C. & C.L., § 1303; am. 1919, ch. 184, § 1, p. 565; C.S., § 2012; I.C.A., § 24-2102; am. 1935, ch. 90, § 1, p. 171; am. 1947, ch. 75, § 1, p. 120; am. 1953, ch. 118, § 1, p. 172; am. 1963, ch. 264, § 1, p. 674; am. 1983, ch. 120, § 1, p. 313; am. 1985, ch. 56, § 1, p. 109; am. 1990, ch. 222, § 2, p. 589.]

**Compiler's notes.** Section 2 of S.L. 1953, ch. 118 is compiled herein as § 25-2404.

Section 3 of S.L. 1990, ch. 222 is compiled as § 25-2407.

**Cited in:** *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

**ANALYSIS**

- Alternative to fencing.
- County police power.
- Creation of herd districts.
- Inclusion of federal land.
- Modification by court.
- Effect of creation of herd district.
- Enclosure of district by fences.
- Open range.
- Purpose.
- Trailed or driven.

**Alternative to Fencing.**

A herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. *Easley v. Lee*, — Idaho —, 721 P.2d 215 (1986).

**County Police Power.**

The legislature contemplated a process whereby a majority of the landowners in an area could compel the county to create herd

districts and thereby place upon livestock owners within such districts the duty to fence in their stock; there is nothing in that statutory scheme indicating counties may not exercise their police power to control roaming livestock, but rather must ignore any problems and wait until action is forced upon the county by the presentation of a petition for the formation of a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

**Creation of Herd Districts.**

Herd districts may still be created in any area not within "open range" as defined in this section. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

Herd districts may not be created sua sponte by a county but only in response to a petition of a majority of the landowners within a certain area and the creation of a herd district imposes civil liability upon livestock owners when their stock trespasses on the land of another; county ordinance prohibiting livestock from running at large, on the other hand, expressly provided that it should not apply to the resolution of any civil liability and, hence, the purpose and effect of the ordinance in question were different from the purpose and effect of a herd district and the ordinance did not constitute the de facto creation of a herd district. *Benewah County Cat-*

tlemen's Ass'n v. Board of County Comm'rs, 105 Idaho 209, 668 P.2d 85 (1983).

The requirement of this section, requiring a herd district to be enclosed by a lawful fence, could not under the provisions of § 25-2404, be removed in the county commissioners' order forming the herd district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

Creation of a herd district by ordinance is within the power of the county commissioners. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

**—Inclusion of Federal Land.**

Where the county commissioners by ordinance purported to create a herd district which contained parcels of federal land within its boundaries, the ordinance conflicted with subdivision (2)(a) of this section, and a valid herd district was not created. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

**—Modification by Court.**

The district court's modification of the herd district boundaries by exclusion of federal lands was improper as an exercise of a legislative function by the court; the district court properly should have simply ruled that the herd district was invalid due to the inclusion of federal land. *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987).

**Effect of Creation of Herd District.**

The creation of a herd district in Idaho reinstates the English common law within that district, placing a duty on the livestock owner to fence in his stock and holding him liable for damages caused if his stock escapes onto another's land, regardless of whether that land is fenced or not. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

Once a herd district is created, the rule of fencing out, which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in a herd district is guilty of a misdemeanor, and additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the land-

owner's fence. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

**Enclosure of District by Fences.**

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

**Open Range.**

The unenclosed lands within a county but outside cities and villages clearly fell within the definition of "open range" and, hence, the county had no authority to create a herd district. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, 668 P.2d 85 (1983).

**Purpose.**

The passage of this section and § 25-2118, with their accompanying definition of "open range" in terms of historical use, was not intended to and does not change the law of this State that with the exception of cities, villages, and herd districts, livestock may run at large and graze upon unenclosed lands in this State. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

The purpose of the herd district statutes is to provide an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not desire, or are unable, to afford fencing out stray cattle. *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 740 P.2d 57 (1987).

**Trailed or Driven.**

Where the sheep were in a shoulder-to-shoulder, close formation under the direction of several drivers, the sheep were not being "herded" upon the highway, but instead were being "trailed" or "driven" by the men in charge of the move. *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 740 P.2d 57 (1987).

**Collateral References.** 3A C.J.S., Animals, § 143.

**25-2403. Notice of hearing petition.** — It shall be the duty of the board of county commissioners, after such petition has been filed, to set a date for hearing said petition, notice of which hearing shall be given by posting notices thereof in three (3) conspicuous places in the proposed herd district, and by publication for two (2) weeks previous to said hearing in a newspaper published in the county nearest the proposed herd district. [1907, p. 126, § 3; reen. R.C. & C.L., § 1304; C.S., § 2013; I.C.A., § 24-2103.]

1  
the  
19  
a  
la  
to  
th  
m  
wi  
to  
ef  
or  
ur  
up  
pe  
ele  
C.  
11  
C  
ch.  
S  
in  
En  
T  
cor  
ma  
cat  
tha  
con  
boa  
her  
suc  
agr  
gat  
119  
C  
graz  
§ 40  
Fe  
comi  
Fe



, 111 Idaho 115,

### Fences.

ibilities resulting  
d district, do not  
ing swine, that  
en range into the  
rd district is en-  
cattle guards in  
ct. Easley v. Lee,  
15 (1986).

hin a county but  
early fell within  
and, hence, the  
reate a herd dis-  
tlemen's Ass'n v.  
105 Idaho 209,

n and § 25-2118,  
efinition of "open  
l use, was not in-  
ge the law of this  
ion of cities, vil-  
vestock may run  
enclosed lands in  
se, 99 Idaho 829,

istrict statutes is  
landowners who  
d from damage  
t do not desire, or  
out stray cattle.  
. Simplot Co., 113  
37).

n a shoulder-to-  
nder the direction  
p were not being  
but instead were  
by the men in  
erry Sheep Co. v.  
15, 740 P.2d 57

3A C.J.S., Ani-

e duty of the  
filed, to set a  
l be given by  
proposed herd  
l hearing in a  
herd district.  
2013; I.C.A.,

Cross ref. Post card notice, § 31-863.  
Publication requirements, § 60-109.  
Cited in: Nelson v. Holdaway Land & Cat-  
tle Co., 107 Idaho 550, 691 P.2d 796 (Ct. App.  
1984).

### Notice Required.

Herd district created without posting no-  
tices required by this section is invalid. State  
v. Catlin, 33 Idaho 437, 195 P. 628 (1921).  
Collateral References. 3A C.J.S., Ani-  
mals, § 145.

**25-2404. Order creating district.** — At such hearing, if satisfied that a majority of the landowners owning more than fifty percent (50%) of the land in said proposed herd district who are resident in, and qualified electors of, the state of Idaho are in favor of the enforcement of the herd law therein, and that it would be beneficial to such district, the board of commissioners shall make an order creating such herd district, in accordance with the prayer of the petition, or with such modifications as it may choose to make. Such order shall specify a certain time at which it shall take effect, which time shall be at least thirty (30) days after the making of said order; and said order shall continue in force, according to the terms thereof, until the same shall be vacated or modified by the board of commissioners, upon the petition of a majority of the landowners owning more than fifty percent (50%) of the land in said district who are resident in, and qualified electors of, the state of Idaho. [1907, p. 126, § 4; reen. R.C. & C.L., § 1305; C.S., § 2014; I.C.A., § 24-2104; am. 1947, ch. 75, § 2, p. 120; am. 1953, ch. 118, § 2, p. 172.]

Compiler's notes. Section 1 of S.L. 1953,  
ch. 118 is compiled herein as § 25-2402.  
Sec. to sec. ref. This section is referred to  
in §§ 25-2402, 25-2407 and 25-2408.

herd district to be enclosed by a lawful fence,  
could not under the provisions of this section,  
be removed in the county commissioners' or-  
der forming the herd district. Easley v. Lee,  
111 Idaho 115, 721 P.2d 215 (1986).

### Enclosure of District by Fence.

The requirement of § 25-2402, requiring a

**25-2405. Fences on agricultural lands adjacent to public domain — Cattle guards.** — The board of county commissioners may provide as a condition in any order creating a herd district which may hereafter be made that any agricultural lands in the proximity of public domain where cattle, horses or mules are grazed, shall be inclosed by a lawful fence and that any road extending from agricultural area to such public domain shall contain cattle guards or gates at such places and of such nature as the board shall prescribe. The board of county commissioners may make its herd district orders inapplicable to cattle, horses or mules straying from such public domain or along roads leading to such public domain until such agricultural lands are inclosed by lawful fence and such cattle guards or gates are installed. [I.C.A., § 24-2104A, as added by 1947, ch. 74, § 1, p. 119.]

Cross ref. Cattle guards across roads in  
grazing country, landowners may erect,  
§ 40-2310.

Fences along railroads, public utilities  
commission may require, § 62-1201 et seq.  
Fences generally, § 35-101 et seq.

Gates on public highways, § 40-2320.  
Passageways for stock under highways,  
§ 40-2314.

Removal of fences when highway altered or  
new highway opened, § 40-2317.

Trails for livestock, laying out highways, and rules concerning use, § 40-2313.

Cited in: Petricevich v. Salmon River Canal Co., 92 Idaho 865, 452 P.2d 362 (1969).

**25-2406. Limitation on powers of commissioners.** — The provisions of sections 25-2401 and 25-2405 shall not be construed to confer upon the board of county commissioners any jurisdiction over animals otherwise prohibited from running at large under existing laws. [1907, p. 126, § 5; reen. R.S. & C.L., § 1306; C.S., § 2015; I.C.A., § 24-2105.

**25-2407. Violation of commissioners' order — Civil liability.** — Any person who shall, in violation of any order made pursuant to the provisions of section 25-2404, Idaho Code, permit or allow any of the animals designated in such order, owned by him or under his control, to run at large in such herd district, or to be herded on the said highway, shall be deemed guilty of a civil offense, for which, within a period of one (1) year, law enforcement officials shall issue a warning on at least the first and second such offense, and thereafter, for which a civil penalty of not to exceed fifty dollars (\$50.00) may be imposed per animal unit in violation, the aggregate of which shall not exceed five hundred dollars (\$500), plus restitution to the owner for any damage to property. The pendency of any such action shall not prevent nor prejudice the bringing of another action against the same party for a violation of such order committed after the commencement of such pending action. For purposes of this section, an animal unit shall be as defined, at the time of such violation, by federal and state agencies which administer the grazing of livestock on public lands. [1907, p. 126, § 6; reen. R.C. & C.L., § 1307; am. 1919, ch. 184, § 1, p. 565; C.S., § 2016; I.C.A., § 24-2106; am. 1990, ch. 222, § 3, p. 589.]

**Compiler's notes.** Section 2 of S.L. 1990, ch. 222 is compiled as § 25-2402.

Section 4 of S.L. 1990, ch. 222 declared an emergency and provided that the act should be in effect upon its passage and approval retroactive to January 1, 1990. Approved April 5, 1990.

**ANALYSIS**

Effect of creation of district.  
Enclosure of district by fences.

**Effect of Creation of District.**

Once a herd district is created, the rule of fencing is out which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in

a herd district is guilty of a misdemeanor, and additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the landowner's fences. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

**Enclosure of District by Fences.**

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

**Collateral References.** 3A C.J.S., Animals, §§ 168, 169.

**25-2408. Civil liability.** — The owner of animals permitted or allowed to run at large, or herded in violation of any order made in accordance with the provisions of section 25-2404, shall be liable to any person who shall suffer damage from the depredations or trespasses of such animals, without regard to the condition of his fence; and the person so damaged shall have a

A  
E  
C  
D  
E  
E  
H  
P  
A  
la:  
fr  
no  
Ea  
(1  
Bt  
in  
ani  
sat  
on  
Ida  
Co:  
P  
rec  
live  
peri  
Co.,  
198.  
Dar  
Ti  
nom  
prev  
to p  
Lan  
1098  
Effe  
Or  
fenci  
keep  
of a  
of st

Salmon River Ca.  
P.2d 362 (1969).

The provisions  
infer upon the  
als otherwise  
7, p. 126, § 5;

liability. —  
rsuant to the  
ny of the ani-  
ntrol, to run at  
way, shall be  
f one (1) year,  
the first and  
alty of not to  
t in violation,  
s (\$500), plus  
ndency of any  
nother action  
tted after the  
is section, an  
oy federal and  
public lands.  
4, § 1, p. 565;  
589.]

a misdemeanor,  
y is imposed for  
s of such animals  
tion of the land-  
e, 111 Idaho 115,

**Fences.**  
ibilities resulting  
d district, do not  
ing swine, that  
range into herd  
istrict is enclosed  
guards in roads  
sley v. Lee, 111  
986).  
3A C.J.S., Ani-

ed or allowed  
ordance with  
on who shall  
nals, without  
shall have a

lien upon said animals for the amount of damage done, and the cost of the proceedings to recover the same, and may take the animals into custody until all such damages are paid; provided, that the person so taking said animals into custody shall not have the right to retain the same for more than five (5) days without commencing an action against the owner thereof for such damages. Said damages may be recovered by a civil action before any court of competent jurisdiction, and no such action shall be defeated or affected by reason of any criminal action commenced or prosecuted against the same party under the provisions of the preceding section. [1907, p. 126, § 7; reen. R.C. & C.L., § 1308; am. 1919, ch. 184, § 1, p. 566; C.S., § 2017; I.C.A., § 24-2107.]

#### ANALYSIS

Alternative to fencing.  
Burden of proof.  
Cost for care of livestock.  
Damages.  
Effect of creation of district.  
Enclosure of district by fences.  
Evidence.  
Hearing.  
Presumption of negligence.

#### Alternative to Fencing.

A herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Burden of Proof.

Where the presence of animal on highway in herd district resulted in injury, owner of animal was liable therefor unless he could satisfactorily explain the animal's presence on the highway. *Corthell v. Pearson*, 88 Idaho 295, 399 P.2d 266 (1965).

#### Cost for Care of Livestock.

Pursuant to this section, the plaintiff can recover the reasonable costs of caring for the livestock lawfully retained for a reasonable period. *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

#### Damages.

The district court did not err in awarding nominal damages for damages caused by a previous trespass where the landowner failed to prove actual damages. *Nelson v. Holdaway Land & Cattle Co.*, 111 Idaho 1035, 729 P.2d 1098 (Ct. App. 1986).

#### Effect of Creation of District.

Once a herd district is created, the rule of fencing out which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in

a herd district is guilty of a misdemeanor, and additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the landowner's fence. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Enclosure of District by Fences.

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986).

#### Evidence.

A finding is not clearly erroneous if it is supported by substantial and competent, though conflicting, evidence; thus, where the testimony and exhibits revealed a wheat field heavily infested with weeds, and one or more of several causes, all supported by the record, could have brought the weeds to the field including farm equipment, wild animals, other livestock, and plaintiff's own farming practices, and testimony at trial indicated that factors other than the weeds, such as the late harvest, contributed to the reduced yield, the trial court's findings that plaintiff's field was in poor condition before the cattle trespassed and that other factors could have caused the weed infestation was not clearly erroneous. *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

#### Hearing.

The court did not abuse its discretion in refusing to allow an evidentiary hearing in place of the requested written proposals as an aid in determining damages. *Nelson v. Holdaway Land & Cattle Co.*, 111 Idaho 1035, 729 P.2d 1098 (Ct. App. 1986).

#### Presumption of Negligence.

Where defendant's horse was upon the roadway in a herd district, there was a presumption of negligence in letting the horse

run free, which the defendant, who could of- not overcome. *Cunningham v. Bundy*, 100  
fer no explanation of freedom of his horse, did Idaho 456, 600 P.2d 132 (1979).

**25-2409. Trespassing animals may be taken up.** — Any person may take into custody any of the animals specified in the said order of the board of commissioners that may be about to commit a trespass upon the premises owned, occupied or in charge of such person, and retain the same until all reasonable charges for keeping said animals are paid: provided, that it shall be the duty of the person so taking said animals into custody to notify the owner or person in charge of the same within five (5) days thereafter, and if the owner or person in charge of them shall not be known to the person so taking said animals into custody, and cannot be found after diligent search and inquiry, he may proceed in the manner provided for the taking up and disposal of estrays. [1907, p. 126, § 8; reeen. R.C. & C.L., § 1309; C.S., § 2018; I.C.A., § 24-2108.]

Cross ref. Taking up and disposal of es-  
trays, §§ 25-2301 — 25-2312.

Collateral References. 3A C.J.S., Ani-  
mals, §§ 159-164.

## CHAPTER 25

### IDAHO HORSE BOARD

SECTION.	SECTION.
25-2501. Board created.	25-2506. Deposit and disbursement of funds.
25-2502. Officers — Meetings — Expenses.	25-2507. Bonding — Records — Audits.
25-2503. Definitions.	25-2508. Assessment liens.
25-2504. Powers and duties.	25-2509. Assessment is mandatory.
25-2505. Assessments — Collection.	

**25-2501. Board created.** — (1) There is hereby created in the department of self-governing agencies the Idaho horse board. The board shall be composed of seven (7) members, each of whom shall be appointed by the governor from a list of nominees recommended by the Idaho horse council. The horse council shall recommend at least four (4) names for each appointment, and the governor shall appoint from the nominees recommended. The membership of the board shall consist at all times of members representing the following interests:

- (a) Two (2) members shall at all times be representative of horse racing interests;
- (b) One (1) member shall at all times be representative of trail pleasure riding interests and one (1) member shall at all times be representative of general horse interests;
- (c) Two (2) members shall at all times be representative of show interests; and
- (d) One (1) member shall at all times be representative of breeding interests.

(2) Each member of the board shall be a citizen of the United States and a bona fide resident of this state, and a member of the Idaho horse council. During a term of office, a member must continue to possess all of the qualifications necessary for appointment. Failure to maintain such qualifi-

Exhibit "G"  
Idaho Code Section 25-2402, as amended in 1996.

## Note 6

et seq., 25-2404, 25-2408. *Corthell v. Pearson*, 1965, 88 Idaho 295, 399 P.2d 266. Automobiles ⇒ 244(2.1)

Evidence sustained finding that heifer owner, who was sued by motorist for damage to automobile as result of automobile colliding with

heifer on highway in nighttime, and whose fenced land was located in herd district, was negligent. I.C.A. §§ 25-2118, 25-2119, 25-2401 et seq., 25-2404, 25-2408. *Corthell v. Pearson*, 1965, 88 Idaho 295, 399 P.2d 266. Automobiles ⇒ 244(2.1)

### § 25-2402. Petition and requirements for district

(1) A majority of the owners of taxable real property, including corporations, in any area or district described by metes and bounds and who are also domiciled and resident in the state of Idaho, may petition the board of county commissioners in writing to create, modify or eliminate a herd district in such area; provided, that in the case of a petition for the purpose of eliminating an existing district or any portion thereof, said area must be contiguous to open range. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such district; and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards as needed in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Such petition may also state the conditions and location(s), if any, for the construction of legal fences and cattle guards which may be required to prohibit the running at large of livestock within the interior of the proposed district; provided, that if such petition does not address the issue of interior fencing and cattle guards, the board of county commissioners shall have the power to establish such internal fencing requirements upon their approval of a proposed district. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code.

(2) Notwithstanding any other provision of law to the contrary, no herd district shall:

(a) Contain any lands owned by the United States of America or the state of Idaho, upon which the grazing of livestock has historically been permitted.

(b) Result in the state, a county, a city or a highway district being held liable for personal injury, wrongful death or property damage resulting from livestock within the public right-of-way.

(c) Prohibit trailing or driving of livestock from one location to another on public roads or recognized livestock trails.

(3) Open range means all uninclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam.

highway in nighttime, and whose  
 as located in herd district, was  
 A. §§ 25-2118, 25-2119, 25-2401  
 4, 25-2408. *Corthell v. Pearson*,  
 295, 399 P.2d 266. Automobiles

(4) The owners of taxable real property within the herd district shall:

(a) Pay the costs, including on private land, of constructing and maintaining legal fences as required on the district's border with open range so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district.

(b) Pay the costs, including on private land, of constructing and maintaining cattle guards as required on the district's border with open range so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; except that the costs of maintaining a cattle guard located on a public right-of-way shall thereafter be paid by the state, county, city or highway district responsible for maintaining said right-of-way.

(c) Pay seventy-five percent (75%) of the costs, including on private land, of constructing legal fences required, at the time of the creation or modification of the district only, to control livestock within the interior of the district; provided that (i) the costs of maintaining such fences shall thereafter be paid by the owner(s) of the land on which the fencing is constructed as prescribed by chapter 1, title 35, Idaho Code, and that (ii) the costs of constructing and maintaining fences on livestock operations which come into existence after the creation or modification of the district shall be paid by owner(s) of the land on which the fencing is constructed as prescribed by chapter 1, title 35, Idaho Code.

(d) Pay seventy-five percent (75%) of the costs, including on private land, of constructing legal cattle guards required, at the time of the creation or modification of the district only, to control livestock within the interior of the district; provided that (i) the costs of maintaining a cattle guard located on a public right-of-way shall thereafter be paid by the state, county, city or highway district responsible for maintaining the public right-of-way on which the cattle guard is located, or, in the case of a cattle guard located on private land, by the owner(s) of the land on which the cattle guard is constructed as prescribed by chapter 1, title 35, Idaho Code, and that (ii) the costs of constructing and maintaining cattle guards on livestock operations which come into existence after the creation or modification of the district shall be paid by the owner(s) of the land on which the cattle guard is constructed as prescribed by chapter 1, title 35, Idaho Code.

(e) In the case of a new herd district created contiguous to an existing herd district, there shall be no obligation to maintain a legal fence or cattle guards on the border between the new district and the existing district, except to the extent that said fence or cattle guards, or any portion thereof, may be required to control movement of livestock on the interior of the district. In the case of a modification of an existing herd district which alters its borders with open range, there shall be no obligation to maintain a legal fence or cattle guards on its previous border with open range, except to the extent that said fence or cattle guards, or any portion thereof, may be required to control movement of livestock on the interior of the district.

(5) In the case of interior fencing and cattle guards as described in subsections (4)(c) and (d), the owner(s) of private land on which such fencing or cattle guards are constructed shall pay twenty-five percent (25%) of the total cost of their construction, provided that the share of that total cost to be paid by each individual landowner shall be as prescribed by chapter 1, title 35, Idaho Code.

(6) Notwithstanding any provision of law to the contrary, a county shall have the authority to and shall levy an annual property tax not to exceed six hundredths percent (.06%) of market value for assessment purposes on taxable real property within the district for the costs of constructing and maintaining the legal fencing and cattle guards required by the creation or modification of such a herd district; provided that a herd district created on or after January 1, 1990, shall have no force and effect unless and until such a levy is approved, and provided that the revenues derived therefrom may not be used for any other purpose. In the case of a new herd district contiguous to an existing herd district, said levy shall apply, for purposes of constructing legal fences and cattle guards required by the new district, only to owners of taxable real property residing within the new district; but for purposes of maintaining thereafter fences as required on the district's border with open range, shall apply to owners of taxable real property residing within both the new district and the existing district to which it is contiguous.

S.L. 1907, p. 126, § 2; S.L. 1919, ch. 184, § 1; S.L. 1935, ch. 90, § 1; S.L. 1947, ch. 75, § 1; S.L. 1953, ch. 118, § 1; S.L. 1963, ch. 264, § 1; S.L. 1983, ch. 120, § 1; S.L. 1985, ch. 56, § 1; S.L. 1990, ch. 222, § 2; S.L. 1996, ch. 322, § 5.

Codifications: R.C. 1909 and C.L. 1919, § 1303; C.S. 1919, § 2012; I.C.A., § 24-2102.

Library References

Animals ⇨ 50(1), 50(2).

Westlaw Key Number Searches: 28k50(1); 28k50(2).

C.J.S. Animals §§ 265 to 270, 272 to 290.

Notes of Decisions

- In general 1
- Civil actions 6
- Construction and application 2
- Creation of herd district 4
- Local legislation 5
- Purpose 3

1. In general

Animals may roam freely in open range areas, which are all areas of state not within cities, villages, or already created herd districts, without their owner's risking liability. I.C. § 25-2402. *Adamson v. Blanchard*, 1999, 133 Idaho 602, 990 P.2d 1213. Animals ⇨ 50(1)

Although animals may not be herded upon the highway in a herd district, trailing or driving of livestock from one location to another on public roads cannot be prohibited. I.C. § 25-2402(2)(c). *Adamson v. Blanchard*, 1999,

133 Idaho 602, 990 P.2d 1213. Animals ⇨ 50(1)

Controlled movement of livestock within a herd district is not prohibited. *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 1987, 113 Idaho 15, 740 P.2d 57. Animals ⇨ 50(1)

Herd districts are a legislative exception to the "fence out" rule and once a herd district is created, the rule of fencing out which requires landowners to keep out another's livestock by construction of a fence no longer applies; rather, an owner of stock who allows animals to run at large in herd district is guilty of a misdemeanor and additional civil liability for damage caused by trespass of such animals. I.C. §§ 25-2402(3), 25-2403, 25-2407, 25-2408. *Easley v. Lee*, 1986, 111 Idaho 115, 721 P.2d 215. Animals ⇨ 50(1); Animals ⇨ 53

In Idaho the "fence out" rule prevails where in if a landowner's property is not within a herd district, and is outside a city or village, land-

owner des from stray them out. v. Lee, 15 Animals ⇨

A herd from the 1 apply to li drift or st district, ur lawful fen- erating th *Easley v.* 215. Anin

Once a requiring erty to ke applies; v owner mu prevent hi er's prop- away Lanc 691 P.2d 7

Cattle o to keep li boring pro herd distr was also § 25-2408 the Co., 1 Animals ⇨

There a cities and tion to lia done by t herd distr. which En livestock and seco rule that fence their ages caus unless lar legal fenc 25-2402. 829, 590 97

Only me himself o: place upo stock in § 25-2401 Idaho 829

In all a districts, v livestock land, and for dama onto ano damaged I.C. §§ :



s described in subsection such fencing or cattle (%) of the total cost of cost to be paid by each, title 35, Idaho Code.

ry, a county shall have ax not to exceed six nt purposes on taxable cting and maintaining ion or modification of on or after January 1, ch a levy is approved, r not be used for any ous to an existing herd tting legal fences and wners of taxable real poses of maintaining ith open range, shall both the new district

, § 1; S.L. 1947, ch. 75, ch. 120, § 1; S.L. 1985,

A., § 24-2102.

265 to 270, 272 to 290.

) P.2d 1213. Animals ⇌

ent of livestock within a t prohibited. Etcheverry nplot Co., 1987, 113 Idaho mals ⇌ 50(1)

a legislative exception to and once a herd district is encing out which requires out another's livestock by out no longer applies; rath- who allows animals to run district is guilty of a misde- al civil liability for damage of such animals. I.C. 403, 25-2407, 25-2408. 111 Idaho 115, 721 P.2d 1); Animals ⇌ 53

: out" rule prevails where- operty is not within a herd le a city or village, land-

owner desiring to prevent animals of others from straying onto his property must fence them out. I.C. §§ 25-2402(3), 25-2403. Easley v. Lee, 1986, 111 Idaho 115, 721 P.2d 215. Animals ⇌ 50(1)

A herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is enclosed by lawful fences and cattle guards in roads penetrating the district. I.C. §§ 25-2402, 25-2404. Easley v. Lee, 1986, 111 Idaho 115, 721 P.2d 215. Animals ⇌ 50(1); Animals ⇌ 53

Once a herd district is created, the statute requiring landowners to fence their own property to keep another's livestock out no longer applies; within the herd district, the livestock owner must fence his own land in order to prevent his livestock from roaming onto another's property. I.C. § 25-2408. Nelson v. Holdaway Land and Cattle Co., 1984, 107 Idaho 550, 691 P.2d 796. Animals ⇌ 50(1)

Cattle owner had a duty to fence its property to keep livestock from trespassing onto neighboring property, which was completely within a herd district, where a portion of owner's land was also within the herd district. I.C. § 25-2408. Nelson v. Holdaway Land and Cattle Co., 1984, 107 Idaho 550, 691 P.2d 796. Animals ⇌ 50(3)

There are two geographical areas other than cities and villages recognized in Idaho in relation to liability of livestock owners for damage done by their stock to another's land; first is herd districts created pursuant to statute within which English common-law rule of prohibiting livestock from running at large is reinstated, and second containing "open range," where rule that livestock owners are not required to fence their stock in and are not liable for damages caused by their stock to another's land unless landowner's property is enclosed by a legal fence obtains. I.C. §§ 25-2401 et seq., 25-2402. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 92; Animals ⇌ 97

Only method by which landowner may relieve himself of his duty to fence livestock out and place upon livestock owner the duty to fence his stock in is creation of herd district. I.C. § 25-2401 et seq. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 92

In all areas in state, with exception of herd districts, villages, and cities, there is no duty for livestock owner to confine his cattle to his own land, and no liability attaches to livestock owner for damage occasioned by his stock straying onto another's property, unless landowner's damaged property is enclosed by legal fence. I.C. §§ 25-2202, 25-2401 et seq., 25-2402,

35-101, 35-102. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 97

In essence, creation of herd district in Idaho reinstates English common law within that district, placing duty on livestock owner to fence in his stock and holding him liable for damages caused if his stock escapes onto another's land, regardless of whether that land is fenced or not. I.C. § 25-2401 et seq. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 50(3)

## 2. Construction and application

Statutory definitions of "open range" as set forth in statute prohibiting creation of herd district in open range and statute relieving owners of livestock roaming on open range of duty to keep such stock off the highway are inconsistent with case law concept of "open range" as unfenced, unenclosed, public range, domain or common. I.C. §§ 25-2118, 25-2401 et seq., 25-2402. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 49

Passage of statute prohibiting creation of herd district in open range and statute relieving owners of livestock roaming on open range of duty to keep such stock off the highway, with their accompanying definition of "open range" in terms of historical use, was not intended to and does not change the law of state of Idaho that with exception of cities, villages, and herd districts, livestock may run at large and graze upon unenclosed lands in state. I.C. §§ 25-2118, 25-2401 et seq., 25-2402. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 48

## 3. Purpose

The purpose of the herd district statutes is to provide an alternative to landowners who wish to protect their land from damage by roaming stock. I.C. § 40-2313. Etcheverry Sheep Co. v. J.R. Simplot Co., 1987, 113 Idaho 15, 740 P.2d 57. Animals ⇌ 50(1)

Intent of legislature in enacting statutes governing creation of herd districts was that for areas where historical use has been one of enclosed lands, landowners in that area must petition and vote to designate that area a herd district in order to change Idaho law regarding liability for damage by roaming livestock. I.C. § 25-2401 et seq. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 50(1)

It is clear that amendment of statute prohibiting creation of herd district in open range, by inserting definition of "open range," was designed to protect the rights of livestock owners by prohibiting herd districts in areas where they historically grazed stock, rather than limiting the area where livestock owners were free to let their stock roam at large. I.C. § 25-2402. Maguire v. Yanke, 1978, 99 Idaho 829, 590 P.2d 85. Animals ⇌ 50(1)

4. Creation of herd district

Inclusion of federal lands in herd district created by board of county commissioners was expressly forbidden by statute and attempt to create district was thus invalid. I.C. §§ 25-2401 et seq., 25-2402(2)(a). *Miller v. Miller*, 1987, 113 Idaho 415, 745 P.2d 294. Animals ⇌ 50(1)

Herd districts may not be created sua sponte by a county but only in response to a petition of a majority of the landowners within a certain area. I.C. §§ 25-2401 to 25-2409. *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 1983, 105 Idaho 209, 668 P.2d 85. Animals ⇌ 50(2)

5. Local legislation

Provision of statute requiring herd district to be enclosed by lawful fence, could not be removed by modification of the county commissioners. I.C. §§ 25-2402, 25-2404. *Easley v. Lee*, 1986, 111 Idaho 115, 721 P.2d 215. Counties ⇌ 21.5

The herd district statutes were not intended to preempt, and do not preempt, the field of livestock regulation so as to preclude local regulation. I.C. §§ 25-2401 to 25-2409. *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 1983, 105 Idaho 209, 668 P.2d 85. Counties ⇌ 24

The legislature did not preempt the field of livestock control through its enactment of the herd district statutes, but even if it did, the extension or amplification of that control by county ordinance would not be prohibited in the absence of constitutional or statutory provisions clearly evidencing intent on a statewide basis to permit livestock to freely roam and graze regardless of the ownership or the character of lands. I.C. §§ 25-2401 to 25-2409. *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 1983, 105 Idaho 209, 668 P.2d 85. Counties ⇌ 24

County ordinance which prohibited livestock from running at large and from grazing on property other than that of owner and which required erection and maintenance of fences by owners of livestock was not invalid as amounting to a de facto creation of a herd district inasmuch as nothing in ordinance could be construed as imposing strict liability in tort against a violator and any civil action arising from livestock running at large was to be determined on basis of laws pertaining to civil actions and not on basis of a violation of ordinance. I.C. §§ 25-2401 to 25-2409. *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 1983, 105 Idaho 209, 668 P.2d 85. Animals ⇌ 50(1)

The herd district statutes did not apply to "open range" and, hence, did not apply to county ordinance which purported to control all

unenclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, were grazed or permitted to roam. I.C. § 25-2402. *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 1983, 105 Idaho 209, 668 P.2d 85. Animals ⇌ 50(1)

6. Civil actions

Landowners had no duty to maintain fence around its property to fence out cattle, and thus landowners were not liable to ranchers for consumption of large quantities of grain by the ranchers' cattle after the cattle went around landowners' fence, even though stipulation in prior litigation between the parties had required landowners to maintain a "legal fence" around its property; prior litigation dealt with boundary and not cattle, none of the documents in first litigation addressed livestock, and the lands in question did not encompass a herd district. I.C. § 25-2405. *Bybee v. Clark*, 1990, 118 Idaho 254, 796 P.2d 131. Animals ⇌ 52; Stipulations ⇌ 14(1)

Trial court's order in trespass action, effectively redesignating areas of herd district, was an unconstitutional exercise of a legislative function of board of county commissioners; court should have simply ruled that herd district was invalid on finding that district included federal land, contrary to statute. Const. Art. 2, § 1; I.C. §§ 25-2402, 31-714, 31-803. *Miller v. Miller*, 1987, 113 Idaho 415, 745 P.2d 294. Animals ⇌ 50(1); Constitutional Law ⇌ 72

Calculation of damages for care of cattle captured and cared for after having trespassed onto adjoining agricultural lands was appropriately based upon written proposals ordered to be submitted, despite failure of owner of property to submit such proposal, without differentiation on basis of increased costs for some animals and other alleged shortcomings which caused variance from damages awarded to be only minimal. I.C. § 25-2408. *Nelson v. Holdaway Land and Cattle Co.*, 1986, 111 Idaho 1035, 729 P.2d 1098. Animals ⇌ 100(8)

Farmer was entitled to recover his reasonable costs for caring for trespassing cattle, but only for those cattle captured within five days prior to suit or thereafter. I.C. § 25-2408. *Nelson v. Holdaway Land and Cattle Co.*, 1984, 107 Idaho 550, 691 P.2d 796. Animals ⇌ 100(10)

Owner of livestock who allows them to roam in a herd district is liable for any damage caused to another by the animals and the person damaged has a lien upon the livestock and can take custody of the livestock until the damage is paid for, except that the injured party does not have a right to hold the livestock for more than five days without commencing an action to recover damages. I.C. § 25-2408.

H  
Ne  
10  
lia  
tre  
§§  
tle  
of  
P.  
:  
ac  
ce:  
mc  
evi  
au  
an  
tin  
of  
ha  
13:  
24-  
I  
acc  
ces  
mo  
cre  
ed  
enc  
wit  
§ 2  
Ida  
245  
I  
acc  
full  
bile  
cou  
ing  
sen  
defi  
§  
I  
has  
sha  
pro  
hez  
dis  
S.L  
Cod  
Al  
W

tside cities and villages  
m, license or otherwise,  
vine, were grazed or per-  
§ 25-2402. Benewah  
Ass'n, Inc. v. Board of  
Benewah County, 1983, 105  
85. Animals ⇨ 50(1)

o duty to maintain fence  
fence out cattle, and thus  
liable to ranchers for con-  
quantities of grain by the  
the cattle went around  
en though stipulation in  
n the parties had required  
n a "legal fence" around  
gation dealt with bound-  
one of the documents in-  
d livestock, and the lands  
compass a herd district.  
v. Clark, 1990, 118 Ida-  
Animals ⇨ 52; Stipula-

in trespass action, effec-  
reas of herd district, was  
exercise of a legislative  
county commissioners;  
ly ruled that herd district  
g that district included  
to statute. Const. Art. 2,  
31-714, 31-803. Miller  
Idaho 415, 745 P.2d 294.  
Constitutional Law ⇨ 72  
ges for care of cattle cap-  
er having trespassed onto  
lands was appropriately  
proposals ordered to be  
ire of owner of property  
d, without differentiation  
costs for some animals  
rtcomings which caused  
awarded to be only min-  
Nelson v. Holdaway  
86, 111 Idaho 1035, 729  
100(8)

to recover his reasonable  
spassing cattle, but only  
d within five days prior  
C. § 25-2408. Nelson v.  
tle Co., 1984, 107 Idaho  
mals ⇨ 100(10)  
ho allows them to roam  
liable for any damage  
he animals and the per-  
upon the livestock and  
livestock until the dam-  
that the injured party  
o hold the livestock for  
without commencing an  
ages. I.C. § 25-2408.

Nelson v. Holdaway Land and Cattle Co., 1984,  
107 Idaho 550, 691 P.2d 796. Animals ⇨ 53

The creation of a herd district imposes civil  
liability upon livestock owners when their stock  
trespasses on the land of another. I.C.  
§§ 25-2401 to 25-2409. Benewah County Cat-  
tlemen's Ass'n, Inc. v. Board of County Com'rs  
of Benewah County, 1983, 105 Idaho 209, 668  
P.2d 85. Animals ⇨ 53

In personal injury action arising out of an  
accident, which occurred when horse unsuc-  
cessfully attempted to jump over passing auto-  
mobile, on a public highway in a herd district,  
evidence sustained trial court's findings that  
automobile passenger was free of negligence  
and that horse owner was negligent in permit-  
ting horse to be on roadway within boundaries  
of a herd district. I.C. § 25-2408. Cunning-  
ham v. Bundy, 1979, 100 Idaho 456, 600 P.2d  
132. Automobiles ⇨ 244(2.1); Automobiles ⇨  
244(56)

In personal injury action arising out of an  
accident, which occurred when horse unsuc-  
cessfully attempted to jump over passing auto-  
mobile, on public highway in a herd district,  
credibility of witnesses and weight to be afford-  
ed their testimony, together with proper infer-  
ences to be drawn therefrom, was a question  
within province of trier of facts. I.C.  
§ 25-2408. Cunningham v. Bundy, 1979, 100  
Idaho 456, 600 P.2d 132. Automobiles ⇨  
245(21)

In personal injury action arising out of an  
accident which occurred when horse unsuc-  
cessfully attempted to jump over passing auto-  
mobile, on a public highway in a herd district, trial  
court did not abuse its discretion in not award-  
ing attorney fees to prevailing automobile pas-  
senger where it was satisfied that horse owner's  
defense was a bona fide defense. I.C.

§§ 12-121, 25-2408. Cunningham v. Bundy,  
1979, 100 Idaho 456, 600 P.2d 132. Costs ⇨  
194.28

Finding that livestock owner had duty to keep  
his cattle fenced in because area was not one  
where by custom livestock were grazed or per-  
mitted to roam, thereby adopting rule creating  
de facto herd district in that area and rendering  
statutory procedure for establishment of herd  
districts unnecessary, was error. I.C.  
§ 25-2401 et seq. Maguire v. Yanke, 1978, 99  
Idaho 829, 590 P.2d 85. Animals ⇨ 92

Heifer owner, who was sued by motorist for  
damage to automobile which struck heifer on  
highway in nighttime, had burden to show that  
heifer was lawfully on highway where owner's  
land was fenced and was located in herd dis-  
trict. I.C. §§ 25-2118, 25-2119, 25-2401 et  
seq., 25-2404, 25-2408. Corthell v. Pearson,  
1965, 88 Idaho 295, 399 P.2d 266. Automobiles  
⇨ 242(1)

Evidence sustained finding that heifer owner,  
who was sued by motorist for damage to auto-  
mobile as result of automobile colliding with  
heifer on highway in nighttime, and whose  
fenced land was located in herd district, was  
negligent. I.C.A. §§ 25-2118, 25-2119, 25-2401  
et seq., 25-2404, 25-2408. Corthell v. Pearson,  
1965, 88 Idaho 295, 399 P.2d 266. Automobiles  
⇨ 244(2.1)

Evidence sustained finding that heifer owner,  
who was sued by motorist for damage to auto-  
mobile as result of automobile colliding with  
heifer on highway in nighttime, and whose  
fenced land was located in herd district, was  
negligent. I.C.A. §§ 25-2118, 25-2119, 25-2401  
et seq., 25-2404, 25-2408. Corthell v. Pearson,  
1965, 88 Idaho 295, 399 P.2d 266. Automobiles  
⇨ 244(2.1)

### § 25-2403. Notice of hearing petition

It shall be the duty of the board of county commissioners, after such petition  
has been filed, to set a date for hearing said petition, notice of which hearing  
shall be given by posting notices thereof in three (3) conspicuous places in the  
proposed herd district, and by publication for two (2) weeks previous to said  
hearing in a newspaper published in the county nearest the proposed herd  
district.

S.L. 1907, p. 126, § 3.

Codifications: R.C. 1909 and C.L. 1919, § 1304; C.S. 1919, § 2013; I.C.A., § 24-2103.

#### Library References

Animals ⇨ 50(1), 50(2).

C.J.S. Animals §§ 265 to 270, 272 to 290.

Westlaw Key Number Searches: 28k50(1);  
28k50(2).

Exhibit "H"  
Idaho Code Section 31-116.

# Idaho Statutes

TITLE 31  
COUNTIES AND COUNTY LAW  
CHAPTER 1

COUNTY BOUNDARIES AND COUNTY SEATS

31-116. CANYON COUNTY. Canyon county is described as follows: beginning at a point in the middle of the channel of Snake river, where the line between township one (1) south, range one (1) west, and township one (1) south, range two (2) west, crosses said river;

Eastern boundary. Thence north to the northwest corner of township one (1) north, range one (1) west; thence east to the southeast corner of section thirty-two (32), township two (2) north, range one (1) west; thence north to the northwest corner of section four (4), township three (3) north, range one (1) west; thence west to the northwest corner of township three (3) north, range one (1) west; thence north to the northwest corner of township five (5) north, range one (1) west (R.C., section 23h);

Northern boundary. Thence west on the township line between townships five (5) and six (6), to the southwest corner of section thirty-one (31), township six (6) north, range three (3) west (1915, ch. 165, section 2, p. 363; 1917, ch. 11, section 2, p. 15); thence south on range line between ranges three (3) and four (4), one-half (1/2) mile to the east quarter corner of section one (1), township five (5) north, range four (4) west; thence west along the center line of sections one (1) and two (2), said township and range, two (2) miles to the east quarter corner of section three (3), said township and range; thence south along the section line one-half (1/2) mile to the southeast corner of section three (3), said township and range; thence west along the section line three (3) miles to the southwest corner of section five (5), said township and range; thence north along the section line one (1) mile to the northwest corner of section five (5), said township and range; thence west along the township line between townships five (5) and six (6) north, two (2) miles to the southwest corner of section thirty-six (36), township six (6) north, range five (5) west; thence north along the section line one (1) mile to the northwest corner of section thirty-six (36), said township and range; thence west along the section line one (1) mile to the southwest corner of section twenty-six (26), said township and range; thence north along the section line one (1) mile to the southwest corner of section twenty-three (23), said township and range; thence west along the section line two (2) miles to the southwest corner of section twenty-one (21), said township and range; thence north along the section line three (3) miles to the northwest corner of section nine (9), said township and range; thence west along the section line one and one-half (1 1/2) miles, more or less, to an intersection with the west line of the state of Idaho (1917, ch. 11, section 2, p. 15);

Western boundary. Thence up the middle of the channel of Snake river to the boundary line between Idaho and Oregon; thence south along the boundary line between Idaho and Oregon to the middle of Snake river;

Southern boundary. Thence up the middle of the channel of Snake river to the place of beginning (R.C., section 23h).

County seat--Caldwell.

Exhibit "I"

Letter received from Canyon County prosecuting attorney Scott Spears; two pages of the Minutes of the December 1982 meeting of the Canyon County Commissioners and a Certified Copy of the Order signed by the three County Commissioners establishing a herd district



**DAVID L. YOUNG**  
**Canyon County Prosecuting Attorney**

Virginia Bond  
Chief Criminal Deputy

Charles L. Saari  
Chief Civil Deputy

September 12, 2005

Debora L. Schrecongost  
Chasan & Walton  
1459 Tyrell Lane  
Boise, Idaho 83706

*Re: Public Records Request*

Dear Ms. Schrecongost:

This letter acknowledges receipt of your public records request which was received in this office on August 29, 2005 requesting a copy of "Canyon County Commissioners complete minutes and attachments of their December 1982 meeting." Please find attached to this letter copies of the requested information.

Please contact me if you have any questions or concerns.

Cordially,

SCOTT SPEARS  
Deputy Prosecuting Attorney

SS:cm

Enc:

TWENTY THIRD DAY OF NOVEMBER TERM, A.D., 1982  
CALDWELL, IDAHO DECEMBER 10, 1982

COMMISSIONERS REFER COPY OF SUMMONS FROM ATTORNEY FOR GARY  
GOCHENOUR TO THE PROSECUTING ATTORNEY

The Board of Commissioners acknowledged receipt of a Summons from Herbert W. Rettig, attorney for Gary Gochenour, and referred summons to the Office of the Prosecuting Attorney for advice as to further proceedings.

ORDER ESTABLISHING HERD DISTRICT

The Board has again reviewed the complexity of the Herd District Boundaries throughout the County and has determined, by resolution, that the time has come to simplify and unify the status of Herd Districts in Canyon County. In making this determination the Board has found the following:

1. A survey map, attached to the Order on file in the Recorder's Office, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.
2. That map shows that over 95% of the land within the County is now in Herd District status.
3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.
4. Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.
5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County.  
Therefore,

IT IS HEREBY ORDERED by the Board of Canyon County Commissioners on this 10th day of December, 1982, that a Herd District be established in the three remaining open range areas in Canyon County as shown on the survey map filed with this Order in the Recorder's Office (Marked in black), to the end that the entire land area of Canyon County be placed in Herd District status.

Order signed by the Board of Canyon County Commissioners and attested by the Deputy Clerk to the Board of Commissioners.

RESOLUTION PASSED REGARDING SHERIFF'S REQUEST TO RESCIND PREVIOUS  
RESOLUTION IN ORDER TO MAINTAIN A FULL STRENGTH STAFF IN THE  
CIVIL DEPARTMENT

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 10th day of December, 1982: Upon motion of Commissioner Bledsoe and the second by Commissioner Koch the Board resolves as follows: The Resolution of September 20, 1982, appointing Davetta Naumann to serve as Public Information Specialist for Civil Defense is hereby rescinded at the request of Sheriff John Prescott, and the Disaster Services Coordinator shall serve



SEVENTEENTH DAY OF NOVEMBER TERM, A.D., 1982  
CALDWELL, IDAHO                                  DECEMBER 2, 1982

CERTIFICATE OF RESIDENCY APPROVED

The Board of Commissioners approved a Certificate of Residency for Marcedalin Torres to receive tuition aid to attend College of Southern Idaho.

RESOLUTION PASSED REGARDING HERD DISTRICTS IN CANYON COUNTY

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 2nd day of December, 1982: Upon motion of Commissioner Hobza and the second by Commissioner Bledsoe the Board resolves as follows: That because of the confusion that exists due to the over-lapping lines of herd districts and open range and because over ninety-five (95%) percent of the area of Canyon County is already designated a herd district the Board will issue an order designating all of Canyon County to be herd district as of December 14, 1982. Motion Carried Unanimously.

BEER AND WINE LICENSE APPROVED

The Board of Commissioners granted a retail license to Intermountain Food Stores, Inc. dba M&W Market #11, 120 Holly, Nampa, Idaho to sell beer and wine.

BEER LICENSE APPROVED

The Board of Commissioners granted a retail license to John L. O'Very dba El Charro Mini Mart, 1701 1st Street North, Nampa, Idaho to sell beer.

Dec 10, 1982  
Herd District Map in Minutes

RECEIVED  
7-27-90  
HARRIS  
CHUBB  
COOK  
ELLIS

ORDER ESTABLISHING HERD DISTRICT

NO OPEN RANGE

The Board has again reviewed the complexity of the Herd District Boundaries throughout the County and has determined, by resolution, that the time has come to simplify and unify the status of Herd Districts in Canyon County. In making this determination the Board has found the following:

1. A survey map attached hereto, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.
2. That map shows that over 95% of the land within the County is now in Herd District status.
3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.
4. Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.
5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County. Therefore,

IT IS HEREBY ORDERED by the Board of Canyon County Commissioners in this 10 day of December, 1982, that a Herd District be established in the three remaining open range areas in Canyon County as shown on the attached survey map (marked in black), to the end that the entire land area of Canyon County be placed in Herd District status.

State of Idaho }  
County of Canyon } s.s.

I hereby certify that the foregoing document is a true and correct copy of the original as the same appears in this office. *copy*

Dated 8-29-05  
G. Noel Hales

G. Noel Hales, Clerk of the Board and Ex Officio Recorder

Carlos E Bledsoe  
Carlos Bledsoe  
Chairman

Del Hobza  
Del Hobza  
Member

Glenn O. Koch  
Glenn O. Koch  
Member

ATTEST BY Bill A. Steiner  
Clerk/Deputy

EST  
HERD3 ORD45

4/680

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
Post Office Box 1539  
Boise, Idaho 83701  
Telephone: (208) 343-5454  
Facsimile: (208) 384-5844  
Evett - ISB #5587

**F I L E D**  
A.M. *10:10* P.M.  
JUL 24 2007 ✓  
CANYON COUNTY CLERK  
D. BUTLER, DEPUTY

Attorneys for Defendant Jennifer Sutton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA, by and through LOREE  
RIVERA, her mother and natural guardian; and  
LUIS J. GUZMAN, by and through  
BALLARDO GUZMAN, his father and  
natural guardian,

Plaintiffs,

v.

DALE PIERCY, individually and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

DEFENDANT JENNIFER SUTTON'S  
OPPOSITION TO DEFENDANT DALE  
PIERCY'S MOTION FOR SUMMARY  
JUDGMENT

**I. Introduction**

Without involving Canyon County in this litigation, Dale Piercy ("Piercy") asks this Court to find that a herd district established in 1982 by the Canyon County Board of Commissioners is void. Accordingly, he asks that the Court dismiss the case against him and find that he bears no responsibility for his black bull running at large on a dark road late at night.

DEFENDANT JENNIFER SUTTON'S OPPOSITION TO DEFENDANT  
DALE PIERCY'S MOTION FOR SUMMARY JUDGMENT - 1

There are a number of grounds on which the Court should deny summary judgment: First, the Court cannot grant summary judgment in the absence of Canyon County from this case. The County is a necessary party under Rule 19(a). Second, the Court should rule that Piercy's 25 years late challenge to the 1982 herd district ordinance is barred by the doctrine of estoppel by laches.<sup>1</sup> The ordinance enacting a herd district in all of Canyon County is too old and too entrenched, and its effects on public and private interests too great, to justify voiding it based on 25 year-old alleged technical defects in its passage. Third, the Court's proposed decision would constitute an advisory opinion, as it will not be binding on Canyon County. Idaho law does not permit the issuance of advisory opinions. Last, there are too many disputed issues of material fact present to grant summary judgment.<sup>2</sup>

## II. Standard

The basic standards governing motions for summary judgment are well established. Summary judgment should be granted if "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). "At all times, the moving party has the burden of establishing the lack of a genuine issue of material fact." *Northwest Bec-Corp. v. Home Living Service*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002).

Pursuant to Rule 56:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations and denials of that party's pleadings, but the party's response, by affidavit or...otherwise...must set forth specific facts showing that there is a genuine issue for trial. If the party does not

---

<sup>1</sup> See *Finucane v. Village of Hayden*, 86 Idaho 199, 205 (1963).

<sup>2</sup> Sutton joins in Plaintiffs' opposition to Piercy's motion for summary judgment in its entirety.

so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56(c). Nevertheless, Idaho Appellate Courts have held as follows:

[w]hen the party moving for summary judgment will not carry the burden of production or proof at trial, the ‘genuine issue of material fact’ burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to establish, through further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial . . .

*Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App. 1994); *see also Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (reh. den.), citing *Celotex v. Caltrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (“The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial.”)

As a general rule, “[s]tandards applicable on summary judgment require the district court...to liberally construe facts in the existing record in favor of the non-moving party, and to draw all reasonable inferences from the record in favor of the non-moving party.” *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). “The requirement that all reasonable inferences be construed in the light most favorable to the non-moving party is a strict one.” *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991).

### III. Argument

#### A. The Court Should Order Piercy To Join Canyon County Before Rendering A Decision

Piercy’s approach to invalidating a 25 year old county ordinance is too casual. The more appropriate avenue for challenging the ordinance is a declaratory relief action pursuant to Idaho

Code sec. 10-1201, et seq. and I.R.C.P. 57, which would afford Canyon County the opportunity to defend its ordinance. Such actions have been taken frequently in Idaho since the enactment of the Uniform Declaratory Judgment Act to challenge county ordinances, municipal ordinances, and other state and local laws. *See, e.g., Harris v. Cassia County*, 106 Idaho 513 (1984); *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701 (1982); *Agricultural Servs., Inc. v. City of Gooding*, 120 Idaho 627 (Ct.App. 1991).

The court should not grant summary judgment, but should instead order Piercy to join Canyon County to the case if he wishes to overturn a 25 year old ordinance.

**1. Rule 19(a) Standards.**

Rule 19(a) requires the joinder of parties who are necessary to a case:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party . . . .

This test is not capable of mechanical application, and must be applied with the policy considerations of the rule in mind. *Boles v. Greenville Housing Authority*, 468 F.2d 476, 478 n. 3 (6th Cir. 1972). Rule 19 provides criteria to determine if a non-party's interests are substantial enough that a court not consider the merits in the party's absence. *Id.* While generally a court should not unduly prejudice the interests of parties properly before it based on the hypothetical

interests of absent parties, the interests of an unjoined party are particularly vulnerable in that they are not vigorously pursued by counsel. *Id.*

Accordingly, it is possible that the true nature and extent of these interests will not be explored until after they are irreparably prejudiced. *Id.*, citing *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-119 (1969).

There are three purposes behind Rule 19: To protect the absentee from prejudice resulting from the judgment, to protect the parties from harassment by successive suits, and to advance judicial economy by avoiding multiple litigation. *See Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 292 (Ct. App. 1984).

A district court should liberally grant joinder because the absence of an indispensable party is considered a “significant defect.” *Id.*, 107 Idaho at 293. If the policies of the rule would be furthered by the joinder of a rule 19(a) absentee, the “prejudice to the original parties must be significant to justify denial of the joinder.” *Id.*

The concern regarding prejudice to absentee parties is deeply rooted in Idaho law. As far back as 1892 the Idaho Supreme Court recognized the power of a court to adjudicate the rights of those before it, unless an adjudication would prejudice the rights of others:

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; *but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in*, and thereupon the party, directed by the court, must cause to be served a copy of the summons . . . .

*Deer Creek*, 107 Idaho 292 (emphasis added), citing *First National Bank of Hailey v. Bews*, 3 Idaho 486, 491-492 (1892).

Once all parties are necessarily before the Court, there is no difficulty in determining the rights and obligations of each, and entering judgment accordingly. *First National Bank of Hailey*, 3 Idaho at 492. It is fair to say that these rules are a recognition of the deep respect our system of law pays to procedural due process and other protections that exist in our law to protect the interests of those whose rights a court adjudicates.

The Sixth Circuit *Boles* case involved a situation similar to the one presented by Piercy's proposed action. In that case plaintiff challenged a partially completed urban renewal project that was HUD approved. The plaintiff sued, seeking declaratory and injunctive relief. The only defendant however was the Greenville Housing Authority. HUD was not included as a defendant. Nevertheless, the plaintiff attacked the HUD approved plan on the grounds it was arbitrary and capricious, was an unconstitutional taking of plaintiff's property, and because plaintiff had failed to receive proper notice of the plan. *Boles*, 468 F.2d at 477-478.

*Sua sponte* the Sixth Circuit found that HUD was an indispensable party under Rule 19(a). The Court noted that its decision would have an impact on a party not before it, HUD. The Court considered the potential prejudice to HUD's interests as so substantial that it had to consider HUD an indispensable party. *Boles*, 468 F.2d at 478.

The Court found that granting appellant's requested relief would deprive HUD of the opportunity to defend the integrity of its administrative decisions that so intimately affect its policies and procedures. *Id.* In conclusion, the Sixth Circuit found it would effectively overhaul the policies and procedures of HUD and other federal agencies without giving them a chance to defend their own policies and procedures.



Other cases are in accord with the Sixth Circuit's approach. *See, e.g., US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365, 38 Fed. R. Serv. 3d (LCP) 1367 (W.D. Wash. 1997) (action was essentially petition for judicial review of Commission's actions); *Coalition on Sensible Transp., Inc. v Dole*, (1986, DC Dist Col) 631 F. Supp. 1382 (Administrator of State Highway Association was necessary party in that it had interest in road widening project that would be impaired if plaintiffs obtained their requested relief).

There is a consistent point to these cases: a court cannot simply void the laws, rules, regulations, or administrative decisions of a government or government body without the government's participation. It makes no more sense for Piercy to challenge Canyon County's 1982 herd district ordinance without Canyon County's involvement than it would for Canyon County to ask a Court to judge Piercy in violation of a county ordinance for letting his cattle run at large without his involvement.

**2. The Court Should Order Joinder under Rule 19(a)(2)(i) and 19(a)(1).**

Applying the relevant portions of the test set forth in *Deer Creek*, 107 Idaho 292<sup>3</sup>, this Court should find that Canyon County is a necessary party and order Piercy to join it. The analysis with respect to the prejudice and judicial economy criteria is as follows:

**a. Prejudice (Rule 19(a)(2)(i))**

Piercy asks the Court to enter a judgment voiding the ordinance. This would be extremely prejudicial to Canyon County without its participation in this case. Rule 19(a)(2)(i) requires the Court to join an absentee party when "disposition of the action in the person's

---

<sup>3</sup> It does not appear that the harassment from successive suits concern is relevant for the parties presently before the Court.

absence may (i) as a practical matter impair or impede the person's ability to protect . . . [its interests]." This is the prejudice prong of *Deer Creek*, 107 Idaho 292.

Assuming that the Court grants Piercy's motion, the Court's decision no doubt will be utilized by parties similarly situated to Piercy in similar litigation (whether ongoing or in the future). Should the issue be litigated through the appellate level, it is conceivable that the Idaho Supreme Court will issue a decision affirming the Court's voiding of the Canyon County ordinance, which would be extremely prejudicial without Canyon County's involvement.

Piercy may respond that any judgment entered by the Court would not be binding on Canyon County, and so therefore there is no prejudice to Canyon County. The U.S. Supreme Court notes that while it is true that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty, this does not mean that a Court may always proceed without considering the "potential effect" on nonparties simply because they are not bound by the judgment in a technical sense. *Provident Tradesmens Bank*, 102 U.S. at 110. The Court must rather "consider the extent to which the judgment may 'as a practical matter impair or impede' the absent parties ability to protect its interest in the subject matter. *Id.*

In spite of the fact that this Court's decision will not be *res judicata* as to the County, it would be contrary to common sense to find that a decision of this Court voiding the Canyon County ordinance will not prejudice Canyon County. A judgment is important and persuasive,<sup>4</sup> hence the protections that exist throughout our rules of civil procedure that give parties whose interests are to be adjudicated the right to notice and a fair hearing. It is certainly possible that ranchers in Canyon County, once aware of the Court's decision, might ignore the herd district

status of the county and become lax in taking steps to fence in their livestock, or ignore the county's criminal ordinance forbidding cattle on the roadway. *See* Canyon County Ordinance 03-05-17(2).

The full implications of Piercy's motion, and the potential prejudice to Canyon County and those who drive on its hundreds (if not thousands) of miles of roads, is illustrated by Piercy's "interesting question" of whether the "entire county" has now reverted to open range status because of the alleged defects in the 1982 ordinance. *See* Piercy's Memo in Support, p. 11. While Piercy professes that this question is "not before this Court," it is obvious that Piercy's counsel recognize that this is an implication of the decision they want this Court to make.

Any decision of this Court that by implication would void the herd district status of Canyon County – a now heavily populated and increasingly urbanized part of Idaho - in its entirety would be extremely prejudicial to Canyon County.

The magnitude of the decision Piercy asks this Court to make is obviously apparent to Piercy and his counsel, and the implications of the decision stretch *far* beyond the confines of this case. These implications favor joining the county to the case as a necessary party.

**b. Judicial Economy**

It would be a waste of this Court's resources to void the Canyon County ordinance without the county's participation in the litigation. Without the county's participation in the case the Court's decision will have no *res judicata* effect as to the county. Accordingly, as the issues raised in Piercy's motion arise in other cases involving the county, or in other cases such as this one where the county is not involved, the issue will continue to be litigated piecemeal.

---

<sup>4</sup> Parties in other cases before this Court have probably frequently provided the Court with

A more economical use of judicial resources would be to order Piercy to join Canyon County so that the issues posed by Piercy's motion can be fully litigated and resolved with the participation of the county. If the ordinance is adjudicated to be void then the court's decision will be binding on the county. The county will have the opportunity to fix the ordinance, which assumably it will want to do given the undeniably urban character of large portions of Canyon County now in herd district status.

Issuing a judgment voiding the 1982 ordinance will create more problems than it solves. There will be a Court decision voiding the ordinance, but that decision will not be binding on the county since it was not a party. Nevertheless, individuals or others may use such a decision to excuse non-compliance with the county's herd district ordinance. The ordinance will remain on the books and the county will continue to enforce it. Nevertheless, it is fair to assume that organizations like the Idaho Farm Bureau Federation will publicize any decision by this Court finding that the 1982 Canyon County herd district ordinance is void. The result will be confusion and more litigation, all created by the uncertainty of a decision that will not be binding on the county and the anticipated actions of the Idaho Farm Bureau Federation and liability carriers in other cases defending parties such as Piercy.

**3. The Court Should Order Joinder Under Rule 19(a)(1)(i).**

Rule 19(a)(1)(i) requires joinder where "in the person's absence complete relief cannot be accorded among those already parties."

Here, the decision requested by Piercy will not provide the parties complete relief unless Canyon County is present in the litigation. The Court's decision will not bind Canyon County.

---

District Court decisions in an effort to influence the Court's decision making.

DEFENDANT JENNIFER SUTTON'S OPPOSITION TO DEFENDANT  
DALE PIERCY'S MOTION FOR SUMMARY JUDGMENT - 10

*See Provident Tradesmens Bank*, 102 U.S. at 110. The order will have no *res judicata* effect as to Canyon County since it is not a party to the case. The ordinance that Piercy seeks to void will remain on Canyon County's books and still be enforceable as to him and others similarly situated.

While Piercy will obtain the relief he seeks if the Court declares the ordinance void (i.e., immunity from negligence in this case), he will not obtain relief from the ordinance in any other respect. It will still be on the books, the county will still enforce it, and Piercy will still be obligated to comply with herd district requirements, as will every other livestock owner in Canyon County.

Given the fact that Piercy's cattle have gotten out onto Wamstad Road on numerous other occasions, it is not unreasonable to assume that it may happen again and that he may find himself again facing civil suit or a criminal misdemeanor charge under Canyon County Ordinance 03-05-17. Because this Court's decision will not be binding on any hypothetical parties to that litigation, in this hypothetical litigation, Piercy will have to litigate the issues now before this Court again. The decision Piercy wishes this Court to make will not grant full relief to the parties before the Court.

Only with Canyon County's participation can this Court make an appropriate declaration of the ordinance's validity that provides complete relief to the parties to the litigation.

**B. The Court Cannot Rule On Piercy's Summary Judgment Because Such A Ruling Would Be An Advisory Opinion**

Black's Law Dictionary defines an advisory opinion as "A nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose." Black's Law Dictionary (7th ed. 2000). At least one federal court has held that an opinion not binding on an

absent indispensable party could be construed as an advisory opinion, warranting dismissal. See *Ostman v. St. John's Episcopal Hosp.*, 918 F.Supp. 635, 647 (D.C.N.Y. 1996).

With respect to Canyon County, this Court's decision on whether or not Canyon County's 1982 herd district ordinance will be an advisory opinion, as it will be a nonbinding statement by this Court on its interpretation of the ordinance. The ordinance will remain in effect, as Canyon County is not a party to this litigation, and the Court's judgment will have no *res judicata* effect as to Canyon County.

C. **Piercy's Motion To Void A 25 Year Old Ordinance Is Barred By The Doctrine Of Estoppel By Laches**

The doctrine of estoppel by laches<sup>5</sup> is applicable in cases where a party claims that an ordinance is invalid because of the means of its enactment. Laches is a claim founded in equity and is a species of estoppel. *Sword v. Sweet*, 140 Idaho 242, 249 (2004). Most cases in Idaho regarding the application of laches in the context of a challenge to a law or regulation involve municipal annexations. In *Alexander v. Trustees of Village of Middleton*, 92 Idaho 823 (1969), Middleton annexed land owned by the plaintiff, but did so in violation of state law. In that case the plaintiff made arguments similar to Piercy in this case: that a municipality (in this case a county) derives its authority solely from the state legislature, and that only annexations (in this case herd districts) complying with the conditions, restrictions and limitations imposed by the state are valid. *Id.*, 92 Idaho at 825.

The *Alexander* Court cited McQuillin, *Municipal Corporations*, Vol. 2, § 7.09, holding that if the elements of estoppel are present, the owners of land over which a municipal

---

<sup>5</sup> The term "estoppel by laches" is found in *Finucane v. Village of Hayden*, 86 Idaho 199, 205 (1963).

corporation has exercised the powers and functions of government for a significant time will be estopped from questioning the location of municipal boundaries. *Alexander*, 92 Idaho at 826. The *Alexander* Court, citing *Finucane v. Village of Hayden*, 86 Idaho 199 (1963), with approval, noted that this rule is applied even though the municipal boundaries as extended are void, when by reason of lapse of time municipal authority has been exercised, and there have resulted changed conditions involving extensive public and private interests. *Alexander*, 92 Idaho at 826 (citations omitted).

These holdings are based on public policy. Where the parties acquiesce in the action of public officials and transact business on the theory that the land is located with the boundaries of the municipality, it is in the interest of the general public that such a rule be applied. *Id.* (citations omitted).

Lapse of time, while an important element, is not controlling in determining the applicability of a laches defense. *Finucane*, 86 Idaho at 206. “Courts must accord due legal regard to all surrounding circumstances, and the acts of the parties in their relationship to the property involved in the controversy.” *Id.* (citations omitted).

In the *Alexander* case, Idaho Code § 50-303 provided, in pertinent part, that a municipality could only annex property “laid off into lots or blocks, containing not more than five acres of land each . . . .” *Alexander*, 92 Idaho at 824. It was stipulated in the case that the plaintiff Alexander’s property, was larger than five acres, and technically was annexed in violation of 50-303. *Id.*, 92 Idaho at 823 and 825. (“All parcels of property involved herein exceed five acres in size and all are devoted to agricultural uses.”)

In *Alexander*, more than two years had elapsed from the annexation to the time suit was filed. Plaintiffs were notified of the intent to annex and the annexation once accomplished. Plaintiffs knew their land would be annexed. Plaintiffs' land benefited through increased value and the elimination of hazardous health conditions. There was a correlative detriment to the municipality by expenditures of money to maintain the sewer system to which plaintiffs' property was attached following annexation.

On these facts, the Idaho Supreme Court estopped the appellant in that case from arguing that the municipal boundaries were void.

Although "lapse of time" is not dispositive, in the instant case it should be. In determining whether the doctrine of laches applies, the Court must give "consideration . . . to all surrounding circumstances and acts of the parties." *Henderson v. Smith*, 128 Idaho 444, 449 (1996) (citations omitted, emphasis added). Piercy challenges an ordinance that has been in effect for 25 years. When the ordinance was passed, neither Jennifer Sutton, Erika Rivera, or Luis Guzman were even born. Glenn Koch, one of the commissioners who voted on the ordinance is 80 years old and cannot recall the details leading up to the passage of the ordinance. *See* Affidavit of Glenn O. Koch in Opposition to Defendant Piercy's Motion for Summary Judgment. The other two commissioners who voted on the ordinance are dead. *Id.*, para. 3.

The entirety of Canyon County has followed the "fence in" rule of the herd district, as opposed to the "fence out" rule of open range, for 25 years. For 25 years Canyon County ranchers have had the responsibility to fence in their livestock to keep their stock off the road and off their neighbors' property. Piercy himself admits that all livestock in Canyon County, to



his knowledge, are either fenced in or contained by natural geographic barriers, such as rivers. This includes his own livestock.

The public benefits and influence on public and private behavior of Canyon County's 25 year herd district status are significant. Cattle are not allowed on Canyon County roads, and the county's police and sheriff officers have confirmed that repeatedly in deposition. For 25 years it has been a misdemeanor for a rancher in Canyon County to permit his cattle to run at large in Canyon County. *See Idaho Code sec. 25-2407.* For 25 years a rancher in Canyon County has been strictly liable for damages caused by his livestock to the property of others. *See Idaho Code sec. 25-2408.* For 25 years county commissioners have had the authority to order agricultural landowners in the vicinity of public domain where livestock are grazed to fence their land to prevent livestock in a herd district from entering onto their land. *See Idaho Code sec. 25-2405.*

At the time of the accident there were no "Open Range" warning signs or cattle warning signs along the road where the accident happened. *See Affidavit of Jennifer Sutton, para. 5.* Ms. Sutton had seen such signs in other parts of Idaho before the accident, and understood these signs to indicate that livestock might be in the roadway and that she should keep a lookout for cattle. *Id.*, para. 6. Jennifer Sutton did not expect any cattle on the road the night of this accident, *see id.*, para. 8, a product of the absence of these warning signs and the fact that she grew up in an area where ranchers were required, by county ordinances, to keep their cattle fenced in.

Piercy has benefited from herd district status, as his lands have not been subject to depredations from the at large cattle of his neighbors. Because he is required to fence his cattle in, fewer of his livestock (and the livestock of others) have been on the road and subject to injury or death because of collisions with automobiles. In the same way that third party automobile

drivers have been protected since 1982 by a county wide herd district, Piercy has benefitted from that protection in his travels on roads throughout Canyon County.

If ever public policy supported the application of estoppel by laches, this is the case. Generations of Canyon County residents, Canyon County governments, and Canyon County law enforcement, have assumed the entire county is in herd district status. They have ordered their behavior accordingly. It is too late for Piercy, having benefitted from the herd district status of Canyon County for 25 years, to now complain about alleged technical defects in the ordinance's passage because he finds himself in this unfortunate case. He has had more than enough time to challenge herd district status.

Last, because laches is an equitable doctrine, the Court is permitted to consider all the circumstances surrounding the issues raised by the parties and do equity. The Court can take into consideration the passage of time, fading of memories, and disappearance of evidence in determining whether it is equitable to uphold the validity of the herd district ordinance. Piercy and Plaintiffs have submitted affidavits, two by Glenn Koch (one of the Canyon County Commissioners in 1982) and the clerk of the Canyon County District Court in 1982, Bill Straker. Neither can remember whether the ordinance was passed pursuant to a petition. *See* Plaintiffs' Memo in Opposition, p. 19. Neither man can recall the details leading to passage of the ordinance. Two of the county commissioners who voted on the 1982 ordinance are dead. *See* Koch Aff., para. 3.

This is precisely the type of situation laches is intended to avoid. Time has passed, memories have faded, and it is accordingly inequitable to force Plaintiffs and Ms. Sutton to

defend a 25 year old ordinance based on incomplete county records, faded memories, and incomplete evidence.

We just don't know, 25 years after the fact, what the circumstances of the ordinance's passage were. What the Court *does know*, however, is that the county and its citizens – including Piercy<sup>6</sup> - have for 25 years ordered their affairs under the assumption that they live in a county wide herd district. Equity therefore supports continued herd district status.

More difficulties which support the application of laches are demonstrated by the absence of critical evidence. For example, Piercy admits that he could not definitively locate the map identified by the Canyon County Commissioners in 1982. Affidavit of Michael Pope, para. 6; *see also* Affidavit of Timothy Walton, para. 12. Because of the passage of time, to reconstruct the boundaries of the various districts, Piercy relies on the affidavit of his own counsel, Ryan Peck.<sup>7</sup>

In conclusion, it would be manifestly inequitable for the Court to strike down the 1982 herd district ordinance. All parties to this litigation, including Piercy, have treated the area of the accident as part of a herd district. It has been a herd district since at least 1982. Piercy has benefitted from this status. Canyon County, which has become increasingly and rapidly urbanized since 1982, has reaped the benefits of county wide herd district status, as its citizens do not have to deal with livestock in their roads. There are no warning signs warning of "Open

---

<sup>6</sup> Piercy's liability carrier has on at least two occasions paid individuals who hit Piercy's cattle in the roadway, *see* Plaintiffs' Memo in Support, pp. 18-20, which was only required in a herd district. *See also* Affidavit of Linda Hansen and Affidavit of Don Allen. As Plaintiffs point out, had these incidents occurred outside a herd district, the automobile drivers who hit Piercy's cattle would have been liable to Piercy.

<sup>7</sup> Sutton asks that the Court strike the Affidavit of Ryan Peck and the Affidavit of Michael Pope. Mr. Peck is not a witness in this case, nor is Mr. Pope. They are both lawyers for Piercy.

Range” or cattle present. To Piercy’s knowledge all livestock in Canyon County are fenced in, and he has paid at least two automobile owners for damage to their vehicles when they hit his cattle, which is only required in a herd district. Nevertheless, Piercy asks for a ruling that, taken to its logical conclusion, would support a counterclaim by him against the young woman who hit his black bull in the dark of night, Jennifer Sutton.

The Court should reject remaking history, as Piercy requests. Equity firmly supports upholding this herd district.

The Court should rule that Piercy is estopped by laches from challenging the herd district regime under which he has lived for 25 years.

**D. Issues Of Disputed Material Fact Preclude Summary Judgment**

Sutton joins in the disputed issues of material fact identified by Plaintiffs.

DATED this 23rd day of July 2007.

ELAM & BURKE, P.A.

By Joshua S. Evett  
Joshua S. Evett  
Attorneys for Defendant Jennifer Sutton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July 2007 I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton  
Chasan & Walton, LLC  
P.O. Box 1069  
Boise, ID 83701-1069

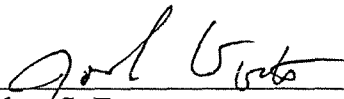
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
Blackburn Law, P.C.  
660 East Franklin Road, Suite 255  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Ryan B. Peck  
Saetrum Law Offices  
P.O. Box 7425  
Boise, ID 83707

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Joshua S. Evett

Joshua S. Evett  
 ELAM & BURKE, P.A.  
 251 East Front Street, Suite 300  
 Post Office Box 1539  
 Boise, Idaho 83701  
 Telephone: (208) 343-5454  
 Facsimile: (208) 384-5844  
 Evett - ISB #5587

**F I L E D**  
 A.M. *7:10* P.M.  
 JUL 24 2007  
 CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

Attorneys for Defendant Jennifer Sutton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA, by and through )  
 LOREE RIVERA, her mother and natural )  
 guardian; and LUIS J. GUZMAN, by and )  
 through BALLARDO GUZMAN, his father )  
 and natural guardian, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 DALE PIERCY, individually and )  
 JENNIFER SUTTON, individually, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. CV05-4848

AFFIDAVIT OF JENNIFER SUTTON

STATE OF IDAHO )  
 ) ss.  
 County of Ada )

Jennifer Sutton, being first duly sworn upon oath, deposes and says:

1. I am one of the defendants in this case.

AFFIDAVIT OF JENNIFER SUTTON - 1

2. I obtained my drivers license in approximately September, 2002. I grew up in Parma, and live there now.

3. Ever since I have been driving, I have frequently driven Wamstad Road in the area where I hit Mr. Piercy's bull in 2005. I have frequently driven the road at night as well.

4. In the time I drove prior to hitting Mr. Piercy's bull in 2005, I did not encounter any livestock at any point on Wamstad Road.


5. In the time I drove prior to hitting Mr. Piercy's bull in 2005, and on the night of the accident itself, I never saw any "Open Range" signs on Wamstad Road or cattle warning signs. (The yellow sign with the sillohouette of a cow.) I have never seen any such signs anywhere in Canyon County while I have driven a car, except after the accident in the vicinity of the accident. After the accident someone placed a cattle warning sign in the vicinity of the accident.

6. I have driven in other parts of Idaho extensively, and have seen "Open Range" signs and cattle warning signs. I saw these types of signs outside of Canyon County before my accident with Mr. Piercy's bull, and understood them to mean that cattle might be on the roadway and that I would need to keep a lookout for cattle.

7. Growing up in Parma and ever since I have driven a car I have always understood that cattle owners in my area of Canyon County have to keep their livestock fenced in.

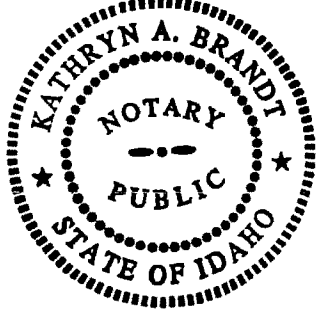
8. The presence of Mr. Piercy's black bull on the road the night of the accident was a complete surprise to me.

DATED this 23rd day of July, 2007.

  
JENNIFER SUTTON

AFFIDAVIT OF JENNIFER SUTTON - 2

SUBSCRIBED AND SWORN to before me this 23rd day of July, 2007.



Kathryn A Brandt  
Notary Public for Idaho  
Residing at: Boise  
Commission Expires: 10/05/2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of JULY, 2007, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton  
Chasan & Walton, LLC  
P.O. Box 1069  
Boise, ID 83701-1069

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
Blackburn Law, P.C.  
660 East Franklin Road, Suite 255  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Ryan B. Peck  
Saetrum Law Offices  
P.O. Box 7425  
Boise, ID 83707

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
Joshua S. Evett

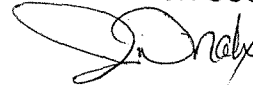


Rodney R. Saetrum  
ISB: 2921  
Ryan B. Peck  
ISB: 7022  
SAETRUM LAW OFFICES  
P.O. Box 7425  
Boise, Idaho 83707  
Telephone: (208) 336-0484

FILED  
7:01 A.M. P.M.

JUL 31 2007

CANYON COUNTY CLERK  
DEPUTY



Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA and LUIS J. GUZMAN,

Case No. CV05-4848

Plaintiffs,

AFFIDAVIT OF DAWN  
MCCLURE

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

COMES NOW, Dawn McClure, who first being duly sworn upon her oath and deposes  
and says as follows:

1. That I am Dawn McClure, a paralegal in Saetrum Law Offices, and I make this  
affidavit of my own personal knowledge.

2. That attached as Exhibit 1 CD containing Exhibit 1 and 2 are certified copies of  
the legal notices of the Idaho Press Tribune from November 10, 1982 to December 20, 1982.  
These copies were obtained from the Idaho State Historical Society Archives where they are kept  
on micro film.

AFFIDAVIT OF DAWN MCCLURE - 1

3. Newspapers are self authenticating pursuant to I.R.E. 902(6).

4. After carefully reviewing each of the newspapers and especially their legal notices, I found that there was no notice of the hearing held by the Canyon County Commissioners on the herd district ordinance which was passed on December 10, 1982. According to Idaho Code § 25-2403, notice of the hearing on a herd district petition is to be made in a newspaper published in the county nearest the herd district two weeks prior to the hearing. No such notice was found by me.

5. Attached as Exhibit 2 is a CD containing Exhibits 1 and 2 is a certified copy of a newspaper article from Idaho Press Tribune of the Canyon County Commission proceedings on December 20, 1982 which included the order dated December 10, 1982. There was no map attached or included with the order as published in the newspaper showing the remaining open range areas in Canyon County as stated in the order. These copies were obtained from the Idaho State Historical Society Archives, they were kept on microfilm.

6. Attached as Exhibit 3 is a certified copy of the herd district map which was attached to the Minutes of the December 10, 1982, Canyon County Commissioners meeting is certified copy of the Minutes attached as Exhibit 4. This map was found attached to the minutes at the Canyon County Recorder's Office and certified by the Recorder's Office.

12. Attached as Exhibit 5 is a certified color copy of the herd district map which is the same as the one attached to the December 10, 1982, Canyon County Commissioners' meeting Minutes. This map was found at the Development Services Office at Canyon County. It is simply easier to read than the black and white map.

Further this affiant sayeth naught.

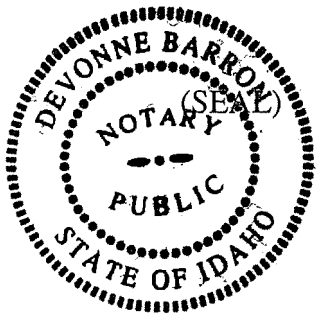
DATED this 30th day of July 2007.

By *Dawn McClure*  
Dawn McClure

STATE OF IDAHO    )  
                              : ss.  
County of Ada        )

On this 30th day of July 2007 before me, Notary Public, personally appeared DAWN McClURE, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.



*Devonne Barron*  
Notary Public, State of Idaho  
Residing at Nampa, Idaho  
My Commission Expires 8/02/10

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of July 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

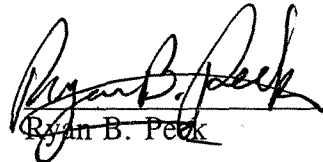
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 220  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Ryan B. Peek

***EXHIBIT "I"***

Copy of CD. sent to  
Supreme Court

***EXHIBIT "2"***

Copy of CD. sent to  
Supreme Court

CONTENTS OF CD

EXHIBIT 1.

November 1-31 1982 all Legal Notices and Commissioner Minutes published in the Idaho Press Tribune on Microfiche at the Idaho State Historical Society.

December 1-20 1982 all Legal Notices and Commissioner Minutes Published in the Idaho Press Tribune on Microfiche at the Idaho State Historical Society.

EXHIBIT 2.

December 20, 1982 Legal Notice and Commissioner Minutes published in the Idaho Press Tribune on Microfiche at the Idaho State Historical Society.

*EXHIBIT "3"*





State of Idaho

County of Canyon  
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears in this office.

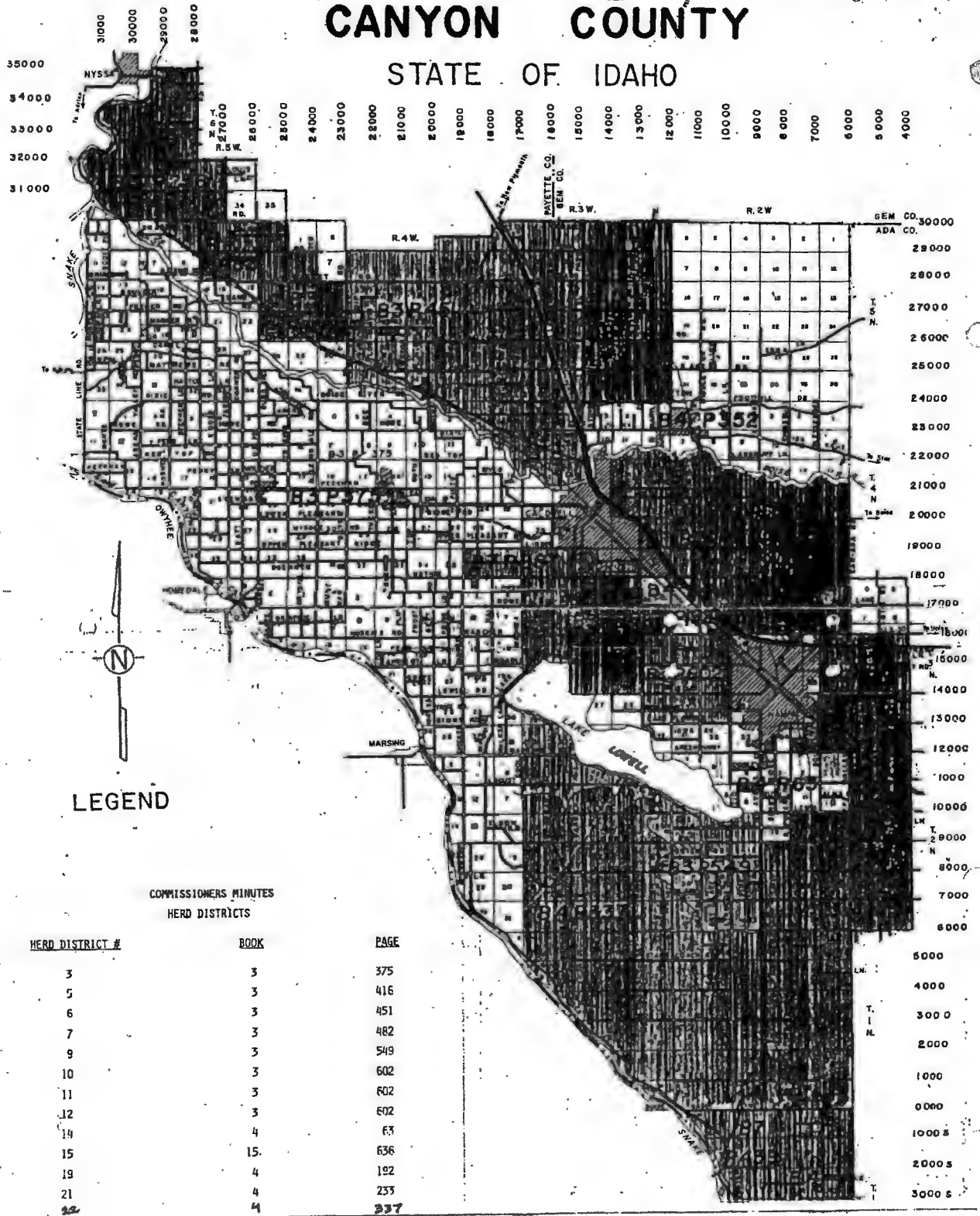
DATED 7-17-07

William H. Hurst, Clerk of the District Court  
and Ex. Office Recorder

By *William H. Hurst* Deputy

# CANYON COUNTY

## STATE OF IDAHO



### LEGEND

#### COMMISSIONERS MINUTES HERD DISTRICTS

HERD DISTRICT #	BOOK	PAGE
3	3	375
5	3	416
6	3	451
7	3	482
9	3	549
10	3	602
11	3	602
12	3	602
14	4	63
15	15	636
19	4	192
21	4	233
22	4	337

***EXHIBIT "4"***

TWENTY THIRD DAY OF NOVEMBER TERM, A.D., 1982  
CALDWELL, IDAHO DECEMBER 10, 1982

PRESENT: Carlos E. Bledsoe, Chairman, Del Hobza, Glenn O. Koch,  
Jeanie Irvine, Deputy Clerk.

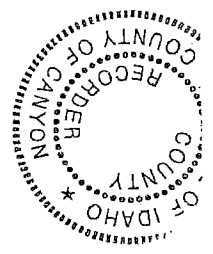
COMMISSIONERS REFER COPY OF SUMMONS FROM ATTORNEY FOR GARY  
GOCHENOUR TO THE PROSECUTING ATTORNEY

The Board of Commissioners acknowledged receipt of a Summons from Herbert W. Rettig, attorney for Gary Gochenour, and referred summons to the Office of the Prosecuting Attorney for advice as to further proceedings.

ORDER ESTABLISHING HERD DISTRICT

The Board has again reviewed the complexity of the Herd District Boundaries throughout the County and has determined, by resolution, that the time has come to simplify and unify the status of Herd Districts in Canyon County. In making this determination the Board has found the following:

1. A survey map, attached to the Order on file in the Recorder's Office, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.
2. That map shows that over 95% of the land within the County is now in Herd District status.
3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.
4. Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.
5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County. Therefore,



State of Idaho }  
 County of Canyon }  
 I hereby certify that the foregoing instrument is }  
 a true and correct copy of the original as the }  
 same appears in this office. }  
 DATED 12-12-82 }  
 By William H. Hurd, Clerk of the District Court }  
 and Deputy Recorder }  
*[Signature]* }  
 Deputy }  
 ss.

IT IS HEREBY ORDERED by the Board of Canyon County Commissioners on this 10th day of December, 1982, that a Herd District be established in the three remaining open range areas in Canyon County as shown on the survey map filed with this Order in the Recorder's Office (Marked in black), to the end that the entire land area of Canyon County be placed in Herd District status.

Order signed by the Board of Canyon County Commissioners and attested by the Deputy Clerk to the Board of Commissioners.

RESOLUTION PASSED REGARDING SHERIFF'S REQUEST TO RESCIND PREVIOUS  
RESOLUTION IN ORDER TO MAINTAIN A FULL STRENGTH STAFF IN THE  
CIVIL DEPARTMENT

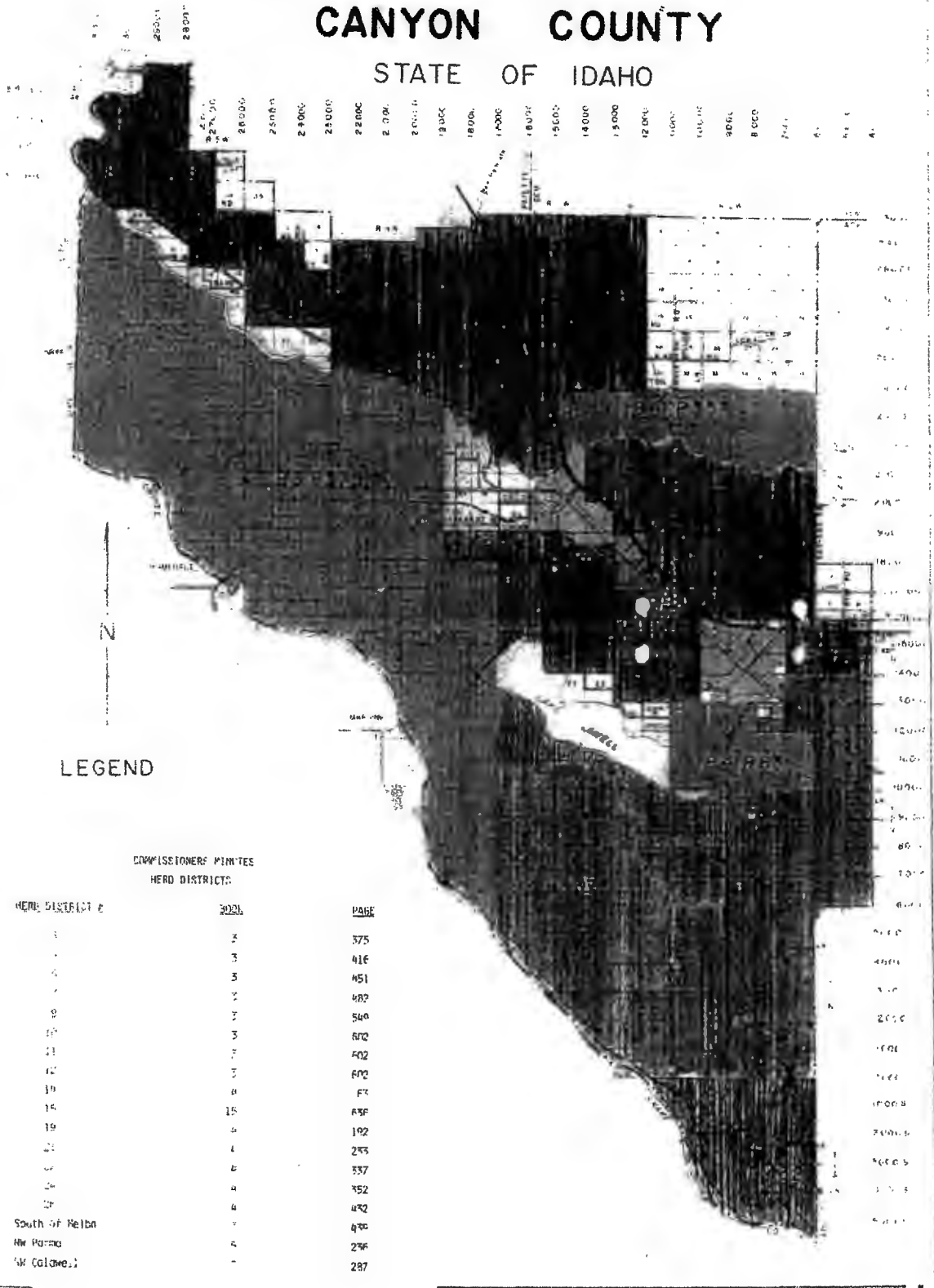
The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 10th day of December, 1982: Upon motion of Commissioner Bledsoe and the second by Commissioner Koch the Board resolves as follows: The Resolution of September 20, 1982, appointing Davetta Naumann to serve as Public Information Specialist for Civil

*EXHIBIT "5"*

State of Idaho }  
 of Canyon } ss.  
 certify that the foregoing instrument is a  
 correct copy of the original as the same  
 appears in this office.  
 DATED 7-17-07  
 By Charles Lee Assessor  
 Deputy

# CANYON COUNTY

## STATE OF IDAHO



### LEGEND

COMMISSIONER'S MINUTES  
HERD DISTRICTS

HERD DISTRICT #	ACRES	USAGE
1	3	375
2	3	416
3	3	451
4	3	482
5	3	540
6	3	502
7	3	502
8	3	502
9	3	502
10	3	502
11	3	502
12	3	502
13	3	502
14	3	502
15	3	502
16	3	502
17	3	502
18	3	502
19	3	502
20	3	502
21	3	502
22	3	502
23	3	502
24	3	502
25	3	502
26	3	502
27	3	502
28	3	502
29	3	502
30	3	502
31	3	502
32	3	502
33	3	502
34	3	502
35	3	502
36	3	502
37	3	502
38	3	502
39	3	502
40	3	502
41	3	502
42	3	502
43	3	502
44	3	502
45	3	502
46	3	502
47	3	502
48	3	502
49	3	502
50	3	502
51	3	502
52	3	502
53	3	502
54	3	502
55	3	502
56	3	502
57	3	502
58	3	502
59	3	502
60	3	502
61	3	502
62	3	502
63	3	502
64	3	502
65	3	502
66	3	502
67	3	502
68	3	502
69	3	502
70	3	502
71	3	502
72	3	502
73	3	502
74	3	502
75	3	502
76	3	502
77	3	502
78	3	502
79	3	502
80	3	502
81	3	502
82	3	502
83	3	502
84	3	502
85	3	502
86	3	502
87	3	502
88	3	502
89	3	502
90	3	502
91	3	502
92	3	502
93	3	502
94	3	502
95	3	502
96	3	502
97	3	502
98	3	502
99	3	502
100	3	502
101	3	502
102	3	502
103	3	502
104	3	502
105	3	502
106	3	502
107	3	502
108	3	502
109	3	502
110	3	502
111	3	502
112	3	502
113	3	502
114	3	502
115	3	502
116	3	502
117	3	502
118	3	502
119	3	502
120	3	502
121	3	502
122	3	502
123	3	502
124	3	502
125	3	502
126	3	502
127	3	502
128	3	502
129	3	502
130	3	502
131	3	502
132	3	502
133	3	502
134	3	502
135	3	502
136	3	502
137	3	502
138	3	502
139	3	502
140	3	502
141	3	502
142	3	502
143	3	502
144	3	502
145	3	502
146	3	502
147	3	502
148	3	502
149	3	502
150	3	502
151	3	502
152	3	502
153	3	502
154	3	502
155	3	502
156	3	502
157	3	502
158	3	502
159	3	502
160	3	502
161	3	502
162	3	502
163	3	502
164	3	502
165	3	502
166	3	502
167	3	502
168	3	502
169	3	502
170	3	502
171	3	502
172	3	502
173	3	502
174	3	502
175	3	502
176	3	502
177	3	502
178	3	502
179	3	502
180	3	502
181	3	502
182	3	502
183	3	502
184	3	502
185	3	502
186	3	502
187	3	502
188	3	502
189	3	502
190	3	502
191	3	502
192	3	502
193	3	502
194	3	502
195	3	502
196	3	502
197	3	502
198	3	502
199	3	502
200	3	502
201	3	502
202	3	502
203	3	502
204	3	502
205	3	502
206	3	502
207	3	502
208	3	502
209	3	502
210	3	502
211	3	502
212	3	502
213	3	502
214	3	502
215	3	502
216	3	502
217	3	502
218	3	502
219	3	502
220	3	502
221	3	502
222	3	502
223	3	502
224	3	502
225	3	502
226	3	502
227	3	502
228	3	502
229	3	502
230	3	502
231	3	502
232	3	502
233	3	502
234	3	502
235	3	502
236	3	502
237	3	502
238	3	502
239	3	502
240	3	502
241	3	502
242	3	502
243	3	502
244	3	502
245	3	502
246	3	502
247	3	502
248	3	502
249	3	502
250	3	502
251	3	502
252	3	502
253	3	502
254	3	502
255	3	502
256	3	502
257	3	502
258	3	502
259	3	502
260	3	502
261	3	502
262	3	502
263	3	502
264	3	502
265	3	502
266	3	502
267	3	502
268	3	502
269	3	502
270	3	502
271	3	502
272	3	502
273	3	502
274	3	502
275	3	502
276	3	502
277	3	502
278	3	502
279	3	502
280	3	502
281	3	502
282	3	502
283	3	502
284	3	502
285	3	502
286	3	502
287	3	502
288	3	502
289	3	502
290	3	502
291	3	502
292	3	502
293	3	502
294	3	502
295	3	502
296	3	502
297	3	502
298	3	502
299	3	502
300	3	502

Rodney R. Saetrum, ISB: 2921  
Ryan B. Peck, ISB: 7022  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd  
Boise, Idaho 83702  
Telephone: (208) 336-0484

**F I L E D**  
A.M. 9:01 P.M.

**JUL 31 2007**

CANYON COUNTY CLERK  
*Donale* DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

**SUPPLEMENTAL  
MEMORANDUM IN SUPPORT  
OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY  
JUDGMENT**

**I. RELEVANT FACTUAL BACKGROUND**

Defendant Dale Piercy provided the relevant factual background in the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment. The investigation into this matter has been ongoing and extensive, and therefore, we submit the following additional evidence.

The map used to develop Exhibit A to the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment is the map that was utilized by the Canyon County Commissioner's in conjunction with the 1982 herd district ordinance adopted on December 10,

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 1**

1982 (1982 ordinance). (Affidavit of Dawn McClure, Exhibit 3.) Exhibit A to the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment is an enlarged portion of Exhibit 3 to the Affidavit of Dawn McClure. Exhibit 3 was found attached to the minutes of the 1982 ordinance.

Attached hereto are the affidavit of a landowner and rancher who owns a significant amount of land in the area outlined in red and striped in blue on Exhibit A to the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment. (Second Affidavit of Ryan B. Peck, Exhibit A, Affidavit of Ed Johnson) E.G. Johnson, President of E.G. Johnson Farms, Inc., states that while being aware after the fact that the Canyon County Commissioners had attempted to place his land in a herd district in 1982, he was not aware of a petition or notice of hearing for the proposed ordinance. Mr. Johnson states that he would not have signed such a petition and that if there had been a petition or a notice of hearing sent he would have been made aware of that due to his membership in the Cattlemen's Association and the Cattle Feeder's Association.

Attached hereto is the Second Affidavit of Dale Piercy. Defendant Piercy attests that it was his understanding that the area shaded in green on Exhibit A to the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment where he has grazed his cattle is in an open range area and has always been open range. Defendant Piercy attests that until he became involved in the present lawsuit he was not aware of the 1982 ordinance or its proposed effect upon his land. Defendant Piercy attests that the accidents involving his cattle in 2001 referred to in Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 2**

Judgment resulted in claims that were submitted directly to his insurance carrier. Defendant Piercy did not see the claims nor was involved in the decision whether to pay or not pay these claims. Defendant Piercy has no personal knowledge regarding why any payment was made to those persons involved in the 2001 accidents. Defendant Piercy also attests that ranchers and farmers in Canyon County, whether in open range or herd districts, have used fences to separate their land and livestock from other peoples' land and livestock.

Attached hereto is the Affidavit of Dawn McClure, which includes the herd district map as stated above, certain newspapers from Canyon County establishing the Canyon County Commissioner's failure in November and December of 1982 to properly notify the public of a hearing to create a herd district. (Affidavit of Dawn McClure, Exhibits 1 and 2.)

## II. LAW AND ANALYSIS

The additional testimony and evidence provided by Defendant Piercy along with additional law and analysis establishes: (1) That the Canyon County Commissioners did not establish a herd district pursuant to the 1982 ordinance; (2) That the area from which the bull involved in the accident came from was open range at the time of the accident; (3) Mr. Piercy is not liable by law for the injuries incurred by Plaintiffs.

### **A. The Canyon County Commissioners did not properly establish a herd district under State Law.**

Prior to 1990, the authority to create herd districts was given to counties solely pursuant to the provisions of the 1963 version of I.C. § 25-2402-2409. The authority was limited by the procedures a county must go through in creating a herd district. Idaho Code 25-2402 in 1982



stated the procedures for creating a herd district as follows:

A majority of the landowners in any area or district described by metes and bounds not including open range and who are also resident in, and qualified electors of, the state of Idaho, may petition the board of county commissioners in writing to create such area a herd district. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such district; and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code.

Idaho Code § 25-2403 requires a hearing on the petition as follows:

It shall be the duty of the board of county commissioners, after such petition has been filed, to set a date for hearing said petition, notice of which hearing shall be given by posting notices thereof in three (3) conspicuous places in the proposed herd district, and by publication for two (2) weeks previous to said hearing in a newspaper published in the county nearest the proposed herd district.

Idaho Code § 25-2404 emphasizes the need for the procedures set forth in I.C. § 25-2402(1) by stating:

At such hearing, if satisfied that a majority of the landowners owning more than fifty percent (50%) of the land in said proposed herd district who are resident in, and qualified electors of, the state of Idaho are in favor of the enforcement of the herd law therein, and that it would be beneficial to such district, the board of commissioners shall make an order creating such herd district in accordance with the prayer of the petition, or with such modifications as it may choose to make. Such order shall specify a certain time at which it shall take effect, which time shall be at least thirty (30) days after the making of said order; and said order shall continue in force, according to the terms thereof, until the same shall be vacated or modified by the board of commissioners, upon the petition of a majority of the landowners owning more than fifty percent (50%) of the land in said

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 4**

district who are resident in, and qualified electors of, the state of Idaho.

The authority for a county to create a herd district prior to 1990 was entirely dependent upon a petition from the majority of landowners in any given area of the county. I.C. § 25-2402. Without the petition there was no authority for the county commissioners to create a herd district. The order creating the herd district must be in accordance with the landowner's petition. I.C. § 25-2404.

Idaho Code § 31-857 does provide a legal prima facie presumption for herd districts and other districts which are enacted by county commissioners and after a lapse of two years from the date of such order, that all proceedings and jurisdictional steps preceding the making of such order have been properly and regularly taken so as to warrant said board in making said order. The presumption created in I.C. § 31-857 by the language of the statute is a rebuttable presumption. Idaho Rule of Evidence 301 declares that a presumption only shifts the burden of going forward with evidence until that presumption is rebutted. This is sometimes referred to as the bursting bubble theory, which has been adopted by the Idaho Supreme Court. *See: State v. Hagerman Water Rights Owners*, 130 Idaho 736, 745, 947 P.2d 409, 418 (1997).

This presumption is rebutted by the evidence and arguments provided in Defendant Piercy's memorandums in support of the motion for summary judgment as well as the following analysis. Once the presumption is rebutted the standard remains that typical of motions for summary judgment. According to the standard of adjudication in summary judgment proceedings:

The burden of proving the absence of material facts is upon the moving party.  
Once the moving party establishes the absence of a genuine issue, the burden

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 5**

shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. The nonmoving party may not rest upon the mere allegations or denials contained in the pleadings, but must come forward and produce evidence by affidavits or as otherwise provided in the rules to set forth specific facts showing that there is a genuine issue for trial (citations omitted).

*Levinger v. Mercy Medical Center, Nampa*, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003) (parenthesis added). Therefore, evidence defeating a presumption may also shift the burden of proof to the non-moving party to come forward with evidence supporting their theory.

The statute governing the creation of herd districts as stated above requires: (1) a majority landowner petition in order for county commissioners to establish a herd district; (2) the Canyon County Commissioners must provide two weeks notice of the hearing on the petition; (3) the Canyon County Commissioners at the hearing must be convinced that a majority of landowners owning more than 50 percent of the land in the area are in favor of the creation; and (4) the order must also set forth a time in which the herd district shall take effect. I.C. § 25-2402-2404.

The 1982 ordinance states:

The Board has again reviewed the complexity of the Herd District Boundaries throughout the County and has determined, by resolution, that the time has come to simplify and unify the status of Herd Districts in Canyon County. In making this determination the Board has found the following:

1. A survey map attached hereto, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.
2. That map shows that over 95% of the land within the County is now in Herd District status.
3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 6**

4. Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.
5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County.

Therefore,

IT IS HEREBY ORDERED by the Board of Canyon County Commissioners on this 10 day of December, 1982, that a Herd District be established in the three remaining open range areas in Canyon County as shown on the attached survey map (marked in black), to the end that the entire land area of Canyon County be placed in Herd District status.

(Affidavit of Michael A. Pope, Exhibit 3.)

The language of the ordinance indicates that there was no majority petition by the landowners of the open range areas to create a herd district in those areas or a petition by the majority of landowners to create a herd district that encompasses the entire land area of Canyon County. The Board does not cite to any petition and the language states that the Board took to reviewing the herd district status of Canyon County of their own volition. Further, Mr. Koch has stated that he does not recall any landowner petition in conjunction with the 1982 ordinance. The language of the petition along with the admission of Mr. Koch shows that the Canyon County Commissioners improperly took it upon themselves to attempt to establish a herd district.

Further proof is found in the minutes provided by Plaintiffs' counsel. The minutes state:

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 2nd day of December, 1982: *Upon motion of Commissioner Hobza and the second by Commissioner Bledsoe the Board resolves as follows:* That because of the confusion that exists due to the over-lapping lines of herd districts and open range and because over ninety-five (95%) percent of the area of Canyon County is already designated a herd district the board will issue an order designating all of Canyon County to be herd district as of December 14, 1982. Motion Carries Unanimously.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 7**

(Affidavit of Timothy C. Walton in Opposition to Defendant Piercy's Motion for Summary Judgment, Exhibit I at 3.)(Emphasis added). It is clear from the minutes that the Canyon County Commissioners were acting pursuant to Commissioner Hobza's motion and not a landowner petition. It is striking that in all the testimony and evidence presented there is not one mention of a landowner petition or a hearing involving the landowners. Even the documents provided by Plaintiff establish that the Canyon County Commissioners were not acting with proper authority in attempting to create a herd district by the 1982 ordinance. This evidence alone is enough to rebut the presumption in I.C. § 31-857 and shift the burden to Plaintiff to come forward with evidence that the Commissioners acted within their authority.

The 1982 ordinance also contains three additional deficiencies which by themselves rebut any presumption of validity. The 1982 ordinance lacks the required specification of metes and bounds of the proposed herd district. The ordinance seems to simply designate the entire land area of Canyon County as the boundaries of the herd district. This is not a proper designation of the bounds of a herd district under I.C. § 25-2402.

The 1982 ordinance also fails to "specify a certain time at which it shall take effect,." I.C. § 25-2404. This lack of a specified time invalidates the ordinance. The Idaho Code states that the ordinance 'shall' contain a specific time at which it will take effect. *Id.* This language is mandatory. The 1982 ordinance evidently has never taken effect due to the lack of a time certain for its inception. This facial defect also rebuts the presumption of validity found in I.C. § 31-857.

Plaintiff attempts to cite the above minutes as a cure for the lack of a stated time at which

the ordinance will take effect. Idaho Code § 25-2404, specifically states that the "order" shall contain a specific time at which it will take effect. An effective date placed in the minutes does not meet the requirements of the statute. Further, the effective date stated in the minutes is not "at least thirty (30) days after the making of said order." I.C. § 25-2404. Without citing any authority, Plaintiff argues that these mistakes are "mere technicalities" which should not justify the overturning of the ordinance. The Idaho Code makes these steps a requirement to the Canyon County Commissioners having authority to create a herd district. Without following these steps the attempted ordinance is invalid.

Finally, the Canyon County Commissioners failed to properly provide notice of the hearing on the alleged creation of a herd district. According to I.C. § 25-2403, notice is to be placed in the newspaper for two weeks prior to the hearing date. According to the newspapers we have provided the Canyon County Commissioners failed to provide this required notice. (Affidavit of Dawn McClure, Exhibit 1; and p. 2.) This failure meant that prior notice of the hearing would be difficult, and therefore, it is not surprising that people did not know of the Commissioner's actions until after it was completed. (Second Affidavit of Ryan B. Peck, , Exhibit 1, Affidavit of Ed Johnson.) Mr. Johnson was in a position in 1982 to know of any petitions by landowners regarding the open range land in Canyon County. *Id.*

The 1982 ordinance was not enacted pursuant to the County Commissioners' authority and is therefore invalid.

**B. The 1982 ordinance violates the prohibition found in I.C. § 25-2402(2).**

Despite the above evidence rebutting the presumption of validity in the formation of the

herd district, Defendant Piercy has also provided evidence that the enactment of the 1982 ordinance was not within the jurisdiction of the Canyon County Commissioners.

Idaho Code § 25-2402(2) states:

Notwithstanding any other provision of law to the contrary, no herd district shall:

- (a) contain any lands owned by the United States of America or the state of Idaho, upon which the grazing of livestock has historically been permitted.
- (b) Result in the state, a county, a city or a highway district being held liable for personal injury, wrongful death or property damage resulting from livestock within the public right-of-way.
- (c) Prohibit trailing or driving of livestock from one location to another on public roads or recognized livestock trails.

Idaho Code § 25-2402(2)(a) simply recognizes the jurisdictional limitations of counties.

The Idaho Supreme Court held that a herd district containing parcels of BLM land was an invalid exercise of powers by the county. *Miller v. Miller*, 113 Idaho 415, 418, 745 P.2d 294, 297 (1987). In *Miller*, the District had attempted to rule that the herd district was valid to the extent that it did not include areas of BLM land. *Id.* The Idaho Supreme Court responded by holding as follows:

The district court's modification of the herd district boundaries by exclusion of BLM lands was also improper and cannot be upheld. I.C. § 25-2401 (1977) provides: "The board of county commissioners of each county in the state shall have power to create herd districts within such county." I.C. § 25-2402 prescribes the method for creating a herd district -- by which a petition is presented to the commissioners by a majority of landowners setting out the area or district which the commissioners are asked to declare a herd district. The presenting of the petition with its designated areas is within the province of a majority of landowners in the proposed district. Creation of a herd district by ordinance is within the power of the county commissioners. *See Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978). By an order effectively redesignating the areas of the herd district, the district court has performed a legislative

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 10**

function of the county commissioners. See I.C. §§ 31-714 (1983), 31-803 (1983). The exercise of a legislative function by the court is prohibited by Idaho Const., art. 2, § 1. The district court properly should have simply ruled that the herd district was invalid due to the inclusion of BLM land.

*Id.*

The 1982 ordinance does not specify by metes and bounds the area that it was attempting to place into a herd district. The ordinance does, however, state that it was the intention of the 1982 ordinance to place the entire land area of Canyon County into herd district status. Mr. Koch, one of the commissioners who signed the order, stated that it was the intention of the Canyon County Commissioners at that time to unify the herd districts and to place the entire land area of Canyon County into one herd district. (Affidavit of Glenn Koch.) The ordinance reinforces this in its initial parts by stating that the commissioners are attempting to "simplify and unify" the herd districts in Canyon County. Therefore, even had the commissioners properly established a herd district it encompassed the entire land area of Canyon County. This is an invalid exercise of the commissioners authority in that the land area of Canyon County includes many areas of state and federal land that are permitted and have been historically permitted for grazing. (Affidavit of Jerry Deal) (Affidavit of Dennis Sorrell) (Affidavit of Rosemary Thomas). This evidence rebuts the presumption of validity found in I.C. § 31-857. The *Miller* case shows that the Courts have ignored the presumption set forth in I.C. § 31-857, when evidence is presented showing that the commissioners included land in a herd district that violated their jurisdictional authority and I.C. 25-2402.

Plaintiff attempts to argue around this prohibition by looking to the statutory history of I.C. § 25-2402. Plaintiff correctly cites that the 1963 version of I.C. § 25-2402 does not include

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 11**



the present prohibition against herd districts including "any lands owned by the United States of America or the state of Idaho, upon which the grazing of livestock has historically been permitted." I.C. § 25-2402(2)(a)(2007). Plaintiff, however, ignores the statutory history establishing the legislature's intention that this provision be retroactive. In 1983, a new section (2) was added to I.C. § 25-2402 which stated:

*(2) Notwithstanding any other provision of law to the contrary, no herd district established before or after July 1, 1983, shall:*

*(a) Contain any lands owned by the United States of America, and managed by the department of the interior, bureau of land management, or its successor agency, upon which lands the grazing of livestock has historically been permitted.*

Chapt. 120 Idaho Session Laws 314 (1983).

The legislature clearly intended by the 1983 amendment to invalidate any herd districts created prior to July 1, 1983, that contained federal land upon which grazing of livestock had historically been permitted. The "Notwithstanding any other provision of law to the contrary" language is effective as against the portion of I.C. § 25-2402 cited by Plaintiff stating that "any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404. These two portions of I.C. § 25-2402 are right next to each other. It is clear that the effect of I.C. § 25-2402(2)(a) is governing to the extent it conflicts with "any other provision of law." This language was never dropped in the subsequent changes to the statute. Any intent by the section cited by Plaintiff to grandfather in previously created herd districts is ineffective as they conflict with I.C. § 25-2402(2)(a).

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 12**

Plaintiff also argues that there is "no proof that there are federal lands within the herd district created in 1982." (Plaintiffs' Memorandum in Opposition at 11.) The 1982 ordinance attempted to create a herd district that encompassed the entire land area of Canyon County. We have conclusively established that Canyon County contains land area owned by the Bureau of Land Management (BLM) and has historically been grazed by cattle. (Affidavit of Rosemary Thomas.)

The Plaintiff also submitted an affidavit of Rosemary Thomas stating that there was recorded proof of grazing going back to 1981 on the lands in Canyon County. The grazing was historical as it applied to the 1982 ordinance. Further, Ms. Thomas is certain that grazing took place prior to 1981. I see no merit in or legal authority for the argument that "historically" must mean since the early days of livestock grazing in Idaho, although it is likely that the federal land has been grazed for that amount of time. Solid evidence has been provided that the grazing of the BLM land in Canyon County pre-dated the 1982 ordinance. No evidence has been submitted by Plaintiff that these lands were not being grazed prior to 1981.

Defendant Piercy has established that the 1982 ordinance attempted to include in a herd district BLM land that was permitted for grazing. This inclusion is in violation of I.C. § 25-2402(2)(a), and therefore, the attempted herd district is invalid.

### **C. The Canyon County Commissioner's Actions are Preempted by Federal Law**

Even if the Idaho Legislature had attempted to give County Commissioners the authority to place BLM land in a herd district, the 1982 ordinance would still be invalid as regulating livestock on BLM land is specifically preempted by Federal Law. When congress evidences an

attempt to occupy a given field, any state law falling within that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 203-204 (1983). The United States Congress, through its statutes and regulations regarding public range lands, grazing of public lands, and establishing the Bureau of Land Management to manage these lands shows an intent to occupy the field of public lands. Therefore, any state law falling within that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 203-204 (1983). In 1934, Congress passed 43 U.S.C. § 315, otherwise known as the *Taylor Grazing Act*. By this *Act*, and by the federal regulations adopted by the BLM, Congress has preempted all state regulations regarding grazing and fencing of public lands. The Congress did allow that police regulation and state laws regarding public health or public welfare were not restricted by the *Act*. The 43 U.S.C. § 315n. However, cases decided by federal courts regarding the interaction between state fencing statutes and the *Taylor Grazing Act* have held that federal statutes and regulations preempt the state statutes and regulations regarding grazing livestock and fencing.

The above statutes were discussed in the case of *United States v. Shenise*, 43 F. Supp. 2d 1190 (D. Colo. 1999). In particular, the court discussed the applicability of Colorado's Open Range Law which defendant was attempting to allege allowed him to avoid the charge of willful trespass on BLM land. The government argued that Colorado's fencing laws were not applicable to federal land because the Colorado law conflicts with the *Taylor Grazing Act* and its implementing regulations. The Colorado District Court relying upon the cases of *Bilderback v. United States*, 558 F. Supp. 903 (D. OR. 1982) and *Zinn v. BLM*, Interior Dec, CO 030-87-1

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 14**

(Sept. 9, 1988) found that under Supremacy Clause of the United States Constitution, federal law overrides conflicting state law with respect to federal public lands.

The Colorado District Court specifically rejected defendant's argument that the Colorado fencing statutes were a valid exercise of the state's police power and not subject to the *Taylor Grazing Act*. *United States v. Shenise*, 43 F. Supp. 2d at 1197-1198.

The Montana District Court came to the same conclusion in *United States v. Montgomery*, 155 F.Supp. 633 (D. Mont. 1957). The Court held:

It is well settled (1) that the United States can prohibit absolutely or fix terms on which its property may be used; (2) that Congress has the exclusive right to control and dispose of the public lands of the United States; and (3) that when that right has been exercised with reference to lands within the borders of a state, neither the state nor any of its agencies has any power to interfere. (citations omitted).

Pursuant to the Taylor Grazing Act (43 U.S.C.A. 315, et seq.) and the regulations, Grazing District No. 2, Montana, which embraces the lands trespassed upon, was established by the Secretary of the Interior on July 11, 1935.

*Id.* at 635.

The Court recognized that the Taylor Grazing Act was sufficient to grant the Federal Government exclusive control regarding the grazing of livestock. This is in line with Defendant Piercy's assertion that I.C. § 25-2402(2)(a) was simply a restatement of existing law that States do not have authority in the area of grazing and fencing on federal land.

Therefore, since federal law preempts state law in this area of grazing land, and since the 1982 Ordinance, by its inclusion of federal BLM land interfered with federal law and is void as a result.

**D. The Bull That was Involved in the Subject Accident was Being Pastured in an Open**

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 15**

### Range Area.

The Idaho Supreme Court has held that: "Livestock areas in Idaho fall into two categories outside of cities and villages: open range areas and herd districts. 'Open range' is defined by I.C. § 25-2402 as all areas of the state not within cities, villages, or already created herd districts. *Adamson v. Blanchard*, 133 Idaho 602, 606, 990 P.2d 1213, 1217 (1999). The Supreme Court reaffirmed the dichotomy of *Adamson* in *Moreland v. Adams*, Idaho , 152 P.3d 558 (2007). The Court stated: "*Adamson* makes it clear there is no third "hybrid" category for land outside of cities and villages." *Moreland v. Adams*, Idaho , 152 P.3d 558, 561 (2007).

Plaintiff attempts to ignore the plain dichotomy set forth in the *Moreland* and *Adamson* cases by introducing evidence from Mr. Piercy's deposition regarding the state of fencing in Canyon County. The precedents set forth in the two case above clearly reject any interpretation of the status of fencing in an area to determine whether or not there is a herd district. The fact that Mr. Piercy believes all cattle in Canyon County to be contained by fences is irrelevant to this case. Mr. Piercy's Second Affidavit explains why the Idaho Supreme Court has rejected the use of the status of fencing to determine whether or not an area is open range. Despite being in open range, cattlemen still use fences to separate their livestock from other ranchers' livestock. Therefore, whether the ranchers in an area are fencing their cows in is irrelevant to a determination as to whether the area is open range or within a herd district. Further, to the extent that Plaintiff claims Mr. Piercy was opining as to the herd district status of the County based upon the term "enclosed", it is clear from the deposition transcript that the questions

leading to that response were objected to on the basis that it called for a legal conclusion and such evidence should not be considered part of the record.

As shown in Exhibit A, the bull involved in the subject accident prior to the accident, was being pastured in an area that was not located within any herd district prior to the attempted inclusion of the pasture into a county-wide herd district pursuant to the 1982 ordinance. (Affidavit of Ryan B. Peck at 2.) The area where the bull was pastured was also not included in a city or village. (Affidavit of Dale W. Piercy) The above cases establish that where there is an invalid herd district the land is considered open range for there is no other designation outside of a city or village. The 1982 ordinance was an invalid attempt to create a herd district.

Therefore, Mr. Piercy's bull that was involved in the subject accident was being pastured in open range.

**E. Mr. Piercy is Not Liable for the Accident Because the Bull Involved in the Accident was Being Pastured in an Open Range Area.**

Two Idaho Code statutes apply in this case to provide Mr. Piercy with immunity from liability for the Plaintiffs' damages in the present case.

Idaho Code § 25-2118 provides:

No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal. "Open range" means all uninclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.

Idaho Code § 25-2402(1) which was cited in full above, in relevant part states: "and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 17**

shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards as needed in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district;."

Mr. Piercy was pasturing his bull in an open range area. The accident occurred on or near a bridge that was straddling a boundary between open range and the boundary of an alleged herd district. The area just south of the Boise River bridge where the accident took place was within the boundaries of a herd district that was allegedly established on July 18, 1908 (1908 ordinance), which boundaries are outlined in orange on Exhibit A. (Affidavit of Ryan B. Peck at 2.) For purposes of summary judgment, Mr. Piercy will assume that the accident occurred within the orange boundaries.

**1. The 1908 ordinance created an invalid herd district by enclosing state lands that have been historically permitted for grazing.**

The area where the accident occurred was also open range due to the invalidity of the herd district set forth in the 1908 ordinance. Idaho Code § 25-2402(2)(a) prohibits herd districts from containing lands owned by the state of Idaho upon which the grazing of livestock has historically been permitted. The herd district area of the 1908 ordinance is set forth on Exhibit A by the yellow boundaries. This area includes two areas of Idaho State land that are permitted for grazing and have been historically permitted for grazing. (Affidavit of State of Idaho Representative.) These areas have been outlined in blue and outlined in blue shaded in yellow on Exhibit A. (Affidavit of Ryan B. Peck at 1.) The inclusion of these lands within the herd

district invalidates the herd district, because the attempted inclusion was not within the power of the Canyon County Commissioners in violation of I.C. § 25-2402(2)(a). Therefore, pursuant to the above-cited case law, this area is also open range. See *Moreland, Adamson and Miller*. Therefore, the accident also occurred in an open range area. All events having occurred in open range, Mr. Piercy is statutorily mandated as being immune from liability.

Mr. Piercy pursuant to I.C. § 25-2118, had no duty to prevent his bull from being on the highway where the bull was struck and is not liable for the alleged damages incurred by the Plaintiffs as a result of the subject accident. Mr. Piercy's motion for summary judgment should be granted due to the immunity that applies to him pursuant to I.C. § 25-2118.

**2. Mr. Piercy Cannot be Liable for Plaintiffs' Damages Even Assuming the Accident Occurred in a Herd District.**

Even had the 1908 ordinance created a valid herd district, I.C. § 25-2402(1) would except Mr. Piercy's bull from the herd district, because Mr. Piercy's bull came from open range and the alleged herd district was not inclosed by a lawful fence or necessary cattle guards. (Affidavit of Ryan B. Peck at 3.; Affidavit of Dale W. Piercy) The Idaho Supreme Court upheld and emphasized the provision in I.C. § 25-2402(1), in *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986). The Supreme Court stated: "We hold, therefore, that a herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is inclosed by lawful fences and cattle guards in roads penetrating the district." *Id.*



Plaintiff attempts to sidestep this analysis with an interpretation of the term "as needed". Plaintiff attempts to suggest that a cattleguard was not needed. It is clear from the facts of the case that a cattleguard across Wamstad road was needed in order to prevent livestock from crossing the bridge. If there had been a cattleguard on the bridge the bull in question would not have been able to cross the bridge and end up in a potential herd district.

Due to the fact that Wamstad road at the point at which it separates the open range area from the alleged herd district does not have cattle guards to prevent livestock from crossing into the alleged herd district, I.C. § 25-2402(1) eliminates liability for Mr. Piercy's bull crossing over into the alleged herd district. Even had the 1908 ordinance created a valid herd district it does not apply to Mr. Piercy's bull. Mr. Piercy's motion for summary judgment should be granted in that his is statutorily immune from liability for the subject accident.

**F. I.C. § 25-2118 Governs the Liability Issue in This Case.**

Plaintiffs argue that despite the immunity provided in I.C. § 25-2118, Defendant Piercy could still be held liable under Canyon County ordinance 03-05-17 and other interpretations of I.C. § 25-2402. However, Idaho law provides that when there is a more specific statutory provision applied to a subject, that more specific statute or section addressing the issue controls over the statute that is more general. *Mulder v. Liberty Northwest Radiation for Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000). Further, state statutes will control over County ordinances. Idaho Code § 25-2118 is very specific that:

No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 20**

A Canyon County ordinance cannot place liability upon a person who is specifically free from liability under State Statute. Further, I.C. § 25-2402(1) provides this immunity when a bull goes from open range to closed range in a situation as this one. The Supreme Court has interpreted this provision in the *Easley* case, which has not been questioned. Defendant Piercy's bull was being pastured in open range and potentially wandered into a herd district that was not properly enclosed by fencing or cattleguards.

**G. Plaintiff has Failed to Provide Adequate Evidence That Would Prove a Claim of Quasi-Estoppel**

The Idaho Supreme Court has held:

The doctrine of quasi-estoppel "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." (Citation omitted). This doctrine applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. (Citation omitted).

*Atwood v. Smith*, 143 Idaho 110, 138 P.3d 310 (2006).

The necessary proof is that a party be proven to have taken a contradictory position to the current position. This being an equitable defense, the burden is upon Plaintiff to prove that equitable estoppel applies. Plaintiff has not provided any real evidence that Mr. Piercy either thought that the land in question was a herd district or that he ever took that position to his advantage. As stated in Mr. Piercy's second affidavit, he always thought that the land where the bull came from was in open range. Mr. Piercy did not gain any benefit from the land purportedly being in a herd district. The affidavits of the people who were paid by Mr. Piercy's

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 21**

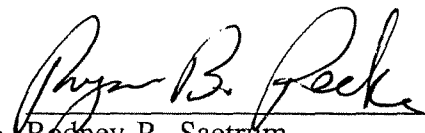
insurance company do not state why they were paid. Almost universally, such settlements include a provision which states that the party is specifically denying any liability, but that the insurance company is buying its peace. Nevertheless, Mr. Piercy's irrefuted testimony is that he did not know why his insurance company at the time paid for damages.

As stated in the case above, the reliance of the Plaintiffs in this matter is not relevant to the elements of quasi-estoppel. The affidavits from the Plaintiffs are irrelevant. In short Plaintiffs have provided no evidence that Mr. Piercy took the position that a herd district existed in the area where his bull was being pastured. Mr. Piercy has always believed that his pasture was in open range and has never contradicted that position. Quasi-estoppel simply does not apply in this case.

In conclusion, the bull was being pastured in open range, and therefore, Defendant Piercy is not liable for the damages to the Plaintiffs.

DATED this 30th day of July 2007.

SAETRUM LAW OFFICES

  
\_\_\_\_\_  
s. Rodney R. Saetrum  
Attorneys for Defendant Dale Piercy

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 22

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of July 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

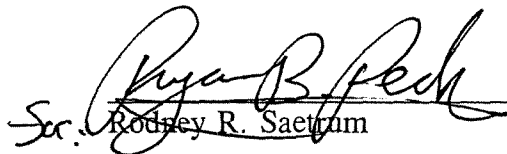
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 255  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Ser. Rodney R. Saetrum

Rodney R. Saetrum, ISB: 2921  
Ryan B. Peck, ISB: 7022  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd  
Boise, Idaho 83702  
Telephone: (208) 336-0484

**FILED**  
9:01 A.M. P.M.  
**JUL 31 2007**

CANYON COUNTY CLERK  
*[Signature]* DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON.

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

**SECOND AFFIDAVIT OF  
DALE PIERCY**

I, Dale Piercy, being first duly sworn, deposes and says as follows:

1. Affiant is a Co-Defendant in this case and has been a farmer and rancher in the Parma\Wilder area for over 30 years and bases this Affidavit on his own personal knowledge and belief.
2. Affiant attests that it was his belief that the bull involved in the subject accident was being pastured in an area that was open range. Affiant has never believed that this pasture area was in a herd district.
3. Affiant attests that in 2001 he had a different insurance company than at the present time. Affiant further attests that he was not part of the decision to pay for

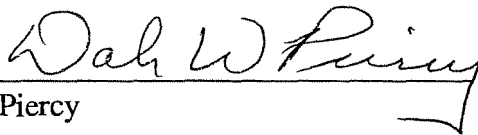
**SECOND AFFIDAVIT OF DALE PIERCY - 1**

the claims made on his insurance company in 2001 regarding the accidents involving his calves. Affiant was never informed why his insurance company in 2001 paid the claims of those involved in the accidents. Affiant was not told at that time that his pasture land was within a herd district.

4. Affiant attests that ranchers and farmers in Canyon County, whether in open range or herd districts, have used fences to separate their land and livestock from other peoples' land and livestock.

Further your Affiant sayeth naught.

DATED this 30<sup>th</sup> day of July 2007.

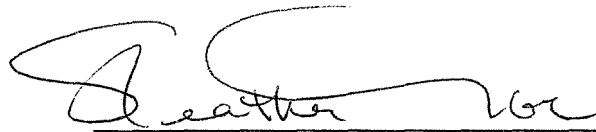
  
Dale Piercy

STATE OF IDAHO )  
: ss.  
County of Canyon )

On this 30<sup>th</sup> day of July 2007, before me, a Notary Public, personally appeared DALE PIERCY, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.



  
Notary Public, State of Idaho  
Residing at: Boise, Idaho  
My Commission Expires: 5/25/12

SECOND AFFIDAVIT OF DALE PIERCY - 2

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of July 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 255  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Ryan B. Peck

E I L E D  
9:01 A.M. P.M.

JUL 31 2007

CANYON COUNTY CLERK  
*J. Peck* DEPUTY

Rodney R. Saetrum  
ISB: 2921  
Ryan B. Peck  
ISB: 7022  
SAETRUM LAW OFFICES  
P.O. Box 7425  
Boise, Idaho 83707  
Telephone: (208) 336-0484

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

SECOND AFFIDAVIT OF RYAN  
B. PECK

COMES NOW, Ryan B. Peck, who first being duly sworn upon his oath and deposes and  
says as follows:

1. That I am a attorney for Saetrum Law Offices, who represent Defendant Dale Piercy, and I make this affidavit of my own personal knowledge;
2. Attached to this affidavit as Exhibit A is a true and correct copy of the Affidavit of Ed Johnson.

Further this affiant sayeth naught.

AFFIDAVIT OF RYAN B. PECK - 1



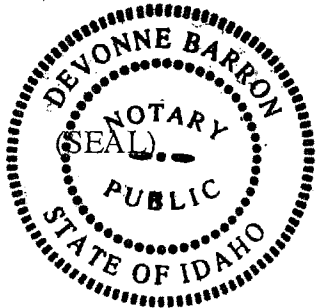
DATED this 30th day of July 2007.

By *Ryan B. Peck*  
Ryan B. Peck

STATE OF IDAHO    )  
                              : ss.  
County of Ada        )

On this 30th day of July 2007 before me, Notary Public, personally appeared RYAN B. PECK, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.



*Devonne Barron*  
Notary Public, State of Idaho  
Residing at <sup>Van Dyke</sup> Boise, Idaho *8/2/20*  
My Commission Expires ~~6/24/09~~

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of July 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 220  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

*Ryan B. Peck*  
\_\_\_\_\_  
Rodney R. Spectrum

***EXHIBIT "A"***

Rodney R. Saetrum, ISBN: 2921  
Robert R. Gates, ISBN: 2045  
SAETRUM LAW OFFICES  
Post Office Box 7425  
Boise, Idaho 83707  
Telephone: (208) 336-0484

Attorneys for Defendant

**FILED**  
A.M. P.M.

JUL 19 2007

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TRAVIS D. GAZZAWAY,  
Plaintiff,

v.

E. G. JOHNSON FARMS, INC., an Idaho  
corporation,  
Defendant.

Case No. CV 07-2141

AFFIDAVIT OF  
E.G. JOHNSON

COMES NOW, E. G. Johnson, who first being duly sworn upon his oath and deposes and  
says as follows:

1. That I am E.G. Johnson, President of E. G. Johnson Farms, Inc. located at 24007 Highway 20-26, Parma, Idaho 83660. I make this affidavit of my own personal knowledge.
2. I have lived in western Canyon County since 1942. My family has owned the land described in the attached Exhibit 1, which contains a legal description of the land, since it was purchased by my grandfather in the early 1900s prior to 1920. I am familiar with the roads in western Canyon County.

AFFIDAVIT OF E.G. JOHNSON - 1

3. I lived at the above location from 1969 to 2006 which is in section 25, Township 5 North, Range 5 West, Boise Meridian, Canyon County, Idaho. A map of this property is included in Exhibit 1. I currently live at 28335 Silo Way, Wilder, Idaho 83767.

4. When I moved to the property on which E.G. Johnson Farms, Inc. is located, I understood the property to be in open range. This property has been grazed by livestock as long as I can remember.

5. Sometime in either late 1982 or early 1983, I discovered that the above property had been placed into the herd district created by the Canyon County Commissioners in December 1982.

6. I cannot remember seeing either a notice of the hearing for the herd district or a petition from the landowners in this area requesting that the area be made into a herd district.

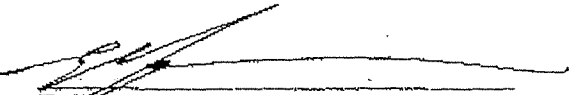
7. I would not have signed such a petition if it had been presented to me.

8. As a member of the Cattlemen's Association and the Cattle Feeders Association at that time, I would have received information about the proposed herd district prior to the hearing if such information had been available as this information would have been important to the cattle operation at E.G. Johnson Farms, Inc..

Further this affiant sayeth naught.

DATED this <sup>18</sup>~~20~~ day of July 2007.

By

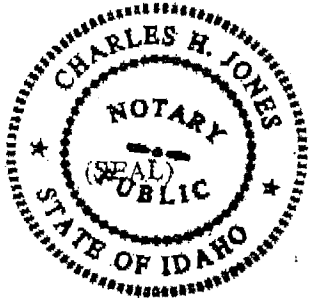
  
E.G. Johnson

AFFIDAVIT OF E.G. JOHNSON - 2

STATE OF IDAHO )  
 )  
 : ss.  
 County of Canyon )

On this 18 day of July 2007 before me, Notary Public, personally appeared E.G. JOHNSON, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.



Charles H. Jones  
Notary Public, State of Idaho  
Residing at Mesa, Idaho  
My Commission Expires JAN 31, 2008  
Filing # 33135

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of July 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

J. Brent Gunnell  
GOICOECHEA LAW OFFICES  
1226 E. Karcher Road  
Nampa, ID 83687

<input type="checkbox"/>	U.S. Mail
<input checked="" type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile

  
\_\_\_\_\_  
Robert R. Gates

**EXHIBIT 1**



## LEGAL DESCRIPTION

The complete legal description for Parcel #1 was provided to the appraiser by Mr. Robert S. Yamashita of West One Bank, Idaho, Corporate Banking Department, from a title policy of the property. The legal description of Parcel #2 was provided by Mr. Ed Johnson from a real property purchase agreement.

The subject property consists of 560.20 acres, more or less, together with water rights and as per the Canyon County Assessor situated in Canyon County, Idaho. The real property is more particularly described as follows:

Parcel #1

All of the Northeast Quarter; all of Lots 1,2,3,4,5, and 6; all of the Northeast Quarter of the Northwest Quarter and all of the Northwest Quarter of the Southeast Quarter, all being in Section 25, Township 5 North, Range 5 West, Boise Meridian, Canyon County, Idaho;

EXCEPTING FROM THE FOREGOING that part of the Northeast Quarter of the Northeast Quarter lying Northeast of the right of way of the Oregon Short Line Railroad Company;

ALSO EXCEPTING FROM said Northeast Quarter of the Northeast Quarter the right of way of the Oregon Short Line Railroad Company;

ALSO EXCEPTING THEREFROM

FROM a POINT OF BEGINNING located South 529.9 feet from the Northeast corner of Section 25, Township 5 North, Range 5 West, and where the East section line intersects the South right of way boundary of the Union Pacific Railroad; running thence

North 66°21' West 84.8 feet along said South right of way boundary; turning thence and running

South 23°47' West 159.0 feet; turning and running thence

South 42°06' East 211.5 feet to the point of intersection with the East boundary of Section 25; thence and running

North along said East boundary line 268.3 feet, more or less, to the POINT OF BEGINNING, said parcel lies within the Northeast Quarter of the Northeast Quarter of Section 25, Township 5 North, Range 5 West, Boise Meridian, Canyon County, Idaho.

Parcel #2

GOVERNMENT Lot 9 (located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ ), in Section 25, T5N, R5W, BM, Canyon County, Idaho.

EXCEPTING Therefrom: A parcel of land located within Lot 9, Section 25, T5N, R5W, BM, further described as follows: A 25-foot road right of way, being the West 25 feet of said Lot 9.

ALSO Excepting therefrom: A parcel of land described as follows: Beginning at a point 25 feet East of the SW Corner of Section 25, T5N, R5W, BM; thence North along the East right of way line of said road a distance of 200 feet to a point; thence East a distance of 175 feet to a point; thence South a distance of 200 feet to a point; thence West a distance of 175 feet to the point of beginning.

TOGETHER With all tenements, hereditaments and appurtenances thereto belonging or used in connection therewith.

TOGETHER with all water, water rights, ditches, and rights of way for ditches appurtenant thereto including Water Right License No. 3348 of the Department of Water Resources, State of Idaho.

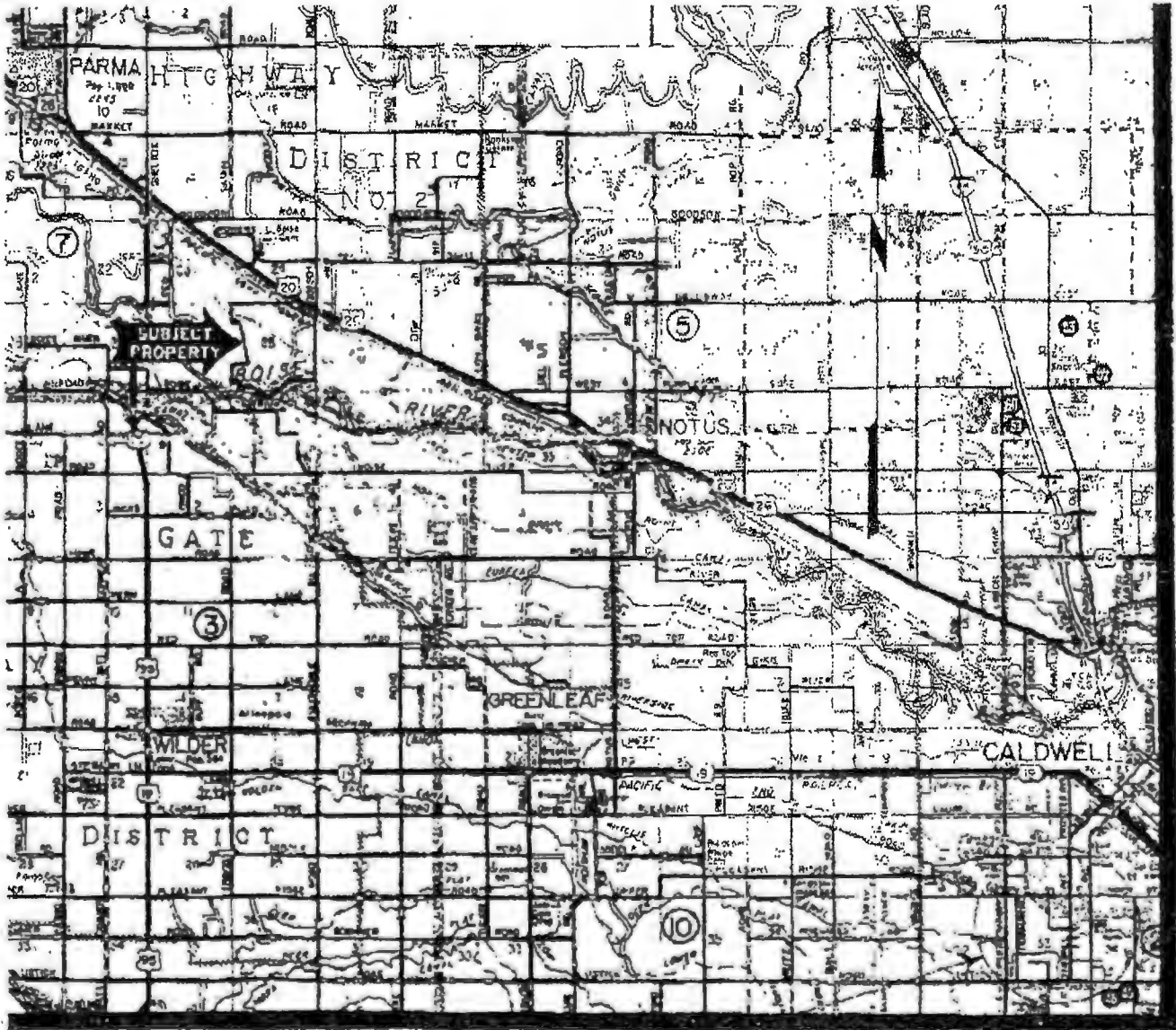
The property's purported address is:

24007 Highway 20-26  
Parma, Idaho 83660

<u>Parcel</u>	<u>Assessor's Account #'s</u>	<u>Legal</u>	<u>Acres</u>	<u>1994 Property Taxes</u>
1	4R39047-000-0	Sec 25-5N-5W	521.00	\$8,912.92
2	4R39051-000-0	Sec 25-5N-5W	39.20	\$ 324.98
Totals	2 Accounts		560.20	\$9,237.90

Note: The property taxes on Parcel #1 include the Assessor's valuation of the feedlot and support improvements. These were not valued in this appraisal.

LOCATION MAP



Rodney R. Saetrum, ISB: 2921  
Ryan B. Peck, ISB: 7022  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd  
Boise, Idaho 83702  
Telephone: (208) 336-0484

Attorneys for Defendant Dale Piercy

**F I L E D**  
A.M. ~~12:30~~ P.M.

**AUG 02 2007**

**CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

**AMENDED NOTICE  
OF HEARING**

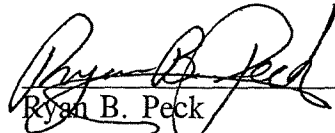
TO: ALL PARTIES:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on Thursday,  
September 6, 2007 at 1:30 p.m. or as soon as counsel may be heard, Defendant Piercy will call  
up and present for disposition his Motion for Summary Judgment, before the Honorable Gordon  
W. Petrie at the Canyon County Courthouse, 1115 Albany Street, Caldwell, Idaho.

AMENDED NOTICE OF HEARING - 1

DATED this 1st day of August 2007.

SAETRUM LAW OFFICES

  
\_\_\_\_\_  
Ryan B. Peck  
Attorneys for Defendant Dale Piercy

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 1st day of August 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

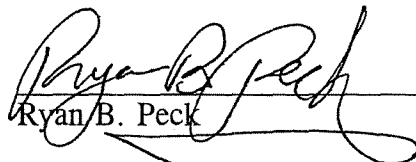
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 220  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

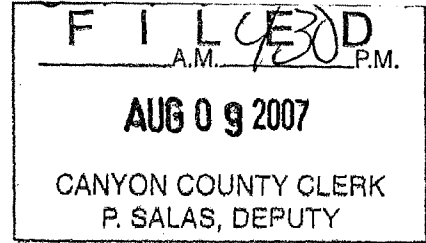
Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Ryan B. Peck

AMENDED NOTICE OF HEARING - 2

Rodney R. Saetrum  
ISB: 2921  
Ryan B. Peck  
ISB: 7022  
SAETRUM LAW OFFICES  
P.O. Box 7425  
Boise, Idaho 83707  
Telephone: (208) 336-0484



Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

SECOND AFFIDAVIT OF  
ROSEMARY THOMAS IN  
SUPPORT OF DEFENDANT  
PIERCY'S MOTION FOR  
SUMMARY JUDGMENT

COMES NOW, Rosemary Thomas, first being duly sworn upon her oath and deposes  
and says as follows:

1. That I am employed as the Field Manager for the Four Rivers Field Office within  
the Boise District of the Bureau of Land Management (BLM) located in Boise, Idaho;
2. I make this affidavit upon my own personal knowledge;

SECOND AFFIDAVIT OF ROSEMARY THOMAS IN SUPPORT OF DEFENDANT  
PIERCY'S MOTION FOR SUMMARY JUDGMENT - 1

3. My position with BLM requires that I manage and supervise the Range Administration Program of all federal BLM grazing land in Canyon County, Idaho;

4. After providing an affidavit to Plaintiff's counsel, I was asked by Defendant Piercy's counsel to do some additional research into land management plans that precede the Cascade Resource Management Plan which includes the BLM land in Canyon County. Prior to the implementation of the Cascade Resource Management Plan the BLM land in Canyon County was included in the Black Canyon Management Framework Plan, a version of which was adopted in 1967.

5. Attached is a true and correct copy of sections of a Planning System Progress Report on the Black Canyon Management Framework Plan. These were found in my office, which is where documents of this type are typically stored and are documents that were produced pursuant to BLM procedures. These records show that grazing on BLM lands in Canyon County was being permitted and regulated by the BLM under the Black Canyon Management Framework Plan at least since 1967.

Further this affiant sayeth naught.

DATED this 8th day of August 2007.

By Rosemary Thomas  
Rosemary Thomas

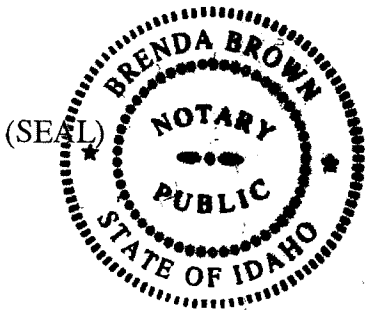
STATE OF IDAHO )  
 : ss.  
County of Ada )

On this 8th day of August 2007 before me, Notary Public, personally appeared ROSEMARY THOMAS, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.

*Brenda Brown*

Notary Public, State of Idaho  
Residing at Boise, Idaho  
My Commission Expires 6/24/09





CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of August 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

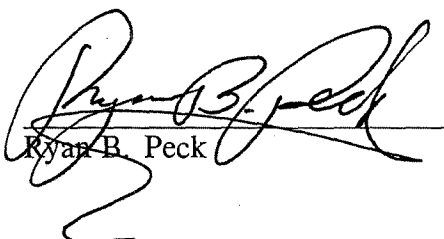
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 220  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
Ryan B. Peck

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
PLANNING SYSTEM PROGRESS REPORT

State (code)  
21  
District (code)  
010

Instructions on reverse

A. PLANNING UNIT IDENTIFICATION

NAME	CODE	ACREAGE (1,000's acres)				TOTAL
		PUBLIC*	STATE	PRIVATE	OTHER	
<i>Black Canyon</i>	<i>05</i>	<i>55</i>	<i>5</i>	<i>32</i>		<i>94</i>
		<i>W 2</i>				

PROGRAMMED: URA FY 75 MFP FY 75

B. PLANNING SYSTEM COMPONENT

1. Unit Resource Analysis and Management Framework Plan Step 1		DATES				
		ORIGINAL	LATEST REVISION			
(a) Steps 1 and 2 - URA		<i>1967</i>	<i>1969</i>			
(b) Steps 3 and 4 - URA - Step 1 - MFP	DATES					
	UNIT RESOURCE ANALYSIS		MANAGEMENT FRAMEWORK PLAN			
	STEP 3	Step 4	STEP 1			
ACTIVITIES	ORIGINAL	LATEST REVISION	ORIGINAL	LATEST REVISION	ORIGINAL	LATEST REVISION
Lands	<i>1968</i>	<i>2/75</i>	<i>1968</i>	<i>2/75</i>	<i>1972</i>	<i>2/75</i>
Minerals	<i>1967</i>	<i>2/75</i>	<i>1967</i>	<i>2/75</i>	✓	<i>2/75</i>
Livestock Forage	<i>1969</i>	<i>2/75</i>	<i>1969</i>	<i>2/75</i>	✓	<i>2/75</i>
Timber	<i>No timber</i>					
Wildlife	<i>1969</i>	<i>2/75</i>	<i>1969</i>	<i>2/75</i>	<i>1972</i>	<i>2/75</i>
Watershed	✓	<i>2/75</i>	✓	<i>2/75</i>	✓	<i>2/75</i>
Recreation	✓	<i>5/74</i>	✓	<i>5/74</i>	✓	<i>5/74</i>
<i>Energy Code, R/W</i>						
2. Environmental profile		DATES				
		ORIGINAL	LATEST REVISION			
3. Management Framework Plans		DATES				
		ORIGINAL	LATEST REVISION			
(a) Step 2 - MFP						
(b) Step 3 - MFP						

Form 1600-9  
(October 1970)

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

MANAGEMENT FRAMEWORK PLAN  
STEP 1 - ACTIVITY RECOMMENDATION

Planning Unit Name Black Canyon

Program Activity Livestock Forage

Activity Recommendation Area (code) Entire Area

Activity Recommendation(s)	Rationale
<p>1. Manage the native range to increase the perennial grass species.</p>	<p>1. Sagebrush (<i>Artemisia tridentata</i>) and blue bunch wheatgrass (<i>Agropyron spicatum</i>) are the possibly climax type in this area. There is not enough bunch grass left for a seed supply. The major portion of the range is in annual type. The succession stage will be Sandberg blue grass (<i>Poa sandbergii</i>), squirreltail (<i>Sitanion hystrix</i>) then blue bunch wheatgrass. Seed may need to be introduced in some areas to obtain a perennial grass cover.</p>
<p>2. Plow and seed all acreage possible in Highland Livestock and Land, Spring Valley Livestock Co. and Russell Bishop Allotment.</p>	<p>2. The soils in these allotments are suitable for seeding and the area where the slope is not too steep. Allowed Desert Land Entrées and Bureau of Reclamation sales have reduced the area and carrying capacity of the allotments in the Black Canyon Unit significantly. A successful seeding would increase forage production where the operator could retain their Class I privileges.</p>
<p>3. Initiate a rest rotation system on Tom and John Shaw Allotment.</p>	<p>3. The pastures are fenced and rest rotation for the winter season is proving successful on Little Cattle Co. Allotment. The Shaw Allotment showed considerable improvement under the management practices of Wesley Cruickshank. It is desirable to continue this improvement with an orderly and systematically plan.</p>
<p>4. Plan a management system on the following allotments: Russell Bishop James Cruickshank Albert Helmick Highland Livestock and Land Co. Walter Little MacGregor Land and Livestock Co. Ed McCool Wesley McPherson Stanley and Lewis Nelson Elwood Smith  Spring Valley Livestock Co.</p>	<p>4. These allotments are not large enough or the grazing season long enough to implement a rest rotation grazing system. A deferred rotation grazing system would allow one half the allotment to be rested each spring. This would increase vigor and seed production of the desired perennial plants. Heavy early spring use on the remaining one half of allotment will tend to reduce cheat grass and medusa head competition. A management system should be designed on these allotments to meet the physiological requirements of the plants.  Will increase perennial species.</p>

Form 1600-9  
(October 1970)

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

MANAGEMENT FRAMEWORK PLAN  
STEP 1 - ACTIVITY RECOMMENDATION

Planning Unit Name      Black Canyon

Program Activity              Livestock Forage

Activity Recommendation Area (code)      Entire Area

Activity Recommendation(s)

5. Continue the Black Canyon portion of the Indian Jake AMP and continue trial seeding and plantings until a successful combination can be found.

6. Continue custodial management of the following allotments:

W. E. Adams and Son, Inc.

Jim Bean

Lucas Bicandi

Dallas Burt

former Rulon Esplin

Mrs. Harvey Gatfield

Joseph Little

M. C. & M. Ranch

Ray Nissula

Don Weilmunster

7. Designate, acquire and post a continuance stock driveway across the Black Canyon Unit. The stock driveway then should be withdrawn for this purpose.

8. Continue the present spring-fall, winter season of use. If users agree to rest rotation and deferred rotation grazing system as proposed opening date is not too critical; otherwise range readiness should be reached before turn out is authorized. The opening date of the Black Canyon Unit for allotments not covered by an Allotment Management Plan will be approximately March 20th. Sheep trail use prior to this date will move through Unit with a minimum of use.

Rationale

5. The Indian Jake AMP was designed by Gus Hormay for the purpose of reducing the medusa head competition and increasing perennial grass cover. The trend is definitely increasing as verified by trend studies, photos and observations.

6. These allotments have a small amount of isolated National Resource Land which cannot be managed effectively. Most of these isolated tracts could be disposed of by exchange or sale.

7. Approximately 25,000 sheep and 2,000 cattle that trail in the Unit. The present stock driveway traverses through private land. It is desirable to acquire some key private land blocks to continue interrupted trailing. The Black Canyon Unit is so situated that it is a natural crossing for livestock movement to and from summer and winter ranges.

8. The unit is in a low annual precipitation belt of 10 to 12 inches. The forage is mainly annual and poor water distribution and high temperatures make area undesirable for summer use. The area is open enough to allow winter grazing. The plants are not developed enough before March 20th to withstand grazing pressure annually without deterioration of the range. Livestock trailing the 1st part of March causes considerably trampling when soil is wet. The sheep should be moved along the roads rapidly so a minimum of trampling will occur on the range.

Form 1600-9  
(October 1970)

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

MANAGEMENT FRAMEWORK PLAN  
STEP 1 - ACTIVITY RECOMMENDATION

Planning Unit Name	Black Canyon
Program Activity	Livestock Forage
Activity Recommendation Area (code)	Entire Area

Activity Recommendation(s)  
9. Reduce the Class I grazing privileges by the amount of the carrying capacity of the land that has gone out of federal ownership. Each individual allotment will need to be reduced proportionally by federal acres lost. The stock driveway will need to be deducted from the allotments they traverse.

Rationale  
9. There is approximately 22,000 acres that has gone out of federal ownership since 1954, or 22% of the Black Canyon Unit. There has been no significant increase in production such as range seedings to offset this loss. Insufficient AUM's have been deducted for livestock trails. This has resulted in over obligation.

NOV 28 1975

Rodney R. Saetrum, ISB: 2921  
Ryan B. Peck, ISB: 7022  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd  
Boise, Idaho 83702  
Telephone: (208) 336-0484

**F I L E D**  
A.M. 9:50 P.M.  
**AUG 09 2007**  
CANYON COUNTY CLERK  
P. SALAS, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

**THIRD SUPPLEMENTAL  
MEMORANDUM IN SUPPORT  
OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY  
JUDGMENT**

**I. RELEVANT FACTUAL BACKGROUND**

Defendant Dale Piercy provided the relevant factual background in the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment. The investigation into this matter has been ongoing and extensive, and therefore, we submit the following additional evidence.

After receiving the Affidavit of Rosemary Thomas that was obtained by Plaintiffs' counsel, we obtained the Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment. Ms. Thomas states that after doing some additional

**THIRD SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 1**

research into the area of BLM management of grazing on BLM lands in Canyon County, she located some additional documents which establish that grazing on BLM lands in Canyon County were being permitted and regulated by the BLM under the Black Canyon Management Framework Plan at least since 1967. (Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment at 1-2 and attached documents.)

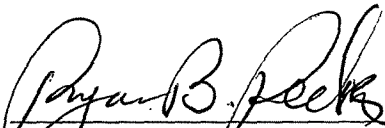
## II. LEGAL ANALYSIS

This evidence shows that the BLM lands in Canyon County were being permitted for grazing since 1967. This establishes that the BLM lands in Canyon County that the 1982 ordinance attempted to include in a herd district were historically permitted for the grazing of cattle even beyond the prior evidence establishing grazing on those BLM lands since 1981. Further, this evidence shows that the BLM land was being regulated by the BLM several years prior to the 1982 ordinance. This regulation by the BLM preempted any regulation by Canyon County of this BLM land regarding grazing.

The 1982 ordinance was never effective and the land area which had previously been open range remains open range. Therefore, Defendant Piercy's Motion for Summary Judgment should be granted.

DATED this 9th day of August 2007.

SAETRUM LAW OFFICES

  
for, Rodney R. Saetrum  
Attorneys for Defendant Dale Piercy

**THIRD SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S  
MOTION FOR SUMMARY JUDGMENT - 2**

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of August 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

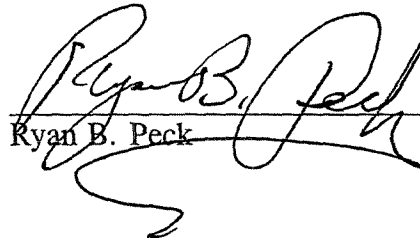
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 255  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Ryan B. Peck



9/6 Pet

FILED  
A.M. 5:25 P.M.

AUG 13 2007

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
Post Office Box 1539  
Boise, Idaho 83701  
Telephone: (208) 343-5454  
Facsimile: (208) 384-5844  
Evett - ISB #5587

Attorneys for Defendant Jennifer Sutton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA, by and through )  
LOREE RIVERA, her mother and natural )  
guardian; and LUIS J. GUZMAN, by and )  
through BALLARDO GUZMAN, his father )  
and natural guardian, )  
Plaintiffs, )  
v. )  
DALE PIERCY, individually and )  
JENNIFER SUTTON, individually, )  
Defendants. )

Case No. CV05-4848

DEFENDANT SUTTON'S ANSWER TO  
THIRD AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL

Defendant Jennifer Sutton ("Defendant Sutton"), by and through her attorney of record,  
Elam & Burke, P.A., in answer to Plaintiffs' Third Amended Complaint and Demand for Jury  
Trial (Plaintiffs' Complaint), filed on or about June 5, 2007, admits, denies and otherwise alleges  
as follows:

DEFENDANT SUTTON'S ANSWER TO THIRD AMENDED  
COMPLAINT AND DEMAND FOR JURY TRIAL - 1

**FIRST DEFENSE**

Plaintiffs' Complaint fails to state a cause of action against Defendant Sutton upon which relief may be granted.

**SECOND DEFENSE**

Defendant Sutton denies each and every allegation contained in Plaintiffs' Complaint not specifically admitted herein.

**THIRD DEFENSE**

1. In response to Paragraph I of Plaintiffs' Complaint, Defendant Sutton admits the allegations contained therein.
2. In response to Paragraph II of Plaintiffs' Complaint, Defendant Sutton admits the allegations contained therein.
3. In response to Paragraph III of Plaintiffs' Complaint, Defendant Sutton admits the allegations contained therein.
4. In response to Paragraph IV of Plaintiffs' Complaint, Defendant Sutton admits the allegations contained therein.
5. In response to Paragraph V of Plaintiffs' Complaint, Defendant Sutton admits the allegations contained therein.
6. In response to Paragraph VI of Plaintiffs' Complaint, Defendant Sutton admits the allegations contained therein.
7. In response to Paragraph VII of Plaintiffs' Complaint, Defendant Sutton admits Piercy's conduct was negligent, reckless or wilful but denies that Defendant Sutton's conduct

DEFENDANT SUTTON'S ANSWER TO THIRD AMENDED  
COMPLAINT AND DEMAND FOR JURY TRIAL - 2

was negligent, reckless or wilful. Defendant Sutton admits the allegations of the second paragraph and denies the allegations of the third paragraph in Paragraph VII.

8. In response to Paragraph VIII of Plaintiffs' Complaint, Defendant Sutton admits that Erika Rivera and Luis Guzman were injured because of Dale Piercy's tortious misconduct, but denies the remaining allegations with respect to Defendant Sutton.

9. In response to Paragraph IX of Plaintiffs' Complaint, Defendant Sutton admits that Erika Rivera and Luis Guzman have incurred some medical expenses and further admits that Plaintiff Rivera may incur some medical expenses in the future. Defendant Sutton denies the remaining allegations pertaining to wage loss. Defendant Sutton further admits that Plaintiffs have sustained some general damages and that Plaintiffs may suffer some additional general damages in the future. Defendant Sutton denies the remaining allegations.

**FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' case fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Defendant Piercy is comparatively at fault for the accident.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs have failed to mitigate their damages.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' damages were proximately caused in whole or in part by superseding, intervening and/or supervening acts or omissions of other third persons or other force, over which Defendant Sutton had no control and any negligence or breach of duty on the part of Defendant Sutton, if any, was not a proximate cause of Plaintiffs' damages.

DEFENDANT SUTTON'S ANSWER TO THIRD AMENDED  
COMPLAINT AND DEMAND FOR JURY TRIAL - 3

**REQUEST FOR ATTORNEY FEES**

Defendant Sutton requests that they be awarded attorney fees and costs incurred pursuant to Idaho Code Section 12-120 and Rule 54 of the Idaho Rules of Civil Procedure.

**DEMAND FOR JURY TRIAL**

Defendant Sutton demands a trial by jury in accordance with the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure.

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant Sutton prays for judgment as follows:

- (1) Plaintiffs take nothing by their Complaint and the same be dismissed;
- (2) Defendant Sutton be awarded her attorney fees and costs incurred herein; and
- (3) Other and further relief as to the Court seems just and equitable.

DATED this 13th day of August, 2007.

ELAM & BURKE, P.A.

By Meghem E. Sullivan for  
Joshua S. Evett  
Attorneys for Defendant Jennifer Sutton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2007, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton  
Chasan & Walton, LLC  
P.O. Box 1069  
Boise, ID 83701-1069

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Stephen E. Blackburn  
Blackburn Law, P.C.  
660 East Franklin Road, Suite 220  
Meridian, ID 83642

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Rodney R. Saetrum  
Ryan Peck  
Saetrum Law Offices  
P.O. Box 7425  
Boise, ID 83707

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Meghan E. Sullivan for  
Joshua S. Evett

**FILED**  
A.M. 1200 P.M.

**AUG 17 2007**

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Rodney R. Saetrum, ISB: 2921  
Ryan B. Peck, ISB: 7022  
SAETRUM LAW OFFICES  
300 E. Mallard Drive, Suite 370  
Boise, Idaho 83706  
Telephone: (208) 336-0484

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually

Defendants.

Case No. CV05-4848

**ANSWER TO PLAINTIFFS'  
THIRD AMENDED  
COMPLAINT AND DEMAND  
FOR JURY TRIAL**

Defendant Dale Piercy, as and for an Answer to Plaintiffs' Third Amended Complaint,  
pleads and alleges as follows:

FIRST DEFENSE

Plaintiffs' Third Amended Complaint, and each and every allegation contained therein,  
fails to state a claim against Defendant Dale Piercy upon which relief can be granted.

ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY  
TRIAL - 1

SECOND DEFENSE

I.

Defendant Dale Piercy denies each and every allegation contained in Plaintiffs' Third Amended Complaint, unless expressly and specifically hereinafter admitted.

II.

With regard to paragraphs I-IV of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy admits the allegations contained therein.

III.

With regard to paragraph V of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy admits that on March 20, 2005, a vehicle collided with a black cow owned by Defendant Dale Piercy on Wamstad Road near Parma, Canyon County, Idaho. Defendant Dale Piercy admits that Defendant Jennifer Sutton was the operator of the vehicle in which Plaintiffs rode.

IV.

With regard to paragraph VI of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy denies each and every allegation contained therein.

V.

With regard to paragraph VII of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy denies each and every allegation contained therein relating to himself. Regarding the allegations contained within paragraph VII concerning the alleged negligence, reckless or willful misconduct of Defendant Jennifer Sutton, Defendant Piercy does not respond to those allegations contained in this paragraph except to refer to the following Defenses wherein Defendant Piercy alleges that Defendant Sutton was negligent in causing Plaintiffs' injuries.

ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 2

## VI.

With regard to paragraph VIII of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy admits that Plaintiffs were injured as a result of the collision between the vehicle operated by Defendant Jennifer Sutton and the bull owned by Defendant Dale Piercy, but otherwise denies each and every allegation concerning himself. Regarding the allegations contained within paragraph VIII concerning the alleged negligence, reckless or willful misconduct of Defendant Jennifer Sutton, Defendant Piercy does not respond to those allegations contained in this paragraph except to refer to the following Defenses wherein Defendant Piercy alleges that Defendant Sutton was negligent in causing Plaintiffs' injuries.

## VII.

With regard to paragraph IX of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy admits that Plaintiffs have incurred medical expenses in this matter, however, Defendant Dale Piercy is without knowledge or information sufficient to form a belief as to the truth of the allegation regarding sustained lost wages, future medical expenses, and future lost wages and therefore denies these allegations. With regard to the second sentence of paragraph IX of Plaintiffs' Third Amended Complaint, Defendant Dale Piercy is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Plaintiffs sustaining general damages for pain and suffering, other general damages, or that they will suffer additional general damages in the future, and therefore denies these allegations. Defendant Piercy denies all remaining allegations regarding the tortious conduct of himself.

THIRD DEFENSE

ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 3



Plaintiffs' injuries and damages, if any, were caused by the superseding, intervening acts and/or negligence of third persons not parties to this action.

#### FOURTH DEFENSE

Plaintiffs' injuries and damages, if any, were caused solely by the negligence of the operator of the vehicle in which Plaintiffs rode, Defendant Jennifer Sutton.

#### FIFTH DEFENSE

Plaintiffs are not the real parties in interest for all or portions of their alleged damages.

#### SIXTH DEFENSE

Plaintiffs have failed to mitigate their damages, if any.

#### SEVENTH DEFENSE

Defendant Dale Piercy asserts the collateral source doctrine found in *Idaho Code* § 6-1606.

#### EIGHTH DEFENSE

Defendant Dale Piercy is entitled to the protection of Idaho's Open Range statutes and immunities provided therein, including but not limited to, *Idaho Code* § 25-2118.

#### NINTH DEFENSE

The accident and injuries alleged in Plaintiffs' Third Amended Complaint were unavoidable and/or due to an act of God.

#### TENTH DEFENSE

Plaintiffs' injuries and damages, if any, were due to the unpredictable nature of an animal, which unpredictable nature caused the animal to be on the road over and above all

ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 4

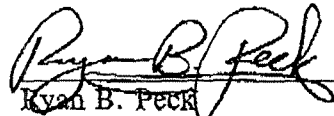
reasonable and appropriate measures taken by Defendant Dale Piercy to corral the animal and prevent it from being on the road.

**WHEREFORE**, Defendant Dale Piercy prays for judgment as follows:

1. That Plaintiffs' Third Amended Complaint be dismissed with prejudice and that Plaintiffs take nothing thereunder from Defendant Dale Piercy;
2. For costs and attorney's fees pursuant to *Idaho Code* §§ 12-120 & 12-121, and *Idaho Rules of Civil Procedure* 54;
3. For such other and further relief as the Court deems just and proper in the premises.

DATED this 17th day of August 2007.

SAETRUM LAW OFFICES


  
 Ryan B. Peck  
 Attorney for Defendant Dale Piercy

DEMAND FOR JURY TRIAL

Defendant Dale Piercy hereby demands a jury trial pursuant to I.R.C.P. 38.

DATED this 17th day of August 2007.

SAETRUM LAW OFFICES

  
 Ryan B. Peck  
 Attorney for Defendant Dale Piercy

ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 5

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of August 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

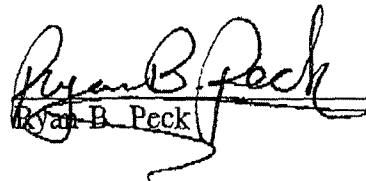
\_\_\_\_ U.S. Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 255  
Meridian, ID 83642

\_\_\_\_ U.S. Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

\_\_\_\_ U.S. Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Overnight Mail  
 Facsimile

  
Ryan B. Peck

Rodney R. Saetrum, ISB: 2921  
Ryan B. Peck, ISB: 7022  
SAETRUM LAW OFFICES  
101 S. Capitol Blvd  
Boise, Idaho 83702  
Telephone: (208) 336-0484

**F I L E D**  
A.M. / J.S. P.M.  
AUG 23 2007 ✓

CANYON COUNTY CLERK  
D. BUTLER, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE  
RIVERA her mother and natural guardian AND  
LUIS J. GUZMAN by and through  
BALLARDO GUZMAN his father and natural  
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER  
SUTTON, individually,

Defendants.

Case No. CV05-4848

**MEMORANDUM IN SUPPORT  
OF DEFENDANT PIERCY'S  
MOTION TO STRIKE**

**I. PROCEDURAL BACKGROUND**

The Plaintiffs filed their Motion to Amend Complaint to Include a Claim for Punitive Damages on July 20, 2007. The evidence supporting this motion is contained solely in the Affidavit of Timothy C. Walton in Support of Motion to Amend Complaint to Include a Claim for Punitive Damages filed with the motion. This affidavit includes the following exhibits:

1. Exhibit A - Copy of police report pertaining to March 20, 2005, accident.
2. Exhibit B - Copy of report of Tim O'Byrne.
3. Exhibit C - Copy of report of Dave Hambleton.
4. Exhibit D - Copy of photographs of Defendant Piercy's fence taken by Dave

Hambleton.

5. Exhibit E - Copy of report of Tom Fries.
6. Exhibit F - Copy of police reports of October 5, 2001.
7. Exhibits G-I, K, and M - Copies of police reports involving loose cattle.
8. Exhibit J - Copy of answers to plaintiff's interrogatories numbers 16 and 17.
9. Exhibit L - Copy of answers to plaintiff's interrogatories 15 and 16.
10. Exhibit N - Copy of pages of the deposition transcript of Defendant Piercy.

## II. STANDARD OF ADJUDICATION

According to I.R.C.P. 56(e):

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. ...

The decision to exclude evidence involves an exercise of discretion by the court.

*Sprinkler Irrigation Co. v. John Deere Insurance Co.*, 139 Idaho 691, 695-96, 85 P.3d 667, 671-72 (2004).

Idaho Rule of Evidence 801(c) states: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Idaho Rule of Evidence 802 states that: "Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho."

Idaho Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 2**

testify thereto in the form of an opinion or otherwise." The Idaho Court of Appeals has held that:

Once the witness is sufficiently qualified as an expert, the trial court must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence. *Id.*; I.R.E. 702. If the testimony is thus competent and relevant, it may be admissible; the weight given to the testimony is left to the trier of fact. *IHC Hosp., Inc. v. Board of Commissioners, supra*. The admissibility of expert opinion testimony is discretionary with the trial court and will not be disturbed absent a showing of abuse of discretion. *Sidwell v. William Prym, Inc., supra*.

*State v. Hopkins*, 113 Idaho 679, 680-681, 747 P.2d 88, 89-90 (Id.App. 1987); *See also State v. Dragoman*, 130 Idaho 537, 542, 944 P.2d 134, 139 (Id.App. 1997).

Idaho Rule of Evidence 401 states: "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Idaho Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Idaho Rule of Evidence 404(a) states that: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: ... ."

#### ANALYSIS

The exhibits attached to the Affidavit of Timothy C. Walton will be dealt with separately depending upon their content.

**A. Exhibits A, F, G, H, I, K, and M Constitute Inadmissible Hearsay and Should be Stricken.**

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 3**

These exhibits all are police reports which are statements being offered to establish the truth of the matters contained in the police reports. These are hearsay and there is no exception to allow them into evidence. Idaho Rule of Evidence 803(8) specifically excludes reports of this type from being presented as evidence stating: "The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case." These reports are not admissible evidence and should be excluded from the Court's consideration of Plaintiff's Motion to Amend the Complaint to Include a Claim for Punitive Damages (Plaintiff's Motion to Amend).

**B. Exhibits F, G, H, I, K, and M are Inadmissible as Being Irrelevant or Unfairly Prejudicial.**

Exhibit F constitutes two police reports regarding accidents where two different people struck two cows reported to be Defendant Piercy's on Wamstad Road on October 5, 2001. These reports do not explain where the cows originated or what type of fencing was in existence at the time to control the animals. The information in these reports is not relevant to any issue in this case. Plaintiffs attempt to use these reports to provide evidence that Defendant Piercy's actions with regard to the accident on October 10, 2005, merits punitive damages. Plaintiffs fail to establish how two police reports of an accident that happened four years prior to the accident in question bears any relation to the subject accident. Without knowing where the cows originated or what type of fencing or the condition of that fencing or how the cows escaped it is impossible to draw any connection to the subject accident. Any connection based upon these two police reports would be mere speculation and therefore would be of no probative value.

At the same time such speculation would be extremely unfairly prejudicial to Defendant

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 4**

Piercy. The Court would be requiring Defendant Piercy to defend himself from unsupported claims of inappropriate behavior for an accident that occurred four years ago. There is not even a suggestion in the police reports that Defendant Piercy's cows were being improperly contained or that any improper action on his behalf led to the cows escaping. Defendant Piercy was not even given a citation in conjunction with these accidents.

Exhibits G, H, and I are reports that were generated weeks after the occurrence of the accident in question regarding cattle that were on the roadway. These reports are brief and do not contain any conclusive statements regarding the ownership of the cattle that were being reported. The officers merely report statements by the reporting party as to ownership. Plaintiffs use of these statements amounts to attempting to admit double hearsay. As stated above, these reports are all hearsay with Plaintiff providing no exception for their admissibility and the statements reported in the reports are double hearsay with no exception being provided. As with the reports contained in Exhibit F, the reports do not suggest a point of origin for these cows or their method of escape or what type of fencing was being used to contain them. These exhibits provide little or no probative value as to Defendant Piercy's fence that was containing the bull involved in the subject accident, nor any of Defendant Piercy's actions involving the subject accident. It would be unfairly prejudicial to Defendant Piercy to make him defend himself against reports of cows being out when the ownership of the cows reported is not even suggested by the person making the report.

Exhibit K is a report that regards a calf being on the roadway and recites that it is owned by Dale Piercy. The report does not indicate how that information was determined or if this was simply the belief of the reporting party. The report does not suggest any further evidence that

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 5**



the calf in question belonged to Defendant Piercy or where it came from and from what type of enclosure, if any, it escaped. This incident was over a year after the accident. This report has no probative value of the issues regarding the subject accident. It would also be unfairly prejudicial to allow a jury to speculate based upon double hearsay and inconclusive reports that the calf being reported was Defendant Piercy's and was out on the roadway do to a failure of Mr. Piercy's fence.

Exhibit M contains reports that do not even suggest through double hearsay or otherwise that the cattle discussed in them belong to Defendant Piercy. There is no evidence that the incidences in these reports has anything to do with Defendant Piercy.

Exhibits F, G, H, K, I and M having little or no probative value and any value being substantially outweighed by the danger of unfair prejudice, they should be held inadmissible and should not be considered by the Court regarding Plaintiff's Motion to Amend.

**C. To the Extent Exhibits F, G, H, I, K and M are Being Used to Establish a Trait of Defendant Piercy's They are Inadmissible**

It appears that Plaintiff is attempting to argue that the reports contained in Exhibits F, G, H, I, K and M, establish a character trait of Defendant Piercy's for being an inadequate fence builder or maintainer and that with regards to the accident in October of 2005, he acted in conformity therewith by failing to build or maintain an adequate fence. This use of this evidence is clearly prohibited by I.R.C.P. 404(a). Plaintiff has failed to show any justification for using this evidence in that manner. Therefore, the evidence contained in Exhibits F, G, H, I, K and M are inadmissible and should not be considered by the Court in its determination of Plaintiffs Motion to Amend.

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 6**

**D. Exhibits B, C and D Contain Irrelevant Information Which is Unfairly Prejudicial and Therefore Inadmissible.**

Exhibit B is a report of Plaintiff's livestock expert, Tim O'Byrne. Mr. O'Byrne's report includes the following conclusions that are relied upon in Plaintiff's Motion to Amend:

1. The fence in question was built and maintained in a substandard manner that was an extreme deviation from industry standards.
2. The fence in question requires major repairs before it would be considered suitable for containing domestic bovines or equines.
3. Domestic livestock animals kept within the containment area appear to have exerted excessive outward pressure on an obviously inadequate fence likely in an attempt to obtain forage beyond the containment borders.

In coming to these conclusions, Mr. O'Byrne does not express any timing for these conclusions. Mr. O'Byrne's inspection of a portion of Mr. Piercy's fencing was accomplished on August 2, 2006, over a year after the subject accident. Mr. O'Byrne's deposition was taken on July 25, 2007. (Affidavit of Ryan B. Peck, Exhibit A, Excerpts of Deposition of Tim O'Byrne.) Mr. O'Byrne opined that the proper procedure for maintaining fences was to inspect the particular enclosure prior to allowing cattle in the enclosure and then fixing any defects that are found in the fence. *Id.* at 54-56. Mr. O'Byrne says that it is common to need fencing repairs that are caused by conditions occurring while no cattle are present in the enclosure. *Id.* Mr. O'Byrne admitted that at the time he inspected the fence there was no livestock being contained within the enclosure. *Id.* at 77. Mr. O'Byrne has admitted to having no knowledge regarding what type of livestock had been in the enclosure in 2006. *Id.* at 83-84. Mr. O'Byrne

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 7**

admitted that he had no knowledge regarding the nutritional state of the bulls in the subject enclosure in October of 2005. *Id.* at 123-124. In fact, Mr. O'Byrne opined that the way Defendant Piercy reported to have fed the bulls was an acceptable method. *Id.* Mr. O'Byrne opined that he would have to inspect an animal to determine if it was nutritionally challenged. *Id.* Mr. O'Byrne did not inspect the fence on May 10, 2006, or in 2005.

Mr. O'Byrne's testimony is not relevant due to his failure to examine the fence at a time when livestock were being kept within the enclosure. The condition of the fence when livestock are being enclosed within the fence is irrelevant. Mr. O'Byrne admitted that the industry standard would say that fences were often in disrepair or inadequate prior to livestock being enclosed in them. This is why repairs and inspections are done prior to allowing cattle into the enclosure. To allow Mr. O'Byrne to make his conclusions would be to require the Court or a jury to speculate as to what Defendant's fences are like when they are actually containing livestock. Further, Mr. O'Byrne's inspection was not done close to the time of Defendant Piercy's deposition statement on May 10, 2006. It is mere speculation that the condition of the fence did not change in the intervening three months.

It is also clear that Mr. O'Byrne has no reason to believe that the bulls at the time of the accident were nutritionally challenged or grazed outside the fence. In fact, it appears that Mr. O'Byrne accepts the method by which the bulls were being fed. One of his main conclusions relied on by Plaintiffs in their motion is that Defendant Piercy's cattle were nutritionally challenged and therefore exerting outward pressure on the fence. Mr. O'Byrne's deposition testimony establishes that this conclusion is based upon conjecture and speculation.

It would be unfairly prejudicial to allow Mr. O'Byrne to testify consistent with his report

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S MOTION TO STRIKE - 8**

since it is based on irrelevant information and speculation.

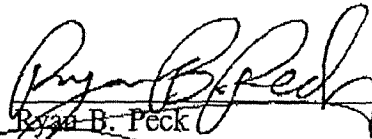
Exhibits C and D are similarly flawed due to the fact that they deal with an enclosure that is not containing any livestock.

Therefore, these Exhibits should not be allowed into evidence to support Plaintiff's Motion to Amend the Complaint.

Oral argument is requested.

DATED this 23rd day of August 2007.

SAETRUM LAW OFFICES

  
\_\_\_\_\_  
Ryan B. Peck  
Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of August 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton  
CHASAN & WALTON LLC  
1459 Tyrell Lane  
P.O. Box 1069  
Boise, ID 83701-1069

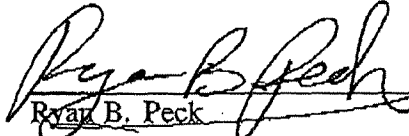
\_\_\_\_ U.S. Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Overnight Mail  
 Facsimile

Stephen E. Blackburn  
BLACKBURN LAW PC  
660 E. Franklin Road  
Suite 255  
Meridian, ID 83642

\_\_\_\_ U.S. Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Overnight Mail  
 Facsimile

Joshua S. Evett  
ELAM & BURKE, P.A.  
251 East Front Street, Suite 300  
P.O. Box 1539  
Boise, ID 83701

\_\_\_\_ U.S. Mail  
\_\_\_\_ Hand Delivery  
\_\_\_\_ Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Ryan B. Peck