11-15-2012

Guzman v. Piercy Clerk's Record v. 3 Dckt. 39708

(VOLUME 3)

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

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

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ORIGINAL

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

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' MOTION TO STRIKE AND NOTICE OF HEARING** August 22, 2007

COME NOW the above-captioned plaintiffs, by and through their counsel of record, and hereby moves this court to strike the following:

1. Defendant Piercy's "Federal preemption" argument, advanced in his motion for Summary Judgment;

2. The Second Affidavit of Dale Piercy in support of his Motion for Summary Judgment;

3. The Affidavit of E.G. Johnson in support of Piercy's Motion for Summary Judgment;

4. The Affidavit of Dawn McClure in support of Defendant Piercy's Motion for Summary Judgment;

5. The Second Affidavit of Rosemary Thomas submitted by Piercy in support of his Motion for Summary Judgment (Ms. Thomas' Third Affidavit).

This Motion, and Plaintiff's Opposition to Defendant Piercy's Motion for Summary Judgment is based upon Plaintiffs' Memorandum in Support of Motion to Strike, or in the alternative, Plaintiffs' Second Memorandum Opposing Piercy's Motion for Summary Judgment, upon plaintiffs' original memorandum and opposition to defendant Piercy's Motion for Summary Judgment, upon the affidavits and exhibits submitted in opposition to Defendant Piercy's memorandum, and upon the Affidavit of Deborah Schrecongost, submitted herewith.

Plaintiffs will call up and present for disposition the Motion to Strike before the Honorable Gordon W. Petrie at the Canyon County Courthouse, 1115 Albany Street, Caldwell, Idaho, on Thursday, September 6, 2007 at 1:30 p.m.

DATED this 22d day of August, 2007.

CHASAN & WALTON, LLC

Timothy C. Walton, of the firm, attorneys
for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 22nd day of August, 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

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

CHASAN & WALTON, LLC

Timothy C. Walton, 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

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

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ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

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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 DEBORAH SCHRECONGOST IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE

August 21, 2007

STATE OF IDAHO)
) ss
COUNTY OF ADA)

My name is Deborah Schrecongost and the statements contained herein are made from my own personal knowledge.

I am employed as a paralegal with the law firm of Chasan & Walton, counsel for plaintiffs in this matter.

I conducted a search of the Idaho State Historical Society's website and learned that from 1909 until 1993 there was published in Canyon County a paper by the name of The Parma Review. Attached hereto as Exhibit "A" is a copy of a document I downloaded from the Idaho State Historical Society's website documenting that that paper was published in Canyon County from 1909 until 1993.

I have not conducted an exhaustive search to determine if there were other newspapers published in Canyon County in 1982.

Further your Affiant saith not.

DATED this 21st day of August, 2007.

By _____
Deborah Schrecongost, Paralegal with
CHASAN & WALTON, L.L.C., counsel for
Plaintiffs

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 21st of August, 2007.

_____
Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires 2/24/2012

DOREEN R. GARDNER
Notary Public
State of Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 22nd day of August, 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
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Ryan Peck
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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

Timothy C. Walton, of the firm, attorneys for Plaintiffs

Exhibit "A"
Idaho State Historical Society website showing
The Parma Review, newspaper

Idaho State Historical Society

IDAHO NEWSPAPERS: N-R

Note! A "y" in the status column indicates the newspaper is contained in the ISHS collection and can be accessed through the Library & Archives. The designation "9999" in the Dates field indicates the paper is still being published and received at the Library and Archives.

CITY	TITLE	COUNTY	DATES	STATUS
Nampa	County-wide Sunday limelight	Canyon	1951:11:18-1952:7:13	y
Nampa	Daily Nampa leader-herald	Canyon	1930:10:23-1937:8:28	y
Nampa	Daily Nampa leader-herald	Canyon	1926:2:16-1936:6:11	y
Nampa	Idaho conservative	Canyon	1968:5	y
Nampa	Idaho free press	Canyon	1919:4:9-1980:6:30	y
Nampa	Idaho leader, 1899	Canyon	1899:10:28-1904:12:20	y
Nampa	Idaho leader, 1918	Canyon	1918:8:17-24, 1920:10:2-9	y
Nampa	Idaho leader, 1919	Canyon	1919:1:4-1919:12:20	y
Nampa	Idaho leader, 1920	Canyon	1920:1:3-1920:12:18	y
Nampa	Idaho press-tribune	Canyon	1980:7:1-9999	y
Nampa	Nampa evening leader	Canyon	1907:4:1-1907:8:31	y
Nampa	Nampa leader	Canyon	1898:5:6	y
Nampa	Nampa leader	Canyon	1898:5:6-1904:11:8	y
Nampa	Nampa leader-	Canyon	1904:12:27:-	y

	herald		1930:10:21	
Nampa	Nampa progress	Canyon	1889:9:14-1895:1:18	y
Nampa	Nampa times	Canyon	1902:8:30, 1904:5:20	y
New Meadows	Adams County advance	Adams	1914:12:4	y
New Meadows	New Meadows tribune	Adams	1912:1:2, 3:7	y
New Plymouth	New Plymouth outlook	Payette	1904:1:22-1906:4:6	y
New Plymouth	New Plymouth sentinel	Payette	1910:2:3-1926:5:6	y
New Plymouth	Payette Valley sentinel	Payette	1926:5:13-1970:1:1	y
New Plymouth	Red apple bulletin	Payette	1972:2:9-1991:6:26	y
Nezperce	assessment roll, village of Nez Perce (newspaper ver.)	Lewis	1917:6:17	y
Nezperce	Lewis County herald	Lewis	1957:4:18-9999	y
Nezperce	Nezperce herald	Lewis	1901:4:19-1957:4:11	y
Nezperce	Nezperce herald	Lewis	1920:12:23	y
Oakley	Oakley eagle	Cassia	1902:4:2, 1904:7:7, 1907:8:8, 1908:9:4	y
Oakley	Oakley eagle	Cassia	1905:9:14-1906:11:15	y
Oakley	Oakley herald	Cassia	1910:2:18-1961:2:9	y
Oakley	Oakley news	Cassia	1975:10:16 - 1978:7:20	y
Oakley	Oakley star	Cassia	1893:5:11	y
			1896:1:30,	

Oakley	Oakley sun	Cassia	2:20, 1898:11:3	y
Old Town	Gem State miner	Bonner	1983:9-1995:12:27	y
Orofino	Clearwater Republican	Clearwater	1912:3:28-1922:4:28	y
Orofino	Clearwater tribune	Clearwater	1922:5:5-9999	y
Orofino	Orofino courier	Clearwater	1899:5:19	y
Orofino	Orofino tribune	Clearwater	1906:3:23	y
Orofino	Orofino tribune	Clearwater	1910:1:7-1922:4:21	y
Osburn	Coeur d'Alene statesman	Shoshone	1890:8:29-1892:11:5	y
Osburn	Statesman	Shoshone	1893:2:11-1893:5:20	y
Oxford	Idaho enterprise	Franklin	1879:7:31-1882:9:7	y
Paris	Bear Lake booster	Bear Lake	1939:9:7-1941:6:26	y
Paris	Bear Lake Democrat	Bear Lake	1880:10:23-1885:10:9	y
Paris	Paris post	Bear Lake	1899:7:7-1966:7:31	y
Paris	Southern Idaho independent	Bear Lake	1885:10:23-1892:8:26	y
Paris	Southern Idaho independent	Bear Lake	1889:10:11	y
Parma	Gateway journal	Canyon	1995:3:9-1995:11:9	y
Parma	Parma herald	Canyon	1903:10:17-1917:10:11	y
Parma	Parma review	Canyon	1909:12:3-1993:6:29	y
Parma	Review	Canyon	1993:6:30-1995:3:8	y
Paul	Paul Idaho news	Minidoka	1977:5:11-1977:6:8	y
Payette	Independent	Payette	1937:1:2-	y

	enterprise		9999	
Payette	Payette enterprise	Payette	1909:9:2-1935:12:26	y
Payette	Payette independent	Payette	1891:6:4-1936:12:31	y
Payette	Payette independent	Payette	1907:7:26	y
Payette	Three rivers chronicle	Payette	1995:11:16-1996:12:12	y
Payette	Western recorder	Payette	1925:3:17-1925:7:1	y
Peck	Peck enterprise	Nez Perce	1910:2:17	y
Peck	Peck press	Nez Perce	1901:7:6 - 1904:11:19	y
Peck	Peck sun	Nez Perce	1908:1:24, 3:6	y
Pierce City	Pierce City miner	Clearwater	1902:3:21-1911:7:14	y
Pierce City	Pierce City miner	Clearwater	1910:10:14	y
Plummer	Couer d'Alene Council fires	Benewah	1990:2:5-1992:12:22	y
Plummer	Council fires	Benewah	1979:11-1981:9	y
Plummer	Plummer advocate	Benewah	1935:1-1937:10	y
Plummer	Plummer post	Benewah	1952:3:28-1954:8:13	y
Plummer	Plummer reporter	Benewah	1916:8:25 - 1916:9:1	y
Plummer	Plummer-Worley post	Benewah	1970	y
Pocatello	Bannock newsletter	Bannock	1959:2:5-1959:9:3	y
Pocatello	Daily Pocatello tribune	Bannock	1897:3:15-1897:5:15	y
Pocatello	Idaho examiner	Bannock	1932:12:10-1947:12:13	y
Pocatello	Idaho herald	Bannock	1889:9:27-1889:10:11	y
Pocatello	Idaho labor	Bannock	1933:4:15-	y

			1937:7:24	
Pocatello	Idaho State journal	Bannock	1949:10:2:-9999	y
Pocatello	Intermountain	Bannock	1967:7:27	y
Pocatello	ISU Techniad, Bengal, Speculum, Advocate	Bannock	1910:11:1-1980:5:7	y
Pocatello	Pocatello advance	Bannock	1898:12:23, 1899:2:10	y
Pocatello	Pocatello budget	Bannock	1935:6:29	y
Pocatello	Pocatello chieftain	Bannock	1936:1-1938:9	y
Pocatello	Pocatello free press	Bannock	1929:4:5	y
Pocatello	Pocatello post	Bannock	1947:12:7-1949:9:30	y
Pocatello	Pocatello shopper news	Bannock	1939:10:13	y
Pocatello	Pocatello tribune, weekly	Bannock	1893:1:6-1949:9:29	y
Pocatello	Tribune war bulletin	Bannock	1917:5:7-1917:5:13	y
Porthill	Port Hill news	Boundary	1916:4:1	y
Post Falls	Post Falls advance	Kootenai	1913:2:21-1948:10:26	y
Post Falls	Post Falls gazette	Kootenai	1889:3:1	y
Post Falls	Post Falls tribune	Kootenai	1963:10:28-9999	y
Preston	Cache Valley clarion	Franklin	1940:1:4-1941:12:25	y
Preston	Franklin County citizen	Franklin	1913:1:31:-1942:7:9	y
Preston	Preston booster	Franklin	1912:1:25:-1913:1:15:	y
Preston	Preston citizen	Franklin	1942:7:16:-9999	y
Preston	Preston standard	Franklin	1901:8:16 - 1902:9:5	y
Preston	Southeastern	Franklin	1913:12:3-	y

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	advocate		1914:12:30	
Priest River	Intermountain marketplace	Bonner	1984:12:4-1985:9:10	y
Priest River	Priest River enterprise	Bonner	1903:7:17	y
Priest River	Priest River times	Bonner	1914:4:16-9999	y
Rathdrum	Kootenai courier	Kootenai	1889:3:9: -1890:9:6	y
Rathdrum	Rathdrum tribune	Kootenai	1903:5:8-1963:5:8	y
Rathdrum	Silver blade	Kootenai	1895:6:1-1903:4:24	y
Rathdrum	Tribune	Kootenai	1963:3:7-1963:10:24	y
Rathdrum/Sandpoint	Kootenai County Republican	Bonner	1899:5:26-1903:10:30	y
Rexburg	Current-journal	Madison	1905:1:19 -1917:12:13	y
Rexburg	Enterpise citizen	Madison	1973:1:4-1976:12:2	y
Rexburg	Rexburg journal	Madison	1917:12:14-1984:8:23	y
Rexburg	Rexburg standard	Madison	1909:12:30-1984:8:21	y
Rexburg	Rexburg standard-journal	Madison	1984:8:28-9999	y
Rexburg	Rexburg standard-journal	Madison	1987:3:19-1987:3:24	y
Rexburg	Silver hammer	Madison	1894:1:5-1896:8:20	y
Richfield	Richfield recorder	Lincoln	1909:4:22-1931:4:7	y
Rigby	Jefferson County star	Jefferson	1979:1:3-1997:1:31	y
Rigby	Rigby star	Jefferson	1906:1:5-1975:12:25	y
Rigby	Star	Jefferson	1976:1:1-1978:12:27	y
Roberts	Gem State	Jefferson	1935:6:6	y

	sentinel			
Roberts	Market Lake citizen	Jefferson	1959:7:16-1970:12:10	y
Roberts	Roberts sentinel	Jefferson	1912:1-1914	y
Roberts	Roberts sentinel	Jefferson	1914:6:12	y
Roosevelt	Prospector & Thunder Mountain news	Valley	1904:11:12-1905:8:12	y
Roosevelt	Prospector & Thunder Mountain news	Valley	1904:11:5, 1906:8:18	y
Roosevelt	Prospector & Thunder Mountain news	Valley	1905:5:13	y
Roosevelt	Thunder Mountain news	Valley	1905:8:26	y
Roseberry	Long Valley advocate	Valley	1904:10:27-1907:11:28	y
Rupert	Minidoka County news	Minidoka	1919:3:13-9999	y
Rupert	Minidoka County patriot	Minidoka	1918:2:7-1919:3:6	y
Rupert	News journal	Minidoka	1988:5:11-1991:9:11	y
Rupert	Rupert Democrat	Minidoka	1917:5:23-1918:1:31	y
Rupert	Rupert pioneer	Minidoka	1905:9:14-1908:3:5	y
Rupert	Rupert pioneer-record	Minidoka	1908:3:25-1923:8:30	y
Rupert	Rupert record	Minidoka	1905:9:28-1908:3:19	y

problems to:
webmaster@ishs.state.id.us

Street, Suite
250
Boise, Idaho 83702
Phone 208-334-2682
Fax 208-334-2774

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 SUPPLEMENTAL BRIEF IN OPPOSITION TO NEW ARGUMENTS AND FACTS RAISED BY PIERCY

I. INTRODUCTION

Piercy has raised new legal arguments and asserted new facts in the course of briefing his motion for summary judgment. This opposition by Sutton addresses Piercy's federal preemption argument (first made in his Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment), and the Affidavit of E.G. Johnson.

II. ARGUMENT

A. Federal Peemption Does Not Invalidate Canyon County's Herd District.

Piercy argues that federal preemption invalidates the 1982 herd district ordinance at issue in this case. Piercy argues that states cannot regulate federal land within their borders, and that therefore the inclusion of BLM land within the 1982 herd district invalidates the herd district in its entirety.[1] Conveniently, - because whether or not the 1982 herd district includes BLM land is entirely collateral to the issue of who is potentially liable for Piercy's black bull being on Wamstad Road in March, 2005 – Piercy claims federal preemption voids the various statutory provisions relating to the liability of a livestock owner for injuries or damages caused by his livestock.

In an argument that strongly supports Sutton's position that this Court cannot decide the validity of the 1982 ordinance without Canyon County's involvement in the case, Piercy impliedly argues that federal preemption invalidates Canyon County herd districts enacted *as long ago as 1908. See, e.g.*, Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, p. 18 (arguing that 1908 herd district where accident occurred is void).

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[1] It is questionable whether this issue is even properly before the court. Neither the BLM or any other branch of the federal government has raised any concerns about the herd district at issue in this case. Piercy has not shown that enforcement of the herd district ordinance in his herd district will have any impact on the BLM land within the district. It is unknown whether that BLM land contains fencing of any kind or, if it does, who erected it. Certainly, if this were a case where one party – the federal government – disputed that Canyon County could enforce laws that conflicted with federal law and/or control of federal land, the Court could properly decide whether federal law preempted county law. This was precisely the situation in United States v. Shenise, 43 F.Supp.2d 1190 (D.Colo. 1999), where the federal government criminally prosecuted a rancher for wilfully trespassing his animals on federal land. The rancher defended based on Colorado's open range laws. The U.S. District Court in Colorado found that federal law preempted state open range laws. Whether or not the inclusion of BLM land in the 1982 herd district is preempted by federal law is not ripe for adjudication. There is no dispute between the federal government and anyone else. There is no evidence that Canyon County is attempting to force the federal government to fence in cattle that graze on federal land. Piercy cannot create a dispute or conflict between federal and state law where none exists, nor can he raise objections on behalf of the federal government.

This Court should not make such a sweeping ruling, one that clearly implicates the interests of Canyon County, without joining Canyon County as a party to this case.

Piercy relies on various cases in support of his preemption argument: *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190 (1983); *United States v. Shenise*, 43 F.Supp.2d 1190 (D.Colo. 1999); *Bilderback v. United States*, 558 F.Supp. 903 (D.Or. 1982); Zinn v. BLM, Interior Dec, CO 030-87-1 (Sept. 9, 1998); *United States v. Montgomery*, 155 F.Supp. 633 (D. Mont. 1957).

It is true that states do not have the authority to regulate federal lands within their borders, with the exception of police regulation and state laws regarding public health or public welfare. *See* 43 U.S.C. sec. 315n.[2] Piercy has submitted no authority, however, that state laws of general application that in some instances may affect federal lands are, as a matter of law, void in their entirety. So, as a preliminary matter, even assuming that the Canyon County ordinance affects a small part of the 1982 herd district that contains BLM land, Piercy has not established that this mere fact – under federal or Idaho law – voids the 1982 herd district in its entirety.

That point aside, Piercy cannot show that federal law would preempt the 1982 herd district ordinance even within BLM land.

---

[2] 315n reads as follows: Nothing in this subchapter shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this subchapter, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

First, as already noted there is no preemption of laws enacted for police regulation or public health and public welfare. *See* 43 U.S.C. sec. 315n. In this context, a case from Arizona supports the position that there is no preemption of state law regarding open range or herd district status to the extent such laws apply to private individuals who graze their livestock on federal land.

This is the Arizona case of *Ricca v. Bojorquez,* 13 Ariz.App. 10, 473 P.2d 812 (1970), which held that a person's grazing rights under the Taylor Grazing Act were subjected to state legislation creating a no fence district. In *Ricca,* the plaintiff was the holder of a grazing permit on federal land. He protested as unconstitutional the formation of a " no-fence district" as authorized by Arizona statute because he was not given notice prior to the enactment of the statute. The " no-fence district" legislation in effect reinstated the prior common law which held that an owner of livestock was liable for damage caused when his animals trespassed onto the land of another and the landowner had no duty to fence his lands to keep trespassing livestock out. Ricca complained that he was required to curtail the grazing activity of his cattle in and near the no fence district in order to avoid liability for trespass. A panel of the Arizona Court of Appeals rejected Ricca's argument, reasoning that the no fence district legislation was similar to town ordinances prohibiting the at large roaming of animals, and therefore an exercise of state police power permitted by Section 315n of the Taylor Grazing Act.

In *Ricca,* the result of legislatively creating the no fence district was to create liability for the BLM permittee when his cattle trespassed onto defendant's state land. Creation of the no fence district in effect made both federal and state lessees liable for trespass, thereby creating a uniformity and not a conflict between federal and state law.

The same reasoning applies here. The 1982 herd district creates uniformity in the law by making those who graze their livestock on federal and private land liable for damages caused by their cattle in certain circumstances. Herd district status does not create a conflict with federal law, and Piercy has not demonstrated any conflict. Therefore, his preemption argument fails.[3]

Second, the preemption issue is not properly before the Court. Piercy does not have standing to ask this Court to find that the 1982 herd district is void because it contains BLM land. Only the federal government or a private individual directly affected by inclusion of BLM land in the 1982 herd district can make a preemption argument. Piercy has not shown that he grazes animals on the BLM land, or that those who do now face a conflict between the 1982 ordinance Piercy challenges and federal law.

Piercy's argument is pure speculation. He has not shown a concrete dispute that gives him standing to challenge the 1982 ordinance based on a preemption argument. "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1132 (2000). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641 (1989). In order to satisfy the requirement of standing, the petitioners must "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief

[3] The Taylor Grazing Act expressly recognizes the operation of state law with respect to fencing. It provides: Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. 43 U.S.C. sec. 315c.

requested will prevent or redress the claimed injury." *Id.* Standing may be predicated upon a threatened harm as well as a past injury. *Harris v. Cassia Count*, 106 Idaho 513, 516 (1984).

B. Idaho Case Law Does Not Permit a Court to Invalidate an Entire County Ordinance Based on a Discrete Defect in the Ordinance.

Sutton does not dispute that the Idaho Supreme Court in its 1987 *Miller* decision voided the herd district at issue in that case because it contained BLM land. *See* Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, p. 10, citing *Miller v. Miller*, 113 Idaho 415 (1987). The *Miller* decision does not appear consistent with other Idaho cases, however, which permit county ordinances to stand if the valid portions of a challenged ordinance are "distinctly separable" from the remainder. In *Johnston v. Savidge*, 11 Idaho 204, 209 (1905) (citations omitted), the Idaho Supreme Court held that:

> Where the portion of the statute or ordinance which is invalid is distinctly separable from the remainder, and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected, and the remainder stand as valid and operative.

In similar contexts involving the exercise of municipal or county legislative power that exceeds the geographic limitations of an enabling act, the Idaho Supreme Court has not held that such exercise is invalid in its entirety.

For example, while the Idaho Legislature has given counties the right to regulate the sale of alcohol, it has not given counties the right to regulate the sale of alcohol within municipalities. In the same way that Piercy seeks to invalidate the 1982 herd district in its entirety because it contains federal land, in the case of *Hobbs v. Abrams,* 104 Idaho 204 (1983), plaintiff argued that a county ordinance intended to regulate the sale of beer in a county was void in its entirety because the ordinance did not explicitly exclude municipalities within the county.

The Idaho Supreme Court rejected this draconian approach and let the law stand. The Court affirmed that the ordinance did not apply to municipalities. It did not, however, void the entire ordinance. The Court held that while the regulation in question did not expressly exclude municipalities, that did not make it "invalid in the territory to which it is applicable." *Hobbs*, 104 Idaho at 207 (citations omitted).

There is no principled reason why a herd district that includes BLM land must be invalidated in its entirety. While Idaho Code sec. 25-2402(2)(a) provides that no herd district shall contain any lands owned by the United States of America or the State of Idaho on which grazing has been historically permitted, nothing in the herd district statutes requires voiding such a herd district in its entirety.

Taking Piercy's argument to its logical conclusion would have absurd results. Idaho Code sec. 25-2402(2) also provides that a herd district cannot "[r]esult 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" or "[p]rohibit trailing or driving of livestock from one location to another on public roads or recognized livestock trails." *See* 25-2402(2)(b) and (c). Under Piercy's approach, a herd district that did either of these things would be void in its entirety.

No one disputes that *if* this case involved an effort to hold a county liable for personal injury (which it does not) or *if* this case involved an effort by the county to prohibit trailing of livestock from one location to another on public roads, this Court could grant relief from the ordinance to the party affected by the violation of the ordinance.[4] It is absurd, however, to

[4] E.g., in a case where a plaintiff sought to have a city held liable in a livestock-auto accident, the city could have the case dismissed.

conclude that the Idaho Legislature intended for individuals in Piercy's situation to have a herd district declared void in its entirety because of defects in an ordinance that are completely collateral to the liability of a livestock owner created by herd district status.

Stated differently, what statutory support is there for the proposition that Piercy is immune from liability in this case simply because there is BLM land within the 1982 herd district? It would be absurd - in a hypothetical case involving a herd district ordinance that provided for state liability in violation of subsection (b) - for Piercy to argue that such a provision voids the entire ordinance and he escapes liability.

The more sensible approach, supported by the 1905 *Johnston* case, is that the ordinance *simply does not apply* in the circumstances forbidden by the enabling act. The imposition of herd district liability, being "distinctly separable" from the remainder of the herd district statutes, remains valid. *Johnston*, 111 Idaho at 209. To hold otherwise would be to permit Piercy to escape liability because a small percentage of land in the 1982 herd district contains BLM land, an issue that is entirely collateral to the issue of Piercy's responsibility to fence in his livestock under that ordinance.

C. E.G. Johnson's Affidavit Supports Application of the Doctrine of Estoppel by Laches

Mr. Johnson's Affidavit supports application of the estoppel by laches doctrine. Mr. Johnson has known that his property has been in the herd district enacted in 1982 by the Canyon County Commissioners since 1982. Nevertheless, he apparently took no steps to challenge enactment of that ordinance.

Mr. Johnson has believed his farm has been in a herd district since 1982. He has ordered his affairs accordingly. It is too late to complain about technical aspects of the ordinance's passage.

D. **Testimony of Law Enforcement Personnel Supports Application of the Doctrine of Estoppel by Laches**

In her opposition, Sutton noted that law enforcement personnel who responded to the accident believed that cattle were not allowed on the road where the accident occurred. Sutton offers the following testimony from these officers:

> Q: Did you have a conversation with Mr. Piercy?
>
> A: My only conversation with him really was trying to establish whether this animal was his or not. Because if it was his, of course, my FTO had informed me that we were going to have to cite him for his animal being on the roadway because there is no open grazing in Canyon County. And so we were going to cite him for his animal being on the roadway.

Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition To Defendant Piercy's Motion for Summary Judgment, Exh. A., Heng Depo., p. 28, l. 24 – p. 29, l. 8.

> A: * * * * * With this being a closed range county the cattle aren't supposed to be out on the roadway. And if a cow was up on the roadway, it's not supposed to be there.

Id., Exh. B., Herrera Depo., p. 41, ll. 6-9.

> A: * * * * * There was a bull in the roadway, that is not where the bull should be. In my opinion, I'm telling you we know what caused the accident, *we've done numerous of these*. The bull should be behind the fence.

Id., Exh. C., Sloan Depo., p. 83, ll. 17-22.

The officers who responded to and invesigated this accident understood that cattle were not permitted on roads in Canyon County. This has been the law for 25 years. Deputy Sloan noted many such similar accidents, and that the conclusion is always the same (because Canyon County is a herd district): the animal is not permitted on the roadway.

The 1982 ordinance is too old and too established to be thrown out 25 years after the fact.

DATED this 24th day of August, 2007.

ELAM & BURKE, P.A.

By _____
Joshua S. Evett
Attorneys for Defendant Jennifer Sutton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th 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
Ryan B. Peck Saetrum Law Offices P.O. Box 7425 Boise, ID 83707	____ U.S. Mail ____ Hand Delivery ____ Overnight Mail __✓__ Facsimile

Josh Evett

Joshua S. Evett

Joshua S. Evett
Meghan E. Sullivan
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
Sullivan - ISB #7038

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 and LUIS J. GUZMAN, Plaintiffs, v. DALE PIERCY, individually and JENNIFER SUTTON, individually, Defendants.	Case No. CV05-4848 AFFIDAVIT OF MEGHAN E. SULLIVAN IN SUPPORT OF DEFENDANT SUTTON'S OPPOSITION TO DEFENDANT PIERCY'S MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Ada)

Meghan E. Sullivan, having first been duly sworn, upon her oath deposes and says as follows:

1. I am one of the attorneys for Defendant Jennifer Sutton ("Defendant") in the above-captioned case, and I make these statements based on my personal knowledge and information.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts from the deposition testimony given by Deputy Gerald Heng on August 10, 2006: 29:1-8.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the deposition testimony given by Sergeant Todd Herrera on September 19, 2006: 41:1-9; 41:13-20; 62:22-63:4.

4. Attached hereto as Exhibit C is a true and correct copy of excerpts from the deposition testimony of Deputy Eron Sloan on August 10, 2006: 42:21-24; 83:16-22.

5. Attached hereto as Exhibit D is a true and correct copy of excerpts from the deposition testimony given by Deputy Bryce Smith on September 19, 2006: 43:3-6.

DATED this 24 day of August 2007.

Meghan E. Sullivan

SUBSCRIBED AND SWORN to before me this 24 day of August 2007.

NICHOLE PAPPAS NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise
Commission expires 1/10/2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th 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:

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Josh Evett

Joshua S. Evett

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,	)	Case No. CV05-4848
Plaintiffs,	)	
vs.	)	
DALE PIERCY, individually and JENNIFER SUTTON, individually,	)	
Defendants.	)	
_____	)	

DEPOSITION OF DEPUTY GERALD HENG

August 10, 2006

REPORTED BY:

BEVERLY A. BENJAMIN, CSR No. 710, RPR

Notary Public

vehicle south of the bridge itself, just off the northbound lane, off the side of the road to not block traffic, which of course was already blocked anyway, nobody was going across.

However, we exited the vehicle, walked up on the scene. The first thing I visually seen, of course, was the cow laying in the southbound lane, being as large as he was, and then around the cow was debris from the vehicle itself. Then further on up the road in the southbound lane of the bridge was the vehicle itself.

I didn't get a good look at the vehicle at that point because I was still standing considerably far back. However, nothing I could do for the cow at that point in time; in fact, I believe somebody was trying to make contact with the owner of the animal. If I remember correctly, it was a Parma officer --

Q. Calhoun?

A. Calhoun, thank you.

-- that indicated that he believed that the animal belonged to Mr. Piercy. And so they were trying to contact Mr. Piercy at that point to have him come out and identify the animal.

At that time myself and Deputy Sloan proceeded forward up the bridge or further north up the bridge, and then I got a better look at the vehicle, and pretty much the entire front end of the vehicle was caved in, I'm assuming from impacting the cow, that would be a reasonable assumption, and in fact that was the case.

Q. Were the occupants in the vehicle still present?

A. We were actually at that time waiting for -- somebody had already called in Life Flight for the female passenger. Ms. Sutton was at the time being attended to in an ambulance that was on location. The female passenger, I don't remember her name exactly.

Q. Erika Rivera, my client.

A. Thank you. Ms. Rivera, we were waiting for Life Flight for her. And Mr. Guzman was -- I don't remember if he was in another ambulance or the ambulance that he was in had already taken off. He was taken to Mercy Medical at first. So all three occupants of the vehicle were actually being attended to by medical personnel. So at that point we didn't have any contact with them whatsoever.

Q. So then what happened?

A. We basically contained the scene until Mr. Piercy came on location, and I myself questioned Mr. Piercy, asked him if that was his animal. He said he believed that it was his animal. Apparently he had some animals out in the surrounding fields there.

Q. Do you know how he identified this bull as his?

A. By the markings on the bull. I believe there was a tag on the ear.

Q. Did you notice what that tag was all about?

A. It's a numbering system that each rancher will use for their animals.

Q. You didn't make notes of the specifics on this bull?

A. No, not other than the fact that it was a bull of black fur; it was covered with black fur; it was large in size. That was about it. I didn't make any notations on the numbering.

Q. On the ear tag, that is what I meant.

A. Right. No.

Q. Did you have a conversation with Mr. Piercy?

A. My only conversation with him really was trying to establish whether this animal was his or not. Because if it was his, of course, my FTO had informed me that we were going to have to cite him for his animal being on the roadway because there is no open grazing in Canyon County. And so we were going to cite him for his animal being on the roadway.

Q. So what conversations did you and Mr. Piercy have?

A. After establishing that this animal was his by his own indication, I don't remember verbatim word for word what we spoke of, but I did inform Mr. Piercy that I was going to have to cite him. It was a misdemeanor charge, a county charge, as a matter of fact, for his animal being on the roadway. I apologized to him for having to give him the citation, but I did let him know it was his responsibility to maintain his animals, so that is why I was having to cite him.

Q. Did Mr. Piercy discuss with you how the animal got out?

A. He didn't. Well, I shouldn't say he did not. He asked me if we had seen anywhere in the fence line where the animal had gotten out,

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,	)	Case No. CV05-4848
Plaintiffs,	)	
vs.	)	
DALE PIERCY, individually and JENNIFER SUTTON, individually,	)	
Defendants.	)	

DEPOSITION OF SERGEANT TODD HERRERA

SEPTEMBER 19, 2006

REPORTED BY:

MONICA M. ARCHULETA, CSR NO. 471

NOTARY PUBLIC

Q. Anything else about this accident that you can talk about that we haven't talked about that you recall?
A. I don't. You know, you might query the Parma QRU folks or some of those medical people that were out there. They might be able to tell you a little bit more about interaction with the patients and whatnot.
Q. I want to ask you about your experiences you have had, if any, with Mr. Piercy and his livestock getting out.
A. I haven't. And when I looked it up on Spielman this morning it looked like somebody else had been out and referenced that this year or something like that. Maybe last year. Since this time. Because I notice there was entry in the log table or something. It looks like a Parma police report. Parma City had dealt with him. But I haven't.
Q. Have you ever had experience with Mr. Piercy's livestock getting out on any occasion?
A. No. I dealt with livestock around the county. But not in that location with Mr. Piercy.

Q. Do you recall what part of the bull was injured?
A. I do not. You know, it seemed -- if I had to take a guess I would guess it was bleeding from the nose. Maybe some facial or head type of injury.
Q. You're guessing?
A. I'm guessing. It almost seems like one of the back legs. But I have dealt with several over the years. But that is the impression I get from just guesstimating.
Q. Recognizing this might be a delicate question. Not meaning to embarrass anybody. Is there a reason Officer Heng has not gone back to patrol?
A. I am not sure why he was removed from patrol personnel wise. Like I say, I was transferred out of division about two weeks later to take an emergency management position. I'm not sure of the outcome of his FTO.
Q. Of his what?
A. Field training officer program. His training program
MR. WALTON: I believe that is all I have. These folks might have questions for you.

MS. MEIKLE: I do. I apologize, but I need to take a two-minute break.
(Recess.)

EXAMINATION
QUESTIONS BY MS. MEIKLE:
Q. We are back on the record. Sergeant Herrera, I do want to ask you some questions. We were off the record and you indicated that -- and I'm trying to rephrase what you had just stated. You had just stated that --
A. About the seriousness of the accident?
Q. Well, you were stating with regard to the fact that you thought this was a cut and dried incident. That a bull was on the road.
A. Yes.
Q. Can you clarify what you were saying?
A. Well, you know, my impression is, and with a feeling of working in traffic accident cases, is that through the sheriff's office we are looking for criminal prosecutable cases. And so the officers out there that night, and I'm not speaking for them, but the impression they are trained to do is to look for those criminal cases where something can be prosecuted or not. Where

is the criminal problem there? In Idaho, Canyon County, for the most part, 98 percent is closed range county. I think we've got a couple spots of open range in the very southern tip, and maybe a little bit up in the northern tip, of the county. With this being a closed range county the cattle aren't supposed to be out on the roadway. And if a cow was up on the roadway, it's not supposed to be there. Maybe that's the intent of the cow. And I'm not speaking for owners or anything like that. I don't know the intent of the owner and his fence or anything like that. Or how the cow got out. But the cow is not supposed to be there. That's number one. It is not supposed to be up on the roadway. So cut and dry. The cow was on the roadway and it caused an accident. So the cow then would be technically at fault. And so it is fairly cut and dry that the cow was there and that is what caused the accident.
Q. So is it fair to say you weren't taking these measurements and doing these -- completing Exhibit 3 to make a determination as to the driver or any other fault? Because you had made a determination that the cow was on the road

fairly cut and dry. Whereas, it is quite obvious as to what the outcome of the wreck was. But that is just the once and rare occasion. For the most part, though, 99 percent of the time on an accident fatality we'll do a reconstruction or have the State come out and do those. We have two reconstructionists and sometimes it is hard to get them at the end of the week to come out if they are not available, or if they are out of town, or whatnot.

And on this one we had just one vehicle involved. It is not involved with another vehicle. Where a reconstructionist might be brought out if there is two vehicles involved where you can show the fault of the other vehicle. Either/or. If you have a crash with two vehicles at an uncontrolled intersection you are probably going to want to be able to determine who entered the intersection first. Or who had the right-of-way. Who ran the stop sign. Who didn't yield. Who did what or when.

One vehicle involved with a cow -- I'm sorry, but the impression is that it is a fairly cut and dry accident. The cow is at fault. We know what caused the accident. We don't know if

the cow got out of the pen. Or maybe it was going to the other pasture. But the cow was up on the roadway. And that was the primary cause of the accident.

Q. So based on that fact, once you determined that the cow was on the roadway, and that is what you determined to be the primary cause of the accident, there wasn't a further investigation as to the driver?

A. No.

Q. Is that correct?

A. Right. And that might not be the case. If an officer found out the driver was drunk, then, sure, he is going to follow through with that. And follow through with even going back to the hospital and maybe doing a blood draw or something. And seeing what the alcohol content of the driver was. And I don't know what the other two officers found there. It seems like when I looked in the vehicle, and from the photos, it didn't seem like there was anything alcohol obvious to be seen or not. I'm not sure if they found anything there or not.

Q. Did you actually look in the vehicle?

A. Just probably from the distance that

the photographs were taken. As I walked by the vehicle, and looked, and said, "Ooh, good crash."

Q. So you didn't do an investigation?

A. No, I didn't.

Q. Do you know if one was done?

A. Those officers should have done an inventory when they did the accident. And I didn't see an inventory sheet in there, also. That should have been in there. Which would have documented if they found alcohol. Whatever they found they would have documented it on the inventory sheet.

Q. Was there any discussion with the officers about doing an inventory of the vehicle?

A. I didn't have any discussion with them on that.

Q. But one should have been done?

A. If the vehicle was towed by a tow truck at our request we do an inventory sheet. If it was something that they requested, an inventory sheet might not have been done. If Uncle Joe came out with the wrecker or something like that and towed it away. And sometimes when they are using -- these people might have said, "Oh, we are calling Parma." Which has its own wrecker.

Which isn't on our wrecker list. And then an evidence sheet might not -- or an inventory sheet might not have been done.

Q. But it would be protocol to actually inspect the vehicle --

A. Yes.

Q. -- at the time? Regardless of how it is being towed?

A. Yes. I would suggest to those officers that they should do that inspection.

Q. And that should be noted in the report?

A. Because that goes back to what you are kind of after here, too. You are looking -- you want to make sure that, you know, them hitting the cow, that there wasn't something else along there. Be it -- you know, this guy is trying to commit suicide or something by running into a cow or a wall. Or there is a homicide. Or there is bald tires on the thing. No headlights. That is part of the whole thing is just to kind of -- part of the investigation is looking at things and seeing if there is things obvious that just aren't right there.

You know, you could do the "what if" game and say, what if these people were drag

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,	)	Case No. CV05-4848
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

A. We ID them, we talk to them, get their side of the story, what happened, and just collect evidence that way, either verbal statements or just looking at the scene itself.
Q. What is the purpose of talking to them?
A. We weren't there when it happened, so you need to get everybody's side of the story. If there is just one vehicle involved, you are just talking to the driver, you try to get as much information as you can. If there's other witnesses, you just try to take it all in and you develop your own opinion with evidence that way.
Q. Counsel asked you about the determinations you made at the scene. You said that there was a bull in the road and a car hit the bull. Why didn't you investigate the driver?
A. When you are asking "investigate," what are you asking?
Q. In terms of the driver, any causation by the driver?
A. Because it's pretty self-explanatory what happened. We know what happened. Because it's obvious, because there was a bull in the road. It's not the driver's fault.
Q. What if the driver were impaired?

A. What is that?
Q. What if the driver were impaired?
A. Would it be their fault if they hit a bull in the road?
Q. If they were impaired?
A. Possibly.
Q. But you didn't do an investigation of whether the driver was impaired; correct?
A. Did I do an investigation? No.
Q. Did anyone do an investigation with regard to the impairment of the driver?
A. Me and Deputy Heng did not.
Q. Why was there no testing done with regard to alcohol or drugs on the driver?
A. Sergeant Herrera was in charge. I was not in charge. You'll have to ask him. We conducted -- if you want me to elaborate, I can as much as possible --
Q. Please.
A. -- if you need that. We conducted an interview with the driver at the hospital who spoke just fine. We had no indications of any type of alcohol, drugs, and we always have the indications when we are on the scene, either alcohol in the car, smell. And Deputy Smith also

informed us at the scene that there was no indications of any of them.
Q. Did Mr. Piercy -- do you know if Mr. Piercy asked that any blood testing or breath testing be conducted on the driver?
A. Not to me. I don't remember him saying anything.
Q. How long after you arrived at the scene did you have the conversation with Ms. Sutton at the hospital; do you know how long that was?
A. I can look on the radio log. I can look and tell you.
Q. Would you check for me?
A. It was quite a ways after that, but let me see. (Reviewing document.)
I believe it shows in the radio log history, which you guys have labeled page 10, I think, unit number is 5259, which is Deputy Heng, at 01:19 hours on March 21st, '05. It says: We arrived at West Valley for follow up. It says: "WV," which is West Valley, "FUP" is follow up.
Q. So is that about three hours after the initial officer arrived?
A. Close to it.
Q. And Deputy Sloan, you and I have

chatted before, correct, on the phone?
A. Yes.
Q. Does January 18th pretty much -- is that about the time you recall having a conversation with me?
A. I chatted with you a couple times and then I talked with you, of course, in the courtroom. I don't remember when it was.
Q. And I had asked you about the testing at the scene and you indicated -- do you recall telling me that you didn't think that Officer Herrera wanted testing done?
A. Yeah, because he never directed us to do that. That is why I said that.
Q. Were you present during any conversations in which testing was discussed?
A. No. I don't remember that, no.
Q. You indicated that Officer Smith had indicated there were no indications of the smell of alcohol. To the best of your recollection, what was the conversation you had with Deputy Smith about this?
A. It was -- I didn't have a conversation with Deputy Smith. It was a group conversation while I was doing -- because everybody was doing

A. Are you talking about like impact sites, where there is actually huge chunks of asphalt out of the road because the vehicle slams into the pavement? Yeah. That is different than skid marks.
Q. Did you see any of that at this scene?
A. Yeah. I don't remember exactly where they were though. So the skid marks and impact points where the vehicle slams against the asphalt is different than skid marks and we know what those are.
Q. But you don't recall what the location is of those?
A. No.
Q. Earlier you testified that the speed limit was 50 miles an hour?
A. Yes.
Q. And you indicated that Ms. Sutton actually testified that she thought she was traveling about 55 miles an hour?
A. Correct.
Q. So technically she was speeding from the information you were given?
A. Yes. She said possibly, yeah, traveling about 55.

Q. There was no accident reconstruction to determine her speed; correct?
A. We did not go that far, do the reconstruction to figure out her speed because that wasn't the issue. We know what happened, we know what caused the accident.
Q. You are saying you know what caused the accident. Do you know how long it took the vehicle to get stopped?
A. Do I know? No.
Q. If you don't know Ms. Sutton's speed, if you haven't done an analysis as to her speed, is it possible that she was driving faster than her -- over-driving her headlights, if it were? Do you know what I mean when I say that?
A. Yeah, I understand what you are saying. But that is not what caused the accident. There was a bull in the roadway, that is not where the bull should be. In my opinion, I'm telling you we know what caused the accident, we've done numerous of these. The bull should be behind the fence.
Q. What if the driver isn't paying attention; could that be part of the cause?
A. Could it be?

Q. Yes.
A. Possibly.
Q. Okay.
A. But --
MR. WALTER: Wait a second. He was going to finish an answer.
THE WITNESS: I don't know if you want -- are you asking for my opinion in these things?
Q. (BY MS. MEIKLE) I'm asking for you --
MR. WALTER: Let him answer, kindly, Counsel.
MS. MEIKLE: He asked me a question. I'm clarifying.
THE WITNESS: Do you want my opinion and why --
Q. (BY MS. MEIKLE) I'll restate the question. Is it possible that a driver is not paying attention and didn't see the object soon enough to stop?
A. Are you talking about in this case?
Q. Is it possible that could have happened?
A. We wouldn't have had skid marks then. She would have just hit the bull. She at least

hit her brakes, that is what I can tell you. At least she reacted initially to either: Okay, we hit something because it's black and it's pitch dark out here and we couldn't really see possibly because it's dark. If this big black bull -- and things happen just like that, but at least we had skid marks, so there was some reaction there.
So I don't know how you want me to answer your questions, but in my opinion, and I can just tell you that, what I think.
Q. In typical accident reconstructions do you ask the driver what they were doing right before impact?
A. It depends. If we have a case where, okay, they ran through a stop sign or there was a sign or a signal where they should have saw or if we have a witness who saw them on a cell phone, things like that, possibly. But not every accident do we ask them: What were you doing right before you ran off the road or --
Q. So in this case did you ever interview Mr. Guzman?
A. I didn't.
Q. So do you know whether someone was using their cell phone at the time?

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	)	Case No. CV05-4848
GUZMAN, his father and natural	)	
guardian,	)	
Plaintiffs,	)	
vs.	)	
DALE PIERCY, individually and	)	
JENNIFER SUTTON, individually,	)	
Defendants.	)	

DEPOSITION OF DEPUTY BRYCE SMITH

SEPTEMBER 19, 2006

REPORTED BY:

MONICA M. ARCHULETA, CSR NO. 471

NOTARY PUBLIC

investigate the driver and determine if there were causes to the accident?
A. Absolutely. But I did not do the crash investigation.
Q. Okay. But you are assuming that another officer would?
A. I knew they would. They requested to take the investigation.
Q. So your assumption is that they -- but they didn't arrive until later on; correct?
A. Correct. Several minutes later.
Q. Is it typical to have the primary officer that is doing the report be one that is not responding until later?
A. For training purposes, yes. That is how you gain experience.
Q. So you're assuming that the other officers who were conducting the crash investigation would have asked the questions that we talked about in terms of what was happening in the car, where they were going, what they were doing?
A. If there were no other cause for the crash, if they had just driven off a straight road, then, yeah, we look pretty hard at things

like that. If you are driving down the road and hit a bull, that's another scenario.
Q. How is that different in terms of a driver's attention or impairment?
A. Because the bull shouldn't have been in the road.
Q. But just because a bull is on the road doesn't mean necessarily that the driver isn't A, impaired, also. Or B, distracted.
A. Correct. Which all comes as part of the crash investigation. Which I didn't do.
Q. But you are assuming that those questions in the investigation should have been conducted?
A. Correct.
Q. Deputy, what did you do to prepare for your deposition today?
A. I gathered the requested information and brought it with me. Other than that, I glanced over the crash report just to refresh my memory. That's about it.
Q. Have you talked with any other individuals about this accident before -- recently in preparation for your deposition?
A. No.

Q. Have you reviewed any transcripts of depositions in this case?
A. I have looked at some of the exhibits. Diagrams and things. Just to refresh my memory. Just today when I got here.
Q. Have you talked to any of the officers involved in this accident recently?
A. Specifically about the accident, no. They are on my team. So we associate.
Q. Did you talk with anyone else such as counsel in preparation for your deposition?
A. No.
Q. When Deputy Sloan and Heng arrived at the scene did anyone talk to you about your contacts with the driver?
A. We spoke regarding -- I gave them their personal information so that that could be included in the report. I don't know as to whether they made further investigation with the people involved at the hospital or not. I would have if I would have been doing the investigation. But I don't know if they did that or not.
Q. When they arrived on the scene -- and when I say "they" I mean Deputy Sloan and Deputy

Heng -- was the driver and Mr. Guzman still at the scene?
A. They were at the scene, but they were in separate ambulances being checked out.
Q. Okay. And back to my previous question. You indicated that you gave Deputy Sloan and Heng the identification information that you had asked for.
Did you have a conversation with them about your contacts with the driver?
A. No. I just gave them the information so they could have it.
Q. So they didn't know if you had asked any questions of her?
A. Huh-uh.
Q. Was that a "no"?
A. That was a no.
Q. I just want to make the record clear. Did you ever have a conversation with Deputy Sloan or Heng after you left the scene with regard to your conversations with the driver?
A. I don't believe so. Oftentimes we confer and compare notes before we write reports. And that may have been the case. But I don't recall that specifically.

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

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 **REPLY TO PLAINTIFFS' AND CO-DEFENDANT'S RESPONDING MEMORANDUMS AND MOTION TO STRIKE CO-DEFENDANT'S SUPPLEMENTAL BRIEF**

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, it has been necessary for Defendant Piercy to file additional memorandums and affidavits as new evidence was revealed. This memorandum is filed as a reply to the Plaintiffs' and Co-Defendant's responding memorandums.

Defendant Dale Piercy also moves this Court to strike the Co-Defendant's supplemental memorandum as being untimely or in the alternative to allow Defendant Piercy additional time to file supplemental briefing solely on those portions involving new law and argument.

II. LAW AND ANALYSIS ON DEFENDANT PIERCY'S MOTION TO STRIKE CO-DEFENDANT'S SUPPLEMENTAL MEMORANDUM

Idaho Rule of Civil Procedure 56(c) states:

> The motion, affidavits and supporting brief shall be served at least twenty eight (28) days before the time fixed for the hearing. If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least 14 days prior to the date of the hearing. The moving party may thereafter serve a reply brief not less than 7 days before the date of the hearing. ...

Co-Defendant Sutton filed Defendant Sutton's Supplemental Brief in Opposition to New Arguments and Facts Raised by Piercy on, Friday, August 24, 2007, which was approximately one day past the deadline for filing a responding memorandum in this case. This Brief was facsimiled to our office at 4:56 p.m. (Affidavit of Ryan B. Peck in Support of Motion to Strike, Exhibit A.) The time of facsimile made it so that this document would not be reviewed until Monday morning. *Id.* Co-Defendant Sutton has provided no reason for the delay considering that Co-Defendant Sutton has had almost four months to prepare and file a responsive memorandum.

Defendant Piercy would be greatly prejudiced by this late filing. Defendant Piercy has had to respond to Plaintiffs' briefing and affidavits, Plaintiffs' motion for punitive damages, Plaintiffs' motion to strike and Co-Defendant Sutton's original responsive briefing. To force Defendant Piercy to also respond to late briefing which adds new arguments and law would be

extremely unfair. Therefore, Defendant Piercy requests that the Court strike Co-Defendant Sutton's Supplemental Brief in Opposition to New Arguments and Facts Raised by Piercy.

If the Court does decided to consider the arguments and law presented in Co-Defendant's brief, Defendant Piercy requests that he be allowed to provide supplemental briefing regarding any new law or argument contained in Co-Defendant Sutton's supplemental brief.

III. REPLY TO PLAINTIFFS' RESPONSIVE MEMORANDUMS

Despite the arguments in the Plaintiffs' responsive memorandums the evidence provided by Defendant Piercy conclusively 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.

1. The Canyon County Commissioners did not act pursuant to a petition.

Defendant Piercy in his memorandums and affidavits have provided conclusive evidence that the Canyon County Commissioners in 1982 invalidly attempted to create a county-wide herd district by ignoring the steps necessary in establishing a herd district at that time and exceeding their authority as provided by I.C. § 25-2402-2409.

The evidence that has been presented thus far establishes that the Canyon County Commissioners in 1982 did not act pursuant to a petition as required. Not only does the order and minutes exclude mention of a petition or any indication that a petition was discussed, but

the minutes provided specifically that the motion to create a herd district was made by Del Hobza and not pursuant to a petition. (Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment filed on July 2007 at). Neither Plaintiff nor Co-Defendant in their responding briefs attempt to refute this clear evidence. In addition to the above evidence, Plaintiff has submitted affidavits from two significant landowners, Mr. Piercy and Mr. Johnson, in the open range area that the Commissioners attempted to include in a herd district pursuant to the 1982 ordinance which is shown by the area outlined in red and striped in blue on Exhibit A to Defendant Piercy's initial memorandum. It would be surprising to suggest that a petition attempting to include their land in a herd district would be circulated and a hearing had without Mr. Johnson having been privy to that information.

It is significant that neither Plaintiffs nor Co-Defendant have provided any positive evidence that the Canyon County Commissioners acted pursuant to a landowner petition after having four months to research these issues. All the evidence weighs in favor of the conclusion that the Canyon County Commissioners were not acting pursuant to a petition.

2. The Canyon County Commissioners did not include any metes and bounds in their order or discussions concerning the 1982 ordinance.

While it is true that the 1963 version of I.C. § 25-2402, does not specifically say that a metes and bounds description must be in the order, it can be presumed by the requirement. It does not provide any notice to the citizens of Canyon County that a herd district has been created without specifying the bounds of that herd district.

Plaintiff also contends that the Canyon County Commissioners were specifying

boundaries by stating that the entire land area of Canyon County is the herd district. (Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment at 17.) This argument is in direct contradiction to their argument that the Canyon County Commissioners only created a herd district containing the three remaining open range areas in Canyon County. *Id.* at p. 9, fn. 7.) Plaintiffs need to choose which argument they are making. If they are claiming that the Canyon County Commissioners were creating a county-wide herd district, then this does potentially answer the metes and bounds problem. If Plaintiffs are arguing that the ordinance only created one herd district containing three specific areas, then the metes and bounds requirement was not met and the ordinance is invalid. It is contrary to justice to allow an ordinance to create legal obligations with no reasonable way for people to determine the area of effect of that ordinance.

3. The Canyon County Commissioners failed to specify a certain time in their order when the herd district was to take effect.

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.

Plaintiffs made arguments to this issue in their first response. *Id.* at p. 18. This argument was refuted by Defendant Piercy. (Supplemental Memorandum in Support of

Defendant Piercy's Motion for Summary Judgment filed July 30, 2007, at p. 8 and 9.) Neither Plaintiffs nor Co-Defendant has provided any evidence or rational to refute Defendant Piercy's argument. This constitutes a facial defect in the 1982 ordinance, which is fatal to Plaintiffs' arguments that it is impossible, 25 years later, to determine if the Canyon County Commissioners failed to validly enact the 1982 ordinance. It is beyond dispute that they failed to follow the express requirements provided in the 1963 version of I.C. § 25-2402-2404.

Because it is beyond dispute that the Canyon County Commissioners failed to follow such an obvious requirement, this is evidence that they failed to even read the provisions of I.C. § 25-2402-2404, or that they were choosing to ignore them.

4. The Canyon County Commissioners failed to properly provide notice of a hearing on the alleged creation of a herd district.

Defendant Piercy admits that this specific argument was not presented until the filing of the July 30, 2007, supplemental memorandum. This may have been a cause for an objection by Plaintiffs or Co-Defendant, but they chose to move the hearing date to cure the problem. Defendant Piercy has relied on that action in moving the date of the hearing to September 6, 2007, as a cure to any objection. Plaintiffs, however, now request that the Court strike this argument and the information supporting it. Despite the fact, that the information and argument provided is very harmful to Plaintiffs position, Plaintiffs have had over a month to find evidence to respond to this argument, which is adequate under the rules.

Plaintiff in responding to this argument contends that the statute does not specifically state when the notices would have to be provided. The only logical reading of the statute is that the

Canyon County Commissioners were required to provide notices for the two weeks prior to the hearing. Allowing the Commissioners to provide notices at any time prior to the hearing would defeat any reasonable purpose of that provision.

The Affidavit of Dawn McClure establishes that there were no notices provided in the Idaho Press Tribune for over a month prior to the hearing on the 1982 ordinance. (Affidavit of Dawn McClure, Exhibit 1; and p. 2.) It is clear from the content of the newspapers provided that the Canyon County Commissioners at the time were using the Idaho Press Tribune to post their legal notices. Further, no notices were found that a hearing was to be held. Plaintiff makes the claim that perhaps the notice was posted in another newspaper at the time. Plaintiff even provides an affidavit providing evidence that another paper existed in Canyon County at the time and was easily located. More interesting is that Plaintiff does not provide any evidence that a notice of the hearing was issued. If it is so easy to locate and review these newspapers, why did Plaintiff not review them? The only evidence before the Court is that the Canyon County Commissioners failed to provide notice of the hearing regarding the 1982 ordinance in violation of I.C. § 25-2402-2404.

Plaintiff then argues that if the notices were not provided then Defendant Piercy has not been prejudiced by that lack of notice. This argument is not relevant to the issue of whether or not the County Commissioners validly established a herd district. Plaintiffs argument simply is a repeat of his estoppel argument, which is refuted below.

5. As evidenced by Plaintiffs original responsive brief, the Canyon County Commissioners improperly attempted to include open range areas in their 1982 ordinance.

Plaintiff points out one more facial defect in the 1982 ordinance creating a county-wide herd district. (Plaintiff's Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment at p.4, fn. 3.) Plaintiff properly points out that the 1963 version of I.C. § 25-2402 forbids Commissioners at that time to create herd districts that include then existing open range. Despite this clear limitation on the authority of the Canyon County Commissioners, the 1982 ordinance's stated purpose is to include previously established open range areas into a herd district. It seems that the Canyon County Commissioners did not review I.C. § 25-2402-2404 in attempting to create the 1982 ordinance or ignored its express limitations.

All the evidence provided by both Plaintiffs and Defendant Piercy irrefutably establish that the Canyon County Commissioners did not act within their authority in passing the 1982 ordinance. The 1982 ordinance 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.

Plaintiff initially attempted 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 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, ignored 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 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. 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).

In Plaintiffs subsequent responsive brief they do not provide any response to the above analysis, other than to cite to the current version of I.C. § 25-2401(1). Once again, to the extent that this language conflicts with I.C. § 25-2402(2)(a), I.C. § 25-2402(2)(a) governs. This is set forth in the language without any exceptions.

Plaintiff also maintains that the evidence provided by Rosemary Thomas does not prove there is BLM land in the area covered by the 1982 ordinance. If Plaintiff chooses to make the argument that the area of the 1982 ordinance contains all the land area of Canyon County, which is supported by the weight of all the evidence, it is clear that the map provided in Ms. Thomas' affidavit shows BLM land that is within the boundaries of Canyon County.

If Plaintiff abandons his argument regarding metes and bounds above, and argues that the land area included in the 1982 ordinance is only those areas of the map that are clear of herd districts, a casual look at the map provided by Ms. Thomas will show significant areas of BLM land in the Northeast portion of Canyon County. This is one of the areas according to the Canyon County Commissioners' map that was not in a previously created herd district area.

Plaintiff has not refuted the evidence provided by Ms. Thomas third affidavit establishing that these BLM areas were being grazed under BLM management as far back as 1967.

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

Plaintiffs contend that this argument was first introduced in Defendant Piercy's brief filed on July 30, 2007, however, this argument is actually an extension of Defendant Piercy's stated argument that I.C. § 25-2402(2)(a) was simply the Idaho Legislature's recognition of federal law. This was argued in Defendant's original brief. Defendant Piercy does recognize that the

argument was significantly bolstered by federal case law and analysis in Defendant Piercy's later brief. Any claim that these arguments were late is cured by Defendant Piercy moving the hearing date to September 6, 2007.

Plaintiffs responsive brief fails to provide any evidence or case law refuting Defendant Piercy's analysis on the question. Plaintiffs do claim that Defendant Piercy is arguing that all herd districts that contain federal land in Idaho are void. This is not the question before this Court. The question before the Court is whether the 1982 ordinance is pre-empted by federal law. Federal law preempted the 1982 ordinance from including federal land in a herd district. *See* pp. 13-15.

As stated in Defendant Piercy's motion to strike Co-Defendant's second brief, Co-Defendant's brief was untimely and should not be considered by this Court. If it is allowed Defendant Piercy provides the following analysis.

Co-Defendant's arguments in her Supplemental Opposition at pp. 2-5 ignore the statutory requirements of what types of lands may and may not be included in a herd district and argues that a herd district is not preempted by the federal grazing acts.

1. Defendant Piercy has Standing to Argue the Validity of the 1982 Ordinance.

Co-Defendant asserts that Mr. Piercy "does not have standing to ask this Court to find that the 1982 herd district is void because it contains BLM land." *Id.*, p. 5. As held by the Supreme Court of Idaho:

> "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles*

> *v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). To satisfy the requirement of standing, "litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.* "The injury must be distinct and palpable and not be one suffered alike by all citizens in the jurisdiction." *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 833-34, 919 P.2d 1032, 1034-35 (1996). There must also be a fairly traceable causal connection between the claimed injury and the challenged conduct. *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002).

Troutner v. Kempthorne, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). Here, Mr. Piercy has standing to request the 1982 ordinance be declared invalid. The "injury" suffered to Mr. Piercy is a judgment entered against him for Plaintiffs' damages due to his bull being on a county highway in violation of a herd district ordinance and being involved in the subject accident. The judicial relief requested, invalidating the 1982 herd district ordinance, will in all likelihood prevent Mr. Piercy from being found liable for Plaintiffs' damages. This is not an "injury" that is suffered by all citizens of Canyon County because not all citizens are livestock owners. Finally, the challenged conduct of the Canyon County Commissioners in enacting the 1982 ordinance is the only cause of Mr. Piercy's potential "injury" of being found liable for Plaintiffs' damages. Therefore, following the above elements, Mr. Piercy has standing to raise the validity of the 1982 ordinance.

Further, in *Miller*, Defendant E. Paul Miller raised the validity of the Bannock County herd district. 113 Idaho at 416, 745 P.2d at 295. The Supreme Court of Idaho heard the argument on the herd district validity and ruled that it was in fact invalid. *Id.* at 418, 745 P.2d at 297. Had Mr. Miller not had standing to argue the herd district's validity, the Supreme Court would have held so. Following *Miller*, Defendant Piercy has standing to argue the invalidity

of the 1982 ordinance.

2. The Federal Preemption Doctrine invalidates the 1982 ordinance because federal land is found within the county-wide herd district.

As argued in Defendant Piercy's July 30 Supplemental Memorandum, federal preemption prohibits states, or counties in this matter, from regulating what can be done on federal land. In this case, herd districts cannot contain federal land upon which there historically has been grazing. As previously argued, federal land cannot be regulated.

Co-Defendant raises that there are exceptions found under 43 U.S.C. 315n of the *Taylor Grazing Act*, by citing *Ricca v. Bojorquez*, 473 P.2d 812 (Ariz. Ct. App. 1970). In *Ricca*, it was held that a state law allowing "no fence districts" was enforceable upon livestock owners who have permits to graze on federal land. *Id.* at 816-7. However, unlike the present case where a county herd district would regulate what can and cannot be done within the district, even on federal land, *Ricca* did not have anything to do with what could or could not be done on the federal land:

> The effect of the sanctions imposed by A.R.S. § 24-334 is not to *directly* interfere with plaintiff's use of his property. He still may use it for cattle grazing purposes or otherwise to the full extent that he was previously able to do so. However, his right to use, or perhaps better stated, his freedom from liability for the use of the property of others is severely curtailed–he will be liable both civilly and criminally for damages caused by his trespassing livestock under the circumstances set forth in the statute.

Id. at 816. Plaintiff could not be told what he could or could not do on the federal land by the state, but should his livestock stray off of the federal land, he would be liable for the livestock's trespass.

That is not what the 1982 ordinance has done by including federal land in the herd

district. By including federal land under the requirements of the herd district statutes, Canyon County is attempting to regulate the federal lands within the herd district. That is simply not allowed under the doctrine of federal preemption as previously argued.

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.

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 Range Area.

The precedent set for the Court regarding this issue has been stated to be found in *Adamson v. Blanchard*, 133 Idaho 602, 606, 990 P.2d 1213, 1217 (1999) and *Moreland v. Adams*, Idaho , 152 P.3d 558, 561 (2007). Plaintiff has not responded to the arguments set forth in Defendant Piercy's brief filed on July 30, 2007. Plaintiff attempts to create a confusion with regard to these bright line cases by citing to the 1963 version of I.C. § 25-2402, which prohibited open range from being included in a herd district. While this was the law in 1963, it has changed in later versions to allow commissioners to create herd districts in previously open range areas. There is no real conflict as Plaintiffs suggest. Instead, the Idaho Supreme Court has provided us with a bright line standard in determining the status of land.

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.

The analysis provided in Defendant Piercy's brief filed on July 30, 2007, has not been further refuted by Plaintiffs or Co-Defendant. Therefore, further analysis is unnecessary in this reply brief.

F. I.C. § 25-2118 Governs the Liability Issue in This Case.

Defendant Piercy previously provided argument regarding this issue in the July 30, 2007, memorandum. Defendant Piercy now presents further analysis establishing that Canyon County Code 03-05-03, is not designed to provide relief to Plaintiffs. Canyon County Code 03-05-03, "Purpose and Authority", states in pertinent part, "This article is also designed to help solve the problems caused by 'livestock', . . . from running at large in the county." Both sections 03-05-17 (2) and (4) state that "it shall be unlawful" for livestock (subsection 2) and animals (subsection 4) for animals to be at large on county roads, and section 03-05-29 (1) states that "violations of the provisions of this article shall be a misdemeanor and shall be punished as set forth in Idaho Code 18-113". In other words, Canyon County has made it a misdemeanor crime to have livestock or other defined animals at large on the roads of the county.

This is a similar approach taken by the Benewah County Commissioners which was discussed in *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 105 Idaho 209, 668 P.2d 85 (1983). In *Benewah County*, the county commissioners

enacted an ordinance which prohibited livestock running at large in the county. As noted by the Supreme Court of Idaho, "The ordinance expressly leaves unaffected civil liability arising from trespassing livestock." *Id.* at 211, 688 P.2d at 87, *see also* 105 Idaho 213, 214, 688 P.2d 89, 90.

While agreeing that Canyon County validly exercised its legislative authority to create the above sections of its Code, *see* Plaintiffs' Opposition, pp. 24-5, the status of these sections is similar to the ordinance found in *Benewah County* which precludes civil liability for violation of these sections. As a result of the *Benewah County* decision, a livestock owner could be criminally liable for violation of the county ordinance by allowing his livestock to run at large within Benewah County, but would not be civilly liable should that livestock be hit by a vehicle and cause damages because the livestock was in open range and IDAHO CODE § 25-2118 provides complete immunity.

It is the same with the present case and the above Canyon County Code sections. In order "to help solve the problems caused by 'livestock', . . . from running at large in the county", Canyon County has made it a misdemeanor crime to have livestock running at large within the county. However, for those portions of the county still in "open range" status, such as where Defendant Piercy resides, there is no civil liability for any damages caused by livestock running at large under section 25-2118.

Because the subject bull was running at large on Canyon County roads, Defendant Piercy may be in violation of the applicable Canyon County Code sections. However, because the 1982 ordinance is invalid and the pasture from which the bull came was open range, Defendant Piercy

is not civilly liable for Plaintiffs' injuries sustained by the collision with his bull. Plaintiffs' argument that Mr. Piercy was negligent *per se* by violation of the above Canyon County Code sections must fail. Summary judgment is proper as it relates to Defendant Piercy.

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).

While not responding to Defendant Piercy's analysis of the law regarding equitable estoppel found in Defendant Piercy's July 30, 2007, brief, Plaintiff continues to insist that this doctrine applies. Plaintiffs have not provided any relevant evidence that would suggest that Defendant Piercy ever took the position that the subject land was in open range.

Further as indicated in *Atwood*, and the supporting cases, equitable estoppel is an affirmative defense. Plaintiffs arguments are that Defendant Piercy cannot prove that he never took the position that his land was in a herd district. This claim is a misunderstanding of the nature of an equitable estoppel claim. Plaintiffs have the burden to prove that Defendant Piercy took an opposite position to the one he is taking now. Plaintiffs have provided no evidence that Defendant Piercy gained an advantage in taking the position that he allegedly took. In fact, if

the Court were to believe that Defendant Piercy did take the position that the subject land was in a herd district with regard to the 2001 accidents, Defendant Piercy was disadvantaged by that position. Further, there is no evidence that Defendant Piercy ever took a different position regarding the specific parties to this case, and therefore, no disadvantage has been wrought upon the Plaintiffs. Essentially, Plaintiffs are arguing that they are disadvantaged because the state of the law is not what they originally thought. The Plaintiffs have not established any action by Defendant that led them to their mistaken belief that the area in question was contained in a herd district.

The Idaho Appellate Court upheld a Trial Court's decision that such evidence as presented in this case was insufficient to apply the doctrine of equitable estoppel. *Winn v. Eaton*, 128 Idaho 670, 675, 917 P.2d 1310, 1315 (Id.App. 1996). The Court held that the Defendants asserting equitable estoppel did not meet their burden of proof regarding equitable estoppel. *Id.* The Defendants alleged in an easement case that the because the Plaintiffs lived forty feet behind them and shared a driveway that they were well aware of what Defendants were doing in staking out their property. The Defendant also cited that it was only after Defendants had completed building their home, that Plaintiffs attempted to assert their rights. The Court stated that such silence before the trial on the issue is not evidence that Plaintiffs took a contrary position prior to the action they were pursuing. *Id.*

The essence of all Plaintiffs' arguments in regard to the present case is that Defendant Piercy had not previously challenged the 1982 ordinance. As in *Winn*, this type of evidence is not sufficient to prove that Defendant Piercy ever took a contrary position to what he is currently

asserting. The affidavits provided by Plaintiffs and Co-Defendant Sutton merely state that they thought it was illegal to have cows on the road. This does not prove that they even thought that a herd district existed. As discussed below, they may be referring to knowledge of the criminal statute not the 1982 ordinance. Plaintiffs have failed to establish that Defendant Piercy even knew about the 1982 ordinance. Plaintiffs certainly have not established that Defendant Piercy ever took the position that the 1982 ordinance was valid and created a herd district including the subject land. The Plaintiffs have also joined in Co-Defendant's arguments regarding estoppel by laches. This argument is discussed below.

Defendant has definitively established that the subject bull was being pastured in open range, and therefore, Defendant Piercy is not liable for the damages to the Plaintiffs.

IV. DEFENDANT PIERCY'S RESPONSE TO CO-DEFENDANT'S BRIEFS

Co-Defendant makes three arguments in his initial brief. These arguments are: (1) That the Court cannot rule on this question without joining Canyon County as a party; (2) That any decision would be an advisory opinion; and (3) The Court should apply the doctrine of estoppel by laches.

A. Canyon County is Not a Necessary Party in this Dispute.

Co-Defendant spends a considerable amount of her Opposition (pp. 3-11) arguing that Canyon County must be joined under to this action IDAHO R. CIV. P. 19(a) if the validity of the 1982 ordinance is to be determined by the Court. Co-Defendant contends that if Canyon County is not joined, any decision regarding the 1982 ordinance would be an advisory opinion. *Id.*, at 11-2.

Due to factual distinctions and established Idaho case law on the exact matter at issue here, Canyon County does not need to be joined in this matter for the Court to determine the 1982 ordinance's validity despite those case provided by Co-Defendant.

1. Rule 19 Joinder of Canyon County is not Necessary to Determine the 1982 Ordinance's Validity.

Co-Defendant argues that Canyon County must be joined to this action before the 1982 ordinance's validity can be determined. This is not true for the situation at issue in this case, where Mr. Piercy argues that the 1982 ordinance is invalid. First, the cases cited by Co-Defendant, including *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 688 P.2d 1191 (Ct. App. 1984), deal with the situation where a *plaintiff* seeks relief. The cases show how the respective courts determine that a non-party must be joined in order for the *plaintiff* to obtain the relief sought in the complaint. That is not the situation in the present case.

Here, Plaintiffs have sued Defendants for their personal injuries caused by a collision between the vehicle they were in and Mr. Piercy's bull. In order to obtain complete relief as contemplated by Rule 19, Canyon County does not need to be joined. Plaintiffs have not alleged any wrongdoing on the part of Canyon County, without whom relief could not be obtained. Therefore, Canyon County does not need to be joined.

Here, there is a *defendant* asserting as part of his defense that a county ordinance is invalid by motion practice. This is factually distinguishable from the cited cases. No cases could be found where Rule 19 was used to join a non-party for determination of an issue in motion practice; nor could any case be found where a non-party was forced to be joined an action where the *plaintiff* could not obtain relief from that non-party. Because of the factual and

procedural differences in this matter *vis-a-vis* the cases cited by Co-Defendant, Canyon County does not need to be joined in this matter.

Second, established case law in Idaho does not require the joinder of a county when determining the validity of a herd district ordinance. The procedural facts of this matter are identical to those found in *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987). In *Miller*, the defendant, E. Paul Miller, "argued that since a large portion of BLM ground was included in the herd district that the entire herd district ordinance was void." 113 Idaho at 416, 745 P.2d at 295. The District Court did not agree, which led to the appeal. After discussion regarding the proper manner in which to establish a herd district by the Bannock County Commissioners and the actions taken by the District Court to eliminate BLM lands from the subject herd district, *Id.* at 417-8, 745 P.2d at 296-7, the Supreme Court of Idaho held, "*The district court properly should have simply ruled that the herd district was invalid due to the inclusion of BLM land.*" *Id.* at 418, 745 P.2d at 297 (emphasis added). The Supreme Court did not rule that Bannock County needed to be a party to the case in order for the District Court to determine that the herd district was invalid. Instead, it held that the District Court could "simply rule".

In the very next paragraph in *Miller*, the Supreme Court stated:

> An additional issue raised by E. Paul was that the area in which the events occurred was "open range" and pursuant to I.C. § 25-2402 could not be included within a herd district. *Our first holding that the herd district was invalid due to the inclusion of BLM land makes it unnecessary to discuss this issue.*

Id. (emphasis added). The Supreme Court did not hold that Bannock County needed to be a party to the action for it to rule the herd district invalid. Because the county had improperly created the herd district due to BLM land being included within its boundaries, the Court ruled

the herd district invalid. The county did not need to be joined for the determination of validity to be made.

Here, we have the identical situation. Defendant Dale Piercy has argued that the 1982 ordinance, by creating one herd district for the whole of Canyon County contains BLM lands, should be found invalid. Following the holding in *Miller*, '[t]he district court properly should . . . simply rule[] that the herd district was invalid due to the inclusion of BLM land." Canyon County does not need to be joined as a party to this action for the Court to rule on the present Motion for Summary Judgment concerning the validity of the 1982 ordinance.

Further, the Co-Defendant attempts to argue that Canyon County will be prejudiced by the Court voiding the ordinance. Should Canyon County not agree with the Court's ruling voiding the ordinance it is not bound as admitted by Co-Defendant. The voiding of this ordinance would simply require Canyon County Commissioners to make a new herd district that is compliant with the law. Since, the County no longer must have a landowner petition it would likely be a simple solution to pass a new ordinance. There is simply no danger of significant prejudice to Canyon County.

If the Court does find that Canyon County is a necessary party, Defendant Piercy moves that the Court allow him to join Canyon County as a party. Despite the passage of time from the date set by the scheduling order, it would be very prejudicial to Defendant Piercy, who has rightfully relied on *Miller* for the proposition that the County did not be included to dismiss his motion on that basis.

B. The Court's Decision will not be an Advisory Opinion.

Co-Defendant asserts that any decision by the Court without the inclusion of Canyon County in this matter will result in an advisory opinion which will have no effect upon the non-party county. *See* Opposition, pp. 11-2. Co-Defendant cites to *Ostman v. St. John's Episcopal Hosp.*, 918 F.Supp. 635 (E.D.N.Y. 1996) to support this proposition. However, *Ostman* has only been followed by one other case, *Case v. Sobol, et al.*, 988 F.Supp. 85 (N.D.N.Y. 1997). In both cases, *plaintiffs* sought monetary relief from non-party states. No other cases were found which adhered to this holding.

Because the Court can rule on the 1982 ordinance's validity without the inclusion of Canyon County, *Miller*, *supra*, any decision by the Court on this matter will not be considered an advisory opinion. If the Court declares the ordinance invalid, it will have an enforceable affect upon Canyon County. *Id.* What Canyon County does to reinstate herd district status to the applicable areas of the county is not at issue here. As in *Miller*, once the herd district is considered invalid, it is invalid. This would not be an advisory opinion.

C. Co-Defendant and Plaintiffs Have not met Their Burden of Proof to Establish the Doctrine of Estoppel by Laches.

The doctrine of estoppel by laches does not prevent Defendant Piercy from asserting his motion for summary judgment.

The Idaho Supreme Court has held:

> Like quasi-estoppel, laches is an affirmative defense and the party asserting the defense has the burden of proof. Whether or not a party is guilty of laches is a question of fact. (citation omitted). The necessary elements to maintain a defense of laches are:
>
> (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3)

lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

> *Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996). (citation omitted). Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties. (citation omitted). The lapse of time alone is not controlling on whether laches applies. (citation omitted).
>
> *Thomas v. Arkhoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002).

Co-Defendant and Plaintiff have failed to provide evidence establishing the elements required to make a claim of laches. The only evidence provided is that Plaintiffs, Co-Defendant and some police officers thought that it was illegal for cows to be on the roadway. This belief has nothing to do with any of the elements of laches.

First, there must be an invasion of the rights of the non-moving party by the moving party. Defendant Piercy has never asserted that Plaintiffs or Co-Defendant invaded any of his rights. The rights to a person in open range is immunity from liability when a car collides with their livestock. The elements of laches requires proof of a previous invasion of rights, not an invasion of rights if the Court does not grant the relief requested by the non-moving party. Therefore, the laches claim violates the first element of a claim of laches.

The second element involves a delay in asserting a right. Defendant Piercy's right to immunity from liability did not even arise until Plaintiffs and Co-Defendant had the accident involving his animal. Defendant Piercy asserted his right to immunity from liability in his Answer to Plaintiffs' Complaint. Defendant Piercy quickly asserted his rights in this matter. Plaintiffs and Co-Defendant have not provided any evidence to the contrary.

Plaintiffs and Co-Defendant have also not provided any evidence concerning the third element of laches, which requires that they prove that Co-Defendants and Plaintiffs had no knowledge that Defendant Piercy would assert his rights. Co-Defendants and Plaintiff had knowledge from the instigation of this lawsuit that Defendant Piercy was planning to assert his rights.

Essentially, Plaintiffs and Co-Defendant are relying on the passage of time to base their arguments. The *Thomas* case states that this is not a sole basis for granting this affirmative defense. In fact, the Supreme Court of Idaho upheld a Trial Court's ruling to invalidate a 66-year-old ordinance. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir and Canal Co.*, 123 Idaho 634, 851 P.2d 348 (1993). This case states that despite evidence that the movant had relied on the state of the law for 66 years, was not evidence enough to establish laches. *Id.* at 637. 851 P.2d 348, 351.

Plaintiffs and Co-Defendant often make global assertions such as "The entirety of Canyon County has followed the "fence in" rule of the herd district . . ., for 25 years", and that "Piercy has benefitted from herd district status, as his lands have not been subject to depredations from the at large cattle of his neighbors." (Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment at 14-15.) These assertions, however, are without any evidence. Plaintiffs and Co-Defendants have not provided any proof to establish that the doctrine of laches should apply. It is simply not applicable in this case.

D. The *Miller* Case is Dispositive of the Treatment of Herd Districts That are Invalid.

In Co-Defendant's second brief, which was untimely, it is argued for the first time that

this Court should ignore the precedent set by the *Miller* and instead only partially revoke the herd district attempted to be created by the 1982 ordinance. Co-Defendant is asking the Court to redefine what the herd district is and what its effect will have upon those within the herd district, which is just the type of legislating that is forbidden by the *Miller* case.

V. CONCLUSION

The evidence and law establish that the 1982 ordinance was void from its inception. The subject pasture and bull were in open range at the time of the accident. Idaho Code § 25-2118, provides Defendant Piercy with immunity from suit. The Court should grant Defendant Piercy's motion for summary judgment.

DATED this 30th day of August 2007.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th 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 __X__ Hand Delivery ____ Overnight Mail ____ Facsimile
Stephen E. Blackburn BLACKBURN LAW PC 660 E. Franklin Road Suite 255 Meridian, ID 83642	__X__ 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 __X__ Hand Delivery ____ Overnight Mail ____ Facsimile

Ryan B. Peck

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

ERIKA L. RIVERA, an individual, and LUIS J. GUZMAN, an individual, **Plaintiffs,** **vs.** **DALE PIERCY, an individual, and JENNIFER SUTTON, an individual,** **Defendants.**	**CASE NO. CV-2005-4848** **ORDER DENYING DEFENDANT PERCY'S MOTION FOR SUMMARY JUDGMENT, JOINING CANYON COUNTY, AND HOLDING ALL OTHER MOTIONS IN ABEYANCE UNTIL THE HERD DISTRICT'S VALIDITY IS RESOLVED**

This is a civil matter. Defendant Dale Piercy (Piercy) filed a Motion for Summary Judgment (motion) on May 2, 2007, with supporting Memorandum, affidavits, and exhibits. Essentially, Piercy asks this court, as a matter of law, to rule Canyon County contains no herd districts, although Canyon County is not currently a party to this litigation. He also filed supplemental Memorandums on July 9, 2007; July 31, 2007; and August 9, 2007. Plaintiff Erika Rivera (Rivera) and Luis Guzman (Guzman) filed their opposition to Piercy's motion on July 20, 2007, followed by Defendant Jennifer Sutton (Sutton), who filed her opposition to Piercy's motion on July 24, 2007.

The court heard oral argument on September 6, 2007. Mr. Rod Saetrum presented extensive and insightful oral argument on behalf of Piercy. Equally extensive and insightful, Mr. Timothy Walton argued on behalf of Rivera and Guzman, while Mr.

Josh Evett argued on behalf of Sutton, principally arguing that Canyon County must be joined in order for this court to decide the issue of the herd district's existence. Based upon the "facts" presented, the law tendered, and the arguments of counsel, this court denies Piercy's motion. However, on the issue of punitive damages, this court will hold that in abeyance until the issue of the herd district is resolved after the joinder of Canyon County.

While the court has resisted the notion of joining Canyon County, it reluctantly concludes that in order to resolve the issue of the herd district in a meaningful way before the parties try this action to a jury, there exists no other feasible way to directly address the issue. Accordingly, although Piercy raises the issue of the validity of Canyon County herd districts very late in the process, the court still concludes joining Canyon County in this litigation is necessary. Moreover, while it may be necessary to vacate the currently trial setting, once the issue of the herd district is settled following the joinder of its proponent, Canyon County, this court will put this matter on a "fast track" for a reset.

I.

FACTS AND PROCEDURE

Contrary to the assertion of Piercy's counsel, this court cannot find as a matter of law that the presumption of a herd district has been overcome with the "facts" presented. That does not necessarily translate, however, to the notion that for the purposes of this litigation, one in fact does exist, at least to the extent the court need no longer consider it. Regrettably, the parties have not "shaped the battle" for the court to

take the herd district issue head-on, as Piercy asks via the summary judgment process. At the heart of the hundreds of pages of filings in support and in opposition to the summary judgment motion lies Piercy's request: he asks this court to invalidate herd districts created by the Canyon County Commissioners in 1982 and 1908. This court is not prepared to honor that request, for it asks the court to rewrite history, or, at the very least, to rewrite a "presumed" history; and this court abhors revisionism in any form. On the other hand, the court does have a keen interest in the truth of the matter.

During much of the twentieth century, various Canyon County Boards of Commissioners created herd districts in different Canyon County locations. In 1982, the Board of Canyon County Commissioners enacted a final order intending to convert the remaining "open range" land in Canyon County to herd district status. Piercy complains the board's order failed to comply with the clear requirements of Idaho Code §25-2401 *et seq.* Piercy also makes the underpinning of his procedural complaint clear. If this court invalidates the herd district status in the area of the accident at the center of this litigation, this effectively eliminates his liability, since his bull would have escaped from "open range." *See e.g., Moreland v. Adams*, 143 Idaho 687, 152 P.3d 558 (2007), overruling *Soran v. Schoessler*, 87 Idaho 425, 394 P.2d 160 (1964).

There remains no mystery, then, why Piercy takes strong issue with the procedures followed by the Canyon County Commissioners in December 1982. Both parties have provided this court with the recorded actions of the board. For example, it is undisputed that the board issued the following resolution, approved on December 2,

1982, as found in the minutes of the Board of Canyon County Commissioners in Book 27, Page 207 in the Canyon County Recorder's Office.

> 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 Hozba 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.

It is also undisputed that the Board issued the following order, as found in the Canyon County Recorder's Office and the Office of the Canyon County Commissioners.

> 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.

Finally, Piercy alleges the board failed to cause the publication of this Order in the Idaho Press Tribune on December 20, 1982, as set out in the Affidavit of Dawn McClure and the accompanying CD (containing a PDF file without authentication) as to which newspaper and on what date the paper published this information.

The procedural history, as it relates to the numerous Complaints and the most recent application to amend for punitive damages purposes in this case, is set forth in this Court's Order of April 27, 2007. After entry of that Order, Plaintiffs filed a Third Amended Complaint alleging the conduct of the defendants was reckless and/or willful. The Third Amended Complaint also eliminates the parents and natural guardians of Erika Rivera and Luis Guzman as plaintiffs to the action.

On July 20, 2007, pursuant to Idaho Code § 6-1604, Rivera and Guzman filed a Motion to Amend the Complaint, seeking to include a claim for punitive damages

against Defendant Piercy. The court also heard oral argument on this motion on September 6, 2007. Mr. Andrew Chasan presented argument on behalf of Rivera and Guzman. Mr. Ryan Peck argued on behalf of Piercy against the motion to amend. Mr. Josh Evett, counsel for Jennifer Sutton, was present at the hearing, but offered no argument on this issue. As noted, however, the court should hold this issue in abeyance until a resolution comes at the trial level concerning the Canyon County herd district's validity. *Compare Miller v. Miller*, 113 Idaho 415, 418, 745 P.2d 294, 297 (1987) [1] with *Marchbanks v. Roll*, 142 Idaho 117, 119-20, 124 P.3d 993, 995-96 (2005).[2]

II.

ANALYSIS

A. Summary Judgment in General

Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *City of Idaho Falls v. Home Indemnity Co.,* 126 Idaho 604, 606, 888 P.2d 383, 386 (1995). At all times, the burden of proving the absence of a genuine issue of material fact rests upon the moving party. *G&M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Furthermore, the trial court must draw all reasonable inferences in favor of the

[1] Holding that the inclusion of BLM land in a county herd district invalidates that district; note especially Shepard, C.J., in dissent, commenting that *Miller* has effectively overruled *Benewah County Cattlemen's Assoc., Inc., v. Board of County Commissioners of Benewah County,* 105 Idaho 209, 668 P.2d 85 (1983).

[2] Where Schroeder, C.J., would not allow a challenge to the Canyon County herd district's validity in view of the parties stipulating at the trial in magistrate court concerning its validity. Appellants raised the issue of validity for the first time on appeal to the district court, then the Idaho Supreme Court. Appellants' counsel asked both reviewing courts to take "judicial notice" that Canyon County contains BLM lands.

party resisting the motion. *Id.*; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

Nevertheless, to withstand a motion for summary judgment, the non-moving party must anchor its case in something more solid than speculation. A mere scintilla of evidence does not create a genuine issue. *Edwards v. Conchemco Inc.,* 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App. 1986). Put another way, the party opposing the motion for summary judgment may not merely rest on the allegations contained in the pleadings; rather, the non-moving party must produce evidence by way of affidavit or deposition to contradict the assertions of the moving party. *Ambrose v. Buhl School Dist. #412,* 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994).

Herein, the "battle of the affidavits" has raised issues of material fact. Hence, the presumption of the herd district's validity pursuant to the Idaho Code, so far, carries the day for the plaintiffs. This court rejects affidavits in support of Piercy's motion that simply imply the absence of something otherwise required to create a valid herd district. The court further rejects any affidavits advancing the notion "we cannot find it, therefore it does not exist," in view of the presumption of validity of any and all Canyon County herd district ordinances.

B. Herd Districts and Their Presumption of Validity

Before this court considers the merits of Piercy's claims on the invalidity of the herd district at issue, the court must recognize the standards set forth in Idaho Code

§31-857, which presumes the validity of a herd district, if not challenged within two (2) years.[3]

> **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.

Idaho Code § 31-857.

Thus, Piercy has the burden of convincing this court that the board followed improper procedures, such that this court should overturn the herd district created in 1982 after twenty-five (25) years of existence. Indeed, this constitutes an onerous task. Idaho case law strongly favors the validity of ordinances and statutes. *See e.g., City of Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956), and *Hecla Min. Co. v. Idaho State Tax Com'n*, 108 Idaho 147, 697 P.2d 1161 (1985).

The extent of Piercy's burden is set forth in Idaho Rule of Evidence 301. IRE 301 states, "The burden of going forward is satisfied by the introduction of evidence

[3] In 1982, Idaho Code § 31-857 allowed for a challenge to the validity of a district within five (5) years. However, the Legislature amended Idaho Code § 31-857 in 1989 for the current two (2) year window for challenge.

sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved." (Emphasis supplied).

C. The Statutes at Issue

At the time of the December 1982 Canyon County Ordinance at issue, the 1968 version of Idaho Code §25-2401 *et seq.* established the criteria for creating a herd district. This set of statutes gives the board of county commissioners in a particular county the right to create herd districts, and sets forth procedures by which the board would create such districts. The three relevant statutes follow:

> **I.C. 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 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 a 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 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.

Idaho Code §25-2402 (1968) (Emphasis supplied).

I.C. 25-2403 Notice of hearing petition (1968)

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 §25-2403 (1968)

I.C. 25-2404 Order creating district (1968)

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.

Idaho Code §25-2404 (1968)

The lessons gleaned from these sections of the Idaho Code inform this court as follows:

- A majority of landowners may petition for a herd district;
- If such petition is made, it will set forth the metes and bounds description of the requested district, the animals to be included or exempt from the herd district;
- Notice is to be given in three (3) locations and published in a newspaper in the county of the proposed district for two (2) prior to the hearing;
- The board of commissioners may create a herd district by order either "in accordance with the prayer of the petition, or with such modifications as it may choose to make"
- An order creating a herd district shall specify a date, after 30 days, when the district will take effect.

Piercy argues that the order as entered by the Commissioners, and as set forth above, is invalid because it fails to reference the landowner petition; it doesn't provide a metes and bounds description of the herd districts to be created; it fails to provide which breeds of animals are subject to the herd district; and finally, it fails to set forth an date when the herd district went into effect. Piercy contends these flaws overcome the presumption of validity of the herd district; hence, this court must strike it down.

D. The Missing Petition

The bulk of Piercy's argument against the validity of the herd district arises from the fact that no one knows if a majority of the landowner presented their petition to the board of commissioners prior to the entry of this particular order. It appears from the filings that Piercy has attempted to find such petition and has been unable to do so. In addition, because the order fails to reference any landowner petition, Piercy argues, that

translates to one never existing in the first place, thus generating the battle of the affidavits.[4] In support of his argument, Piercy offers the Affidavits of Glenn Koch and E.G. Johnson. Glenn Koch is the sole living commissioner from 1982. In rebuttal, Plaintiffs offer the Affidavits of the same Glenn Koch (he can apparently see both sides of the issue) and Bill Staker, former county clerk.

Glenn Koch asserts to the effect in both affidavits that he cannot recall if the board received a petition submitted by landowners for a herd district. He does state, however, that the commissioners in office in 1982 took their jobs very seriously and always attempted to follow the law in duty performance. (Compare Koch affidavit of July 3, 2007 with Koch affidavit of June 11, 2007). Bill Staker, the Clerk in 1982, also echoes the commitment to follow the law theme in his affidavit. He further asserts that he cannot recall whether the board received a petition. (Affidavit of June 14, 2007).

The Affidavit of E.G. Johnson informs the court that Mr. Johnson is a long-time resident of Canyon County and landowner in Canyon County in the area and at the time of the 1982 herd district ordinance. It further informs that he did not sign a petition in

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[4] There may be a good explanation for why no one has located a petition from twenty-five years ago: there appears to be no requirement under the code to keep it of record. A careful reading of Idaho Code §31-708 (Duties of clerk) and Idaho Code §31-709 (Records to be kept) informs with specificity what the county clerk must generate vis-à-vis records, and what the board must "cause to be kept permanently and indefinitely." Idaho Code §31-708.7 comprises the only section under the clerk's duties dealing with the preservation of petitions and applications. However, that specifically deals with "franchises," and this court concludes that a petition for a herd district is not a petition or application for a franchise. Nevertheless, even if a county clerk has the duty to "preserve and file" a petition for a herd district, under Idaho Code §31-709, there appears to be no duty to keep it "permanently and indefinitely." The only "keeping" required under part 6 is "Ordinance records, containing all ordinances, stating the date enacted." It seems the "ordinance record" means the ordinances with a statement of when the board enacted them. The statute sets forth no specific directions to keep any petition that might have driven the board to enact a herd district ordinance. Yet, even if the statute did require a board to keep a petition "permanently and indefinitely," and a board failed to do so, that still does not vitiate the presumption of validity or mean an ordinance otherwise validly enacted in the first instance becomes invalid.

1982, nor did he have notice that the commissioners considered the creation of such a herd district until after they created a herd district. (Affidavit of July 18, 2007).

From these affidavits, this court is only able to determine that none of the living county officials who would have taken an active part in the process can recall whether interested landowners petitioned the board for a herd district, and that one of the land owners did not sign a petition to create (or consolidate) a herd district. On the other hand, while neither the Resolution nor the Order in question refers to a specific landowner petition, the Order does state, "The Board has again reviewed the complexity of the Herd District Boundaries..." This court focuses on the language of "again reviewed" in conjunction with the fact that it cannot be clearly determined one way or the other whether the board performed this review at the request of a majority of landowners.

The Idaho Supreme Court has stated a court will not presume a procedural irregularity in the face of silence as to the procedures taken. *See Garrett Transfer & Storage Co. v. Pfost,* 54 Idaho 576, 33 P.2d 743 (1933). Thus, despite Piercy's arguments to the contrary, no party has presented this court with evidence showing that no petition existed—at least to the extent it overcomes the presumption of validity. Therefore, Piercy's argument and "evidence" falls short of the mark.[5]

E. The Missing Metes and Bounds Description

[5] There is a bigger issue, however, for purposes of time lapse. While the place Piercy's bull "escaped" may be the 1982 herd district area, where the collision took place with Piercy's bull is apparently an area a former board put into herd district status in 1908. *See* Piercy's Memorandum in Support of Motion for Summary Judgment dated May 1, 2007, page 12.

Idaho Code §25-2402, as it stood in 1982, stated that a landowner's petition for a herd district "shall describe the boundaries of the said proposed herd district." Piercy argues that this language imposed on the Commissioners a duty to include metes and bounds legal property description in the Order creating the herd district at issue here.

However, Idaho Code §25-2404 also provides that "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." (Emphasis supplied). Even if one or more landowners presented a petition to the Commissioners containing a metes and bounds description, the commissioners, by statute, did not have to use a metes and bounds description in their order in order to create it.

The language of the order tells the court that the commissioners intended to limit the herd district created in 1982 to three small areas of remaining open range in Canyon County. The order states, "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," and "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." (Emphasis supplied). The commissioners also apparently recognized this action would place the entirety of Canyon County in a herd district, because the rest of the county already had herd district status. This court does not read this language to the effect that the commissioners were creating a "giant" herd district in their 1982 ordinance. Rather, they seem to be filling in the gaps so that in Canyon County (at least over the area they had jurisdiction) no open range would exist.

The court does not to say the intended effect would not be a "giant" herd district; rather, the 1982 ordinance simply did not describe all of Canyon County as being one large herd district.

Piercy makes much of the fact that the survey map referenced in the order may or may not exist today, and without such map, no metes and bounds description exists for the herd districts thus created. Piercy avers this supplies the proof positive of his contention theory of the invalidity of Canyon County's herd districts. Again, this court declines Piercy's invitation to require a metes and bounds description in the order. The court further declines the invitation to invalidate the herd district created by the order based on a lack of legal description, given that the commissioners indicated the limited land area to be included in the newly created herd districts to the three small areas indicated on the survey map. As previously noted, this court does not adopt the "we-cannot-find-it-so-it-never-existed" theory advanced by Piercy. Accordingly, as a matter of law, this court cannot determine that the herd district created by the 1982 Order is invalid for lacking a metes and bounds description.

F. The Notice Requirement

Idaho Code §25-2403 sets out the notice requirements for a hearing by the commissioners on a petition to create a herd district. The board must cause the posting of notice in three conspicuous places in the proposed herd district and by publication for two weeks prior to a hearing on the issue in a newspaper in the county of the proposed herd district. Idaho Code § 25-2403.

Piercy asks this court to invalidate the 1982 Order and the resulting herd districts because no notice apparently exists in the archives of the Idaho Press Tribune during the period of November 10, 1982 and December 20, 1982. (Affidavit of Dawn McClure). The affidavit of E.G. Johnson is also provided to the court as evidence that no notice existed because Mr. Johnson states, "I would have received information about the proposed herd district prior to the hearing if such information had been available." (Affidavit of E.G. Johnson).

However, Plaintiffs, through the Affidavit of Deborah Schrecongost, inform the court that the Idaho Press Tribune was not the only newspaper in existence in Canyon County in 1982. Schrecongost indicates that The Parma Review was published in Canyon County from 1909 to 1993. No party provides the court with information concerning whether the county published notices of ordinances in this newspaper.

Moreover, it is conceivable that while the board signed the Resolution and Order in December 1982, that the hearing on the issue may have occurred at some point prior to December 1982. It is also clear from the language of the Order that this was not the first time that the board confronted this issue as the Commissioners state in the Order, "The Board has again reviewed the complexity of the Herd District Boundaries." While Piercy is unable to find notice for the November to December 1982 time period in one newspaper published in the county at the time of the Order, this court, cannot based on this evidence alone, invalidate the herd districts. Piercy has failed to overcome the presumption of validity on this issue based upon the "fact" presented.

G. The Date of Effect

Idaho Code § 25-2404 requires an order to create a herd district to include a specific date, thirty days after the entry of the order, at which time the herd district will take effect. Clearly, the Order at issue here does not contain such language, which opens the door to Piercy's argument that the Order has never taken effect. The Resolution passed by the Commissioners does give an effective date of December 14, 1982. However, the "proponent agency" of the herd district, Canyon County, has not had an opportunity to deal with this issue. Again, it is one thing for a bull to escape from an area that is "open range," but there is every indication the accident occurred in an area that constituted a herd district in 1908. None of the parties have presented to this court anything on the consequences of this dynamic.

H. BLM Land

Finally, the parties ask this court to determine the validity of the herd district on the issue of whether the district purports to incorporate BLM lands. It appears Piercy contests the validity of the herd district where he pastured his bull (presumably created in 1982) and further contests the validity of the herd district created in 1908 where the accident occurred. Piercy's argument appears to suggest the board created a single giant herd district throughout the county, thus acting improperly, due to Canyon County containing BLM lands, which cannot be regulated by the county. While this court disagrees with Piercy's view the board created "one giant herd district" in 1982, the court still addresses the matter.

The foundation for Piercy's argument comes from Idaho Code § 25-2402, set out above. The addition to the statute set out below forms the basis of Piercy's argument:

> (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.

Idaho Code §25-2402 (1983)(Emphasis supplied).

Under this statute, as amended, the Idaho Supreme Court invalidated a herd district ordinance created by the Bannock County Commissioners because it contained BLM land. *Miller v. Miller, supra*. There, the Bannock County board purported, in May 1984, to create a herd district encompassing the parties' (Millers) land and containing BLM land. The district court determined that under Idaho Code § 25-2401 *et seq.*, the herd district was invalid as to the portions containing BLM land but otherwise upheld the herd district as created. The Supreme Court found that the district court's decision was at odds with Idaho Code § 25-2402(2) which prohibits a board of county commissioners from creating a herd district that includes BLM lands. The herd district in its entirety was found to be invalid because the Commissioners acted "outside the dictates" of the statute. *Id.* at 419, 745 P.2d at 297.

The situation facing this court is unlike *Miller.* The board passed the ordinance before this court in 1982, prior to the amendment of Idaho Code § 25-2402. In addition, while the statute, as amended, purports to apply to herd districts established before July

1, 1983, nothing in the amendatory language clearly indicates a legislative intent to invalidate all previously established herd districts containing federal land historically used for grazing. Idaho Code § 73-101 clearly states that no statute is to be retroactive unless expressly so declared. *See also State ex rel. Wasden v. Daicel Chemical Industries, Ltd.*, 141 Idaho 102, 106 P.3d 428 (2005). Thus, while a court might construe the language "established before July 1, 1983" retroactivity, it does not rise to the level of express declaration to invalidate all previously established herd districts throughout the state, no matter how long established, that happen to contain BLM administered lands meeting the other definitional requirements of the amendment. Therefore, this court will not apply the language of Idaho Code § 25-2402(2) retroactively to the effect of automatically invalidating the herd district created by the 1982 Order and the 1908 herd district. After all, does it seem reasonable the legislature really sought, in 1982, to undo the ordinances in forty-four Idaho counties after (then) seventy-five years of carving out herd districts? Especially since the current law (as amended in 1996) clearly states "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." Idaho Code § 25-2401 (1996)(Emphasis supplied).[6]

Despite this court's interpretation of the statute and retroactivity, there still exists a factual issue concerning whether the herd districts at issue here (1908 and 1982

[6] The significance of this language should be apparent. First, Piercy argues that since Canyon County contains lands owned by the United States of America, managed by BLM, where historical livestock grazing took place, the 1982 ordinance is void. However, the BLM amendment did not go into effect until July 1, 1983. Second, Piercy argues that since Canyon County herd districts (or, in his words, the "giant herd district) contain state lands, the Canyon County herd district(s) are (is) void. Yet again, the prohibition against herd districts containing state land did not go into effect until July 1, 1990. Both of these prohibitions come after the 1982 Canyon County Herd District Ordinance.

districts) actually contain federal land in violation of the statute as it now reads. In support of the theory that the herd districts contain federal BLM land, Piercy offers not one, but two, Affidavits of Rosemary Thomas, along with the Affidavits of Dennis Sorrell and Affidavit of Jerry Deal to show there is state land in the herd districts. Plaintiffs also offer an Affidavit of Rosemary Thomas to refute Piercy's contention that BLM land exists in the herd district where the accident occurred. Hence, a material fact immediately pops up, provided, that issue is even relevant. While Piercy says it is and every other party to the action indicate their doubts, the proponent of the herd district in the first instance, namely, Canyon County, had not had a vote in the debate.

Furthermore, while the May 8, 2007, Affidavit of BLM Field Manager Rosemary Thomas provides the court with a map demonstrating that BLM grazing land exists in Canyon County, along with the statement that these lands are currently and historically used for grazing, in reviewing the map, this court is only able to determine that sections of land outlined in purple intend to indicate BLM allotments. Beyond that, the court is unable to glean information to assist it in its determination of whether BLM land historically used for grazing and the herd districts at issue overlap.

Then, in the May 30, 2007 Affidavit of Rosemary Thomas, submitted by Plaintiffs, Thomas provides another map showing a large section of Canyon County in yellow (south of the Boise River) to indicate the location of herd districts in Canyon County. Thomas further opines that after a review of BLM records, she determined that no BLM land exists in the herd districts identified in the yellow and that the earliest records of grazing start in 1981. Not to be outdone, however, Piercy submits a third and final

Affidavit of Rosemary Thomas, dated August 8, 2007. In this affidavit, Thomas informs the court that she determined that the Black Canyon Management Framework Plan allowed grazing in Canyon County since 1967. However, upon review of the attached exhibit, this court is unable to determine any connection between the document and Canyon County, other than the word of Thomas as to its applicability. Frankly, to this observer, when one mentions Black Canyon, Gem and Payette Counties come immediately to mind, not Canyon County.

Finally, the Affidavits of Dennis Sorrell and Jerry Deal further purport to show that Canyon County contains state land. One, however, must read these affidavits in conjunction with the May 2, 2007, Affidavit of Ryan Peck. That latter affidavit provides a map required in order to give the Sorrell and Deal affidavits meaning. The alleged effect of these affidavits and the map purports to show that the 1908 herd district, apparently where the accident occurred, contains state land. However, when one reviews the proffered map and affidavits, this court cannot find that the herd districts (1982 or 1908) are, as a matter of law, invalid. As stated above, this court is not of the opinion that the 1982 Order created one giant herd district—that was simply the affect of connecting the final three areas with all the other pre-existing herd districts—and this guides the analysis here. Yet, even assuming the 1982 Herd District Ordinance did create one giant herd district in Canyon County in December of that year, Piercy has yet to answer the "So what?" question. The current law states, as already noted, that "[t]he provisions of [the herd district law] shall not apply to any herd district or herd ordinance in full force and effect prior to January 1, 1990...." Idaho Code § 25-2401 (1996).

Because this court has not been given the legal description of the 1908 herd district, the allegations of state land included in that district only raises an issue of fact. The same is true of the 1982 herd district. Further confounding this court is the lack of specificity and detail concerning where the BLM land complained of by Piercy actually lies. Hence, the current posture of this litigation leaves the court with herd district statutes not cleanly dealt with by the legislature in setting out its intent concerning pre-existing herd districts where it added certain land prohibitions to district formation, only underscored by opposing counsel's argument and briefing. Further, as explained more fully below, the court is without the position by the proponent of herd districts in Canyon County, the Board of County Commissioners. The board may very well want to make its position known before the court goes mucking around in its ordinances.

I. Joinder of Canyon County

Defendant Sutton asks this court to join Canyon County as a necessary party to this action, pursuant to Idaho Rule of Civil Procedure 19. Sutton argues any ruling by this court on the validity of the herd district has an impact on the county as the creator of the herd district, and the entity that enforces it. On this theme, the court intended originally to decline Sutton's invitation, particularly because significant issues of material fact exist with regard to the herd district and the motion comes very late in the process. Yet, this issue, strategically, is a legal issue this court needs to resolve before the parties litigate damages. The resolution of the herd district issue is paramount to getting to the issue of damages among the parties. In short, the herd district issue becomes the "trial within the trial" before this court can even allow the primary litigants

to present evidence to a jury on the issue of damages. Regrettably, this issue comes late. Perhaps Piercy intended it that way as a matter of strategy. Nevertheless, it must be resolved.

III.

CONCLUSION

This court finds and concludes that Piercy has failed to overcome the presumption of validity of the herd districts because genuine issues of material fact exist. For example, material issues of fact exist whether landowners petitioned the board and whether the board gave proper notice of the 1982 ordinance once enacted. There also remains unresolved the issue of the 1908 ordinance in relation to whether the 1982 ordinance affected its validity. The fact that the proponent of herd districts on Canyon County is absent from this litigation exacerbates the lack of resolution. Hence, Canyon County should be joined as a third-party defendant, though not for the purpose of liability. Rather, Canyon County needs to be a part of this litigation for the limited purpose of fully developing the validity of herd districts in the area Piercy's bull escaped and in the area where the collision with the bull took place. As a "heads up," the clerk should provide a copy of this decision to the Canyon County Prosecutor. Finally, this court anticipates that this decision will necessitate the vacation of the current trial date. Nevertheless, as the court informed all counsel at the time they argued for or against Piercy's motion for summary judgment, circumstances involving a rather serious felony matter may have already caused that vacation, apart from this decision. Nevertheless, once the issue of Canyon County herd district validity is determined, should the court

have to vacate the current trial date, this court will ensure that the parties herein go to the "front of the line" for rescheduling purposes.

THEREFORE, THIS ORDERS THAT:

1. The court denies Piercy's motion for summary judgment.

2. The court holds in abeyance the issue of another amendment to the complaint for punitive damages until the court can determine the validity of herd districts in Canyon County.

3. The court directs the joinder of Canyon County as a third-party defendant for the limited purpose of determining whether valid herd districts exist at the locations of the bull's escape and the location of the collision between the Sutton automobile and Piercy's bull.

4. The court directs Sutton's counsel to prepare and serve the necessary pleadings to join Canyon County, through its Board of Commissioners, as a third-party defendant.

DATED this 9 October 2007.

GORDON W. PETRIE, District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on 9 October 2007 s/he served a true and correct copy of the original of the forgoing **ORDER DENYING DEFENDANT PERCY'S MOTION FOR SUMMARY JUDGMENT, JOINING CANYON COUNTY, AND HOLDING ALL OTHER MOTIONS IN ABEYANCE UNTIL CANYON COUNTY HERD DISTRICT VALIDITY IS DETERMINED** on the following individuals in the manner described:

- Upon the Canyon County Prosecutor,

when s/he placed the same into the latter's respective "pick up" boxes at the Canyon County Clerk's office, Canyon County Courthouse, Caldwell, Idaho,

- and upon Rodney R. Saetrum, of SAETRUM LAW OFFICES, 101 S. Capitol Blvd, Boise, Idaho, 83702, attorneys for Defendant Piercy; and upon

- Joshua S. Evett of ELAM and BURKE, P.A., PO Box 1539, Boise, Idaho 83701, attorney for Defendant Sutton; and upon

- Timothy C. Walton of CHASAN & WALTON, LLC PO Box 1069 Boise, Idaho 83701-1069 and upon Stephen E. Blackburn of BLACKBURN LAW, P.C., 660 E. Franklin Road, Suite 255, Meridian 83642, attorneys for the Plaintiffs Rivera and Guzman,

when s/he caused the same to be deposited into the US Mails, sufficient postage attached, at the addresses set forth above.

WILLIAM H. HURST, Clerk of the Court

By: T Crawford
Deputy Clerk of the Court

crt 11-1-07 Petrie

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 ACTION FOR DECLARATORY JUDGMENT
Canyon County, Idaho, Defendant.	

Pursuant to the Court's Order of October 9, 2007,[1] Defendant Jennifer Sutton ("Defendant Sutton"), by and through her attorneys of record, Elam & Burke, P.A., allege and assert as follows with respect to Canyon County:

[1] *See* 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 if Resolved. A copy of this Order is attached as Exhibit A.

II. PARTIES

1. Jennifer Sutton is an individual and Defendant in Canyon County case number CV05-4848. Ms. Sutton resides in Ada County, Idaho.

2. Dale Piercy is an individual and Defendant in Canyon County case number CV05-4848. Mr. Piercy resides in Canyon County, Idaho.

3. Erika Rivera is an individual and Plaintiff in Canyon County case number CV05-4848. Ms. Rivera resides in Canyon County, Idaho.

4. Luis Guzman is an individual and Plaintiff in Canyon County case number CV05-4848. Mr. Guzman resides in Canyon County, Idaho.

5. Canyon County is a duly recognized county in the State of Idaho.

II. JURISDICTION

6. Jurisdiction in this matter is proper under Idaho Code §10-1201.

III. VENUE

7. Venue is appropriate under Idaho Code § 5-403.

IV. ALLEGATIONS

8. On March 20, 2005, Plaintiffs Erika Rivera and Luis Guzman were passengers in a Volkswagen Jetta being driven by Jennifer Sutton.

9. While northbound on Wamstad Road, south of Parma, Idaho, the Jetta hit a black bull owned by Defendant Dale Piercy.

10. As a result of the collision, Rivera and Guzman suffered personal injuries, and sued Piercy on May 10, 2005.

11. Piercy asserted a comparative fault defense against Sutton. Rivera and Guzman then sued Sutton and joined her to their case against Piercy.

12. The accident occurred just south of the Boise River on Wamstad Road in a herd district established by the Canyon County Board of Commissioners in 1908. A copy of the county ordinance establishing this herd district is attached as Exhibit B.

13. The bull was pastured north of the Boise River in a herd district established in 1982. A copy of the county ordinance establishing this herd district is attached as Exhibit C.

14. In the spring of 2007, defendant Piercy filed a motion for summary judgment in which he claimed that the 1982 herd district (where his bull was pastured) and the 1908 herd district (where the Jetta hit the bull) were invalid.

15. Piercy claims that the 1982 herd district is invalid because the ordinance was not enacted pursuant to a petition, does not describe the metes and bounds of the district, does not describe the types of animals to which the district applies, does not specify a date on which the ordinance became effective, and because it includes state and federal land on which grazing has historically been permitted.

16. Piercy claims that the 1908 herd district was invalidated by subsequent legislation providing that herd districts cannot contain state or federal land on which grazing has historically been permitted.

17. Rivera and Guzman contend that the 1982 and 1908 herd districts are valid. Rivera and Guzman do not challenge the validity of these herd districts.

18. Sutton contends that the 1982 and 1908 herd districts are valid. Sutton does not challenge the validity of these herd districts.

19. In response to Piercy's motion for summary judgment, Sutton contended that Canyon County is a necessary party, under Idaho Rule of Civil Procedure 19(a)(1), to adjudicating the validity of the 1982 and 1908 herd districts. The District Court ordered Canyon County joined to this action so that Canyon County can participate in adjudicating Piercy's claims that the 1982 and 1908 herd districts are invalid.

V. CLAIM FOR DECLARATORY RELIEF

20. All previous allegations are incorporated herein.

21. Idaho Code § 10-1201 empowers the court to declare rights, status, and other legal relations.

22. Idaho Code § 10-1202 empowers the court to determine any question of construction or validity of a municipal ordinance and declare the rights, status or other legal relations thereunder.

23. An actual and justiciable controversy exists in this case regarding the validity of the 1982 and 1908 herd districts by reason of Piercy's claim that these districts are invalid and his motion requesting that the District Court enter a judgment declaring these districts invalid.

24. By Order of the Court, Canyon County is a necessary party to the issue of whether or not the 1982 and 1908 herd districts are valid.

25. Piercy requests that the District Court invalidate the 1982 and 1908 herd districts.

26. Rivera, Guzman, and Sutton request that the District Court uphold the 1982 and 1908 herd districts.

DEMAND FOR JURY TRIAL

Sutton demands a trial by jury in accordance with the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure.

WHEREFORE, Defendant Sutton prays for judgment as follows:

A. An Order upholding the validity of the 1982 and 1908 herd districts; and

B. Other and further relief as to the Court seems just and equitable.

DATED this 15th day of October, 2007.

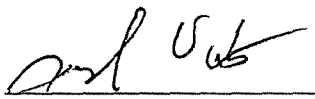
ELAM & BURKE, P.A.

By _____
Joshua S. Evett
Attorneys for Defendant Jennifer Sutton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 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



Joshua S. Evett

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

ERIKA L. RIVERA, an individual, and LUIS J. GUZMAN, an individual, Plaintiffs, vs. DALE PIERCY, an individual, and JENNIFER SUTTON, an individual, Defendants.	CASE NO. CV-2005-4848 ORDER DENYING DEFENDANT PERCY'S MOTION FOR SUMMARY JUDGMENT, JOINING CANYON COUNTY, AND HOLDING ALL OTHER MOTIONS IN ABEYANCE UNTIL THE HERD DISTRICT'S VALIDITY IS RESOLVED

This is a civil matter. Defendant Dale Piercy (Piercy) filed a Motion for Summary Judgment (motion) on May 2, 2007, with supporting Memorandum, affidavits, and exhibits. Essentially, Piercy asks this court, as a matter of law, to rule Canyon County contains no herd districts, although Canyon County is not currently a party to this litigation. He also filed supplemental Memorandums on July 9, 2007; July 31, 2007; and August 9, 2007. Plaintiff Erika Rivera (Rivera) and Luis Guzman (Guzman) filed their opposition to Piercy's motion on July 20, 2007, followed by Defendant Jennifer Sutton (Sutton), who filed her opposition to Piercy's motion on July 24, 2007.

The court heard oral argument on September 6, 2007. Mr. Rod Saetrum presented extensive and insightful oral argument on behalf of Piercy. Equally extensive and insightful, Mr. Timothy Walton argued on behalf of Rivera and Guzman, while Mr.

EXHIBIT A

Josh Evett argued on behalf of Sutton, principally arguing that Canyon County must be joined in order for this court to decide the issue of the herd district's existence. Based upon the "facts" presented, the law tendered, and the arguments of counsel, this court denies Piercy's motion. However, on the issue of punitive damages, this court will hold that in abeyance until the issue of the herd district is resolved after the joinder of Canyon County.

While the court has resisted the notion of joining Canyon County, it reluctantly concludes that in order to resolve the issue of the herd district in a meaningful way before the parties try this action to a jury, there exists no other feasible way to directly address the issue. Accordingly, although Piercy raises the issue of the validity of Canyon County herd districts very late in the process, the court still concludes joining Canyon County in this litigation is necessary. Moreover, while it may be necessary to vacate the currently trial setting, once the issue of the herd district is settled following the joinder of its proponent, Canyon County, this court will put this matter on a "fast track" for a reset.

I.

FACTS AND PROCEDURE

Contrary to the assertion of Piercy's counsel, this court cannot find as a matter of law that the presumption of a herd district has been overcome with the "facts" presented. That does not necessarily translate, however, to the notion that for the purposes of this litigation, one in fact does exist, at least to the extent the court need no longer consider it. Regrettably, the parties have not "shaped the battle" for the court to

take the herd district issue head-on, as Piercy asks via the summary judgment process. At the heart of the hundreds of pages of filings in support and in opposition to the summary judgment motion lies Piercy's request: he asks this court to invalidate herd districts created by the Canyon County Commissioners in 1982 and 1908. This court is not prepared to honor that request, for it asks the court to rewrite history, or, at the very least, to rewrite a "presumed" history; and this court abhors revisionism in any form. On the other hand, the court does have a keen interest in the truth of the matter.

During much of the twentieth century, various Canyon County Boards of Commissioners created herd districts in different Canyon County locations. In 1982, the Board of Canyon County Commissioners enacted a final order intending to convert the remaining "open range" land in Canyon County to herd district status. Piercy complains the board's order failed to comply with the clear requirements of Idaho Code §25-2401 *et seq.* Piercy also makes the underpinning of his procedural complaint clear. If this court invalidates the herd district status in the area of the accident at the center of this litigation, this effectively eliminates his liability, since his bull would have escaped from "open range." *See e.g., Moreland v. Adams*, 143 Idaho 687, 152 P.3d 558 (2007), overruling *Soran v. Schoessler*, 87 Idaho 425, 394 P.2d 160 (1964).

There remains no mystery, then, why Piercy takes strong issue with the procedures followed by the Canyon County Commissioners in December 1982. Both parties have provided this court with the recorded actions of the board. For example, it is undisputed that the board issued the following resolution, approved on December 2,

1982, as found in the minutes of the Board of Canyon County Commissioners in Book 27, Page 207 in the Canyon County Recorder's Office.

> 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 Hozba 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.

It is also undisputed that the Board issued the following order, as found in the Canyon County Recorder's Office and the Office of the Canyon County Commissioners.

> 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.

Finally, Piercy alleges the board failed to cause the publication of this Order in the Idaho Press Tribune on December 20, 1982, as set out in the Affidavit of Dawn McClure and the accompanying CD (containing a PDF file without authentication) as to which newspaper and on what date the paper published this information.

The procedural history, as it relates to the numerous Complaints and the most recent application to amend for punitive damages purposes in this case, is set forth in this Court's Order of April 27, 2007. After entry of that Order, Plaintiffs filed a Third Amended Complaint alleging the conduct of the defendants was reckless and/or willful. The Third Amended Complaint also eliminates the parents and natural guardians of Erika Rivera and Luis Guzman as plaintiffs to the action.

On July 20, 2007, pursuant to Idaho Code § 6-1604, Rivera and Guzman filed a Motion to Amend the Complaint, seeking to include a claim for punitive damages

against Defendant Piercy. The court also heard oral argument on this motion on September 6, 2007. Mr. Andrew Chasan presented argument on behalf of Rivera and Guzman. Mr. Ryan Peck argued on behalf of Piercy against the motion to amend. Mr. Josh Evett, counsel for Jennifer Sutton, was present at the hearing, but offered no argument on this issue. As noted, however, the court should hold this issue in abeyance until a resolution comes at the trial level concerning the Canyon County herd district's validity. *Compare Miller v. Miller*, 113 Idaho 415, 418, 745 P.2d 294, 297 (1987) [1] with *Marchbanks v. Roll*, 142 Idaho 117, 119-20, 124 P.3d 993, 995-96 (2005).[2]

II.

ANALYSIS

A. Summary Judgment in General

Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 606, 888 P.2d 383, 386 (1995). At all times, the burden of proving the absence of a genuine issue of material fact rests upon the moving party. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Furthermore, the trial court must draw all reasonable inferences in favor of the

[1] Holding that the inclusion of BLM land in a county herd district invalidates that district; note especially Shepard, C.J., in dissent, commenting that *Miller* has effectively overruled *Benewah County Cattlemen's Assoc., Inc., v. Board of County Commissioners of Benewah County*, 105 Idaho 209, 668 P.2d 85 (1983).

[2] Where Schroeder, C.J., would not allow a challenge to the Canyon County herd district's validity in view of the parties stipulating at the trial in magistrate court concerning its validity. Appellants raised the issue of validity for the first time on appeal to the district court, then the Idaho Supreme Court. Appellants' counsel asked both reviewing courts to take "judicial notice" that Canyon County contains BLM lands.

party resisting the motion. *Id.*; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

Nevertheless, to withstand a motion for summary judgment, the non-moving party must anchor its case in something more solid than speculation. A mere scintilla of evidence does not create a genuine issue. *Edwards v. Conchemco Inc.*, 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App. 1986). Put another way, the party opposing the motion for summary judgment may not merely rest on the allegations contained in the pleadings; rather, the non-moving party must produce evidence by way of affidavit or deposition to contradict the assertions of the moving party. *Ambrose v. Buhl School Dist. #412,* 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994).

Herein, the "battle of the affidavits" has raised issues of material fact. Hence, the presumption of the herd district's validity pursuant to the Idaho Code, so far, carries the day for the plaintiffs. This court rejects affidavits in support of Piercy's motion that simply imply the absence of something otherwise required to create a valid herd district. The court further rejects any affidavits advancing the notion "we cannot find it, therefore it does not exist," in view of the presumption of validity of any and all Canyon County herd district ordinances.

B. Herd Districts and Their Presumption of Validity

Before this court considers the merits of Piercy's claims on the invalidity of the herd district at issue, the court must recognize the standards set forth in Idaho Code

§31-857, which presumes the validity of a herd district, if not challenged within two (2) years.[3]

> **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.

Idaho Code § 31-857.

Thus, Piercy has the burden of convincing this court that the board followed improper procedures, such that this court should overturn the herd district created in 1982 after twenty-five (25) years of existence. Indeed, this constitutes an onerous task. Idaho case law strongly favors the validity of ordinances and statutes. *See e.g., City of Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956), and *Hecla Min. Co. v. Idaho State Tax Com'n*, 108 Idaho 147, 697 P.2d 1161 (1985).

The extent of Piercy's burden is set forth in Idaho Rule of Evidence 301. IRE 301 states, "The burden of going forward is satisfied by the introduction of evidence

[3] In 1982, Idaho Code § 31-857 allowed for a challenge to the validity of a district within five (5) years. However, the Legislature amended Idaho Code § 31-857 in 1989 for the current two (2) year window for challenge.

sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved." (Emphasis supplied).

C. The Statutes at Issue

At the time of the December 1982 Canyon County Ordinance at issue, the 1968 version of Idaho Code §25-2401 *et seq.* established the criteria for creating a herd district. This set of statutes gives the board of county commissioners in a particular county the right to create herd districts, and sets forth procedures by which the board would create such districts. The three relevant statutes follow:

> **I.C. 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 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 a 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 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.

Idaho Code §25-2402 (1968) (Emphasis supplied).

> **I.C. 25-2403 Notice of hearing petition (1968)**
>
> 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 §25-2403 (1968)

> **I.C. 25-2404 Order creating district (1968)**
>
> 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.

Idaho Code §25-2404 (1968)

The lessons gleaned from these sections of the Idaho Code inform this court as follows:

- A majority of landowners may petition for a herd district;
- If such petition is made, it will set forth the metes and bounds description of the requested district, the animals to be included or exempt from the herd district;
- Notice is to be given in three (3) locations and published in a newspaper in the county of the proposed district for two (2) prior to the hearing;
- The board of commissioners may create a herd district by order either "in accordance with the prayer of the petition, or with such modifications as it may choose to make"
- An order creating a herd district shall specify a date, after 30 days, when the district will take effect.

Piercy argues that the order as entered by the Commissioners, and as set forth above, is invalid because it fails to reference the landowner petition; it doesn't provide a metes and bounds description of the herd districts to be created; it fails to provide which breeds of animals are subject to the herd district; and finally, it fails to set forth an date when the herd district went into effect. Piercy contends these flaws overcome the presumption of validity of the herd district; hence, this court must strike it down.

D. The Missing Petition

The bulk of Piercy's argument against the validity of the herd district arises from the fact that no one knows if a majority of the landowner presented their petition to the board of commissioners prior to the entry of this particular order. It appears from the filings that Piercy has attempted to find such petition and has been unable to do so. In addition, because the order fails to reference any landowner petition, Piercy argues, that

translates to one never existing in the first place, thus generating the battle of the affidavits.[4] In support of his argument, Piercy offers the Affidavits of Glenn Koch and E.G. Johnson. Glenn Koch is the sole living commissioner from 1982. In rebuttal, Plaintiffs offer the Affidavits of the same Glenn Koch (he can apparently see both sides of the issue) and Bill Staker, former county clerk.

Glenn Koch asserts to the effect in both affidavits that he cannot recall if the board received a petition submitted by landowners for a herd district. He does state, however, that the commissioners in office in 1982 took their jobs very seriously and always attempted to follow the law in duty performance. (Compare Koch affidavit of July 3, 2007 with Koch affidavit of June 11, 2007). Bill Staker, the Clerk in 1982, also echoes the commitment to follow the law theme in his affidavit. He further asserts that he cannot recall whether the board received a petition. (Affidavit of June 14, 2007).

The Affidavit of E.G. Johnson informs the court that Mr. Johnson is a long-time resident of Canyon County and landowner in Canyon County in the area and at the time of the 1982 herd district ordinance. It further informs that he did not sign a petition in

[4] There may be a good explanation for why no one has located a petition from twenty-five years ago: there appears to be no requirement under the code to keep it of record. A careful reading of Idaho Code §31-708 (Duties of clerk) and Idaho Code §31-709 (Records to be kept) informs with specificity what the county clerk must generate vis-à-vis records, and what the board must "cause to be kept permanently and indefinitely." Idaho Code §31-708.7 comprises the only section under the clerk's duties dealing with the preservation of petitions and applications. However, that specifically deals with "franchises," and this court concludes that a petition for a herd district is not a petition or application for a franchise. Nevertheless, even if a county clerk has the duty to "preserve and file" a petition for a herd district, under Idaho Code §31-709, there appears to be no duty to keep it "permanently and indefinitely." The only "keeping" required under part 6 is "Ordinance records, containing all ordinances, stating the date enacted." It seems the "ordinance record" means the ordinances with a statement of when the board enacted them. The statute sets forth no specific directions to keep any petition that might have driven the board to enact a herd district ordinance. Yet, even if the statute did require a board to keep a petition "permanently and indefinitely," and a board failed to do so, that still does not vitiate the presumption of validity or mean an ordinance otherwise validly enacted in the first instance becomes invalid.

1982, nor did he have notice that the commissioners considered the creation of such a herd district until after they created a herd district. (Affidavit of July 18, 2007).

From these affidavits, this court is only able to determine that none of the living county officials who would have taken an active part in the process can recall whether interested landowners petitioned the board for a herd district, and that one of the land owners did not sign a petition to create (or consolidate) a herd district. On the other hand, while neither the Resolution nor the Order in question refers to a specific landowner petition, the Order does state, "The Board has again reviewed the complexity of the Herd District Boundaries..." This court focuses on the language of "again reviewed" in conjunction with the fact that it cannot be clearly determined one way or the other whether the board performed this review at the request of a majority of landowners.

The Idaho Supreme Court has stated a court will not presume a procedural irregularity in the face of silence as to the procedures taken. *See Garrett Transfer & Storage Co. v. Pfost*, 54 Idaho 576, 33 P.2d 743 (1933). Thus, despite Piercy's arguments to the contrary, no party has presented this court with evidence showing that no petition existed—at least to the extent it overcomes the presumption of validity. Therefore, Piercy's argument and "evidence" falls short of the mark.[5]

E. The Missing Metes and Bounds Description

[5] There is a bigger issue, however, for purposes of time lapse. While the place Piercy's bull "escaped" may be the 1982 herd district area, where the collision took place with Piercy's bull is apparently an area a former board put into herd district status in 1908. *See* Piercy's Memorandum in Support of Motion for Summary Judgment dated May 1, 2007, page 12.

Idaho Code §25-2402, as it stood in 1982, stated that a landowner's petition for a herd district "shall describe the boundaries of the said proposed herd district." Piercy argues that this language imposed on the Commissioners a duty to include metes and bounds legal property description in the Order creating the herd district at issue here.

However, Idaho Code §25-2404 also provides that "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." (Emphasis supplied). Even if one or more landowners presented a petition to the Commissioners containing a metes and bounds description, the commissioners, by statute, did not have to use a metes and bounds description in their order in order to create it.

The language of the order tells the court that the commissioners intended to limit the herd district created in 1982 to three small areas of remaining open range in Canyon County. The order states, "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," and "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." (Emphasis supplied). The commissioners also apparently recognized this action would place the entirety of Canyon County in a herd district, because the rest of the county already had herd district status. This court does not read this language to the effect that the commissioners were creating a "giant" herd district in their 1982 ordinance. Rather, they seem to be filling in the gaps so that in Canyon County (at least over the area they had jurisdiction) no open range would exist.

The court does not to say the intended effect would not be a "giant" herd district; rather, the 1982 ordinance simply did not describe all of Canyon County as being one large herd district.

Piercy makes much of the fact that the survey map referenced in the order may or may not exist today, and without such map, no metes and bounds description exists for the herd districts thus created. Piercy avers this supplies the proof positive of his contention theory of the invalidity of Canyon County's herd districts. Again, this court declines Piercy's invitation to require a metes and bounds description in the order. The court further declines the invitation to invalidate the herd district created by the order based on a lack of legal description, given that the commissioners indicated the limited land area to be included in the newly created herd districts to the three small areas indicated on the survey map. As previously noted, this court does not adopt the "we-cannot-find-it-so-it-never-existed" theory advanced by Piercy. Accordingly, as a matter of law, this court cannot determine that the herd district created by the 1982 Order is invalid for lacking a metes and bounds description.

F. The Notice Requirement

Idaho Code §25-2403 sets out the notice requirements for a hearing by the commissioners on a petition to create a herd district. The board must cause the posting of notice in three conspicuous places in the proposed herd district and by publication for two weeks prior to a hearing on the issue in a newspaper in the county of the proposed herd district. Idaho Code § 25-2403.

Piercy asks this court to invalidate the 1982 Order and the resulting herd districts because no notice apparently exists in the archives of the Idaho Press Tribune during the period of November 10, 1982 and December 20, 1982. (Affidavit of Dawn McClure). The affidavit of E.G. Johnson is also provided to the court as evidence that no notice existed because Mr. Johnson states, "I would have received information about the proposed herd district prior to the hearing if such information had been available." (Affidavit of E.G. Johnson).

However, Plaintiffs, through the Affidavit of Deborah Schrecongost, inform the court that the Idaho Press Tribune was not the only newspaper in existence in Canyon County in 1982. Schrecongost indicates that The Parma Review was published in Canyon County from 1909 to 1993. No party provides the court with information concerning whether the county published notices of ordinances in this newspaper.

Moreover, it is conceivable that while the board signed the Resolution and Order in December 1982, that the hearing on the issue may have occurred at some point prior to December 1982. It is also clear from the language of the Order that this was not the first time that the board confronted this issue as the Commissioners state in the Order, "The Board has again reviewed the complexity of the Herd District Boundaries." While Piercy is unable to find notice for the November to December 1982 time period in one newspaper published in the county at the time of the Order, this court, cannot based on this evidence alone, invalidate the herd districts. Piercy has failed to overcome the presumption of validity on this issue based upon the "fact" presented.

G. The Date of Effect

Idaho Code § 25-2404 requires an order to create a herd district to include a specific date, thirty days after the entry of the order, at which time the herd district will take effect. Clearly, the Order at issue here does not contain such language, which opens the door to Piercy's argument that the Order has never taken effect. The Resolution passed by the Commissioners does give an effective date of December 14, 1982. However, the "proponent agency" of the herd district, Canyon County, has not had an opportunity to deal with this issue. Again, it is one thing for a bull to escape from an area that is "open range," but there is every indication the accident occurred in an area that constituted a herd district in 1908. None of the parties have presented to this court anything on the consequences of this dynamic.

H. BLM Land

Finally, the parties ask this court to determine the validity of the herd district on the issue of whether the district purports to incorporate BLM lands. It appears Piercy contests the validity of the herd district where he pastured his bull (presumably created in 1982) and further contests the validity of the herd district created in 1908 where the accident occurred. Piercy's argument appears to suggest the board created a single giant herd district throughout the county, thus acting improperly, due to Canyon County containing BLM lands, which cannot be regulated by the county. While this court disagrees with Piercy's view the board created "one giant herd district" in 1982, the court still addresses the matter.

The foundation for Piercy's argument comes from Idaho Code § 25-2402, set out above. The addition to the statute set out below forms the basis of Piercy's argument:

> (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.

Idaho Code §25-2402 (1983)(Emphasis supplied).

Under this statute, as amended, the Idaho Supreme Court invalidated a herd district ordinance created by the Bannock County Commissioners because it contained BLM land. *Miller v. Miller, supra.* There, the Bannock County board purported, in May 1984, to create a herd district encompassing the parties' (Millers) land and containing BLM land. The district court determined that under Idaho Code § 25-2401 *et seq.*, the herd district was invalid as to the portions containing BLM land but otherwise upheld the herd district as created. The Supreme Court found that the district court's decision was at odds with Idaho Code § 25-2402(2) which prohibits a board of county commissioners from creating a herd district that includes BLM lands. The herd district in its entirety was found to be invalid because the Commissioners acted "outside the dictates" of the statute. *Id.* at 419, 745 P.2d at 297.

The situation facing this court is unlike *Miller.* The board passed the ordinance before this court in 1982, prior to the amendment of Idaho Code § 25-2402. In addition, while the statute, as amended, purports to apply to herd districts established before July

1, 1983, nothing in the amendatory language clearly indicates a legislative intent to invalidate all previously established herd districts containing federal land historically used for grazing. Idaho Code § 73-101 clearly states that no statute is to be retroactive unless expressly so declared. *See also State ex rel. Wasden v. Daicel Chemical Industries, Ltd.*, 141 Idaho 102, 106 P.3d 428 (2005). Thus, while a court might construe the language "established before July 1, 1983" retroactivity, it does not rise to the level of express declaration to invalidate all previously established herd districts throughout the state, no matter how long established, that happen to contain BLM administered lands meeting the other definitional requirements of the amendment. Therefore, this court will not apply the language of Idaho Code § 25-2402(2) retroactively to the effect of automatically invalidating the herd district created by the 1982 Order and the 1908 herd district. After all, does it seem reasonable the legislature really sought, in 1982, to undo the ordinances in forty-four Idaho counties after (then) seventy-five years of carving out herd districts? Especially since the current law (as amended in 1996) clearly states "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." Idaho Code § 25-2401 (1996)(Emphasis supplied).[6]

Despite this court's interpretation of the statute and retroactivity, there still exists a factual issue concerning whether the herd districts at issue here (1908 and 1982

[6] The significance of this language should be apparent. First, Piercy argues that since Canyon County contains lands owned by the United States of America, managed by BLM, where historical livestock grazing took place, the 1982 ordinance is void. However, the BLM amendment did not go into effect until July 1, 1983. Second, Piercy argues that since Canyon County herd districts (or, in his words, the "giant herd district) contain state lands, the Canyon County herd district(s) are (is) void. Yet again, the prohibition against herd districts containing state land did not go into effect until July 1, 1990. Both of these prohibitions come after the 1982 Canyon County Herd District Ordinance.

districts) actually contain federal land in violation of the statute as it now reads. In support of the theory that the herd districts contain federal BLM land, Piercy offers not one, but two, Affidavits of Rosemary Thomas, along with the Affidavits of Dennis Sorrell and Affidavit of Jerry Deal to show there is state land in the herd districts. Plaintiffs also offer an Affidavit of Rosemary Thomas to refute Piercy's contention that BLM land exists in the herd district where the accident occurred. Hence, a material fact immediately pops up, provided, that issue is even relevant. While Piercy says it is and every other party to the action indicate their doubts, the proponent of the herd district in the first instance, namely, Canyon County, had not had a vote in the debate.

Furthermore, while the May 8, 2007, Affidavit of BLM Field Manager Rosemary Thomas provides the court with a map demonstrating that BLM grazing land exists in Canyon County, along with the statement that these lands are currently and historically used for grazing, in reviewing the map, this court is only able to determine that sections of land outlined in purple intend to indicate BLM allotments. Beyond that, the court is unable to glean information to assist it in its determination of whether BLM land historically used for grazing and the herd districts at issue overlap.

Then, in the May 30, 2007 Affidavit of Rosemary Thomas, submitted by Plaintiffs, Thomas provides another map showing a large section of Canyon County in yellow (south of the Boise River) to indicate the location of herd districts in Canyon County. Thomas further opines that after a review of BLM records, she determined that no BLM land exists in the herd districts identified in the yellow and that the earliest records of grazing start in 1981. Not to be outdone, however, Piercy submits a third and final

Affidavit of Rosemary Thomas, dated August 8, 2007. In this affidavit, Thomas informs the court that she determined that the Black Canyon Management Framework Plan allowed grazing in Canyon County since 1967. However, upon review of the attached exhibit, this court is unable to determine any connection between the document and Canyon County, other than the word of Thomas as to its applicability. Frankly, to this observer, when one mentions Black Canyon, Gem and Payette Counties come immediately to mind, not Canyon County.

Finally, the Affidavits of Dennis Sorrell and Jerry Deal further purport to show that Canyon County contains state land. One, however, must read these affidavits in conjunction with the May 2, 2007, Affidavit of Ryan Peck. That latter affidavit provides a map required in order to give the Sorrell and Deal affidavits meaning. The alleged effect of these affidavits and the map purports to show that the 1908 herd district, apparently where the accident occurred, contains state land. However, when one reviews the proffered map and affidavits, this court cannot find that the herd districts (1982 or 1908) are, as a matter of law, invalid. As stated above, this court is not of the opinion that the 1982 Order created one giant herd district—that was simply the affect of connecting the final three areas with all the other pre-existing herd districts—and this guides the analysis here. Yet, even assuming the 1982 Herd District Ordinance did create one giant herd district in Canyon County in December of that year, Piercy has yet to answer the "So what?" question. The current law states, as already noted, that "[t]he provisions of [the herd district law] shall not apply to any herd district or herd ordinance in full force and effect prior to January 1, 1990...." Idaho Code § 25-2401 (1996).

Because this court has not been given the legal description of the 1908 herd district, the allegations of state land included in that district only raises an issue of fact. The same is true of the 1982 herd district. Further confounding this court is the lack of specificity and detail concerning where the BLM land complained of by Piercy actually lies. Hence, the current posture of this litigation leaves the court with herd district statutes not cleanly dealt with by the legislature in setting out its intent concerning pre-existing herd districts where it added certain land prohibitions to district formation, only underscored by opposing counsel's argument and briefing. Further, as explained more fully below, the court is without the position by the proponent of herd districts in Canyon County, the Board of County Commissioners. The board may very well want to make its position known before the court goes mucking around in its ordinances.

I. Joinder of Canyon County

Defendant Sutton asks this court to join Canyon County as a necessary party to this action, pursuant to Idaho Rule of Civil Procedure 19. Sutton argues any ruling by this court on the validity of the herd district has an impact on the county as the creator of the herd district, and the entity that enforces it. On this theme, the court intended originally to decline Sutton's invitation, particularly because significant issues of material fact exist with regard to the herd district and the motion comes very late in the process. Yet, this issue, strategically, is a legal issue this court needs to resolve before the parties litigate damages. The resolution of the herd district issue is paramount to getting to the issue of damages among the parties. In short, the herd district issue becomes the "trial within the trial" before this court can even allow the primary litigants

to present evidence to a jury on the issue of damages. Regrettably, this issue comes late. Perhaps Piercy intended it that way as a matter of strategy. Nevertheless, it must be resolved.

III.

CONCLUSION

This court finds and concludes that Piercy has failed to overcome the presumption of validity of the herd districts because genuine issues of material fact exist. For example, material issues of fact exist whether landowners petitioned the board and whether the board gave proper notice of the 1982 ordinance once enacted. There also remains unresolved the issue of the 1908 ordinance in relation to whether the 1982 ordinance affected its validity. The fact that the proponent of herd districts on Canyon County is absent from this litigation exacerbates the lack of resolution. Hence, Canyon County should be joined as a third-party defendant, though not for the purpose of liability. Rather, Canyon County needs to be a part of this litigation for the limited purpose of fully developing the validity of herd districts in the area Piercy's bull escaped and in the area where the collision with the bull took place. As a "heads up," the clerk should provide a copy of this decision to the Canyon County Prosecutor. Finally, this court anticipates that this decision will necessitate the vacation of the current trial date. Nevertheless, as the court informed all counsel at the time they argued for or against Piercy's motion for summary judgment, circumstances involving a rather serious felony matter may have already caused that vacation, apart from this decision. Nevertheless, once the issue of Canyon County herd district validity is determined, should the court

have to vacate the current trial date, this court will ensure that the parties herein go to the "front of the line" for rescheduling purposes.

THEREFORE, THIS ORDERS THAT:

1. The court denies Piercy's motion for summary judgment.

2. The court holds in abeyance the issue of another amendment to the complaint for punitive damages until the court can determine the validity of herd districts in Canyon County.

3. The court directs the joinder of Canyon County as a third-party defendant for the limited purpose of determining whether valid herd districts exist at the locations of the bull's escape and the location of the collision between the Sutton automobile and Piercy's bull.

4. The court directs Sutton's counsel to prepare and serve the necessary pleadings to join Canyon County, through its Board of Commissioners, as a third-party defendant.

DATED this 9 October 2007.

GORDON W. PETRIE, District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on ___ October 2007 s/he served a true and correct copy of the original of the forgoing **ORDER DENYING DEFENDANT PERCY'S MOTION FOR SUMMARY JUDGMENT, JOINING CANYON COUNTY, AND HOLDING ALL OTHER MOTIONS IN ABEYANCE UNTIL CANYON COUNTY HERD DISTRICT VALIDITY IS DETERMINED** on the following individuals in the manner described:

- Upon the Canyon County Prosecutor,

when s/he placed the same into the latter's respective "pick up" boxes at the Canyon County Clerk's office, Canyon County Courthouse, Caldwell, Idaho,

- and upon Rodney R. Saetrum, of SAETRUM LAW OFFICES, 101 S. Capitol Blvd, Boise, Idaho, 83702, attorneys for Defendant Piercy; and upon

- Joshua S. Evett of ELAM and BURKE, P.A., PO Box 1539, Boise, Idaho 83701, attorney for Defendant Sutton; and upon

- Timothy C. Walton of CHASAN & WALTON, LLC PO Box 1069 Boise, Idaho 83701-1069 and upon Stephen E. Blackburn of BLACKBURN LAW, P.C., 660 E. Franklin Road, Suite 255, Meridian 83642, attorneys for the Plaintiffs Rivera and Guzman,

when s/he caused the same to be deposited into the US Mails, sufficient postage attached, at the addresses set forth above.

WILLIAM H. HURST, Clerk of the Court

By: _____
Deputy Clerk of the Court

BOOK 3

370

[illegible] 1908.

Caldwell, Idaho, July 13,1908.

Sixth Day of July Sec...

The Board of County Commissioners met pursuant to adjournment . Present, W.H. Platt,Chairman, G.F.Chaney, L.P.Reed, and O.V.Hadley,Clerk, when the following proceedings were had, to-wit:

IN THE MATTER OF THE PETITION OF J.E.SOPER [illegible] et al praying for the establishment of a herd district, this being the day and the hour set for the hearing of said petition, the same came on regularly for a hearing. It appearing to this Board by documentary evidence and the evidence of witnesses that a majority of the electors of said proposed herd district are in favor of the enforcement of the herd law therein, and it appearing by affidavit on file herein that the notices of hearing were duly posted and published as required by law, the same is hereby granted according to law and shall take effect beginning August 20th,1908. Said district is described as follows: Beginning at a point in the middle of the channel of Boise River where the section line running north and south between sections one and two, eleven and twelve township 4 north, range 4 west B.M. crosses said river, thence due south to the southwest corner of Sec. 30, tp.4 N.R.4 W.B.M., thence due east two miles to the N.E.Cor. of Section 6, Tp. 3 N.R.3 W.B.M. thence due south to the middle of the main channel of the Snake River, thence in a northwesterly direction, along the middle of the main channel of the said river, a point on the line between Idaho and Oregon where the State Line crosses said River, thence due north to the point where the Section Line running north and south between sections 22 and 27, 26 and 27, Tp. 5 N.R. 6 W.B.M. crosses or intersects said Snake River, thence in a northerly direction to a point in the main channel of the Boise River, thence in a southeasterly direction along the middle of the north channel of the Boise River to a point where it intersects with the south channel at the east end of what is commonly known as the McConnell island, and thence in a southeasterly direction along the main channel of said river, to the place of beginning, and the following described animals are prohibited from running at large during each and every year hereafter: horses,mules,asses,cattle,swine,sheep and goats.

IN THE MATTER OF THE PETITION OF A.W.MOODY et al praying for the establishment of a herd district in Middleton, the same is denied for the reason the petitioners have not complied with the law in furnishing an affidavit showing that a majority of the electors of said proposed Precinct had signed the petition.

Rehearing IN THE MATTER OF THE PETITION OF L.WACHTER et al praying for the establishment of a herd district, this being the day and the hour set for the hearing of said petition, the same came regularly on for a hearing. It appearing to this board by documentary evidence and the evidence of witnesses that a majority of the electors of said proposed herd district are favor of the enforcement of the herd law therein, and it appearing by affidavit on file herein that the notices of hearing were duly posted and published as required by law, the same appearing to comply to law the same is granted and shall take effect August 20th 1908. Said district is described as follows: All of Road District No.9 and 29, and all of Road District No.10, except that portion lying west of the right of way of the Oregon Short Line Railroad, and the following described animals are prohibited from running at large, during each and every year hereafter: horses,mules,asses, cattle, swine,,sheep and goats.

IN THE MATTER OF THE NEW PLYMOUTH LAND & COLONIZATION CO. assessment for the year 1908, it appearing to this board that the said assessment is too low in respect to the real estate of said Company situated at New Plymouth, Idaho. It is hereby ordered that Col. Brainard, Secretary of said Company be notified to appear before this Board on Monday the 27th day of July at 10 o'clock A.M. to show cause why the assessment of said Company should not be raised.

Whereupon this board adjourned until Monday, July 20, 1908, at 2 o'clock P.M.

W.H.Platt

Chairman.

O.V.Hadley

Clerk.

EXHIBIT B

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BOOK 27

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,

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 C

ORIGINAL

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 220
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** **NOTICE OF HEARING ON PLAINTIFFS' MOTION TO RECONSIDER** November 6, 2007

On the 6th day of December, 2007, at the hour of 9:00 a.m., or as soon thereafter as counsel can be heard, in the Courtroom of the Canyon County Courthouse, Boise, Idaho, before the Honorable Judge Gordon W. Petrie, the undersigned will call up for hearing Plaintiffs' Motion to Reconsider.

DATED this 7th day of November, 2007.

CHASAN & WALTON, L.L.C.

By _____
Timothy C. Walton, of the firm
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 7th day of Nov, 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
Attorneys for Jennifer Sutton

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 384-5844

Ryan Peck
Rodney R. Saetrum
SAETRUM LAW OFFICES
101 S. Capitol Blvd., Suite 1800
P.O. Box 7425
Boise, ID 83707
Attorneys for Dale W. Piercy

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 336-0448

CHASAN & WALTON, LLC

_____
Timothy C. Walton

ORIGINAL

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 220
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** **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER** November 6, 2007

INTRODUCTION

Defendant Piercy moved for summary judgment, contending that Canyon County's herd districts are invalid. The Court denied Piercy's motion for summary judgment. The Court also held that Canyon County shall be added as

a party to this litigation, and that there will be a separate hearing, prior to the main trial, to determine whether the herd districts at issue are valid.

In its decision denying Piercy's motion for summary judgment, the Court did not address the arguments advanced by Plaintiffs and Defendant Sutton that Piercy is estopped to challenge the validity of Canyon County's herd district ordinances. If Piercy is estopped to challenge the validity of the herd districts, it is unnecessary to conduct a "mini-trial" to determine whether the herd district ordinances are valid.

Thus, Plaintiffs respectfully ask the Court to rule (1) that the 1982 ordinance was properly enacted, or that Piercy is estopped to contend that the 1982 herd district was not properly created, and (2) that Canyon County should be dismissed from this case, since there is no need for a "mini-trial to determine the validity of the herd districts.

PIERCY IS ESTOPPED IN THIS LAWSUIT FROM ATTACKING THE VALIDITY OF THE HERD DISTRICT CREATED IN 1982

Piercy has had 23 years to challenge whether the County Commissioners followed proper procedure when they enacted the 1982 herd district ordinance.

Piercy is estopped to now deny the validity of the ordinance. Piercy cannot accept the benefits of living, working and operating his ranch and farm under herd district status for 25 years and then, **after** he paralyzes Erika and severely wounds Luis, be heard to challenge the law he accepted and benefited from for 25 years.

That Piercy voluntarily accepted the benefits of living and working under the herd district ordinance is undeniable. Because ranchers are required to keep their livestock fenced [1], other ranchers' livestock was prevented from mingling with Piercy's livestock (as may occur in open range). Other rancher's livestock was prevented by such fences from trampling and ruining Piercy's crops. And as Piercy drove the roads of Canyon County over the last 25 years, the 1982 ordinance protected **Piercy** from colliding with another rancher's livestock, because all ranchers were required by that law to keep their livestock fenced, and off the Canyon County roads Piercy drove.

Piercy cannot argue that he had no notice of the existence of the 1982 herd district. It is undisputed that notice of the creation of the herd district was published several times in the Idaho Press Tribune in December 1982. Piercy's affiant, E.G. Johnson[2], testified in his affidavit that that was when he was notified of the herd district. Piercy acknowledges that he has been farming and ranching in Canyon County for 50 year. It is inconceivable that Piercy was unaware of the existence of the1982 herd district (in which he owns land), but even if he was unaware he is charged with notice of the creation of the herd district since he admits that notice of the creation of the herd district was published in the Idaho Press Tribune.

---

1. Piercy himself testified that he intended to keep his livestock in his enclosed pastures, and that all livestock in Canyon County is contained in "enclosed" fields. Of course, because all of Canyon County has been herd district for 25 years, that is exactly what one would expect. Contrast "open range", where livestock generally roams unenclosed. Piercy's testimony confirms that Piercy and, indeed, all of Canyon County's ranchers, have conformed to the county's herd district status. Plaintiffs are only asking that Piercy's conduct be governed by, and judged by, the law that everyone in the county understood to be in effect at the time of the accident.

2. Defense counsel Saetrum also represents E.G. Johnson in a separate "herd district" case brought against E. G. Johnson Farms, Inc by plaintiff Gazzaway, who was injured when his vehicle struck Johnson's cow. In that case, the defendant rancher alleged that the 1982 herd district was invalid because it was not properly enacted (just as Piercy alleges here).

The doctrine of quasi estoppel was adopted as law in Idaho in the case of KTVB, Inc. v. Boise City, 94 Idaho 279 (1971), where the Idaho Supreme Court said that, "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 Idaho, at 281.

That Piercy accepted the benefits of the herd district ordinance is not subject to dispute, as the case of Wong v. Public Utilities Commission, 33 Hawaii 813 (1936) makes abundantly clear. The Idaho Supreme Court, in adopting the quasi estoppel doctrine in KTVB v. Boise, supra, cited and relied upon the holding in Wong.

In Wong, plaintiff was a common carrier who operated his business under the authority of the public utilities commission. Pursuant to law, Wong was required to comply with the regulations promulgated by the public utilities commission. Among other requirements, the regulations required Wong to obtain a certificate to operate his business.

Wong sued when the public utilities commission yanked his certificate to do business. In his suit, Wong contended that the statute that required Wong to obtain the certificate was invalid, just as Piercy argues in this case. The Hawaii court held that Wong was estopped to attack the validity of the statute since he had accepted the "benefit" of the statute. The Hawaii court stated:

> To permit (Wong) 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 (Wong) 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 Hawaii, at 813-814.

While Wong likely perceived that regulatory scheme to be a burden rather than a benefit, the Hawaii court clearly determined that Wong's duty to operate his business in accord with the regulatory scheme of the public utilities commission was a **benefit**.

Per Wong, Piercy can not argue, **after** Piercy has violated the law under which he lived, worked, transacted business, and accepted benefits for 25 years, that the law is invalid.

Under the rationale of Wong, Piercy can not be heard in this case to argue he received no benefit from the herd district law under which he lived and operated his business for the last 25 years. If the regulatory scheme in Wong benefited Wong, the herd district ordinance in this case benefited Piercy. His herds were protected from co-mingling with other ranchers' livestock. His crops were protected from trampling by other ranchers' herds. And Piercy was safer when he drove the roads of Canyon County these last 25 years, because other ranchers were required to keep their livestock fenced and off the road so Piercy wouldn't collide with such livestock and himself be injured.

While the herd district ordinance does impose burdens on Piercy, (just as Hawaii's statute imposed burdens on Wong), the herd district ordinance also clearly benefited Piercy (just as Hawaii's statute benefited Wong).

Moreover, since Piercy chose not to attack the validity of the ordinance for 25 years, Piercy has acquiesced in the application of the ordinance.

As noted in KTVB v. Boise, supra, where Piercy has **either** "acquiesced" in the application of the ordinance, **or** "accepted the benefits" of the ordinance, he is estopped to challenge the validity of the ordinance. KTVB v. Boise City, supra.

For 25 years Piercy has acquiesced in and benefited from living under, and operating his business under, the herd district ordinance. The doctrine of quasi estoppel precludes Piercy from attacking the validity of the ordinance.

ESTOPPEL BY LACHES ALSO PRECLUDES PIERCY FROM CONTESTING THE VALIDITY OF THE HERD DISTRICT

In Alexander v. Trustees of the Village of Middleton, 92 Idaho 823 (1969), it was undisputed that the village had enacted an ordinance that annexed plaintiff's land **in violation of law**. In upholding the annexation on the grounds the plaintiff land owner was estopped by laches to contest the validity of the ordinance, the Idaho Supreme Court noted that the doctrine of estoppel by laches

> "has application even though the proceeding by which the municipal boundaries were extended are void, when by reason of lapse of time the municipal authority has been exercised, and there has resulted changed conditions involving extensive public and private interests.
>
> Such holdings are based upon public policy. Where a municipal corporation and the parties affected acquiesce in such action by the officials of the corporation, and transact business upon the theory that the land is located within the boundaries of the municipality, it is in the interest of the general public that such a rule be applied... 92 Idaho, at 826 (emphasis added).

As in Alexander, over the last 25 years the county, through law enforcement, has enforced herd district status throughout the county; over that 25 years there have "resulted changed conditions involving extensive public and private interests"; and the county and private parties have "transacted business" with the understanding that the entire county was subject to herd district status. "Public policy" and "the interest of the general public" mandate the application of estoppel by laches to the facts of this case. See quoted language from Alexander, supra.

In Alexander, supra, the Idaho Supreme Court held that where (1) two years had elapsed since enactment of the ordinance, (2) the land owner challenging the ordinance had notice of the enactment of the ordinance, (3) the governmental entity that enacted the ordinance would be harmed if the ordinance was declared invalid, and (4) the land owner had been benefited by the ordinance, the land owner was estopped by laches from contesting the validity of the ordinance.

Applying the standards set forth in Alexander: (1) twenty-five years have elapsed since the ordinance was enacted; (2) Piercy had notice of the ordinance, since notice of enactment of the ordinance was published in the Idaho Press Tribune in 1982; (3) the harm to Canyon County and its citizens (and especially Erika and Luis) would be massive if large swaths of Canyon County are suddenly and **retroactively** declared to be open range; and as noted above, (4) Piercy has been benefited by the ordinance.

Piercy is estopped by laches from contesting the validity of Canyon County's herd district.

GAZZAWAY v. E. G. JOHNSON FARMS, INC.

The Court will recall E. G. Johnson, who submitted an affidavit in this case on behalf of Piercy. Mr. Johnson's farm corporation is a defendant in a herd district case pending before Judge Hoff (Gazzaway v. E. G. Johnson Farms, Inc., Canyon County case no. CV07-2141). Mr. Saetrum's law office represents Mr. Johnson and his farm corporation in that case.

The rancher in that case raised exactly the same arguments that Piercy raises in this case: that the 1982 herd district is invalid because it was improperly enacted, and that therefore the site of the collision involving Gazzaway's vehicle and Johnson's cow is open range.

Judge Hoff rejected Johnson's arguments in that case and held, "that the Canyon County Board of Commissioners followed the procedure set forth in Idaho Code 25-2402 as it was in 1982". See Reporter's transcript of October 25, 2007 proceedings in Gazzaway, attached hereto, page 14. Judge Hoff concluded that there was not sufficient evidence presented by Mr. Saetrum's office to overcome the "strong presumption" that the ordinance was properly enacted pursuant to the herd district statutes. Reporter's transcript, pgs. 15-16, attached.

Judge Hoff also concluded that the Board of Commissioners were not required in 1982 to wait until a majority of the landowners presented a petition for the creation of a herd district, but rather that the commissioners were empowered by case law and statutes to create the herd district in 1982 even in the absence of such a petition. Reporter's transcript, pgs. 14-15.

Citing Benewah County Cattlemen's Ass'n v. Benewah County, 105 Idaho 209 (1983), Judge Hoff noted that the Idaho Supreme Court concluded that the County Commissioners have the authority to enact an ordinance requiring ranchers to fence in their livestock, even though the ordinance was not enacted in accord with the procedural requirements of the herd district statutes. As Judge Hoff noted, the Idaho Supreme Court stated in the Benewah case:

> Within the legislative contemplation was 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. We find 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. 105 Idaho, at 214. See also attached reporter's transcript, pg. 14.

Thus, concluded the Idaho Supreme Court and Judge Hoff, the County Commissioners are free to enact an ordinance requiring ranchers to fence in their livestock, and the county need not wait for a petition to be presented to the commissioners before exercising such police power. Under the Benewah case, even if Piercy's allegations that the 1982 ordinance was not enacted pursuant to IC 25-2402 is true, the ordinance is still valid and enforceable.

Plaintiffs adopt and incorporate herein by reference, the reasoning advanced by Judge Hoff in the Gazzaway case. While Judge Hoff's decision is not binding on this Court, Judge Hoff's logic is sound. Further, the interest of judicial consistency mitigates in favor of this Court rejecting Piercy's attack on the law that has governed this county these last 25 years.

CONCLUSION

Estoppel is a creature of equity. Which is fairer? To allow Piercy, **after** he has paralyzed Erika and severely wounded Luis to challenge the validity of a law under which he, every rancher in the county, law enforcement and the citizens of Canyon County (including Erika and Luis) have transacted business, been protected, and ordered their affairs for these last 25 years, or to hold Piercy accountable under that law?

There is nothing fair about allowing Piercy to attempt to immunize himself from conduct that he knew was wrong. He admits he attempted to keep his bull contained. But he failed miserably, and at age 17, two months shy of her high school graduation and about to embark on a course of study and a career in nursing, Erika paid the price for his failure with the loss of voluntary control of much of the left side of her body. Equity demands that the 1982 ordinance be enforced against Piercy, which is nothing less than Piercy had a right to expect.

Piercy, and every other rancher in the county, has had 25 years to file a declaratory judgment action to challenge the validity of the 1982 ordinance. Piercy is free to file a declaratory judgment action now, to **prospectively** attack the validity of the ordinance (though the courts may conclude that, after 25 years he is estopped to do so). Under the doctrines of quasi estoppel and/or estoppel by laches Piercy is estopped from **retroactively** challenging the validity of Canyon County's herd district ordinances.

Finally, per the rationale of Judge Hoff in Gazzaway v. E. G. Johnson Farms, Inc. not only has Piercy failed to overcome the presumption that the 1982 herd district ordinance was validly enacted, the county commissioners were empowered to enact the 1982 ordinance even if they did not (as Piercy alleges) comply with the mandates of IC 25-2402.

Such being the case, a "mini-trial" to determine the validity of the county's herd district ordinance is unnecessary, since Piercy is bound by the herd district law in any event.

Erika and Luis therefore respectfully request: that the Court dismiss Canyon County from this suit; that the Court rule that Piercy was obligated to abide by Canyon County's herd district law; and that the Court immediately set for trial the issues of who is liable for, and the amount of damages to be awarded for, the injuries sustained by Plaintiffs.

DATED this 7th day of November, 2007.

CHASAN & WALTON, L.L.C.

By _____
Timothy C. Walton, of the firm
Attorneys for Plaintiffs

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,

vs.

E. G. JOHNSON FARMS, INC. an Idaho Corporation,

Defendant.

Case No. CV07-2141

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on Thursday, October 25, 2007

before the

Honorable Renae J. Hoff
District Judge

Katherine J. Klemetson, RPR, CSR #436
1115 Albany Street
Caldwell, Idaho 83605
(208)454-7363

A P P E A R A N C E S

For the Plaintiff:

GOICOECHEA LAW OFFICES
By: J. Brent Gunnell
1226 E. Karcher Road
Nampa, ID 83687

For the Defendant:

SAETRUM LAW OFFICES
By: Robert R. Gates
101 S. Capitol Boulevard
Suite 1800
Post Office Box 7425
Boise, ID 83707

CALDWELL, IDAHO

Thursday, October 25, 2007, 9:12 a.m.

THE COURT: The next matter, Gazzaway versus Johnson Farms. This is a case that I previously heard arguments from counsel. And that was on July 26. At that time the motion on the -- plaintiff's motion to strike affidavits essentially was no longer at issue and summary judgment was the remaining issue. I didn't rule on that case because there was a similar case pending before another judge. A decision was made on that case, and Mr. Gates, who's present on behalf of the defendant, had served that on me and on Mr. Gunnell, who's here on behalf of the plaintiff.

Because of that document, I caused a conference call yesterday to be placed to both counsel to determine if they wanted to stay these proceedings and await further decision in that matter. I was advised by both counsel that neither party wanted to stay this action and that both sides were ready to proceed with any further argument today and decision of the court.

Is that your understanding, Mr. Gunnell?

MR. GUNNELL: Yes, it is, Your Honor.

THE COURT: Mr. Gates?

MR. GATES: Yes, Your Honor.

THE COURT: All right. In the meantime, there has been additional documentation provided by Mr. Gates, and I did have a chance to review that and prior arguments of counsel yesterday. I will permit counsel to comment further at this time.

Mr. Gunnell -- or Mr. Gates?

MR. GATES: Thank you, Your Honor. I don't know whether it would serve the court best if I went through the -- all of our entire arguments again, but let me first address the issue of what were the boundaries of the Notus herd district at the time of the initial designation of their district and then after Gem and Payette counties were taken out of Canyon County back in 1915 and 1917.

THE COURT: That's actually what you had submitted as a --

MR. GATES: That's correct.

THE COURT: -- supplement. It was a multiple-page document, not one page, actually, on the Notus herd district.

MR. GATES: That's correct.

THE COURT: You may proceed.

MR. GATES: The Canyon County commissioners, after the state had created two new counties out of the

northern pa... Canyon County, basically redesignated the herd districts in 1918. The only change to the Notus herd district was that the northern part of it was lopped off at the county line. The western border, which is the one that we're concerned with, remained at Fountain Road, which is approximately one mile east of where the accident between the truck and the cow took place, and it's certainly outside the area of where the cow came from.

So if the court has any other questions on that. That's the only argument, additional argument that we have, except to say that plaintiff has basically argued that the 1963 version of the Notus herd district which puts the west border about a mile west of the original herd district western border is the true one.

Your Honor, if we did that, this herd district, which was unfortunately described by using a voting precinct as its boundaries, would become a moving target, and the herd district could be changed whenever the voting precinct borders were changed. And, frankly, if that happened there would be a lack of due process there because of the statute, Idaho Code Section 25-2402, would not be followed with regard to any modification or change in herd districts.

So it's our position, Your Honor, that the

1918 herd district redesignation which put the western border at Fountain Road is the correct one. And we still reiterate our previous arguments that the 1982 Canyon County herd district was illegally adopted for the various reasons that we have gone over once before. And I don't want to take up the court's time with rearguing everything. But suffice it to say that there are at least eight difficulties with that particular ordinance, and it should be invalidated.

All those arguments aside, Your Honor, the Notus herd district does contain federal land which has been used for grazing based on the affidavits that we submitted quite some time ago. And under the statute regarding herd district as it now stands, we maintain that because it does contain federal grazing land that the Notus herd district itself could be invalidated if this court determines that the 1963 version of the Notus voting precinct is the correct one.

So other than that, Your Honor, we renew our arguments requesting summary judgment on behalf of Johnson Farms and would request an order on that. Thank you.

THE COURT: Thank you, Mr. Gates.

Mr. Gunnell?

MR. GUNNELL: Thank you. Your Honor, with regard

to the latest argument by the [redacted]ng party for summary judgment, we'd ask the court to give more consideration to the most recent legal description of the Notus voting precinct which included the area where this incident occurred and which was provided by the defense, by defense counsel, as the appropriate district in earlier affidavits for the -- that voting -- or the boundaries of that voting precinct. And it's certainly not -- a lot more recent than the 90-year-old version of the Notus precinct.

In any event, Your Honor, we believe that the court should reject the argument that the 1982 ordinance is invalid. Your Honor, Idaho Code Section 31-857 says, "A legal prima facie presumption is hereby declared to exist, after a lapse of two years from the date of such order" with regard to herd -- herd and other districts. Presumption of validity.

And it's our argument, Your Honor, that this matter could have been taken up with the commission long ago. It's 25 years old. This county has known for 25 years that it's a closed district.

The -- I find it ironic that now the defendant is saying that if there had been a petition, he wouldn't have signed it. Well, he's known it's been a closed district for 25 years and has done nothing about it

until this incident occurred.

In fact, the property damage claim was paid readily for my client's vehicle, right away, as is usually the case and has been going on for years. And the commissioners did a good thing by closing the -- this district based upon the growth of this area. People need -- people have relied upon that, that it is a closed district, for years.

This is a strong presumption, and it requires clear and convincing evidence to overcome.

The Supreme Court has stated that the court will not presume a procedural irregularity in the face of silence as to procedures taken if the defense has not shown enough evidence to show that the irregularities existed.

The Idaho Code Section 25-2404 says, "Commissioners shall make an order creating such herd districts, in accordance with the prayer of the petition, or with such modifications as it may choose to make." And we believe the defendant has failed to overcome that presumption.

Also, Your Honor, we reiterate our argument that the current law as amended in 1996 clearly states, "The provisions of this chapter shall not apply to any herd district or herd ordinance in full force and effect

prior to Jan[redacted] 1, 1990, but shall apply to any modification thereof."

The Miller case simply does not apply. That was dealing with a herd district that was created after 1983. This herd district was created in 1992. So with that, Your Honor, with what we've submitted, we'd ask that the court deny the summary judgment motion. Thank you.

THE COURT: Thank you.

Did you want to respond, Mr. Gates?

MR. GATES: Just briefly, Your Honor. With respect to the 1982 ordinance, essentially plaintiff is asking us to prove a negative. Plaintiff has come up with no supporting evidence of his own saying that this statute is valid. We have to come up with evidence showing that it's invalid.

If the presumption -- the statutory presumption is so strong, then, Your Honor, not even an unconstitutional ordinance could ever be invalidated, because you'd always be trying to prove a negative which is difficult, as the court knows.

So we believe that the ordinance, number one, is invalid on its face, because it fails to meet the standards set out in the 1963 version of Idaho Code Section 25-2402 in that it included open range areas.

And it said right in the ordinance, we're going to include all of the rest of the open range areas in Canyon County. Well, the 1963 version of the statute says that open range -- that herd districts cannot be created out of open range areas. So right there the statute is invalid.

Plus there was no enactment date when the statute was going to go into effect. The -- there's no description of the animals who are affected by the herd district. There was no notice that we could find either in the recorder's office or at the newspapers that were published at that time. There was no petition that we could find in the recorder's office. So we believe that there were adequate reasons for invalidating the 1982 herd district ordinance.

With regard to the 1990 amendment of Idaho Code Section 25-2402, we'd just remind the court that at the end of the -- or in the statute -- that's 25-2402(2)(a), which says, "Notwithstanding any other provision of law to the contrary, no herd district shall: 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."

That seems fairly clear and straightforward. It's this court's duty to interpret that statute. And

we maintain that that is clear, [redacted] herd district cannot contain either state or federal lands.

And with that, Your Honor, we thank you again and again request that we be granted summary judgment.

THE COURT: All right. Thank you, counsel.

This is an intriguing case. Both sides have spent a considerable period of time. We've been looking at old minutes from county commissioners meetings. We've been looking at maps, affidavits from commissioners from years ago, 25 years ago, at the time that the second herd district supposedly was set up in Canyon County.

[redacted] the plaintiff in this case was operating a pickup truck which collided with a cow on Highway 20/26 between Notus and Parma. And that location where that accident occurred, of course, is the focal point of the arguments before me. The plaintiff's truck was damaged, and the plaintiff suffered injuries and brought the instant suit against the defendant, Johnson Farms, who had care of the cow at the time of this accident.

The defendant livestock owner contends that the accident occurred in open range because the 1982 Canyon County ordinance placing the subject property into a herd district was improperly adopted.

Essentially, I'm being called upon to analyze the applicability of two statutes, the 1907 statute on herd districts and then the 1983 statute.

The 1907 statute had a mandate. Specifically the board of — and this is a quote. "The board of county commissioners of each county in the state shall have the power to create herd districts in such county as hereafter provided."

And it's kind of interesting, because in statutory construction the attorneys and myself are always looking to "may" and "shall." The caption heading for the statute says, "Commissioners may create herd districts." It does contain the "shall."

The 1980 herd district that Mr. Gates continues to argue is applicable here would place the accident site outside a herd district and in open range. Is that correct?

MR. GATES: If I understand Your Honor correctly, yes, the -- based upon what we were able to determine and based upon the herd district statute — or, excuse me, the herd district map which was submitted with the 1982 Canyon County ordinance, yes, that the location of the accident did occur in open range and, furthermore, the cow came from an area that was previously open range.

THE COURT: All right. Okay.

Now, that old statute required, then, a majority of the landowners in any -- and this is 25-2402. A majority of the landowners in any area or district prescribe by metes and bounds, not including open range, and/or also resident and qualified electors of the state of Idaho. And then it's may petition the board of county commissioners in writing to create such area a herd district.

So I view that -- and I'll talk a little bit more about statutory interpretation as a citizen option.

The second statute which the plaintiff argues is applicable is the 1983 statute. And there had been some litigation, and that was discussed by both sides regarding whether BLM lands could be included. But that amendment or that statute in 1983 essentially amended two matters. And that was that the herd district could not contain any lands owned by the United States and managed by the BLM and then, secondly, the subpart, not particularly relevant here, but was that the establishment of a herd district shall not result in a highway district being held liable. So there was a protection for liability of the highway district.

This court concludes that the board proceeded to create a herd district in 1982, and ultimately I'm

required to apply the law that was in effect at that time. I'm called upon to interpret the statute as it existed in 1982.

Under statutory interpretation, [redacted] 1999 Supreme Court case. And therein the file only quotes, "[redacted] primary duty in interpreting a statute is to give effect to the legislature's intent and purpose of the statute. The legislature's intent is ascertained from the statutory language, and the court may seek edification from the statute's legislative history and historical content at enactment."

I also [redacted] 1952 Supreme Court case. The rule -- the general rules of statutory construction also apply to the interpret of local ordinances. And obviously I'm looking at the Canyon County ordinance at issue herein.

Secondly I cite *Lewiston versus Matthewson*, 78 Idaho 347 at page 351, a 1956 Idaho Supreme Court case. The rule, construction of an ordinance is a question of law for the court to determine.

I also cite *Ada County versus Gibson*, 126 Idaho 854 at page 856. This is a Court of Appeals, 1995 case. And I quote, "It is axiomatic that the objective in interpreting a statute or ordinance is to derive the

intent of the legislative body adopted the act. Any such analysis begins with the literal language of the enactment. Where the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction. Where the language of a statute or ordinance is ambiguous, however, the court looks to rules of construction for guidance."

And I also cite for the aspect of presumption of validity the cases discussed by counsel. *Boise City versus Better Homes*, 72 Idaho 441 at page 447, a 1952 Supreme Court case. Ordinances and resolutions of a municipal corporation are presumed valid until the contrary is shown. The burden is on the party who attacks such act to show the illegality thereof.

And then secondly with regard to the presumption of validity, *Cole-Collister versus Boise*, 93 Idaho 558, a 1970 case at page 563. And therein the standard that Mr. Gunnell mentioned again this morning, that presumption has to be overcome by clearly, convincing, and uncontradicted evidence.

With regard again to the presumption of validity statute, I cite 31-857, which addresses the presumption of validity of creation of herd districts

and provides that whenever any herd district be declared to be created by order of the board of county commissioners in any county of the state of Idaho -- and I stress -- a legal prima facie presumption is hereby declared to exist, after a lapse of two years from the date of the order.

And finally with regard to presumption, I cite *Benewah County Cattlemen's Association versus Benewah County*, 105 Idaho 209, a 1983 case from the Supreme Court. And I quote. This is on page 214. "Within the legislative contemplation was 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. We find nothing in that statutory scheme indicating counties may not exercise their police power to control rooming livestock, but rather must ignore any problems and wait until action is forced upon the county by presentation of a petition for the formation of a herd district."

I conclude that the Canyon County Board of Commissioners followed the procedure set forth in Idaho Code 25-2402 as it was in 1982. They were not required, I conclude, to wait until a majority of the landowners presented a petition. On the contrary, the board was

empowered by the case law and statutes to take the action they did in this case.

Now, in addition to attacking the validity of the way that that proposition came before the county, Mr. Gates' clients also attacked further aspects in alleging there was a lack of publication, a lack of a description of livestock. And I am not convinced that he has overcome the presumption of validity, and I conclude he has not met his burden of proof in this matter. It's a high standard. And 25 years have lapsed. That's pretty compelling in this case.

So I don't see that -- and I have to indicate counsel did work very hard at bringing a lot of evidence in. But the evidence must be by clear, convincing, and I conclude at this time that has not been met.

Further, there is no prohibition of BLM land on the 1982 statute. Therefore this court is not empowered to invalidate the herd district as sought by the defendants.

Idaho Code 31-857 states that after a herd district is created, I quote, "a legal prima facie presumption is hereby declared to exist, after a lapse of two years from the date of such order." So we have well more than two years which have lapsed. We have 25 years. And, again, I don't find that the defendant has

overcome that strong presumption.

The defendant has also argued that federal law preempts the field, and therefore the herd district is invalid. I do not find this argument to be compelling, because the federal statute that was relied upon does not cover the same subject matter as the herd district and applies to criminal prosecutions for trespassing on BLM land. So I did not find that argument to be compelling.

I find the defendant has failed to meet its burden on summary judgment. The herd district is presumed valid. And although we did wait for the decision of one of my colleagues who is another district judge, I'm obviously not bound by that, so I guess I'm concluding differently. But both counsel indicated that they prefer to have this court rule, and so I've gone ahead and ruled today.

Now, what I'll have for my findings, formal findings and conclusions is the court reporter's transcript, and I'll be glad to sign that if necessary as written documentation.

Mr. Gunnell, I will instruct you to prepare only an order indicating my final ruling in this matter, and then all of my legal conclusions will be contained of record.

MR. GUNNELL: That'll be fine, Your Honor.
THE COURT: Anything further from either side?
MR. GATES: No, Your Honor.
THE COURT: All right. Thank you, guys.
MR. GUNNELL: Thank you.

(The proceedings concluded at 9:46 a.m.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF CANYON)

I, KATHERINE J. KLEMETSON, RPR, CSR #436, one of the duly appointed qualified and acting official reporters of the Third Judicial District of the State of Idaho, do hereby certify that I reported in shorthand the evidence and proceedings adduced in the above and foregoing cause, and that I thereafter transcribed said shorthand notes into typewriting and that the within and foregoing pages constitute a full, true and correct copy of the transcript of said evidence and to the best of my ability and according to my shorthand notes consisting of pages 1 through 18, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of November, 2007.

Katherine J. Klemetson
KATHERINE J. KLEMETSON, RPR, CSR #436

lodged with me this _____ day
of _____, 2007.
WILLIAM H. HURST, Clerk

By: _____, Deputy.

DAVID L. YOUNG, ISB #3679
CHARLES L. SAARI, ISB #2121
Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605
Telephone: (208) 454-7391

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, CANYON COUNTY, IDAHO, Defendant.	**CASE NO. CV05-4848** **ANSWER OF THIRD PARTY DEFENDANT CANYON COUNTY, IDAHO**

COMES NOW, Third Party Defendant Canyon County, Idaho, by and through its attorney of record the Canyon County Prosecuting Attorney, and in answer to Third Party Plaintiff

Jennifer Sutton, alleges as follows:

FIRST DEFENSE

1.

This answering Defendant denies each and every allegation of the Third Party Complaint not specifically and expressly admitted herein.

2.

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are admitted.

3.

Paragraph 12 is admitted but this Defendant avers that other matters, in addition to the 1908 order establishing a Canyon County Herd District, are addressed in Exhibit B, attached to the Third Party Complaint.

4.

In response to Paragraph 13, this Defendant is without information or belief as to the truth of the allegations contained in the first sentence of paragraph 13 of the Third Party Complaint, and, therefore, denies the same.

5.

In response to Paragraph 13, this Defendant admits the second sentence and avers that the County Commissioners by its action added five percent of open range land to the existing herd district, consisting of ninety-five percent of the land of Canyon County, Idaho.

6.

Paragraph 14 is admitted.

7.

Paragraph 15 is denied and this Defendant avers that the Canyon County 1982 herd district was validly created or established in accordance with law.

8.

Paragraph 16 is denied.

9.

Paragraphs 17, 18 and 19 are admitted.

10.

This answering Defendant realleges its answers to paragraphs 1 through 19 as if the same were set out here and in full.

11.

Paragraphs 21 and 22 are admitted.

12.

To the extent a response is required to Paragraph 23, Paragraph 23 is denied.

13.

Paragraph 24 is admitted in that the Court has authorized the joining of this answering Defendant to this action and this Defendant avers that the 1908 and 1982 herd districts were validly created or established.

14.

Paragraphs 25 and 26 are admitted as to the parties' requests but this answering Defendant avers that the 1908 and 1982 Canyon County Herd Districts were validly created or established.

FIRST AFFIRMATIVE DEFENSE

The 1908 and 1982 herd districts were validity created or established following proper procedures in accordance with law.

SECOND AFFIRMATIVE DEFENSE

By Idaho Code § 31-857, the 1908 and 1982 herd districts were validly created or established and a *prima facie* presumption by operation of law exists and provides that all proceedings and jurisdictional steps preceding the making of the herd district orders were properly and regularly taken; the burden of proof rests on those challenging the validity of the creation or establishment of herd districts.

THIRD AFFIRMATIVE DEFENSE

Idaho Code § 73-101 provides that statutes cannot be applied retroactively without the expressed intent of the legislature and no such intent is found in the governing herd district statutes.

WHEREFORE, Third Party Defendant Canyon County, Idaho, having fully answered Third Party Plaintiff Jennifer Sutton's Third Party Complaint, prays as follows:

1. The Defendant prays that the Court find that the 1908 and 1982 Canyon County, Idaho

herd districts were validly created or established.

2. This answering Defendant be awarded its costs of suit incurred herein.

3. For such other and further relief as the Court seems just and equitable in the premises.

Dated this 8th day of November, 2007.

DAVID L. YOUNG
Canyon County Prosecuting Attorney

By: Charles L. Saari
Charles L. Saari
Attorney for Defendant Canyon County, Idaho

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2007, a true and correct copy of the foregoing **ANSWER OF THIRD PARTY DEFENDANT CANYON COUNTY** was served on the following in the manner indicated.

Joshua S. Evett Elam & Burke, P.A. 251 East Front Street Suite 300 P.O. Box 1539 Boise, Idaho 83701	[✓] U.S. Mail [ ] Overnight Delivery [ ] Hand Delivery [ ] Facsimile
Timothy C. Walton Chasan & Walton, LLC P.O. Box 1069 Boise, Idaho 83701-1069	[✓] U.S. Mail [ ] Overnight Delivery [ ] Hand Delivery [ ] Facsimile
Stephen E. Blackburn Blackburn Law, P.C. 660 East Franklin Road Suite 220 Meridian, Idaho 83642	[✓] U.S. Mail [ ] Overnight Delivery [ ] Hand Delivery [ ] Facsimile
Rodney R. Saetrum Ryan Peck Saetrum Law Offices P.O. Box 7425 Boise, Idaho 83707	[✓] U.S. Mail [ ] Overnight Delivery [ ] Hand Delivery [ ] Facsimile
Board of Commissioners Canyon County Courthouse 1115 Albany Street Caldwell, Idaho 83605	[ ] U.S. Mail [ ] Overnight Delivery [✓] Hand Delivery [ ] Facsimile

Charles L. Saari

Charles L. Saari
Attorney for Defendant, Canyon County, Idaho

Joshua S. Evett
Meghan E. Sullivan
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
Sullivan - ISB #7038

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 RESPONSE AND JOINDER IN PLAINTIFFS' MOTION TO RECONSIDER
CANYON COUNTY, IDAHO Defendant.	

Defendant Jennifer Sutton ("Sutton"), by and through her counsel of record, does hereby respond and join Plaintiffs Erika L. Rivera and Luis J. Guzman's ("Plaintiffs") Motion to Reconsider.

I. INTRODUCTION

On or about October 9, 2007, this Court entered an 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. On or about October 15, 2007, an Action for Declaratory Judgment was filed against Canyon County. Thereafter on or about November 8, 2007, Plaintiffs filed their Motion to Reconsider supported by a memorandum. On November 8, 2007, Canyon County filed its Answer of Third Party Defendant.

The Court's decision denying Defendant Dale Piercy's ("Piercy") motion for summary judgment did not address the estoppel arguments raised in the briefing by Sutton and Plaintiffs. Should the Court determine that Defendant Piercy is estopped from raising the validity of the 1982 herd district ordinance, then dismissal of Canyon County from this action is warranted and proper. Sutton joins in the arguments set forth by Plaintiffs in the Memorandum in Support of Motion to Reconsider to the extent such arguments are consistent with Sutton's arguments in her memorandum in opposition to Piercy's motion for summary judgment.

II. LAW AND ANALYSIS

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 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 plaintiff but did so in violation of state law. In that case 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 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 was accomplished. Plaintiffs knew their land would be annexed. Plaintiffs' land benefitted 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.

Other jurisdictions have had similar holdings. For example, the Court of Appeals of Indiana held that the trial court did not abuse its discretion in finding that landowners' challenge to validity of city ordinance was barred by doctrine of laches. *Simon v. City of Auburn, Ind., Bd. of Zoning Appeals*, 519 N.E.2d 205 (Ind. Ct. App. 1988). In *Simon*, the Building Commissioner of the City of Auburn issued a building permit to Cedar Glen Joint Venture to construct two condominiums in the Auburn area. *Id.* at 206. Both Plaintiffs lived near the site in question and brought action against Defendants on the issue of whether under the Indiana Code a city's general zoning ordinance is legally valid when it purports to incorporate by reference a zoning

map but no zoning map is included in the ordinance and no zoning map is on file in the city clerk-treasurer's office. *Id.*

The Court of Appeals held that the trial court did not abuse its discretion in finding that plaintiffs' claim was barred by the doctrine of laches. *Id.* at 215. The Court based its holding on the fact that plaintiffs did not initiate an action challenging the legal validity of the ordinance until nearly seventeen years after its enactment. *Id.* Furthermore, the Court held that plaintiffs were charged with knowledge of and acquiescence in the content of the zoning ordinance, and to allow plaintiffs to prevail would cause prejudice to defendants since defendants had already expended significant amounts of money on the development of the property at issue. *Id.* Lastly, the Court reasoned that to invalidate the ordinance would cause chaos, confusion and controversy to the City of Auburn, such that would hinder the economic growth and development of the entire area covered by the zoning ordinance. *Id.*

Similarly, the Supreme Court of New Jersey held that prosecutrix was barred from challenging the validity of an ordinance that was nine years old. *Benequit v. Borough of Monmouth Beach*, 125 N.J.L. 65, 67-68, 13 A.2d 847, 849 (N.J. Sup. Ct.1940). In *Benequit*, the prosecutrix was convicted of violating a zoning ordinance. *Id.* at 847. On appeal was the issue of whether the ordinance was invalid for the reason that it had not been published in a qualified newspaper as required by statute. *Id.* at 849.

In *Benequit*, the Court held that prosecutrix's complaint was barred by laches. *Id.* The Court reasoned that the ordinance had been in effect for over nine years and that presumably citizens had conformed to its provisions. *Id.* There was also evidence that the prosecutrix knew of the ordinance as evidenced by a letter sent to the defendant borough stating that she had

purchased the property, that it was located in a zone wherein business was prohibited and applied 'for a special exception to the terms of the zoning ordinance permitting the above mentioned premises to be licensed for a first class hotel'. *Id.* At the time of sending the letter, prosecutrix did not attack the validity of the ordinance. *Id.* The Court held that even assuming that the ordinance was not published in a qualified newspaper, such irregularity was merely procedural and the prosecutrix under these facts and circumstances was guilty of laches, which estopped her from challenging the validity of the ordinance. *Id.*

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). The time lapse between the enactment of the 1982 herd district ordinance and this action is almost twenty-five years. Piercy has failed to show reasonable justification for the delay in challenging the ordinance. Essentially, the passage of twenty-five years demonstrates an implied waiver of the right to seek to invalidate the 1982 herd district ordinance by knowing acquiescence in a condition that had existed for so many years.

The alleged defects, which are primarily technical irregularities, were present and could have been discovered and challenged twenty-five years ago, before so many citizens of Canyon County had come to rely on the validity of the ordinance. Piercy challenges the ordinance only after one of his cattle caused a motor vehicle accident. To invalidate the 1982 herd district ordinance accomplishes Piercy's own individual purposes and would cause prejudice to the entire Canyon County community and more particularly, Plaintiffs.

Piercy challenges an ordinance that has been in effect for 25 years. When the ordinance was passed, neither Jennifer Sutton, Erika Rivera, nor 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 previously filed July 20, 2007 ("Koch Aff.").) The other two commissioners who voted on the ordinance are dead. (*Id.*, ¶ 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 officers have confirmed that repeatedly in depositions. 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 § 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 § 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 § 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 previously filed July 24, 2007, ¶ 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.*, ¶ 6.) Jennifer Sutton did not expect any cattle on the road the night of this accident (*see id.*, ¶ 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 benefitted 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 a herd district. 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 and has not provided any reasonable justification for the delay in challenging the ordinance.

Last, because laches is an equitable doctrine, the Court is permitted to consider all the circumstances surrounding the issues raised by the parties. 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' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment previously filed July 20, 2007, 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., ¶ 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.

Equity firmly supports upholding this herd district under the doctrine of estoppel by laches.

DATED this 27th day of November, 2007.

ELAM & BURKE, P.A.

By _____
Joshua S. Evett
Attorneys for Defendant Jennifer Sutton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21th day of November 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
Charles L. Saari Canyon County Prosecutor Canyon County Courthouse 1115 Albany Caldwell, ID 83605	___ ___ ___ ✓	U.S. Mail Hand Delivery Overnight Mail Facsimile

Joshua S. Evett

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

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 PIERCY'S OBJECTION TO PLAINTIFFS' MOTION TO RECONSIDER

I. INTRODUCTION

Following the Court's Memorandum Decision regarding Defendant Piercy's Motion for Summary Judgment, Plaintiff filed a Motion to Reconsider that ruling. Plaintiffs are essentially requesting that since the Court did not address the issues of estoppel in its Memorandum Decision that it now hold, as a matter of law, that Defendant Piercy is estopped from taking the position that the land where the subject bull was being pastured at the time of the accident is open range.

Despite Plaintiffs assertions that they would limit the current motion to estoppel issues, they request that the Court now adopt the reasoning offered by Judge Hoff in a different case involving different parties.

II. STANDARD OF ADJUDICATION

At the hearing on the Defendant Piercy's motion to vacate, Plaintiffs' provided the Court a

case to support their position that they should be allowed to move forward with their motion to reconsider. In that case the Idaho Supreme Court states the applicable standard of adjudication if a non-moving party is to be granted summary judgment on an issue brought before the Court: "In instances where summary judgment is granted to the non-moving party, this Court liberally construes the record in favor of the party against whom summary judgment was entered." *Harwood v. Talbert*, 136 Idaho 672, 677-678, 39 P.3d 612, 617, 618 (2001). This case establishes that for Plaintiffs to prevail upon their motion to reconsider, they must prove that there are no genuine issues of material fact regarding the issues of estoppel, while looking at the evidence before the Court in a light most favorable to Defendant Piercy.

III. LEGAL ANALYSIS

Plaintiff admittedly has not provided the Court with any new case law or facts upon which to rule on the issue of estoppel. Plaintiffs' and Co-Defendant's affidavits as they were presented as part of the proceedings on Defendant Piercy's Motion for Summary Judgment are the only evidence Plaintiffs have to support their motion to reconsider. The evidence provided does not support a claim for estoppels or laches.

A. Plaintiffs and Co-Defendant have failed to establish the defense of quasi-estoppel.

Neither the Plaintiffs' nor the Co-Defendant's memorandums regarding these issues set forth the actual elements they must prove in order to establish a defense of quasi-estoppel. A cursory look at the elements of equitable estoppel shows Plaintiffs' and Co-Defendant's lack of evidence to support the defense 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 first element requires that a party asserting quasi-estoppel prove that the offending party took a contradictory position to that party's current position. The case law cited by Plaintiffs, although much older than the more current *Atwood* case, states the same requirement. "The requirements for proper application of quasi estoppel are, then, that the person against whom it is sought to be applied has previously taken an inconsistent position, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine." *KTVB, Inc. v. Boise City*, 94 Idaho 279, 282, 486 P.2d 992, 995 (1971). Unless it is established that a party has taken a contrary position then they cannot be held barred under the doctrine of quasi-estoppel, despite their knowledge of, benefit from or acquiescence in an action.

The other elements of quasi-estoppel are only relevant if Plaintiffs and Co-Defendant can first prove there is no genuine issue of fact upon whether Defendant Piercy took a contrary position to the position he is currently asserting. 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. Mr. Piercy's second affidavit in support of summary judgment states that he has always thought that the land where the bull came from was in open range. This testimony is not contradicted by any other testimony. Plaintiffs and Co-Defendant have utterly failed to provide any evidence to prove this element of quasi-estoppel. Defendant Piercy has always believed that his pasture was in open range and has never contradicted that position.

The only fact Plaintiff can positively assert is that prior to this lawsuit Defendant Piercy did not challenge the 1982 ordinances affect upon his land. The Idaho Appellate Court upheld a Trial Court's decision that such evidence as stated above was insufficient to apply the doctrine of

equitable estoppel. *Winn v. Eaton*, 128 Idaho 670, 675, 917 P.2d 1310, 1315 (Id.App. 1996). The Court held that the Defendants asserting equitable estoppel did not meet their burden of proof regarding equitable estoppel. *Id.* The Defendants alleged in an easement case that because the Plaintiffs lived forty feet behind them and shared a driveway that they were well aware of what Defendants were doing in staking out their property. The Defendant also cited that it was only after Defendants had completed building their home that Plaintiffs attempted to assert their rights. The Court stated that such silence before the trial on the issue is not evidence that Plaintiffs took a contrary position prior to the action they were pursuing. *Id.*

The essence of all Plaintiffs' arguments in regard to the present case is that Defendant Piercy had not previously challenged the 1982 ordinance. As in *Winn*, this type of evidence is not sufficient to prove that Defendant Piercy ever took a contrary position to what he is currently asserting. Defendant Piercy was not aware prior to this lawsuit that anyone was claiming that his land was not open range with regard to cattle or otherwise.

Further, Defendant Piercy did not gain any benefit from the land purportedly being in a herd district. The affect of a herd district is to potentially expose Defendant Piercy to legal liability. Plaintiffs and Co-Defendant have not provided any evidence to suggest that Defendant Piercy has gained any special benefit from the 1982 ordinance, which did not even include cattle as an animal to be limited from free roaming. Plaintiffs and Co-Defendants rely on unsupported assertions that Defendant Piercy would benefit from his land being in a herd district.

Plaintiffs cite Defendant Piercy's deposition regarding his understanding of the state of fencing in Canyon County to support their estoppel arguments. The existence or non-existence of fencing is not relevant to the issues of estoppel or whether there is a herd district. Neither Plaintiffs nor Co-Defendants have provided any evidence to suggest that there would not be any fencing in

Canyon County if the small area allegedly affected by the 1982 ordinance were open range versus a herd district. Cattlemen fence in their livestock whether they are in open range or not.

The affidavits provided by Plaintiffs and Co-Defendant Sutton merely state that they thought it was illegal to have cows on the road. They do not even assert that they thought a herd district existed. These vague statements could just as likely be referring to knowledge of the criminal statute not the 1982 ordinance. The reliance of the Plaintiffs in this matter on what they thought was the law is not relevant to the elements of quasi-estoppel. The affidavits from the Plaintiffs are irrelevant. In short Plaintiffs have provided no evidence that Defendant Piercy should be estopped from arguing that the 1982 ordinance did nothing to affect the subject land's open range status.

B. Plaintiffs and Co-Defendant have failed to establish the defense of laches.

As with the doctrine of quasi-estoppel, Plaintiffs and Co-Defendants in all their arguments fail to address the actual elements of laches.

The Idaho Supreme Court has held:

> Like quasi-estoppel, laches is an affirmative defense and the party asserting the defense has the burden of proof. Whether or not a party is guilty of laches is a question of fact. (citation omitted). The necessary elements to maintain a defense of laches are:
>
> > (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.
>
> *Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996). (citation omitted). Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties. (citation omitted). The lapse of time alone is not controlling on whether laches applies. (citation omitted).

Thomas v. Arkhoosh Produce, Inc., 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002). Co-Defendant

and Plaintiffs have failed to provide evidence establishing the elements required to establish a claim of laches. The only evidence provided is that Plaintiffs, Co-Defendant and some police officers thought that it was illegal for cows to be on the roadway and that 23 years passed between the 1982 ordinance and the accident. These facts do not support a claim for laches.

First, there must be an invasion of the rights of the non-moving party by the moving party. Defendant Piercy has never asserted that Plaintiffs or Co-Defendant invaded any of his rights. The rights to a person in open range is immunity from liability when a car collides with their livestock. The elements of laches requires proof of a previous invasion of rights, not an invasion of rights if the Court does not grant the relief requested by the non-moving party. Therefore, Plaintiffs and Co-Defendant have failed to provide evidence for the first element of a claim of laches. It may be that Canyon County violated the due process rights of Defendant Piercy or that the 1982 ordinance is unconstitutional, but Canyon County has not asserted laches and a claim for laches does not apply to an unconstitutional ordinance. *Continental Oil Co. v. City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930).

The second element involves a delay in asserting a right and a finding of notice. The Court has determined several issues of fact regarding the notice to Defendant Piercy of the enactment of the 1982 ordinance. Plaintiffs and Co-Defendant assert that constructive notice applies in this case, but do not support that assertion with case law. In *Alexander v. Trustees of Village of Middleton*, 92 Idaho 823, 452 P.2d 50 (1969), relied on heavily by Plaintiffs and Co-Defendant, the court cites the facts that were determinative: "The appellants had adequate notice of the intent to enact the ordinance and of the actual enactment of the ordinance. They were aware their land would be included within the area to be annexed. Others whose land was proposed for annexation did protest and their lands were excluded from the annexation ordinance. Injury and prejudice to the Village has been shown if relief were to be afforded appellants." *Id.* The notice provided to those in *Alexander* was extensive. There were several public hearings and it was shown that the affected parties were contacted and specifically given the opportunity to opt out of the annexation. *Id.* This is a far cry from the complete lack of notice of the proposed action of the Canyon County

Commissioners. Further, the 1982 ordinance does not even specify what it is attempting to place into a herd district or what animals it is attempting to prevent from roaming free. It also does not state when it will become effective.

Plaintiffs and Co-Defendant claim great harm to Canyon County if the 1982 ordinance was found to be void. This is not true. The area affected by the 1982 ordinance is a small percentage of the land in Canyon County. The 1982 ordinance only purported to affect 5% of the land area in Canyon County. The Canyon County Commissioners under the current laws could with little cost and with little enact a valid herd district ordinance regarding grazing in Canyon County. It may be that Canyon County would not wish to bother with trying to change the status of that 5% of land.

Defendant Piercy did not delay in asserting his rights. Defendant Piercy's right to immunity from liability did not even arise until Plaintiffs and Co-Defendant had the accident involving his animal. Defendant Piercy asserted his right to immunity from liability in his Answer to Plaintiffs' Complaint. Defendant Piercy quickly asserted his rights in this matter. Plaintiffs and Co-Defendant have not provided any evidence to the contrary.

Plaintiffs and Co-Defendant have also not provided any evidence concerning the third element of laches, which requires that they prove that Co-Defendants and Plaintiffs had no knowledge that Defendant Piercy would assert his rights. Co-Defendants and Plaintiff had knowledge from the instigation of this lawsuit that Defendant Piercy was planning to assert his rights.

Essentially, Plaintiffs and Co-Defendant are relying on the passage of time to base their arguments. The *Thomas* case states that passage of time, by itself, is not basis for granting this affirmative defense. In fact, the Supreme Court of Idaho upheld a Trial Court's ruling to invalidate a 66-year-old water rights decree. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir and Canal Co.*, 123 Idaho 634, 851 P.2d 348 (1993). This case states that despite evidence that the movant had relied on the state of the law for 66 years, was not evidence enough to establish laches. *Id.* at 637. 851 P.2d 348, 351.

Plaintiffs and Co-Defendant often make global assertions such as "The entirety of Canyon

County has followed the "fence in" rule of the herd district . . ., for 25 years", and that "Piercy has benefitted from herd district status, as his lands have not been subject to depredations from the at large cattle of his neighbors." (Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment at 14-15.) These assertions, however, are without any evidence. Plaintiffs and Co-Defendants have not provided any proof to establish that the doctrine of laches should apply.

Further, Defendant Piercy is claiming that the 1982 ordinance is unconstitutional even if it was enacted properly. As cited above, the doctrine of estoppel and laches does not apply to unconstitutional laws. A trial on the declaratory judgment will be necessary despite any ruling on procedural irregularities.

C. The Court should not adopt the decision made by Judge Hoff.

The decision by Judge Hoff was delivered from the bench in a different case with different parties. As made clear by the Court, the Court is not bound by the decision by Judge Hoff. Several of Judge Hoff's findings are inconsistent with the findings of this Court in its Memorandum Decision. This Court identified several issues of fact concerning the passage of the 1982 ordinance which needed to be resolved, where Judge Hoff simply states that the Board followed its procedures. Further, Judge Hoff relies upon *Benewah County Cattlemen's Association v. Benewah County*, 105 Idaho 209 (1983), for the proposition that Counties have the inherent police power to create herd districts.

This reasoning misinterprets *Benewah County*. While *Benewah County* holds that counties can enact livestock ordinances enforced by criminal sanctions, it specifically distinguishes that power from the authority to create a herd district which imposes civil liability. Canyon County already has a livestock ordinance, cited by Plaintiffs in their response to our motion for summary judgment, which imposes misdemeanor liability upon those violating the ordinance. It would be incredible to think that a county could avoid the civil immunity provided by the State of Idaho, simply by exercising its police power to make a livestock ordinance. Such a finding would make the entire statutory scheme for the creation and maintenance of herd districts irrelevant. Judge Hoff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of December 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 __X__ Facsimile
Stephen E. Blackburn BLACKBURN LAW PC 660 E. Franklin Road Suite 255 Meridian, ID 83642	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ 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 __X__ Facsimile
Charles L. Saari Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ Facsimile

Ryan B. Peck

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

E RIKA L. RIVERA and LUIS J. GUZMAN, individually,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER SUTTON, individually,

Defendants.

Case No. CV05-4848

ORDER FOR DISMISSAL WITH PREJUDICE

It having been stipulated and agreed between Plaintiff Erika Rivera and Co-Defendant Dale Piercy, through their attorneys of record, that the claims of Erika Rivera contained in the Complaint against Co-Defendant Dale Piercy in this matter have been settled and may be dismissed, and good cause appearing therefor,

IT IS HEREBY ORDERED, AND THIS DOES ORDER, that Plaintiff Erika Rivera's claims in the Complaint against Co-Defendant Dale Piercy in this matter are hereby dismissed with prejudice with each party to bear its own costs and attorney fees.

DATED this 12 day of February 2008.

Honorable Gordon W. Petrie
District Judge

FILED
10:16 A.M. P.M.

FEB 19 2008

CANYON COUNTY CLERK
J. BAKER, 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.

CANYON COUNTY, IDAHO

Defendant.

Case No. CV05-4848

ORDER FOR DISMISSAL WITH PREJUDICE **OF CLAIMS BY ERIKA RIVERA ONLY**

BASED UPON the Stipulation for Dismissal with Prejudice of Claims by Erika Rivera Only, and good cause appearing therefor,

IT IS HEREBY ORDERED AND THIS DOES ORDER that the claims of Plaintiff Erika Rivera only be dismissed with prejudice, with each party to bear their own costs and attorney fees.

DATED this 19 day of February, 2008.

Honorable Gordon W. Petrie
Canyon County District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of February, 2008, 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 Saetrum Law Offices P.O. Box 7425 Boise, ID 83707	✓	U.S. Mail Hand Delivery Overnight Mail Facsimile
Charles L. Saari Canyon County Prosecutor Canyon County Courthouse 1115 Albany Caldwell, ID 83605	✓	U.S. Mail Hand Delivery Overnight Mail Facsimile
Joshua S. Evett Elam & Burke, P.A. P.O. Box 1539 Boise, ID 83701	✓	U.S. Mail Hand Delivery Overnight Mail Facsimile

Deputy Clerk

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

LUIS J. GUZMAN **Plaintiff,** **vs.** **DALE PIERCY, individually and JENNIFER SUTTON, individually** **Defendants.** **CANYON COUNTY, IDAHO** **Third-party defendant.**	**CASE NO. CV 2005-4848** **ORDER FROM SCHEDULING CONFERENCE SETTING BENCH TRIAL ON CHALLENGE TO CANYON COUNTY HERD DISTRICTS**

THIS IS A CIVIL ACTION. The court and respective counsel held a status conference on the record on March 20, 2008. Based upon that conference, the court enters its order, below.

THEREFORE, THIS ORDERS THAT:

1. The above-described matter is now set for a two (2) day bench trial to commence on the **8th day of October 2008**, at the hour of 9:30 o'clock a.m., before the Honorable Gordon W. Petrie, at the Canyon County Courthouse, Caldwell, Idaho.
2. The court also sets a new status conference for **September 3, 2008,** at 0930 a.m.

3. The parties stipulate to a bench trial of that portion of this litigation challenging the validity of Canyon County's Herd District Ordinances.

THIS ALSO ORDERS that within fourteen (14) days, all parties shall submit an amended stipulation to the following scheduling dates:

(a) Joinder of parties or amendment of pleadings;

(b) All discovery completed;

(c) The filing, noticing, and hearing of all pretrial motions, which shall be filed and noticed in compliance with I.R.C.P. 56 (c);

(d) The last day for advancing party to disclose expert witnesses, together with their opinions and reports;

(e) The last day to disclose rebuttal experts, together with their opinions and reports;

(f) If the parties are unable to agree upon the dates called for above, the parties shall forthwith contact the court's secretary to obtain a date for a scheduling conference.

(g) The court notifies the parties that the **current cut-off date** for mediation and alternative dispute resolution is **September 3, 2008**;

(h) The court further notifies the parties they must strictly adhere to I.R.C.P. 56(e). If affidavits setting out facts on personal knowledge do **not** demonstrate on their face the evidence contained therein is admissible under the Idaho Rules of Evidence (or a case on point construing the same), the parties will assist the court by filing a memorandum in

support of the affidavit(s) or applicable parts, specifically referencing the evidence in question, and citing the court and opposing counsel to the rule or case supporting the court's consideration of the affidavit(s) proffered;

(i) If a party moves to **strike an affidavit** as setting forth evidence that is not otherwise admissible, the movant, in either the motion or a supporting memorandum, will assist the court by directing it with specificity to the paragraph or paragraphs objected to and will further cite the court to the rule or case that supports the motion to strike.

(j) The court reminds the parties that a motion under I.R.C.P. 37(a) requires a **certification** that the movant has, in good faith, conferred or attempted to confer with the party not making the disclosure (serving as the object of the motion) in an effort to secure the disclosure without court action.

THIS FURTHER ORDERS that all parties shall file with the court no later than seven (7) days prior to the status conference the following:

(a) A concise **written** statement of the theory of recovery or defense, the elements of such theory, and supporting authorities;

(b) A written list identifying stipulated facts, all witnesses, and all exhibits to be introduced at trial, accompanied by a statement pertaining to each exhibit on whether each exhibit in question is stipulated as admissible;

(c) A written statement that the parties have discussed settlement or the use of extrajudicial proceedings including alternative dispute resolution techniques to resolve the dispute.

DATED this 25th day of March 2008

GORDON W. PETRIE, District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of March 2008, s/he served a true and correct copy of the original of the foregoing **ORDER FROM SCHEDULING CONFERENCE SETTING BENCH TRIAL ON CHALLENGE TO CANYON COUNTY HERD DISTRICTS** upon the following individuals in the manner described:

- Upon Rodney R. Saetrum and Ryan B. Peck of SAETRUM LAW OFFICES, 101 S. Capitol Blvd, Boise, Idaho 83702, attorney for Defendant Dale Piercy; and upon
- Joshua S. Evett of ELAM & BURKE, P.A., PO Box 1539, Boise, Idaho 83701, attorneys for Defendant Jennifer Sutton; and upon
- Timothy C. Walton of CHASAN & WALTON LLC, PO Box 1069, Boise, Idaho, and upon Stephen E. Blackburn, BLACKBURN LAW PC, 660 E Franklin Road, Suite 255, Meridian, Idaho 83642, attorneys for Plaintiff Luis Guzman

when s/he caused to be deposited a copy of the same into the U.S. Mail with sufficient postage affixed to the addresses set forth above; and upon

- Charles L. Saari, Chief Civil Deputy for Canyon County,

when s/he caused to be placed a copy of the same into the latter's "pick up" box in the Canyon County Clerk's Office, Canyon County Courthouse, Caldwell, Idaho.

WILLIAM H. HURST, Clerk of the Court

By: _____
Deputy Clerk of the Court

ORIGINAL

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

Attorneys for Plaintiff Luis J. Guzman

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, Plaintiff, vs. DALE W. PIERCY, individually and JENNIFER SUTTON individually, Defendants. CANYON COUNTY Third Party Defendant.	**Case No:** CV05-4848 **PLAINTIFF'S MOTION TO RECONSIDER** **(No hearing requested)**

On or about November 6, 2007, plaintiff moved this court to reconsider that part of the Court's October 9, 2007 order denying Defendant Piercy's Motion for Summary Judgment that allows defendant Piercy to attempt to challenge the validity of Canyon County's 1982 herd district ordinance.

The basis for Plaintiff's Motion to Reconsider was that Idaho case law holds that defendant Piercy is estopped, under the doctrine of quasi-estoppel and/or under the doctrine of estoppel by laches, from challenging the validity of Canyon County's herd districts, including the 1982 herd district ordinance.

This motion has been fully briefed by the parties, and oral argument was held on this motion on December 6, 2007.

The court has not yet issued its decision on Plaintiff's Motion to Reconsider. Plaintiff Guzman requests that the court decide this Motion. In the event the Court determines that Piercy is estopped to contest the validity of the 1982 herd district ordinance, the "mini-trial" scheduled by this Court for October 8 and 9, 2008, will be unnecessary, and the parties can proceed directly to the trial of plaintiff Guzman's claim against defendants Piercy and Sutton.

In view of the fact that the parties have already fully briefed and orally argued this motion, and in the interest of conserving the Court's resources, plaintiff requests that the Motion to Reconsider be decided by the court without any further argument or briefing from any party.

DATED this 26th day of March, 2008. Chasan & Walton, LLC

Timothy C. Walton, Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26th day of March, 2008, 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
Attorneys for Jennifer Sutton

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 384-5844

Ryan Peck
Rodney R. Saetrum
SAETRUM LAW OFFICES
101 S. Capitol Blvd., Suite 1800
P.O. Box 7425
Boise, ID 83707
Attorneys for Dale W. Piercy

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 336-0448

Charles L. Saari, Chief Civil Deputy
Canyon County Prosecutor's Office
1115 Albany St.
Caldwell, ID 83605
Attorney for Canyon County

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 455-5955

Stephen E. Blackburn ISB #6717
BLACKBURN LAW, P.C.
660 E. Franklin Rd., Suite 220
Meridian, Idaho 83642
Co-Counsel for Plaintiff

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 898-9443

CHASAN & WALTON, LLC

Timothy C. Walton

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

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

LUIS J. GUZMAN, individually, Plaintiff, v. DALE PIERCY, individually, and JENNIFER SUTTON, individually, Defendants.	Case No. CV05-4848 **RESPONSE TO PLAINTIFF'S MOTION FOR A RULING ON PLAINTIFF'S MOTION TO RECONSIDER**
CANYON COUNTY Third Party Defendant.	

Plaintiff filed Plaintiff's Motion to Reconsider on March 26, 2008. This motion is essentially requesting that the Court rule on Plaintiff's prior motion to reconsider that was filed on November 6, 2007.

Plaintiff asserts that oral arguments were held on the motion to reconsider on December 6, 2007. This statement is incorrect. Oral arguments were presented on November 30, 2007, on Defendant Piercy's motion to continue the hearing on Plaintiff's motion to reconsider. Defendant Piercy's motion was denied and the hearing on Plaintiff's motion to reconsider was going to proceed on December 6, 2007, but prior the hearing was canceled due to progress in the

settlement negotiations between the parties. The hearing was never re-scheduled. Defendant Piercy agrees that the arguments were fully briefed, but would not want to deprive the Court of the opportunity to question counsel in oral arguments.

Therefore, Defendant Piercy will defer to the Court's desire on whether or not to have oral arguments presented on the issues encompassed in the motion to reconsider.

DATED this 28th day of March 2008.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorney for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of March 2008, 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 __X__ Facsimile
Stephen E. Blackburn BLACKBURN LAW PC 660 E. Franklin Road Suite 255 Meridian, ID 83642	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ 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 __X__ Facsimile
Charles L. Saari Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ Facsimile

Ryan B. Peck

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually Plaintiff, vs. DALE PIERCY, individually, and JENNIFER SUTTON, individually Defendants.	Case No. CV-2005-4848-C ORDER ON PLAINTIFF'S MOTION TO RECONSIDER
CANYON COUNTY, Third Party Defendant	

On November 8, 2007, Plaintiffs filed a Motion to Reconsider asking this Court to reconsider its decision on Defendant Piercy's Motion for Summary Judgment. Specifically, Plaintiffs asked the Court to find that the Canyon County herd district ordinance at issue in this case was properly enacted, or in the alternative that Defendant Piercy is estopped, under the doctrine of quasi estoppel and/or estoppel by laches, from challenging the validity of the Canyon County herd district ordinance.

Defendant Sutton filed a Response and Joinder in Plaintiffs' Motion to Reconsider on November 27, 2007, and Defendant Piercy filed an Objection to Plaintiffs' Motion to Reconsider on December 3, 2007. Oral argument was set for December 6, 2007 but was vacated prior to the time set for hearing.

On March 27, 2008, Plaintiff Guzman (the sole remaining plaintiff) again filed a Motion to Reconsider asking this Court to now and again address the issues set out above. Plaintiff has asked the Court to issue its decision based on the prior briefing and without oral argument. Defendant Piercy filed a response to clarify that no oral argument was held. No objections have been made by any of the parties to this Court issuing a decision without oral argument and thus, the Court will defer the Plaintiff's request.

Therefore, Plaintiff's Motion to Reconsider is deemed submitted and a written decision will be issued forthwith.

Dated this 3 day of April, 2008.

Gordon W. Petrie
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order on Plaintiff's Motion to Reconsider is forwarded to the following persons by U.S. Mail, first class postage prepaid; by hand delivery; by courthouse basket; or by facsimile copy:

Timothy Walton
Chasan & Walton LLC
1459 Tyrell Lane
P.O. Box 1069
Boise, Idaho 83701-1069

Stephen Blackburn
Blackburn Law PC
660 E. Franklin Road, Suite 225
Meridian, Idaho 83642

Ryan Peck
Saetrum Law Offices
101 S. Capitol Blvd.
Boise, Idaho 83702

Joshua Evett
Elam & Burke, P.A.
251 East Front Street, Suite 300
P.O. Box 1539
Boise, Idaho 83701

Charles L. Saari
Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605

Dated this 3 day of April, 2008

William H. Hurst
Clerk of the District Court

By: _____
Deputy Clerk

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

Attorneys for Plaintiff Luis J. Guzman

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN,

Plaintiff,

vs.

DALE W. PIERCY, individually and JENNIFER SUTTON individually,

Defendants.

CANYON COUNTY

Third Party Defendant.

Case No: CV05-4848

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Plaintiff Guzman has asked this Court to rule on plaintiff Guzman's motion for reconsideration. Plaintiff's counsel has just been advised of another Idaho case that supports plaintiff's contention that Defendant Piercy is stopped to deny the validity of the herd districts at issue (said case came to light because another insurer is attacking the validity of another herd district in eastern Idaho, and undersigned has been communicating with Plaintiff's counsel in that eastern Idaho case).

In *Telfer v School District No. 31 of Blaine County*, 50 Idaho 274, 295 P. 632 (1931) a landowner attacked the validity of a school district created by the board of county commissioners, alleging that the district was created pursuant to a defective petition, and that:

> The complaint affirmatively states many omissions in the preliminary proceedings required by the laws of this state to authorize the commissioners to create school districts, and it is claimed this order of the board creating district No. 13 was null and void for want of jurisdiction in the county commissioners. 295 P., at 632.

In short, the landowners in *Telfer* were contending, exactly as Piercy contends here, that the county commissioners failed to follow proper procedure in creating the district in issue.

The Idaho Supreme Court noted in *Telfer* that the districts at issue were created 10 to 20 years prior to the landowners' lawsuit; that the district had thereafter continuously existed as a political subdivision of the state; that it was therefore at least a de facto corporation, exercising the powers and duties of such political subdivision within the well defined territorial limits of the district.

The trial court sustained the school district's demurrer to the landowners' complaint. On appeal, the Supreme Court affirmed, stating:

"To permit the existence of public corporations to depend on private litigation would be inimical to the welfare of the community. Experience has demonstrated that irregularities of more or less importance are to be found in the organization of nearly every incorporated body. Technical accuracy is not to be expected. The legal existence of a public corporation cannot be questioned without causing disturbance more or less serious, and if the regularity of its organization can be kept open to inquiry indefinitely, no one can ever be sure that any of the taxes levied to meet its expenses or the contracts necessarily entered into by it would be valid and enforceable. The transaction of public business might be blocked by private litigation commenced at the will or whim of any citizen. While there has been an honest effort to comply with the law in the organization of a corporation, as a school district, and the officers selected proceed to execute the powers thereof, every presumption should be, and is, in favor of the regularity of such organization, and it is to be regarded as valid, save when assailed by the state on information in the nature of quo warranto."

This rule is recognized and followed by the federal court in this district. In Oregon Short Line R. Co. v. Kimama Highway Dist. (D. C.) 287 F. 734, 738, Judge Dietrich said: "The other contention is that, though irregularly organized, the district is to be deemed a de facto corporation, and its legal existence cannot be called into question by a private person in an action of this character. In that respect it was stipulated at the trial that since February, 1920, the defendant district has 'been functioning as a highway district, and holding itself out as a highway district, since that time, under color of an organization.' Upon this showing of fact I am inclined to think defendant's position is well taken. The general proposition is considered at length in a decision recently rendered by the Supreme Court of the state in Morgan v. Independent School District, where there may be found a review of many typical decided cases upon the subject. It is to he borne in mind that this is a collateral attack by a private citizen upon the existence of a public corporation, and that the order assailed was not such an order as the board of county commissioners was without authority to make under any circumstances. If invalid at all, it is not because such an order is entirely beyond the general jurisdiction with which the board is vested, but because certain conditions precedent to the exercise of the power were not complied with."

The rule seems of universal application, but sometimes stated differently. It is said in Henderson v. School District, 75 Mont. 154, 242 P. 979, 982: "Thus acquiescence in the exercise of corporate functions, and dealing with the corporation as such over a period of years will estop all persons dealing with the corporation from assailing its legality. In re Flemington Borough, 168 Pa. 628, 32 A. 86; St. Louis v. Shields, 62 Mo. 247; Cowell v. Colorado Springs Co., 3 Colo. 82; People v. Maynard, 15 Mich. 463; People v. Curley, 5 Colo. 412; State v. Westport, 116 Mo. 582, 22 S. W. 888; State v.

Leatherman, 38 Ark. 81; State v. Pell City, 157 Ala. 380, 47 So. 246; Board v. Crittenden, 94 F. 613, 36 C. C. A. 418."

> Mr. Dillon, in his work on Municipal Corporations (5th Ed.) § 67, says: "In public affairs where the people have organized themselves, under color of law, into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises their rights are properly regarded as dependent quite as much on acquiescence as on the regularity of their origin."
>
> In Cooley on Constitutional Limitation (8th Ed.) vol. 1, p. 531, it is said: "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the State as such. Such a question should be raised by the State itself, by quo warranto or other direct proceeding." ...
>
> We hold school district No. 31 having existed, exercising all the functions of a public school district of the state over its present well-defined territory as a public corporation for the past ten years, its legal entity is not subject to attack by a landowner within the district in an injunction proceeding against its officers. It follows the demurrer was good. 295 P., at 633-634.

Pursuant to the law laid down in *Telfer* some 57 years ago, and pursuant to the Idaho case law previously cited to this court, Piercy is estopped to collaterally attack the validity of the Canyon County Commissioners' orders creating the herd districts at issue in this case. The herd districts in issue were created 25 to nearly 100 years ago, and all of Canyon County has been recognized as a herd district, and the herd district laws have been enforced county-wide, since 1982.

Plaintiff has previously indicated to the Court that Plaintiff waives oral argument on this motion. At the time Plaintiff waived oral argument, Plaintiff's counsel mistakenly believed oral argument on Plaintiff's motion for reconsideration had been previously heard, and Plaintiff did not wish to take up more of the Court's time on a motion that Plaintiff (mistakenly) believed had already been orally argued. In actuality, however, there has never been oral argument on Plaintiff's motion to reconsider (rather, there was oral

argument on Piercy's motion to vacate the hearing on Plaintiff's motion to reconsider).

Plaintiff's motion is legally sound, and is based upon solid Idaho case law. The motion deserves careful analysis and consideration by the Court. If Plaintiff's motion is granted there will be no need for the "mini-trial" scheduled for October to determine the validity of the herd district.

To the extent the Court feels oral argument would assist the Court in flushing out the issues at bar, Plaintiff would request that the Court schedule oral argument on Plaintiff's motion for reconsideration at the Court's convenience.

DATED this 18th day of April, 2008.

Chasan & Walton, LLC

Timothy C. Walton, Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of April, 2008, 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
Attorneys for Jennifer Sutton

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 384-5844

Ryan Peck
Rodney R. Saetrum
SAETRUM LAW OFFICES
101 S. Capitol Blvd., Suite 1800
P.O. Box 7425
Boise, ID 83707
Attorneys for Dale W. Piercy

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 336-0448

Charles L. Saari, Chief Civil Deputy
Canyon County Prosecutor's Office
1115 Albany St.
Caldwell, ID 83605
Attorney for Canyon County

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 455-5955

Stephen E. Blackburn ISB #6717
BLACKBURN LAW, P.C.
660 E. Franklin Rd., Suite 220
Meridian, Idaho 83642
Co-Counsel for Plaintiff

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile to (208) 898-9443

CHASAN & WALTON, LLC

Timothy C. Walton