11-15-2012

Guzman v. Piercy Clerk's Record v. 5 Dckt. 39708

5 9

(VOLUME 5)

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

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

INDEX

INDEX, Continued

INDEX, Continued

INDEX, Continued

INDEX, Continued

INDEX, Continued

INDEX, Continued

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 Guzman's Post-trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District

INTRODUCTION

The issue at hand is whether Dale Piercy (Piercy) has sustained his burden of proof that Canyon County's 1982 herd district ordinance is invalid on the grounds that the County Commissioners failed to follow proper procedure in the enactment of the

ordinance.

As the Court knows, the herd district is presumed to have been validly created. IC 31-857.

Piercy has presented to this Court nothing more than speculation and conjecture about the record before the Canyon County Commissioners 26 years ago. Not a single witness has testified that this herd district was created without an antecedent petition presented by landowners within the proposed herd district. Not a single witness has testified that the county failed to publish notice of the hearing on said petition.

Piercy has an extremely high mountain to climb in order to meet his burden of proof on these issues. Piercy must prove the invalidity of the herd district ordinance by clear and convincing evidence. City of Lewiston v Knieriem, 107 Idaho 80 (1984). An ordinance will not be overturned absent "clear proof" of "great force" that the ordinance is invalid. Simmons v. City of Moscow, 111 Idaho 14, at 19 (1986). The presumption of validity that attaches to an ordinance grows stronger the longer the ordinance remains in effect. 6 McQuillin Muni. Corp., Section 20.06 Presumption of Validity, at p. 18 (1998 Rev. Vol., 3rd ed.).

In his brief, Piercy incorrectly cites Cole-Collister Fire Protection Dist. v. City of Boise, 93 Idaho 558 (1970) for the proposition that the burden of proof is on the county to prove that the ordinance was properly enacted. In fact, as the Idaho Supreme Court stated in that case, "The ultimate burden of persuasion is on the party attacking the validity of an ordinance". 93 Idaho, at 564.

Finally, Piercy says in his brief that, "The parties stipulated that none of the herd districts noted on Joint Exhibit #2 included the area designated by Mr. Piercy to be the

area where the subject bull was being pastured." Piercy's brief, p. 2.

Actually, that's not quite correct. What the stipulation says is, "That **prior** to the enactment of the 1982 herd district order found in Joint Exhibit #4 none of the herd district descriptions referenced by or drawn upon Joint Exhibit #2 included the field where Mr. Piercy's bull was being pastured prior to the accident which is the subject matter of the underlying litigation." Stipulation, p. 3, paragraph B(1) (emphasis added).

Thus, it is Guzman's position that the white areas contained in Joint Exhibit #2 **do** depict a herd district that encompassed Piercy's pasture. The herd district at issue, the one created by the county in 1982, **is** depicted on Joint Exhibit #2, and it is comprised of the white areas shown on that map.

Piercy attempts to muddy the waters by arguing that there were more than 3 areas that were not contained within a herd district prior to 1982. So, Piercy argues, there is no way to tell whether Piercy's land was included within the 1982 herd district.

As is discussed below, the map that was originally attached to the herd district order no longer exists. Like the petition, and the Commissioners' resolution to create a herd district, the map referred to in the Order creating the herd district has gone missing.

Piercy argues that it is impossible to know which 3 areas of the county were intended to be included within the 1982 herd district. But we do know the answer to that question. **All** areas of the county that weren't herd district before, were herd district after the 1982 Order.

The commissioners could well have been referring in the Order to 3 general areas of the county, each of which contained one or more parcels of land that were not herd district.

Based upon the evidence presented, Piercy can not even legitimately claim he has proved by a preponderance of the evidence that the herd district was improperly created. Piercy certainly has failed to prove by clear and convincing evidence that this 26 year old ordinance (with it's ever stronger 26 years of presumptive validity) was improperly created.

WITNESS TESTIMONY

Much of the witness testimony in this case has been submitted to the court in deposition format. **All** of these depositions (with exception of Dale Piercy's) were noticed up and taken by counsel for Piercy. The deposition witnesses testified as follows:

E. G. Johnson:

Mr. Johnson is a long time rancher who ranches near Wilder, ID. Piercy offers up Mr. Johnson's testimony to prove no notice was published in the paper, and to prove no petition was circulated. His testimony proves neither.

Johnson testified that if notice of hearing the petition had been published in the newspaper, he wouldn't have seen it as he doesn't read all the legal notices. He testified he did not know the County Commissioners published Joint Exhibit 10 (notice of creation of the 1982 herd district) in the December 20, 1982 edition of the Idaho Press Tribune. Johnson depo, pps. 24-26 (Exhibit D, attached).

Johnson also testified that he has no knowledge that the County Commissioners failed to follow proper procedure in creating the 1982 herd district. Johnson depo, p 29-30.

Piercy claims that Johnson would have held meetings of his cattle associations to address the proposed herd district had it been properly publicized, but Johnson's own

testimony undercuts that argument.

While Johnson testified that he was in 1982 a member of and active in the Idaho Cattlemen's Association and the Cattle Feeder's Association, Mr. Johnson also testified that to his knowledge neither organization **ever** notified its members of the creation, or proposed creation, of any herd district. Johnson depo, p. 31. Further, Mr. Johnson testified that neither organization had any meetings about the 1982 herd district **after** it was created. Johnson depo, p. 32.

Glenn Koch:

Mr. Koch is the sole surviving member of the 3 County Commissioners who enacted the 1982 herd district. Piercy claims Mr. Koch testified that he did not recall a petition being presented to the county commissioners. Piercy brief, p. 10. This is an inaccurate summary of Mr. Koch's testimony. Rather, Mr. Koch testified that he doesn't recall if there was, or was not, a petition for the creation of the herd district, or whether notice of hearing the petition was, or was not, published in the paper. Koch depo, pps. 21 and 25. He simply does not recall, one way or the other, the events surrounding creation of the herd district. Koch depo, pps. 36-37 (Exhibit E, attached).

Leon Jensen:

Mr. Jensen began working for Canyon County in 1994. He has no knowledge of the events surrounding the creation of the herd district in 1982. Jensen depo pps. 8-9 (Exhibit F, attached).

Linda Landis:

Ms. Landis began working for Canyon County in 2005. Landis depo, p. 8-9. She has no knowledge of the events pertaining to the creation of the herd district. Landis depo,

p. 32 (Exhibit G, attached).

Monica Reeves:

Ms. Reeves began working for Canyon County 19 years ago. Reeves depo, p. 8. She has no knowledge regarding the procedures utilized by the county at the time of the creation of the 1982 herd district. Reeves depo, pps. 30-31 (Exhibit H, attached).

William Hurst:

Mr. Hurst has been the Clerk of the District Court for the Third Judicial District for 18 months. Hurst depo, p. 8 (Exhibit I, attached). He has no knowledge as to whether the county followed proper procedure in 1982.

Bill A. Staker:

Mr. Staker was the Canyon County Clerk from 1978 until 1988. Staker depo, pps 4-5. Again, Piercy mischaracterizes Mr. Staker's testimony by suggesting that Mr. Staker testified that he did not remember a petition being submitted to create the subject herd district. Piercy Brief, pps. 10-11 (Exhibit J, attached). In actuality Mr. Staker testified that he has no knowledge as to whether a petition was, or was not, submitted to the County Commissioners for the creation of the 1982 herd district. Staker depo, p. 17. Mr. Staker does not know whether notice of hearing the petition was, or was not, published in the newspaper. Staker depo, p23.

A number of witnesses were also called to testify live at trial. As the Court had an opportunity to see, and hear those witnesses, only brief comment will be made on the testimony of the witnesses called to testify at trial.

David Lloyd:

Mr. Lloyd, is a former employee of Mr. Saetrum's firm. He is married to Karen

Whychell, a current employee of Mr. Saetrum's firm. Mr. Lloyd acknowledged that he looked at "thousands, upon thousands upon thousands" of microfiched Idaho Statesman newspaper pages at the Idaho historical Society while searching the Statesman editions from January 1, 1982 through August 1982, and that his eyes became tired while performing that job.

Karen Whychell:

Ms. Whychell testified that the newspaper print on microfiche at the Idaho Historical Society is small and difficult to read. She acknowledged that if the Idaho Historical Society did not have all of the editions of the newspapers she reviewed her review of the newspapers for 1982 would have been incomplete. She testified she did not check to see that she had reviewed every issue of the Parma Review newspaper for 1982. With respect to her review of the Idaho Statesman, she did not check to see if the Idaho Historical Society was missing any editions for the 1982 year.

She acknowledged that searching the legal notices in the paper was a "tiresome job", and that whether she was able to review every legal notice in the newspapers reviewed depended upon how thorough she was in her research. She acknowledged that, given the sheer volume and conditions under which she researched the legal notices in the Idaho Statesman, the Idaho Press Tribune, and the Parma Review, that it is possible she did not observe every legal notice published for the time periods she reviewed.

She did not recall how many hours she dedicated to this task of researching for legal notices in newspapers of general circulation in Canyon County, other than it took "several weeks". She testified that during this "several weeks", the Idaho Historical Society was only open Wednesdays through Saturday; that she did not do any research on

Saturdays (except maybe one); and that during the time she was doing this research she was also doing work on other cases in her office.

Timothy Fox:

Fox, a surveyor hired by Piercy, testified that the legal descriptions he used to draw a partial map of some of Canyon County's herd districts (Exhibit "A-1") were provided to him by Mr. Saetrum's office. He acknowledged that he could not testify that the "yellow areas" on the map he drew were not in a herd district, since he did no independent research to identify the county's herd districts.

Dale Piercy:

Piercy testified that he is an expert on ranching in Canyon County, as he has ranched there for 30 years. He ranches and farms some 800 acres, and has some 260 head of cows, and another 20 head of bulls. He acknowledged that the 2001 motor vehicle accidents involving his livestock on Wamstad Rd. (like the subject accident involving his bull) occurred in an area that would be covered by the 1982 herd district (and the Court will recall that Piercy's insurer paid for the damage caused to the two motor vehicles as a result of that 2001 accident, just as it would do if the area was within a herd district). Though Piercy now contends that he believed all along that the pasture from which his bull escaped was open range, that is not what he testified to when he was first asked that question. When he was deposed, Mr. Piercy testified that he, "did not know for sure" that the pasture was in open range. Piercy depo, 91:21-23 (exhibit K, attached). At the time this accident occurred, Piercy claimed that he did not even know what a herd district was, or what the words "herd district" meant. Piercy depo, 92:24-93:11. Furthermore, Piercy testified that all livestock in Canyon County, including his livestock, is enclosed and

contained, and not permitted to roam free. Piercy depo, 40:18-41:3; 44:17-45:4.

Michael Bruse:

Mr. Bruse is in charge of Canyon County's "plat room". He is the "Geographical Information Systems" supervisor. He does not know who made the black and white map or the color map of the Canyon County herd districts (Joint Exhibits 1 and 2), nor when or why they were made. He prepared Exhibit "C-1", which is a large map of the county's herd districts. He testified that to the extent the Canyon County Commissioners in 1982 created a herd district that did not encompass the herd districts identified on Exhibit "C-1", the white areas on his map, including the area where this accident occurred, would be in the herd district created in 1982.

Paul Kosterman:

Kosterman has a law degree from the University of Idaho, and works as a paralegal for Chasan and Walton. He testified that there were 10,367 pages published by the Idaho Press Tribune in 1982, and that Piercy's counsel produced in Exhibit "A-3" only 678 of those pages (or about 7% of the total pages published).

Kosterman testified that there were 3 newspapers published in Canyon County in 1982: The Idaho Press Tribune, the Parma Review, and the Canyon Herald.

Kosterman described the tedious, tiresome process of reviewing a single page of a newspaper for legal notices. The pages are on microfiche. One cannot read the small font print without "zooming in", which then focuses the researcher in on a single column of newsprint, making it easy to become "disoriented" and making it easy to lose your position on the page (so that when you "zoom" out and then back in, there is the risk of skipping a column).

He estimated that it would take, on average, 3 minutes to read a page of a newspaper.

He gave a first hand account of how easy it is to over look a legal notice. Citing Joint Exhibit 8, he described how he knew that on December 24, 1976 and January 1, 1977 the County Commissioners had published in the Idaho Press Tribune notice of creation of a herd district in Canyon County (which herd district the county later rescinded). Even though he knew exactly what day, and in which paper the notices were published, he could not find either one until he was shown the December 24, 1976 notice. He then went back to the Historical Society and located the December 24, 1976 notice that he had previously over looked. He again attempted to find the January 1, 1977 notice, but could not. The December 24, 1976 notice was difficult to spot, because it was at the bottom of the page, next to a K-Mart advertisement that took up almost the entire page.

Kosterman testified that doing this research was very tiresome, because the researcher is going through hundreds of pages, looking for one tiny little item. He described the task as looking for the proverbial "needle in the haystack".

Finally, Piercy suggests in his brief that Kosterman reviewed all pages of the Idaho Statesman, the Idaho Press Tribune and the Parma Review published in 1982 to attempt to find notice of hearing the petition for the 1982 herd district. Piercy brief, p. 14. This is completely false.

While Mr. Kosterman did research notices published in newspapers pertaining to Canyon County herd districts, nowhere did Kosterman testify that he researched each page of each newspaper published in those 3 newspapers in 1982. Rather, Kosterman testified, he researched which newspapers were published in Canyon County in 1982 (as

noted above, he identified the Press Tribune, the Parma Review and Canyon Herald); and he attempted to locate the December 24, 1976 notice and the January 1, 1977 notice published regarding a herd district that is not at issue in this case.

Though Mr. Kosterman was never asked to detail the scope of the research he performed when researching for publication of notice of hearing the petition at issue in this case, undersigned represents to the court that Kosterman reviewed the Idaho Press Tribune and the Parma Review for November and December 1982. It was simply too large a task to ask Kosterman to review every page of every newspaper that could have contained the notice of hearing the petition. As noted below, that task could easily take 1500 hours or more, just to review the 1982 newspaper editions, and it would take another 1500 hours or more to review those newspapers for each prior year that the notice might have been published. Moreover, it is Piercy's burden to establish the notice was not published. It was not Guzman's burden to establish that it was.

The court will note that despite all of the witnesses called to testify, not a single witness testified that the County failed to follow statutory procedure in the enactment of the herd district.

IT'S "OPEN SEASON" ON HERD DISTRICTS (OR, WHY THE FAILURE TO DESIGNATE A TIME 30 DAYS AFTER THE HERD DISTRICT ORDER WAS SIGNED FOR THE HERD DISTRICT TO TAKE EFFECT IS NOT FATAL TO THE ORDINANCE, AND A DISCUSSION OF ARGUELLO V. LEE, A CASE PIERCY INDICATED WAS OF SIGNIFICANT IMPORTANCE TO THE OUTCOME OF THIS CASE).

As this Court knows, the insurers who insure ranchers in Idaho, perhaps fueled by the Idaho Supreme Court's decision in Miller v. Miller, 113 Idaho 415 (1987) have declared war on Idaho's herd districts.

Thus, Piercy's counsel attempted to invalidate the 1982 Canyon County herd district in the case of Gazzaway v. Johnson (Canyon County Case No. CV 07-2141). The defendant in that case, of course, was Piercy's witness in this case, E.G. Johnson.

Piercy's counsel in that case raised precisely the same arguments that Piercy raises here. Judge Hoff upheld the validity of Canyon County's 1982 herd district in that case. A copy of her decision is attached as Exhibit A, and Guzman incorporates herein by reference Judge Hoff's legal reasoning as to the reasons Judge Hoff upheld the validity of the 1982 herd district ordinance.

Piercy's counsel brought to this Court's attention the attack on the validity of an eastern Idaho herd district in the case of Arguello v. Lee. Attached as Exhibit B is a copy of counsel's letter to the court bringing the Arguello case to this Court's attention.

Piercy's counsel obviously felt at the time that letter was sent that the Arguello case was an important case. Guzman's counsel agrees whole-heartedly with Piercy's counsel in this regard.

Attached as Exhibit C is a copy of the Federal District Court's Memorandum Decision and Order of October 8, 2008, in which the Federal District Court held that the herd district there at issue was validly formed. Because the defense in Arguello made many of the same arguments in that case that Piercy makes here, and because of the import Piercy obviously attached to the impending Federal District Court's decision in Arguello, the analysis of the Federal District Court deserves discussion in this brief. Guzman incorporates herein by reference both the legal authority cited by the Federal District Court in Arguello, and the legal reasoning advanced by that court in upholding the validity of the herd district under attack in that case.

In Arguello, the defense argued that "the herd district is invalid, and therefore the land is open range". Memorandum Decision, p. 5.

Citing IC 31-857, Judge Winmill noted that after two years, a presumption exists "that all proceedings and jurisdictional steps preceding the making of such order have been properly and regularly taken..." Memorandum Decision, p. 7.

The Federal District Court noted that the defense in Arguello contended the herd district was invalid because (inter alia) the "County Commissioners did not comply with all steps preceding establishment of the herd district." Memorandum Decision, p. 7. Specifically, the defense argued that the County failed to publish notice of the hearing on the herd district petition in the newspaper, as required by the herd district statutes then in effect. The defense provided evidence that such notice was not published in the Rigby Star, the newspaper which ultimately published the commissioners' decision to create the herd district. However, plaintiffs presented evidence that in the year the herd district was created the county paid money to another newspaper, The Roberts Sentinel (though the record was devoid of any evidence showing why the county paid that money to that paper). Memorandum Decision, pps. 11-13.

The Court concluded that the defense had failed to meet its burden of proof that proper notice was not published.

Secondly, the defense in Arguello argued that the herd district was invalid because the commissioners failed to specify a time when the herd district was to take effect, which by statute must be at least thirty days after the making of the herd district order. It was undisputed that the herd district order failed to specify a date when it was to take effect. Memorandum Decision, p. 14.

Citing the treatise by McQuillen, The Law of Municipal Corporations, Judge Winmill noted that "invalidity as to the effective date of an ordinance...does not render the ordinance void", and that "The requirement of a certain period of time before an ordinance goes into effect 'is intended to enable the public to acquire knowledge of the ordinance before it becomes operative for any purpose' ". Memorandum Decision, p. 14.

Because the defense did not present any evidence that the rancher, or his predecessor-in-interest did not receive actual notice of the adoption of the ordinance, or that the defense was prejudiced somehow by the failure to give the statutorily required 30 day grace period before the ordinance took effect, Judge Winmill upheld the validity of the ordinance, notwithstanding the undisputed failure of the county to provide for the thirty-day grace period before the ordinance went into effect. In so holding, Judge Winmill noted that "The power of the court to declare an ordinance invalid should be exercised cautiously, and, in fact, courts are reluctant to do so". (Citing the McQuillen treatise); Memorandum Decision, p. 15.

Significantly, Judge Winmill attached great weight to the fact that the herd district had been in existence for many years. Again citing the McQuillen treatise, Judge Winmill said, "Significantly, '[c]ourts are loathe to construe an ordinance as invalid, where the ordinance has been in operation and unchallenged for many years, and where under it valuable rights have accrued which would be destroyed if the ordinance were held to be invalid.' " Memorandum Decision, pps 15-16.

Judge Winmill then concluded, "The failure by the Commission to specify an exact time at which the herd district took effect is not sufficient reason for this court to invalidate the herd district." Memorandum Decision, p. 16.

Judge Winmill therefore held that the defense had "failed to carry their burden of overcoming the legal prima facie presumption of validity accorded an ordinance which has been on the books almost eighty years." Memorandum Decision, p. 16.

Judge Winmill therefore rejected the defense's contention that the herd district was invalid, and held, as a matter of law, that the herd district was valid. Memorandum Decision, p. 17.

As in Arguello, Piercy has failed to prove that he was prejudiced because the herd district ordinance went into effect less than 30 days after the order designating all of Canyon County herd district was signed. Perhaps if this car/bull wreck had occurred within 30 days of the entry of the 1982 herd district ordinance Piercy could effectively argue he has been prejudiced. That, of course, is not the fact pattern this case presents to the Court.

The ordinance has been on the books for 26 years. Notice of the creation of the herd district was published in the Idaho Press Tribune on December 20, 1982. Joint Exhibit 10.

Though now Piercy contends he did not know his land was in a herd district, such testimony is inherently not credible for a person who claims to be an "expert witness" on ranching in Canyon County, based upon his 30 years of ranching within the county. Even if such testimony were credible, ignorance of the law is no excuse.

Piercy can claim he has always "known" his pasture was in open range, but that wasn't his testimony on this issue when first asked, and his conduct suggests that he well knew that all of Canyon County was subject to herd district status.

Thus, Piercy has failed to carry his burden, by clear and convincing evidence, that

he was prejudiced by the failure of the county commissioners to specify a date more than 30 days after entry of the order, when the herd district would take effect.

Moreover, Piercy acquired the pasture from which his bull escaped some twelve years ago, and there is no evidence his predecessor-in-interest was unaware of the herd district ordinance. Piercy Depo, pps. 93-94, attached.

Finally, it is undisputed that notice of the creation of the 1982 herd district was published in the Idaho Press Tribune newspaper on December 20, 1982 (at a time when Piercy was admittedly ranching in Canyon County) and Piercy therefore has, at the very least, constructive knowledge of the ordinance. See Joint Exhibit 10.

Guzman urges this Court to apply the same analysis as Judge Winmill applied in the Arguello case. Piercy has not demonstrated the failure of the county to provide a 30 day grace period caused him prejudice, so the failure of the county to provide for such 30 day grace period does not invalidate the ordinance. Moreover, as in Arguello, and as discussed in more detail below, the evidence in this case falls short of establishing clearly and convincingly that notice of hearing the petition was not published.

WHERE'S THE PETITION?

At the start of the county's case at trial, this Court inquired of Mr. Saari, "Where's the petition?"

The Court's inquiry was direct and directly on point. The answer to the Court's question is simple. That is not the type of documentation the county retains in its archives.

Piercy presented no evidence that the County has kept the petitions for the 18 (or more) herd districts created by the Canyon County Commissioners since 1908. There is no testimony by any county employee that the county keeps such documentation in the

regular course of business. Simply stated, the inability of the parties to locate the petition, in the complete absence of any proof that the County should have the petition, is meaningless. The inability of the parties to locate the petition is not probative of any issue before this court in the absence of proof that the county has retained and can produce the petitions for the 18 (or more) other herd districts created by the Canyon County Commissioners.

This simple truth, coupled with the fact that no witness has testified that there did not exist an antecedent petition, renders meaningless Piercy's arguments that, "We can not find the petition, therefore it must never have existed."

Further, the absence of any reference to the petition in the County's records is not proof that there was no petition. In Garrett Transfer & Storage Co. v. Pfost, 54 Idaho 576, 33 P.2d 743 (1933), Garrett attempted to argue (just as Piercy argues here) that there were procedural irregularities in the enactment of a statute, and that the statute was therefore unenforceable. The Idaho Supreme Court identified Garrett's allegations, and resolved such issues as follows:

> The appellant claims that the law was not read on three separate days in each house prior to final vote; that no emergency existed warranting dispensing with such provision; it contained no emergency clause; was not read section by section; and no vote was taken by yeas and nays thereon;. . In re Drainage District No. 1, 26 Idaho, 311, 143 P. 299, L. R. A. 1915A, 1210, announces the rule that it will not be presumed in any case from the mere silence of the journals that either house has exceeded its authority or disregarded a constitutional requirement in the passage of a legislative act, unless the Constitution has expressly required the journal to show the actions taken, as, for instance, where it requires the yeas and nays to be entered. 33 P.2d at 746.

Garrett teaches that it will not be presumed that a legislative body exceeded its authority or disregarded a procedural step in the promulgation of a law, merely because

the records of that legislative body are silent as to whether such procedure was followed by the legislative body. Thus, Piercy's arguments to the contrary notwithstanding, this Court must draw no conclusions from the failure of the County Commissioners' records to mention a petition for a herd district.

Piercy attempts to argue that it must affirmatively appear in the County's records of the proceedings that the commissioners took all steps necessary to validly enact the herd district, and Piercy cites 2 cases in support of that claim: State v Caitlin, 33 Idaho 437 (1921) and Smith v Canyon County, 39 Idaho 222 (1924). Firstly, the 2 cases cited by Piercy were over ruled by the Garrett Transfer case.

Moreover, as Piercy as noted in his brief, **after** the Caitlin and Smith cases were decided the Idaho legislature enacted IC 31-857. The legislature is presumed to have knowledge of the holdings in Caitlin and Smith, and IC 31-857 (first enacted in 1935) is clearly the legislature's response to the holdings in those cases. IC 31-857 provides that after 2 years, it is presumed the county took all necessary action to properly enact the herd district ordinance. Thus, IC 31-857 and the Garrett case eliminate any need for the county records to document that the county complied with the requirements of the herd district statutes in the creation of the herd district.

WAS NOTICE OF HEARING ON THE PETITON PUBLISHED?

Piercy argues that the herd district is invalid because (he claims) no notice of hearing on the petition was published in a newspaper. As noted below, Piercy has simply failed to carry his ever-increasing burden that he has proved by clear and convincing

evidence that, twenty-six years ago, the county commissioners failed to publish such notice.

In support of such claim Piercy offers the testimony of Karen Whychell (an employee of the Saetrum law firm) and the testimony of David Lloyd (a former employee of the Saetrum law firm; also, Mr. Lloyd is married to Ms. Whychell).

Whychell and Lloyd testified that (between them) they read every page of the Idaho Press Tribune that was published from January 1, 1982 through December 20, 1982, that they read every page of the Idaho Statesman for the dates January 1, 1982 through December 20, 1982, and that they read every page of the Parma Review for the dates January 1, 1982 through December 20, 1982. Further, they testified, they found no notice published in any of those newspapers of a hearing on the petition for the 1982 herd district. While Guzman does not dispute the sincerity or integrity of Mr. Lloyd and Ms. Whychell, Guzman does question the effectiveness and accuracy of their search.

The court will recall that both Mr. Lloyd and Ms. Whychell testified that the search was very tiresome and difficult. Indeed, it is difficult to imagine a more tedious, coma-inducing task than to read 30,000 pages of fine print newspaper on microfiche in a historical society's office. To say that under such circumstances there is ample opportunity to over-look exactly that which you seek, is a gross understatement.

A few simple comments on the evidence will illustrate this point more clearly.

The court will recall that Paul Kosterman, an employee of Chasan and Walton and a graduate of the University of Idaho College of Law (Mr. Kosterman has not yet secured his license to practice law) also testified on the issue of publication of the notice of hearing on

the petition.

Mr. Kosterman testified that in 1982 there was a third newspaper published in Canyon County: the Canyon Herald. This paper was published until August 25, 1982. Piercy presented no evidence that this paper was searched to determine whether notice of hearing the petition was published in this paper.

Mr. Kosterman testified as to the difficulty of finding a single, specific legal notice in the Idaho Press Tribune. The court will recall that in January 1977 the Canyon County Commissioners entered an order declaring all of Canyon County a herd district (see Joint Exhibit 8). The County Commissioners soon thereafter rescinded that order. See Joint Exhibit 9. However, the county's records reflect that notice of the hearing on the proposed herd district was published in the Idaho Press Tribune on December 24, 1976 and January 1, 1977. See Joint Exhibit 8.

Paul Kosterman attempted to locate such notices in the Idaho Press Tribune by searching the Idaho Historical Society's copies of that newspaper. Despite the fact Kosterman knew the exact dates such notices were published, he could not locate either notice on his first read through of the Idaho Press Tribune for those dates of publication. After he was supplied with a copy of the December 24, 1976 published notice, Kosterman went back to the historical society and this time was able to locate the December 24, 1976 notice. Interestingly, this notice was not published alongside the other legal notices published that day in that paper; rather, it was located in the bottom left corner of page A-12 of the paper, next to a nearly full page K-Mart advertisement. See Joint exhibit 11. It was, for all intents and purposes, camouflaged, or hidden, by both its location and by the failure of the newspaper to group the notice with the other legal notices published that day.

Kosterman never was able to find the notice published in that newspaper on January 1, 1977.

There is good cause to believe that the January 1, 1977 notice was published. The county documented that such notice was published (Joint Exhibit 8). It is curious why one can not find the notice. Perhaps the historical society does not have every page of the newspapers in question (and in fact, there has been no testimony that the Idaho Historical Society does have on microfiche each and every page of each newspaper for the relevant time periods). Perhaps, like the December 24, 1976 notice, the January 1, 1977 notice was published in an obscure location of that day's paper, away from the other legal notices published that day.

Which of course leads to the conclusion that perhaps notice of hearing the 1982 petition was published in a Canyon County newspaper, but no one has found the notice, (1) because of the sheer volume of material that needs to be reviewed with a fine tooth comb, or (2) because the notice may well be published in an obscure location, or (3) because the notice was published in the Canyon Herald.

The Court will recall that Ms. Whychell and Mr. Lloyd could not recall how many hours they expended looking for the published notice. But the testimony of Mr. Kosterman sheds some important light on the magnitude of the job Ms. Whychell and Mr. Lloyd faced.

With regard to the Idaho Press Tribune alone, Kosterman testified that there were approximately 10,367 pages published in 1982. Piercy has admitted into evidence 678 pages of that newspaper, or a mere 7% of the total pages published that year. Piercy failed to put into evidence 9,689 pages that the Idaho Press Tribune published in 1982. In other words, the evidence is lacking 93% of the pages the Idaho Press Tribune published

that year.

Carefully reading a full page of newsprint on microfiche is a time consuming task. Kosterman testified that it takes a researcher three minutes, on average, to review a page of the newspaper. Certainly some pages will take longer than three minutes (those pages, for example, with legal ad after legal ad). The longer one attempts to read fine print on microfiche, the slower one reads. The eyes grow tired. The mind wanders. One must get up from time to time to take a break. Allotting three minutes per page, when reviewing over 10,000 pages, is a very conservative estimate.

At three minutes per page, it would take a researcher 31,101minutes, or over 518 hours, to review the 10,367 pages published by the Idaho Press Tribune in 1982. Assuming a 40 hour work week, it would take almost 13 weeks (12.96 weeks, to be precise) to review all10,367 pages of the Idaho Press Tribune. While Mr. Saetrum's employees were a bit coy about the amount of time expended reviewing the Idaho Press Tribune, a fair reading of the record discloses that they did not spend anywhere near that much time researching whether such notices were published in that newspaper.

The task vis-à-vis the Idaho Statesman would be even greater, given that it is a larger (more pages) newspaper.

It is reasonable to conclude that, between the Idaho Press Tribune, the Idaho Statesman and the Parma Review, Mr. Saetrum's employees were tasked with the job of reviewing some 30,000 pages of tiny newsprint on microfiche at the Idaho Historical Society. At 3 minutes per page, it would take 90,000 minutes to do a credible job of reviewing those pages. 90,000 minutes is 1,500 hours, or 37.5 work weeks at 40 hours per week.

However, since the Historical Society's offices are open only 3 work days per week, it would take a minimum of 21.5 weeks for a researcher to review all 10,367 pages of the Idaho Press Tribune published in 1982 (518 hours divided by 24 hours/week); and it would take 62.5 weeks to review all 30,000 pages of the Idaho Press Tribune, the Idaho Statesman, and the Parma Review (1500 hours divided by 24 hours of work per week). Of course, such a scenario assumes the researcher worked **only** on this case 3 days per week for 62.5 weeks, and it also assumes the researcher is capable of working 8 hours per day without any breaks (though the evidence clearly establishes one must take regular breaks while doing this type of tedious research). The evidence reflects that Ms. Whychell did not work only on this case while researching the Canyon County newspapers; she also worked on other cases during the time frame that she researched for this case.

In summary, the research effort put forth by Mr. Saetrum's employees was wholly inadequate to prove by clear and convincing evidence that the notice of hearing on the petition was not published in the 3 newspapers those employees reviewed.

And, as pointed out, Mr. Saetrum's employees failed to even research a fourth Canyon County newspaper where the notice might have been published, the Canyon Herald.

In summary, though an effort was made to determine whether notice was published in three of the four newspapers in which the notice could have been published, the record is clear that the effort extended fell far short of the Herculean effort required to establish by clear and convincing evidence that no notice of hearing was published.

Guzman submits that this court must reach the same result Judge Winmill reached in Arguello v. Lee. Because Piercy has not proved by clear and convincing evidence that

notice of hearing the 1982 petition was not published, this Court must sustain the validity of the 1982 ordinance. As noted by Judge Winmill, the strength of the presumption favoring the validity of the ordinance grows over time, as the ordinance remains on the books and is actively enforced.

Finally, the record is completely silent as to **when** a proper petition might have been submitted to the County Commissioners. For example, if the petition had first been presented to the County Commissioners in November 1981, notice of hearing the petition might well have been published in a newspaper in November 1981. Mr. Saetrum's office did not research the newspapers for notices of hearing published in 1981, or 1980, or 1979. It appears from reviewing the 1982 Order that this was a topic the County Commissioners had been dealing with for some time, since the Order recites that, "The Board has **again** reviewed the complexity of the Herd District Boundaries..." (emphasis added). Joint Exhibit 7.

The record offered by Piercy is just as consistent with the notion that the Commissioners had wrestled with the issue of creating the subject herd district, pursuant to a proper petition, for years prior to the 1982 Order, and that a hearing had been held and notice thereof properly published years before December 1982. IC 31-857 requires the Court to presume such. Piercy has the nearly impossible task of proving by clear and convincing evidence that no newspaper published the required notice in 1981, or 1980, or 1979, etc. Piercy's proof falls far short of establishing by clear and convincing evidence that such notice was not published.

METES AND BOUNDS DESCRIPTION

Piercy argues the ordinance is invalid because it does not contain a metes and

bounds description of the herd district as (allegedly) required by IC 25-2402. It appears from the record that the order establishing this herd district was accompanied by a map, which map substantially satisfies the requirement for an accurate legal description of the herd district.

Secondly, the ordinance had the effect of making the entire county subject to herd district status, and the legal description of the county is contained in the Idaho Code (IC 31-116). Thus any court can take judicial notice of the land area subject to herd district status.

Finally, the herd district statutes did not require the herd district order to contain a metes and bounds description; rather, the statute only required that the petition contain a metes and bounds description. See IC 25-2402. If this case is to be decided on technicalities (as advocated by Piercy), Piercy can not be heard to complain that the order does not contain a metes and bounds description when the statute does not require the order to contain a legal description.

Similarly, Piercy challenges the validity of the herd district order by contending that since the order does not identify the animals regulated by the herd district the order is invalid. But, as Piercy himself notes, IC 25-2404 did not require that the order specify the animals to which the herd district would apply.

Piercy contends that Joint Exhibits 1 and 2 are the map referred to in the 1982 order creating the herd district that encompassed Piercy's pasture. That can not be true.

The Order (Joint Exhibit 7) expressly states that a "Herd District be established in the three remaining open range areas in Canyon County as shown on the attached survey map (marked in black)." Neither Joint Exhibit 1 nor Joint Exhibit 2 have any areas marked

in black, so neither map can be the map referred to in the order.

The truth is, no one knows who made Joint Exhibits 1 and 2, or when or why they were made. Record, p. 142. Also, while the 2 maps are similar, it is not clear that Joint Exhibit 1 is a copy of Joint Exhibit 2.

At the end of the day, there is so much confusion from the status of the County's record that it can not be said that Piercy has conclusively established anything.

THE CANYON COUNTY COMMISSIONERS DID NOT IMPROPERLY INCLUDE OPEN RANGE AREAS IN THE 1982 ORDINANCE

At the time the 1982 herd district was created, Idaho recognized that land could either be within a herd district (or a city, town or village), or land could be within open range, **or** land could be in a hybrid area that was neither herd district nor open range (because the land was enclosed, or because the land was not historically used for grazing, etc). In the case of Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1978), the Idaho Supreme Court, interpreting the 1963 herd district statutes that apply to this case said:

> Prior to 1963, herd districts could be created in any part of Idaho. It is clear the amendment of I.C. s 25-2402 by the inserting of a definition of "open range" was designed to protect the rights of livestock owners by prohibiting herd districts in areas where they historically grazed stock, rather than limiting the area where livestock owners were free to let their stock roam at large. Under our decision, herd districts may still be created in any area not within "open range" as defined in I.C. s 25-2402.

Thus, at the time the County Commissioners created the 1982 herd district, it was permissible for the county to do so if the land was enclosed (Piercy testified all livestock in Canyon County is enclosed; Piercy depo, pps 40-45) or if the land had not historically been used for open range grazing. In any event, Piercy has presented no proof that the 1982 herd district order included lands that were unenclosed, or lands upon which livestock had historically grazed.

Finally, with regard to the argument that the County Commissioners themselves referred to the land to be encompassed by the 1982 herd district order as open range is of little consequence. Absent proof that the land in question was unenclosed and historically used for grazing, the commissioners' reference to the land as open range does not prove clearly and convincingly that it was open range. Rather, the commissioners simply used the phrase 'open range' to identify that the land was not in a previously established herd district.

Thus the County Commissioners did not impermissibly include open range in the herd district.

PIERCY'S CLAIM THAT THE ORDINANCE IS INVALID IS BARRED BY THE STATUTE OF LIMITATIONS, IC 5-224

Piercy attacks the validity of an ordinance that has been on the books for 26 years. In Canady vs. Coeur d'Alene Lumber Company, 21 Idaho 77, 120 P. 830 (1911), the Idaho Supreme Court ruled that plaintiff's claim that the city of Coeur d'Alene's enactment of an ordinance was procedurally flawed and therefore invalid, was barred by the statute of limitations. In short, the Idaho Supreme Court ruled, nearly 100 years ago, that a landowner who believes an ordinance was improperly enacted can not simply sit upon his rights indefinitely. In Canady, the landowner only waited 9 years after enactment of the ordinance before suing to attempt to invalidate the ordinance.

Of course, in this case, Piercy sat on his rights some 25 years before he asked a court to have the ordinance declared invalid.

In Canady, the city enacted a series of ordinances that vacated certain streets and alleys, and granted a franchise to the lumber company so that the lumber company could build part of its manufacturing operations on the land occupied by those streets and alleys.

With complaints eerily similar to those raised by Piercy in this case, Plaintiff Canady complained that no petition had been circulated regarding the passing of such ordinances, as required by Idaho statute.

With regard to the statute of limitations defense, the Court said:

> It is next contended that appellant's cause of action, if she had one, was barred by the statute of limitations (subd. 1 of section 4054 and sections 4037, 4038, and 4060, Rev. Codes). We think, under the facts of this case, that this action is barred by the statute of limitations: and that this action should have been brought at least within five years from the date such cause of action arose. We think it sufficiently appears that appellant sat by when Ordinances Nos. 71 and 75 were passed in 1900, and more than nine years before this action was commenced, and made no complaint of any damages having been sustained to her property by reason of said ordinances and the vacation of the streets. And, again, in 1905, when Ordinance No. 115 was passed, she made no protest or objection of any kind. She knew that the Cœur d'Alene Lumber Company was expending a great deal of money in establishing its lumber plant upon said blocks and a portion of one of the streets, and made no protest of any kind whatever to the city, and made no claim for damages to her property as resulting from the passage of said ordinances. The first time she complained of damage to her property, so far as the record shows, was when she commenced this action, June 15, 1909. 120 P., at 835.

Despite his protestations to the contrary, Piercy knew his pasture was in a herd district. He testified he is an "expert" on ranching in Canyon County, having ranched there for 30 years or more. Everyone else knew the entire county was subject to herd district status, including E. G. Johnson, Piercy's witness and fellow Canyon County rancher. Moreover, ignorance of the law is no excuse. Finally, at the very least, Piercy had constructive knowledge of the creation of the herd district, as notice of the creation of the herd district was published in the Idaho Press Tribune on December 20, 1982. See Joint exhibit 10.

One of the reasons courts recognize the statute of limitations defense (which both Guzman and Sutton have asserted in their Answers to Piercy's Complaint for Declaratory

Relief) is to prevent litigation of claims, the outcome of which depends on evidence that has been lost to the mists of time.

Two of the three commissioners who signed the herd district ordinance are dead. Neither the surviving commissioner, nor the Canyon County Clerk in 1982, have any recollection about the events surrounding the creation of the herd district. Piercy has not produced a single witness who can testify that the county failed to follow proper procedure 26 years ago. Memories have faded, and documents have been discarded or gone missing.

The County has enforced the herd district ordinance for 26 years. Piercy has benefited from the ordinance, both when he traveled the roads of the county, and because other ranchers' livestock were required to be fenced in so they would not damage Piercy's crops, or mix with Piercy's livestock. Guzman relied upon the law. Valuable rights were protected and advanced by the 1982 ordinance.

IC 5-224 and the Canady case operate to bar Piercy's prosecution of this claim for declaratory relief.

CONCLUSION

The facts in this case are not in dispute. What is in dispute is (1) whether Piercy, or the County, has the burden of proof, and (2) whether Piercy has carried his burden by clear and convincing evidence that the herd district law under which Piercy has farmed, ranched, and traveled these last 25 years is invalid.

Piercy would have this Court strike down that law. It would be easy under current law, Piercy argues, for the County to create a county wide herd district if the ordinance is

struck down.

Of course, nothing could be further from the truth. Obtaining a petition for a herd district in this new millenium, signed by thousands of county residents, presents enormous logistical issues.

Perhaps Piercy believes the functional equivalent of a herd district could be created using the procedure identified in 25-2401(2), but if so, Piercy mis-reads that statute. Under that statute the county can control animals by ordinance only if a panel of 5 (including 2 livestock association representatives) "concludes that the creation, modification or elimination of a herd district is insufficient to control or regulate the movement of livestock" in the area to be regulated. Exactly what this means is unknown. But it certainly does not mean that all a county has to do is slap a panel of 5 people together with instructions to create a county wide herd district. The 2 livestock association representatives will object to the herd district. If the 5th member of the panel (who the livestock representatives helped choose) concurs, the ordinance will fail. And, one wonders exactly how creation of a herd district would be "insufficient to control... the movement of livestock" in the county; but that is exactly what IC 25-2401 says the panel must conclude **before** it can create the ordinance which Piercy says is so easily created.

Thus, this Court's decision in this case **is** a significant event; one that will deeply impact the citizens of this county.

There is a reason the Courts require Piercy to establish by clear and convincing evidence that the ordinance was not validly enacted. People die. Memories fade. Documents and records are lost.

What kind of Pandora's box do we open when we force government to prove (as

Piercy claims the county must) that laws enacted 25, or 50, or 150 years ago, were validly enacted.

Could the state of Idaho prove today, for example, that the state's constitution was validly enacted on that hot, sweltering day, the 3rd of July, 1890? Could the State prove that all procedures required to have been accomplished in the enactment of the Constitution were in fact accomplished? Does the requisite documentation even still exist?

While we don't have the 1982 petition, we don't have a single petition for the other 18 or so herd districts that exist in Canyon County. Are those 18 herd districts invalid? And while no one has located the published notice of hearing the petition, can it be seriously contended that there is clear and convincing evidence that the notice was never published? The Herculean task required to prove that the notice was not published certainly has not been completed in this case, based on the evidence before this court.

Not a single witness has testified that there was no petition, or that no notice of hearing was published.

In Gazzaway v. E.G. Johnson Farms, Judge Hoff rejected the precise arguments Piercy has raised in this case. If Piercy must carry his burden of proof by clear and convincing evidence, it does not seem possible that one judge could conclude the ordinance was validly enacted, while another could conclude it was not.

Piercy is correct when he notes that Piercy noticed up and took a boatload of depositions of County personnel to try to track down the petition. The problem is, Piercy noticed up and took depositions of people who, for the most part, weren't there in 1982 when the deed was done. Yet Piercy points to that pile of depositions and says, "Look. We deposed all these folks and they never heard of a petition." Of course, such evidence

proves nothing.

And the two witnesses who were there at the time, Mr. Koch and Mr. Staker, don't know if a petition was, or was not presented; nor do they know if notice of hearing the petition was, or was not, published.

So what has Piercy proved? Precious little. Only that he can make some clever arguments that "prove" there was no petition, or no notice published. But his proof is hollow. It is not clear and convincing.

It is not clear and convincing because we cannot peer through the mists of time to that time in the late 1970s and the early 1980s when the events of this case occurred. So we can never re-create exactly what did occur back then.

And if we can not know clearly and convincingly all of the circumstances surrounding the creation of this ordinance, Piercy's declaratory judgment suit must fail.

Judge Winmill wisely concluded in the Arguello v Lee case that, ""The power of the court to declare an ordinance invalid should be exercised cautiously, and, in fact, courts are reluctant to do so".

Guzman requests this Court to exercise its power cautiously. Guzman asks this Court to reject Piercy's Petition for Declaratory Relief, and hold that the County's 1982 herd district ordinance was validly enacted.

DATED this 26th day of November, 2008.

Chasan & Walton, LLC

Timothy C. Walton, Attorney for Plaintiff

GAZZAWAY v. E.G. JOHNSON FARMS
ORDER AND REPORTER'S TRANSCRIPT OF PROCEEDINGS

J. BRENT GUNNELL (ISB #5184)
GOICOECHEA LAW OFFICES
1226 E Karcher Rd
Nampa ID 83687
Telephone: (208) 466-0030
Facsimile: (208) 466-8903
brent@legaleaglesnw.com
Attorneys for Plaintiff

THIRD JUDICIAL DISTRICT COURT

STATE OF IDAHO, CANYON COUNTY

TRAVIS D. GAZZAWAY, Plaintiff, vs. E.G. JOHNSON FARMS, INC., an Idaho Corporation, Defendant.	Case No. CV 07-2141 ORDER

Defendant having filed a Motion for Summary Judgment, and this Court having reviewed the parties' briefing memoranda and exhibits, and this Court having heard the parties' oral arguments on July 26, 2007 and on October 25, 2007, this court is prepared to enter its decision as follows:

IT IS ORDERED THAT Defendant's motion for summary judgment is denied, based upon this court's legal analysis contained in the October 25, 2007 hearing transcript.

DATED: NOV 05 2007.

Honorable Renae J. Hoff
Third District Court Judge

State of Idaho }ss.
County of Canyon }
Certificate of [illegible]
I, the [illegible] × copies both parties
above [illegible]
by [illegible]
Dated 6 Nov 2007
Case ORDER
By T Crawford

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 part of [illegible]yon 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 mov 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 Januar 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. The ... 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.

Factually, I find that on September 23, 2006, 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 COU... 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, I cite *Adamson versus Blanchard*, 133 Idaho 602, a 1999 Supreme Court case. And therein the file only quotes, "The court's primary duty in interpreting a statute is to give effect to the legislative 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 cite *Jackson versus Hammersley*, 72 Idaho 301, a 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 that ...pted 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 ... 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.

RYAN PECK'S SEPTEMBER 23, 2008 LETTER
REGARDING ARGUELLO v. LEE

SAETRUM LAW OFFICES

Attorneys at Law

RODNEY R. SAETRUM
ROBERT R. GATES
KARYN WHYCHELL
DAVID W. LLOYD
RYAN B. PECK
JEFFREY S. HARR
MICHAEL A. POPE

101 S. CAPITOL BLVD., SUITE 1800
BOISE, IDAHO 83702
P.O. BOX 7425
BOISE, IDAHO 83707
TELEPHONE: (208) 336-0484
FACSIMILE: (208) 336-0448
E-MAIL: GENERAL@SAETRUMLAW.COM

September 23, 2008

Via Facsimile: (208) 454-7442
Honorable Gordon W. Petrie
Canyon County Courthouse
1115 Albany Street
Caldwell, ID 83605

Re: Case Name: *Rivera v. Piercy*
Case Number: CV-05-4848

Dear Judge Petrie:

This letter is to inform the Court of a case that is currently being litigated in U.S. District Court for District of Idaho in front of Judge B. Lynn Winmill. The case is named *Perez-Robledo v. Lee*, number CV06-485-E-BLW. This case deals with the Mud Lake/Terreton herd district in Jefferson County created in 1930. The defendants in that case have made the same arguments regarding the invalidity of the Mud Lake/Terreton herd district as those submitted before your Court pursuant to Defendant Piercy's motion to reconsider. The arguments made include that the inclusion of federal land in the boundaries of that herd district invalidate the entire herd district. The defendant's position also includes the due process argument of lack of published notice prior to the Jefferson County Commissioner's hearing to enact that herd district. The federal court has taken the matter under advisement.

Judge Petrie
Page 2
September 23, 2008

We thought to advise this Court, in the event that any ruling regarding federal land or due process issues by the federal court becomes precedential to this Court recognizing that this Court has not yet ruled on our motion for reconsideration.

Sincerely,

SAETRUM LAW OFFICES

Ryan B. Peck

cc: Josh Evett (*Via Facsimile*)
Chuck Saari (*Via Facsimile*)
Tim Walton (*Via Facsimile*)

COURT'S MEMORANDUM DECISION AND ORDER DATED OCTOBER 8, 2008 IN ARGUELLO v. LEE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ROLANDO PEREZ ARGUELLO, Plaintiff, v. O. LARRY LEE and CAROLYN LEE, Defendants.	Case No. CV-06-485-E-BLW **MEMORANDUM DECISION AND ORDER**

INTRODUCTION

The Court has before it Plaintiffs' Motion for Reconsideration (Docket No. 81), Plaintiffs' Renewed Motion for Partial Summary Judgment (Docket No. 83), Plaintiffs' Motion to Exclude Expert Report and Testimony of Bryan Finkle (Docket No. 84), Plaintiffs' Objection to Additional Defense Expert Testimony (Docket No. 85), Plaintiffs' Motion to File Excess Pages (Docket No. 86), and Plaintiffs' Second Motion to File Excess Pages (Docket No. 104). The Court heard oral argument on the motions on September 11, 2008 and now issues the following decision.

BACKGROUND

On December 4, 2004, Gabriel Gomez was killed and Rolando Perez was injured when their vehicle struck a cow owned by Larry and Carolyn Lee on Highway 33 in Jefferson County, Idaho. Plaintiffs contend that the Lees' negligence caused the accident.

Earlier this year, Plaintiffs filed a motion for partial summary judgment, based in part on their admission in discovery that their land was in a herd district which, under Idaho law, obligated them to keep their animals fenced off from the public highways. In response to the motion, Defendants filed a motion to permit amendment of their admission concerning the status of their land. After hearing oral argument on the motions, the Court granted the Lees' motion seeking leave to withdraw their admission, and denied the motion for partial summary judgment. However, because the summary judgment motion relied heavily on Defendants' previous admission, the Court gave Plaintiffs an opportunity to do additional limited discovery and file a second motion for summary judgment. That motion and other related matters are now before the Court.

ANALYSIS

I. Summary Judgment Standard of Review

One of the principal purposes of the summary judgment "is to isolate and

dispose of factually unsupported claims . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). It is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The evidence must be viewed in the light most favorable to the non-moving party, *id.* at 255, and the Court must not make credibility findings. *Id.* On the other hand, the Court is not required to adopt unreasonable inferences from circumstantial evidence. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001)(en banc). To carry this burden, the moving party need not introduce any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir.2000).

This shifts the burden to the non-moving party to produce evidence sufficient to support a jury verdict in her favor. *Id.* at 256-57. The non-moving party must go beyond the pleadings and show "by her affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 324.

II. Plaintiffs' Motion for Partial Summary Judgment

In its earlier opinion in this matter, the Court explained in detail Idaho law regarding livestock areas. For ease of reference, the Court will give an overview of the law here.

In Idaho, livestock areas outside of cities and villages fall into two categories – open range and herd districts. *Adamson v. Blanchard*, 990 P.2d 1213, 1217 (Idaho 1999); *see also Moreland v. Adams*, 152 P.3d 558, 561 (Idaho 2007). Open range includes all areas of the state not within cities, villages, or already created herd districts. Animals may roam freely in open range areas without risk of owner liability. *Id.* "In herd districts, however, animals may not roam freely and owners incur a duty to keep livestock fenced." *Id.*

Summarizing Idaho law as it relates to owners of animals which cause accidents on roads in either an open range or a herd district, the Idaho Supreme Court has identified six guiding principles:

> (1) the owners of domestic animals are not liable or negligent when the animals cause a highway collision in "open range" or when the animals are "lawfully on any highway," I.C. §§ 25-2118, -2119; (2) if the "open range" or "lawful" conditions are not present, then the doctrine of *res ipsa loquitur* supplies an inference that the animal owner was negligent; (3) the inference can be supplemented by other evidence of the owner's negligence; (4) the inference can be rebutted by a satisfactory explanation or showing by the animal owner of proper care, enclosures, and any other evidence tending to negate the inference of the owner's negligence; (5) when properly placed at issue by the parties, the issues of lawful presence, inference of negligence, and rebuttal of the inference, are questions for the trier of facts; and (6), in any event, the vehicle owner may be liable for contributory negligence under various theories.

Griffith v. Schmidt, 715 P.2d 905, 909 (Idaho 1985). Although the term "lawfully" is not defined in the statute, the Idaho Supreme Court has determined that "its definition is not at issue in cases of nighttime vehicle collisions with unattended domestic animals running at large wherein we can presume the animals' presence on the highway does not fall within any reasonable definition of 'lawfully.'" *Id.*; *see also Adamson v.* Blanchard, 990 P.2d 1213, 1216 n.2 (Idaho 1999).

In this case, Plaintiffs contend that the accident occurred in the Mud Lake/Terreton herd district. The Lees argue, however, that the herd district is invalid and therefore the land is open range. Idaho Code § 25-2401 *et seq.* provides the current mechanism for creating a herd district. *Adamson*, 990 P.2d at

1217. As relevant here, § 25-2401(1) provides as follows:

> (1) The board of county commissioners of each county in the state shall have power to create, modify or eliminate herd districts within such county as hereinafter provided; and when such district is so created, modified or eliminated, the provisions of this chapter shall apply and be enforceable therein. On and after January 1, 1990, no county shall regulate or otherwise control the running at large of horses, mules, asses, cattle, sheep or goats within the unincorporated areas of the county unless such regulation or control is provided by the creation of a herd district pursuant to the provisions of this chapter, except as provided by subsection (2) of this section. The provisions of this chapter shall not apply to any herd district or herd ordinance in full force and effect prior to January 1, 1990, but shall apply to any modification thereof.
>
> (2) A panel of five (5) members may be created in a county, the members of which shall be appointed as follows: two (2) members by appointment of the board of county commissioners; two (2) members by appointment of a local, county or state livestock association or associations; and the fifth member, by concurrent appointment of the first four (4) appointees. Only if a majority of said panel, after a public hearing held with notice as prescribed by law, concludes that the creation, modification or elimination of a herd district is insufficient to control or otherwise regulate the movement of livestock in an area, the board of county commissioners shall have power to establish such control by ordinance, provided that the cost of construction and maintenance of any fencing or cattle guards required by said ordinance shall be paid by the county current expense fund.

I.C. § 25-2401(1). Whenever a herd district has been created using the mechanism

described in the statute, a legal prima facie presumption exists, after a lapse of two years from the date of such order, that all proceedings and jurisdictional steps preceding the making of such order have been properly and regularly taken so as to warrant the board in making the order. I.C. § 31-857. At that point, the burden of proof falls upon the party disputing the validity of the order to show that any of the proceedings or jurisdictional steps were not properly or regularly taken. Id. Such prima facie presumption is the rule of evidence in all courts in the state of Idaho. Id.

Here, Plaintiffs produced a copy of an order from the Jefferson County Commission dated March 10, 1930, creating the Mud Lake/Terreton herd district. (Boulter Aff., Ex. A). This raises the presumption that a herd district was created and that all proceedings and jurisdictional steps to create the district were properly and regularly taken. I.C. § 31-857. Therefore, the burden of proof falls upon the Lees to show that any of the proceedings or jurisdictional steps were not properly or regularly taken. Id. The Lees contend that the Mud Lake/Terreton herd district is invalid because it includes lands owned by the United States and because the County Commissioners did not comply with all steps preceding establishment of the herd district. The Court will address each contention in turn.

A. Inclusion of lands owned by the United States, upon which the grazing of livestock has historically been permitted.

In arguing that the herd district is invalid because it contains land owned by the United States, the Lees rely upon Idaho Code § 25-2402(2)(a). The statute provides that "[n]otwithstanding any other provision of law to the contrary, no herd district shall . . . [c]ontain 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). Thus, the statute precludes the inclusion in a herd district of any lands (1) which are owned by the United States of America or the state of Idaho, and (2) upon which grazing of livestock has been historically permitted.

In *Miller v. Miller*, 745 P.2d 294 (Idaho 1987), the Idaho Supreme Court held that if a herd district is created which includes federal or state lands excluded by § 25-2402(2)(a), the courts cannot simply excise the federal or state lands from the herd district, but must declare the entire herd district invalid. Relying upon this authority, the Lees contend that the Mud Lake/Terreton herd district contains federal lands and must therefore be declared invalid. The Court is not persuaded that the Idaho Supreme Court decision in *Miller* dictates this result.

Idaho Code § 25-2402(2)(a), which excludes federal and state grazing lands from herd districts, expressly provided that it applies to herd districts "established

before or after July 1, 1983." Thus, when the herd district at issue in *Miller* was created in 1984, the ordinance establishing the district conflicted with the general laws of the state and was therefore "an invalid exercise of the Bannock County Commissioners powers . . . ." *Id.* at 297. This, the *Miller* court determined, requires that the entire ordinance be declared invalid.

The same cannot be said of the the creation of the Mud Lake/Terreton herd district. When it was created in 1930 by the Jefferson County Commissioners, there was no prohibition on the inclusion of federal and state grazing lands in herd districts. Thus, the Jefferson County ordinance, unlike the Bannock County ordinance at issue in *Miller*, was not in conflict with the general laws of the state in existence at the time of its enactment and was therefore a valid exercise of the Commissioners powers. Thus, the premise of *Miller*, that an ordinance adopted in conflict with the general laws of the state is invalid in its entirety, simply does not apply to the ordinance at issue here.

Having determined that *Miller* does not require a finding that the Jefferson County ordinance establishing the Mud Lake/Terreton herd district is invalid, we must still consider the language in I.C. § 25-2402(2)(a) requiring the exclusion of federal and state grazing lands from all herd districts "established before or after July 1, 1983." The language of the statute, while clearly excluding federal and

state grazing lands from herd districts established before July 1, 1983, does not reveal a legislative intent to invalidate all herd districts which lawfully included such lands prior to the effective date of the statute. Had they intended such a draconian result – retroactively invalidating any herd district which contains so much as one acre of federal or state grazing lands – it seems clear the legislature would have been more explicit. A more reasonable view of the statutory language would be to require that any federal or state grazing lands included in herd districts lawfully in effect on July 1, 1983 be excised from the district.[1] This view, which the Court adopts, would require the exclusion of any such government-owned grazing lands from the Mud Lake/Terreton herd district, but would leave the balance of the herd district, and the ordinance creating it, in full force and effect.

Even if the Court were to adopt the Lees argument that I.C. § 25-2402(2)(a) requires that the ordinance be declared invalid if it includes federal or state grazing lands, they cannot rely upon the statute because they have presented no evidence establishing that the federal and state lands included in the herd district were historically grazed. As clearly stated in the statute, a herd district is not invalid simply because it contained lands owned by the United States. Those lands must be lands "upon which the grazing of livestock has historically been permitted."

---

[1] This view would also be consistent with the strong presumption in favor of the validity of long-established herd districts expressed in I.C. § 31-857.

I.C. § 25-2402(2)(a). Without any evidence of permitted historical grazing, the Lees cannot overcome their burden of disputing the validity of the herd district.[2]

B. Steps preceding establishment of herd district.

The Lees next contend that the County Commissioners did not comply with all preceding and jurisdictional steps. Their argument is two-fold. First, the Lees contend that the commissioners did not comply with statutory notice requirements. Second, the Lees contend that the herd district is not valid because the order creating it did not specify the time at which it would take effect.

1. Notice Requirements

To establish a herd district, the Idaho law in effect in 1930 required the Board of County Commissioners to set a date for hearing a petition for a herd district, and give notice of the hearing by posting it in three conspicuous places in the herd district and by publishing it for two weeks prior to the hearing in a newspaper published in the county nearest the proposed herd district. (Coletti Aff., Ex. L, Docket No. 96). The Lees contend that the County Commissioners did not publish notice of the hearing in the newspaper. In support of their argument, the

[2] During oral argument on the pending motions, the Lees requested leave to re-open discovery in this matter in order to obtain evidence of grazing. The Court declined to re-open discovery yet again in this matter, as the parties have already had two attempts at summary judgment, and the Court is unwilling to continue down the slippery-slope of re-opening discovery after the fact.

Lees provide evidence that the notice was not published in the Rigby Star, the newspaper which ultimately published the commissioners' decision to create the herd district.

Plaintiffs counter by suggesting that there is substantial evidence that the notices were published in another Jefferson County newspaper, the Roberts Sentinel. The public record reveals that the petition for a herd district in the Mud Lake area was presented to the Jefferson County Commission at their regular meeting on October 14, 1929. At that same meeting, the Commission specifically ordered that notice of a hearing on the petition be issued in conformity with Idaho law. (Barton Aff., ¶ 3, Ex. B.). The Commission's minutes do not reflect that the Commission designated which of the Jefferson County newspapers should contain the notice. However, publishing the notice in the Roberts Sentinel, rather than the Rigby Star, would be consistent with the spirit of the statutory requirement that the notice be published in the county nearest the proposed herd district, since Roberts is physically much closer to Mud Lake than is Rigby. Moreover, minutes of the commission meetings between October 14, 1929 and June 9, 1930 show an approved payment of a series of charges for printing from the Roberts Sentinel, including $15.00 on October 14, 1929, $45.65 on January 13, 1930, $11.75 on May 12, 1930, and $36.20 on June 9, 1930. (Barton Aff., ¶¶ 3-6, Ex. B, D, E.).

Unfortunately, copies of the Roberts Sentinel for 1929 and 1930 are no longer available from any known source.

On balance, the Court finds[3] that notice was given as required by statute. The Court is led to this conclusion by four undisputed facts: First, the Commission ordered on October 14, 1929 that notice of the public hearing be issued as required by Idaho law. Second, Idaho law required that such notice be published in the county nearest to the proposed herd district. Third, although both communities are in Jefferson County, Roberts is closer in proximity to Mud Lake than is Rigby. Fourth, the County paid charges to the Roberts Sentinel for legal publications during the same time period when the notice would have been published. Against this evidence, the Lees' argument that publication was not made simply because there is no record of publication in the Rigby Star does not fulfill the Lees' burden of overcoming the statutory presumption that the herd district was validly created. *See* I.C. § 31-857.

---

[3] The validity of an ordinance is a judicial question for resolution by the court. 6 McQuillin, The Law of Municipal Corporations § 20:1-2. This would include the resolution of factual disputes relevant to the validity of the ordinance. *See Allred v. City of Raleigh*, 178 S.E.2d 432 (N.C. 1971). Although the issue arises in the context of the Plaintiff's motion for summary judgment, it is the Lees' burden, as the party challenging the validity of the ordinance, to establish that the procedural prerequisites to the adoption of the ordinance were not followed. They have not presented evidence from which the Court, as the finder of fact, can find that the required notice of the public hearing was not given.

2. Time of Effect Requirement

The Lees next contend that the Mud Lake/Terreton herd district is invalid because the commissioners' order did not specify the time at which it would take effect. In 1930, when the herd district was created, Idaho law required the commission to issue an order which "shall specify a certain time at which [the herd district] shall take effect, which time shall be at least thirty days after the making of said order[.]" (Coletti Aff., Ex. L, Docket No. 96). It is undisputed that the order does not specify an effective date. (Boulter Aff., Ex.).

However, "[t]he common rule in regard to legislation is that it shall take immediate effect unless otherwise provided, and this rule is applicable to ordinances." 5 McQuillin, The Law of Municipal Corporations § 15:36. It is not uncommon for a statute to prescribe that certain types of ordinances not take effect until a certain time – for example, 10, 20 or 30 days – after its approval. Id. Nevertheless, "invalidity as to the effective date of an ordinance . . . does not render the ordinance void." Id.

The requirement of the passage of a certain period of time before an ordinance goes into effect "is intended to enable the public to acquire knowledge of the ordinance before it becomes operative for any purpose." Id. But, "the owners of property coming within the regulation of an ordinance are not entitled to

other than the due and proper general public notice of the enactment of the ordinance." Id.

Here, the Lees have not presented any evidence that they, or their predecessors-in-interest, did not receive actual notice of the adoption of the ordinance, or that they were prejudiced in some fashion by the failure to give the statutorily-required thirty day grace period before the ordinance took effect. Under these circumstances, the failure to provide for an effective date in the ordinance, "does not render the ordinance void," id., but only invalidates the effective date of the ordinance so that the ordinance did not take effect for 30 days, rather than immediately upon enactment.

This approach, to deem the ordinance valid but the effective date invalid, is consistent with general principles applicable to the interpretation and enforcement of ordinances. The power of a court to declare an ordinance invalid should be exercised cautiously, and, in fact, courts are reluctant to do so. 6 McQuillin, The Law of Municipal Corporations § 20:4 Thus, a court should not strike down any ordinance where that ordinance can be reasonably upheld, and the ordinance will be upheld if the validity of the ordinance is fairly debatable. Id. When an ordinance can be interpreted in two ways, one of which sustains its validity and the other which defeats it, a court will adopt the sustaining interpretation, "even if that

construction is not the most obvious or natural." 6 McQuillin, The Law of Municipal Corporations 20:56. Significantly, "[c]ourts are loathe to construe an ordinance as invalid, where the ordinance has been in operation and unchallenged for many years, and where under it valuable rights have accrued which would be destroyed if the ordinance were held to be invalid." Id.

With these guidelines in mind, this Court is unwilling, and, in fact, unable to invalidate the Mud Lake/Terreton herd district which has been unchallenged for almost eighty years. The failure by the Commission to specify an exact time at which the herd district took effect is not sufficient reason for this Court to invalidate the herd district. Under the above guidelines, the Court finds that it is reasonable to construe the ordinance to take effect thirty days after the order was issued in accordance with Idaho law in 1930.

In summary, the Court rejects the Lees' arguments that the Mud Lake/Terreton herd district is invalid. The inclusion of federal and state lands in the herd district did not invalidate the ordinance creating the district. In addition, the Lees have failed to establish that federal and state lands included in the district have been historically grazed by livestock. The Lees have also failed to carry their burden of overcoming the legal prima facie presumption of validity accorded an ordinance which has been on the books almost eighty years. They have failed to

establish that the statutorily-required notice of the public hearings leading to enactment of the herd district ordinance was not published in a Jefferson County newspaper. The Court has also concluded as a matter of law that the failure to include in the ordinance an effective date at least 30 days after enactment, as required by statute, does not invalidate the ordinance. In turn, the Court finds, as a matter of law, that the subject area was a herd district.

C. Questions of fact remain.

As explained above, a cattle owner's liability is materially affected by whether the area is open range or a herd district. In open range, there is absolute immunity. In herd districts, as is the case here, there is immunity only if cattle are legally on the road. *Moreland*, 152 P.3d at 561. As the Court also pointed out in its earlier opinion, "[n]o person owning, or controlling the possession of, any domestic animal lawfully on any highway, shall be deemed guilty of negligence by reason thereof." I.C. § 25-2119. However, as the Idaho Supreme Court made clear in *Griffith,* we can presume that unattended domestic animals running at large on the highway does not fall within any reasonable definition of "lawfully." *Griffith* 715 P.2d at 909. Still, even if the accident occurs in a herd district, and lawful conditions are not present, the animal owner is not strictly liable. Rather, the doctrine of *res ipsa loquitur* supplies an inference that the animal owner was

negligent, but that inference can be rebutted, and when properly placed at issue by the parties, the issues of lawful presence, inference of negligence, and rebuttal of the inference are questions for the trier of facts. *Griffith v. Schmidt*, 715 P.2d at 909.

That is the case here. The plaintiffs may find unpersuasive the Lees' explanation as to the care they provided their animals and the claim that they acted diligently to ensure that their fences were properly maintained. However, in resolving a summary judgment motion, "the evidence must be viewed in the light most favorable to the non-moving party, and the Court is not permitted to make credibility findings." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Moreover, direct testimony of the non-movant must be believed, however implausible. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1159 (9th Cir. 1999). Thus, even though the Court has determined that the subject land is a herd district, the question of liability must be left to the jury. Accordingly, this case must proceed to trial.

III. Motion for Reconsideration Standard of Review

A motion to reconsider an interlocutory ruling requires an analysis of two important principles: (1) error must be corrected; and (2) judicial efficiency demands forward progress. The former principle has led courts to hold that a denial of a motion to dismiss or for summary judgment may be reconsidered at any

time before final judgment. *Preaseau v. Prudential Insurance Co.*, 591 F.2d 74, 79-80 (9th Cir. 1979). While even an interlocutory decision becomes the "law of the case," it is not necessarily carved in stone. Justice Oliver Wendell Holmes concluded that the "law of the case" doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). "The only sensible thing for a trial court to do is to set itself right as soon as possible when convinced that the law of the case is erroneous. There is no need to await reversal." *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568, 572 (N.D.Cal. 1981)(Schwartzer, J.).

The need to be right, however, must be balanced with the need for forward progress. A court's opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill.1988). "Courts have distilled various grounds for reconsideration of prior rulings into three major grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or to prevent manifest injustice." *Louen v Twedt*, 2007 WL 915226 (E.D.Cal. March 26, 2007). If the motion to reconsider does not fall within one of

these three categories, it must be denied.

The Plaintiffs ask that the Court reconsider its decision that the Plaintiffs would not be permitted to introduce evidence of past incidents of cattle roaming off the Lees' property in Clark County. The parties agree that the property in Clark County is open range. The Court determined that evidence of incidents on the Clark County property was irrelevant because animals may roam freely in open range areas without risk of owner liability. *Adamson*, 990 P.2d at 1217.

Plaintiffs now assert that notwithstanding the immunity provided by statutes and case law, the Lees are somehow liable based on duties owed to government agencies to maintain fences. However, even if the Lees have some type of contractual or other duty toward government agencies, such a duty does not create liability toward Plaintiffs. Thus, Plaintiffs' motion to reconsider will be denied.

IV. Motion to Exclude

Plaintiffs filed two motions to exclude. At oral argument, Plaintiffs withdrew their second motion (Docket No. 85). Accordingly, the Court will deem that motion to be moot. The other motion seeks exclusion of the expert report and testimony of Bryan Finkle.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony, in conjunction with *Daubert v. Merrell Dow Pharmaceuticals*,

Inc., 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Plaintiffs contend that Dr. Finkle's testimony fails the *Daubert* test.

Daubert provides the following non-exclusive list of factors in determining the reliability of scientific evidence: "(1) whether a scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether the technique is generally accepted." Cooper v. Brown 510 F.3d 870, 942-43 (9th Cir. 2007) (citing *Daubert*, 509 U.S. at 593-94; *Kumho Tire*, 526 U.S. at 151). However, this list of factors is meant to be helpful, not definitive. *Id.* at 943. "The goal is to make certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* (Internal quotation and citation omitted). The Court must ultimately employ an independent, flexible approach in order to determine whether Dr. Finkle's methodology is scientifically valid. *Daubert*, 509 U.S. at 594-95.

Dr. Finkle is a forensic toxicologist. The Lees retained Dr. Finkle to determine the level of intoxication of the driver of the automobile involved in the collision in this matter at the time of the accident. Defendants provided Dr. Finkle

with medical reports showing a blood-alcohol content of 0.049 approximately one hour and 38 minutes after the collision, as well as police reports and notes indicating that the driver had been drinking alcohol prior to the collision. Based on this information, the time of the accident, and the general physical attributes of the driver, such as height, weight, and age, Dr. Finkle made a retrograde determination as to the driver's alcohol level at the time of the accident.

According to his Curriculum Vitae, Dr. Finkle has written several toxicology articles for peer-reviewed journals. Additionally, although Dr. Finkle admits that there would be some variation in results if a clinical study analyzed the particular alcohol clearance of a group, he testified that the typical rate is .02 per hour, which does not suggest the possibility of a significant potential error rate.

A review of Plaintiffs' concerns with Dr. Finkle's testimony and report reveals several statements likely taken out of context in an attempt to rebut the overall findings. Based on these argument, the Court finds that Plaintiffs have not provided the Court with a sufficient basis to conclude that Dr. Finkle's methodology is so unreliable as to justify exclusion under Rule 702. The Court may be open to a pre-trial *Daubert* hearing to flesh out the issue before trial if Plaintiffs request one. At this point, however, the Court will deny the motion to exclude.

The Court will note for the record, however, that the Court will not allow Dr. Finkle to testify about issues where he has no personal knowledge or expertise. Specifically, as discussed during oral argument, Dr. Finkle will not be allowed to give expert testimony about the speed of the vehicle.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiffs' Motion for Reconsideration (Docket No. 81) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Renewed Motion for Partial Summary Judgment (Docket No. 83) shall be, and the same is hereby, GRANTED in part and DENIED in part. The motion is granted to the extent it seeks a finding that the subject land was a herd district. It is denied to the extent it seeks a finding of liability at this point. That issue will be addressed at trial.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Exclude Expert Report and Testimony of Bryan Finkle (Docket No. 84) shall be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Objection to Additional Defense Expert Testimony (Docket No. 85) shall be, and the same is hereby, DEEMED MOOT.

IT IS FURTHER ORDERED that Plaintiffs' Motion to File Excess Pages

(Docket No. 86) shall be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that and Plaintiffs' Second Motion to File Excess Pages (Docket No. 104) shall be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the Clerk of the Court shall set this case for a status conference for the purpose of setting a trial date.

DATED: **October 8, 2008**

Honorable B. Lynn Winmill
Chief U. S. District Judge

RELEVANT PAGES FROM OCTOBER 6, 2008
DEPOSITION OF E.G. JOHNSON

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.) Case No. CV05-4848
)
DALE PIERCY, individually, and)
JENNIFER SUTTON, individually,)
Defendants.)
)
CANYON COUNTY)
Third Party Defendant.)
)

DEPOSITION OF E.G. JOHNSON
OCTOBER 6, 2008

REPORTED BY:
MARLENE "MOLLY" WARD, CSR No. 704, RPR
Notary Public

THE DEPOSITION OF E.G. JOHNSON was taken on behalf of the Defendant Dale Piercy at Saetrum Law Offices, 101 South Capitol Boulevard, Suite 1800, Boise, Idaho, commencing at 11:14 a.m. on October 6, 2008, before Marlene "Molly" Ward, Registered Professional Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For the Plaintiff:

Chasan & Walton, LLC
BY: MR. TIMOTHY C. WALTON
1459 Tyrell Lane
P.O. Box 1069
Boise, Idaho 83701-1069

For the Defendant Dale Piercy:

Saetrum Law Offices
BY: MR. RYAN B. PECK
101 South Capitol Boulevard, Suite 1800
P.O. Box 7425
Boise, Idaho 83707-7425

EXAMINATION

QUESTIONS BY MR. WALTON:

Q. Mr. Johnson, my name is Tim Walton. I represent Mr. Guzman in this litigation. Have you ever been to Hawaii ever?

A. Yeah.

Q. Did you go in '82?

A. I don't believe so. I think the first time I went to Hawaii would have been in about 1998 or '99.

Q. Okay. It's an interesting question just because my paralegal, in looking at the newspapers from back then, noticed that Mr. and Mrs. Johnson went to Hawaii in '82, I think it was November of '82. So I was just wondering if that could have been you.

A. I don't believe so.

Q. Okay.

A. The last -- you know, I'm quite certain it was quite a while after that, but I've been there several times, but ...

Q. All right. Are you a client of Mr. Saetrum's law firm?

A. (Head shake.)

Q. Has this law firm ever represented you?

A. No, I'm sorry. They -- well, they represented our insurance company.

Q. Okay. And in fact they represented you and your ranches in connection with --

A. That's correct.

Q. -- a collision involving a car and a livestock; right?

A. That's correct.

Q. Okay. I'm kind of interested in this notion that had you been aware of the herd district that was created in '82 or had you gotten notice of it, you would have done something about it; is that what you're saying?

A. Well, I'm not sure what comes with the petition, you know. I'm assuming there's some explanation that comes with the petition and I'm assuming that would be a copy of the proposed ordinance --

Q. Okay.

A. -- for you to sign. And so having read the ordinance, you know, recently, I think there would have been some red flags.

Q. Okay. So how would you anticipate that you would have gotten notice of the proposed herd district?

A. Well, I assume that it comes from the County and it affects our property.

Q. And when you say "assume it comes from the County," are you referring to County --

A. County commissioners.

Q. -- something published in the paper or how?

A. Well, you know, if it was just published in the paper, then there's a good chance I wouldn't -- you know, there's a chance I wouldn't have seen it.

Q. Right. Right. Because -- are you aware that this herd district, it was noticed published in the paper about this herd district in December of 1982 that the County Commissioners had decided to go ahead and create this herd district. Are you aware of that notice that was published in the newspaper?

A. No.

Q. Okay. So if there'd been a notice published in the newspaper prior to the hearing where the herd district was created, you're saying you probably wouldn't have known about that anyhow; right?

MR. PECK: I object to that question.

Q. (BY MR. WALTON) Is that what you're saying?

MR. PECK: Misrepresents prior testimony.

Q. (BY MR. WALTON) Is that what you're saying?

A. What I'm saying is, I was not aware that a herd district was being established. And I have not been contacted relative to the establishment of the herd district.

Q. And I understand that. And as we just discussed, it hadn't been published in the newspaper; I think you just testified you probably wouldn't have seen it in the paper anyway, right?

A. I -- well, again --

MR. PECK: Object to the question.

Q. (BY MR. WALTON) It's a simple "yes" or "no" question.

A. You know, we get the paper.

Q. Right.

A. But whether -- but do I read all the legal notices, I don't.

Q. Okay. Fair enough. Now, you don't remember how you learned that your property was

looking for a copy -- I wanted to review this affidavit before I came in here today. And I asked her to -- if she knew where it was at in the files and we went through them and didn't find it. But anyway, she was -- everybody in the area -- we know the Piercys and we know the Suttons and we know the -- you know, the people that were involved in that. And so -- because we've all lived there for a long time, and the Guzmans. But anyway, her comment to me was "I thought Canyon County was open range."

Q. Okay.

A. Now, they've been there three generations. But I haven't had a conversation with other ranchers. There aren't many ranchers left in Canyon County.

Q. This person that you spoke with today thought that the entire Canyon County was open range?

A. Well, that's what her comment -- that's what she said, I think.

Q. Okay.

A. Canyon County was open range.

Q. Okay. Do you have any knowledge that the Canyon County Commissioners failed to file a proper procedure when they created the 1982 herd district ordinance we're talking about today?

A. No. I didn't know what procedure it was.

Q. Okay. Do you have any proof that a notice of hearing was not published in the newspaper pertaining to the hearing for the creation of this herd district that we're talking about today?

A. No.

Q. Do you have any proof that a petition was not circulated amongst the landowners of the area affected by the herd district that we're talking about today?

A. I don't have any proof, no.

Q. Okay. Have you ever talked to Mr. Piercy about this case?

A. No.

Q. When was the last time you and he spoke?

A. Gosh, I don't recall. Because I see him, you know --

Q. Sure.

A. -- from time to time.

Q. Sure.

A. But it's probably been a year or two.

Q. Okay. Have you ever had a discussion with Mr. Piercy about herd districts in Canyon County?

A. No.

Q. The two organizations that you belong to that you mentioned, I think it was the Cattlemen's Association and the Cattle Feeders Association?

A. Um-hmm, yeah.

Q. Has there ever been an occasion when either organization, to your knowledge, has notified its members of the creation of a herd district?

A. Not that I recall.

Q. Okay. Has there ever been an occasion where either organization notified its members of the proposed creation of a herd district?

A. Not that I -- not that I recall.

MR. WALTON: Nothing further. Thanks very much.

THE WITNESS: You know, we get -- you know, just to clarify that a little bit. We get newsletters about every month or every week or when they come out. And so -- and you know legislative things and things that are -- changes in the -- those are printed and they are sent out to their members. I don't specifically remember receiving that, but that doesn't say that they didn't send it out.

MR. WALTON: I understand. Thank you.

EXAMINATION

QUESTIONS BY MR. EVETT:

Q. I have just a few questions, Mr. Johnson.

A. Sure.

Q. Did the Cattlemen's Association or the Cattle Feeders Association have any meetings about this herd district after it was enacted?

A. Not that I'm aware of.

Q. The Boone Ranch, have there been any benefits to your ranch because it has been in a herd district?

MR. PECK: And I'll object to the relevance.

THE WITNESS: There's -- sure there's a benefit, you know. We don't want cattle getting out on the road or getting hit by the -- there's a railroad track going along there, too, you

RELEVANT PAGES FROM AUGUST 25, 2008
DEPOSITION OF GLENN KOCH

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) Case No. CV05-4848

JENNIFER SUTTON, individually,)

Defendant.)

_____)

CANYON COUNTY)

Third Party Defendant.)

_____)

DEPOSITION OF [redacted]

AUGUST 25, 2008

REPORTED BY:

MONICA M. ARCHULETA, CSR NO. 471

NOTARY PUBLIC

hereinafter provided; and when such district is so created the provisions of this chapter shall apply and be enforceable therein."

Q. As you look at this statute do you remember -- does anything about it sound familiar? I mean, does that help at all after reading through the statute to help you remember if you read it at that time or not?

A. It does not.

Q. Now, in the next section, 25-2402, it talks about petition for district. And it says, "A majority of the landowners in any area or district is described by metes and bounds not including open range and who are also resident in, and qualified electors of, the State of Idaho may petition the board of county commissioners in writing to create such area a herd district."

Now, in 1982, in conjunction with what I'm going to call the '82 ordinance, do you recall there being a petition that was submitted to create a herd district?

A. I'm sorry, I do not recall that.

MR. WALTON: Same question. Does that mean that you don't know if there was or wasn't a petition? Is that what you are saying?

THE WITNESS: That's what I'm saying.

MR. WALTON: Thank you.

(Exhibit 2 marked.)

Q. (BY MR. PECK) I have handed you what I have marked as Exhibit No. 2. Now, in looking at Exhibit 2, down there towards the bottom, there is a caption "Canyon County Board of County Commissioners Public Hearing Minutes." And I'll just represent that this is from Book 22. This came out of the recorder's office from the minutes that are kept there. And if you could just read that for me. Not out loud. But to yourself. That section there. Those public hearing minutes.

A. (Complying).

Q. Well, wait a second. That is not the one I want. Hold on. I apologize. This is the one I wanted.

(Exhibit 3 marked.)

Q. (BY MR. PECK) We have marked that as Exhibit 3. This is the same thing. These are minutes. And I guess the date up there is December 2, 1982. Do you see that?

A. Yes.

Q. And then we have in the middle that

says, "Resolution passed regarding herd districts in Canyon County." And if you could read that portion to yourself. And let me know when you are done.

A. (Complying). I have read it.

Q. Now, in reading through those minutes do you recall at all having a meeting on December 2, 1982 regarding this resolution that Commissioner Hobza made?

A. No.

Q. Do you remember discussing the issue regarding having confusion existing due to the overlapping lines of the herd districts in Canyon County?

A. Way back in the back of my mind I just recall that there was an issue regarding a herd district. And that a portion of it was not -- a portion of Canyon County was not in the herd district. And that's about the extent of what I remember.

Q. Now, I take it that you remember Commissioner Hobza; is that correct?

A. Yes.

Q. Just solely based on what it says here in the minutes it sounds as if this was his

motion.

Do you recall Commissioner Hobza talking to you or representing to you that he wanted to create a county-wide herd district?

A. I just remember that they explained to me what a herd district was. And that there was a problem. I think the discussion was held with both Commissioner Hobza and Commissioner Bledsoe.

Q. So when you say that they explained to you what a herd district was, does that mean prior to this time you weren't familiar with the idea of a herd district?

A. I had no concept of what a herd district was.

Q. Do you recall what their explanation of a herd district was?

A. The way I recall it they said a herd district is where you have to keep your animals contained.

Q. Now, let's go back to Exhibit 1 for a minute. Section 25-2403 says, "Notice of hearing petition. It shall be the duty of the board of county commissioners, after such petition has been filed, to set a date for hearing said petition, notice of which hearing shall be given

by posting notices thereof in three conspicuous places in the proposed herd district, and by publication for two weeks previous to said hearing in a newspaper published in the county nearest the proposed herd district."

Now, having read that language would it be correct, based on your prior testimony, that with regard to notice of this hearing for a herd district that that would be the job of the secretaries to put that notice in the paper?

A. Yes.

Q. And do you recall with regards to the herd district discussions that you have had that there was a -- whether or not there was a notice published for the hearing on the herd district ordinance?

A. No, I do not recall anything.

MR. WALTON: Again, you don't recall if one was or was not?

THE WITNESS: Right.

MR. WALTON: Thank you.

Q. (BY MR. PECK) Now, looking at Exhibit No. 3 in the minutes there. Based solely in looking at these minutes I don't see any language there regarding whether or not a petition was

sent out.

Would it be your typical practice in this type of meeting to have included in the minutes that a published notice had been sent out?

MR. SAARI: Objection. Lack of foundation.

MR. WALTON: Join. I believe he has testified the secretaries did that for him.

Q. (BY MR. PECK) You can go ahead and answer the question.

A. State the question again.

Q. Let me have the court reporter read it back.

(Record read.)

THE WITNESS: I guess I can't answer that. I just don't recall one way or the other. Whether those were attached or whether they weren't.

Q. (BY MR. PECK) So let me make sure I understand you. You are not sure whether or not it was your typical practice to include that in the minutes or not? Or have that included in the minutes?

A. That's correct.

(Exhibit 4 marked.)

Q. (BY MR. PECK) Mr. Koch, do you recognize Exhibit No. 4?

A. It's an Order Establishing Herd District.

Q. If you could just review that and let me know when you are done reviewing that order.

A. I have read it.

Q. When was the date of this order?

A. December 9, 1982.

Q. And looking down in the body of the order just above the signatures. That last line. "It is hereby ordered."

What is the date contained there in the body?

A. December 10, 1982.

Q. And then in the signature portion, that bottom signature above Glenn O. Koch, is that your signature?

A. Yes, it is.

Q. Do you recall signing this order?

A. No, I do not.

Q. Now, in the body of the -- well, let me do this first.

(Exhibit 5 marked.)

Q. (BY MR. PECK) Mr. Koch, have you had a chance to review No. 5?

A. Yes.

Q. Now, in Exhibit 4, the Order Establishing Herd District, under No. 1, it says, "A survey map attached hereto, prepared by the Planning and Zoning Administrator, designates the three small areas within the county which remain open range."

Do you recall whether or not you saw that survey map?

A. I don't remember seeing it.

MR. WALTON: Are you saying you don't remember if you did or you didn't see it? Or are you saying you don't think you did see it?

THE WITNESS: I don't remember seeing it. That is what I'm saying.

Q. (BY MR. PECK) Now, looking at Exhibit No. 5. Do you recall having ever seen that map before?

A. No, I don't recall ever having seen it. I probably did, but I don't recall.

Q. Let's go back just for a minute to Exhibit No. 2. Again, down there where it reads, "Canyon County Board of County Commissioners

THE WITNESS: Well, it says that it is hereby ordered by the Board of Canyon County Commissioners that on the 10th day of December, 1982, that a herd district be established.

Q. (BY MR. PECK) And so as being part of the panel that signed this document is it your understanding that that was intended to be the date it was to commence?

MR. SAARI: Objection. He earlier testified he doesn't have the recollection of the events. You are asking him to speculate, guesstimate on matters many, many years ago that he has no independent memory.

THE WITNESS: I don't recall.

Q. (BY MR. PECK) Do you recall ever having any conversations with your fellow commissioners, Commissioner Hobza and Commissioner Bledsoe, regarding what type of animals they wanted the herd district to apply to?

MR. SAARI: Objection. We supplied discovery, Counselor, to you indicating both of those people are dead and deceased. Having him testify as to people who are no longer here to be deposed is not proper.

Q. (BY MR. PECK) You can go ahead and answer the question.

A. No, I don't recall any conversations specifying animals.

Q. You had stated that you were unfamiliar with the concept of a herd district. At the time this order was put out there did you have a concept of what the term "open range" entailed?

A. That is pretty self-explanatory. Open range is open range.

Q. Now, do you recall it being the intent of this order to place a herd district over the open range areas in Canyon County?

MR. SAARI: Objection. The document speaks for itself.

THE WITNESS: Yes.

MR. PECK: That is all the questions I have. Oh, wait. One more. I guess this is just to see if I can spark your memory at all. I'm not going to make it an exhibit. But I'm going to have you look at it.

Q. (BY MR. PECK) Now, in reviewing that map --

MR. SAARI: If you are going to ask him to try to spark his memory you need to mark

something as an exhibit. You just can't put it out there and say, "I want to spark your memory."

MR. PECK: I don't think I have to make it an exhibit.

Q. (BY MR. PECK) If you would just go ahead and review that. This is essentially --

MR. WALTON: We'll make it an exhibit, then. I mean, I agree. If you are going to ask him questions about a document, then the only way we can possibly know what we are talking about a month from now is if we have that document at hand.

MR. PECK: Okay. I mean, I don't mind making it an exhibit. I just don't want to make that an exhibit, because that is the only copy I have. Do you have a color copier here?

MR. SAARI: I believe there is one in the courthouse. We can take a recess and have it copied.

MR. WALTON: Let's go ahead and finish the questioning and make the copies afterwards so we are not delaying Mr. Koch any longer than we need to.

Q. (BY MR. PECK) So we'll just call this Exhibit 6. And we'll just have the understanding

that we are going to make color copies of that and include one as Exhibit 6 in the record.

Does that sound good?

MR. WALTON: Thank you.

Q. (BY MR. PECK) Now, looking over Exhibit No. 6 there, Mr. Koch. Do you recall seeing that particular map before? What is represented there?

A. No, I don't. I thought there was just one area in Canyon County that was not included in the herd district. In my mind, before coming here today, I felt there was only one area in Canyon County that was not included in the herd district. And coming here today I find that there were three. And I assume that these white areas are the three areas that were not included.

MR. PECK: That is all the questions I have.

MR. SAARI: I just have a question or two.

EXAMINATION

QUESTIONS BY MR. SAARI:

Q. Mr. Koch, based upon your testimony here today, with the events having occurred so

long ago, it's true, is it not, that you don't have a recollection one way or the other what the events were surrounding the adoption of that herd district order referenced in Deposition Exhibit No. 4?

MR. PECK: I object to the form of the question.

Q. (BY MR. SAARI) You can answer.

A. No, I do not recall.

Q. One way or the other?

A. One way or the other.

MR. SAARI: I have nothing further.

MR. WALTON: I have no questions.

MS. SULLIVAN: I have no questions.

MR. PECK: Thanks for coming in.

(Deposition concluded at 4:45 p.m.)

(Exhibit No. 6 marked.)

(Signature requested.)

CERTIFICATE OF WITNESS

I, GLENN KOCH, being first duly sworn, depose and say:

That I am the witness named in the foregoing deposition, consisting of pages 1 through 37; that I have read said deposition and know the contents thereof; that the questions contained therein were propounded to me; and that the answers contained therein are true and correct, except for any changes that I may have listed on the Change Sheet attached hereto:

DATED this _____ day of _____, 2008.

_____

GLENN KOCH

SUBSCRIBED AND SWORN to before me this ____ day of _____, 2008.

_____

NAME OF NOTARY PUBLIC

NOTARY PUBLIC FOR _____

RESIDING AT _____

MY COMMISSION EXPIRES _____

ERRATA SHEET FOR GLENN KOCH

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

Page ___ Line ___ Reason for Change _____
Reads _____
Should Read _____

You may use another sheet if you need more room.

~~WITNESS SIGNATURE~~ _____

REPORTER'S CERTIFICATE

I, MONICA M. ARCHULETA, CSR No. 471, Certified Shorthand Reporter, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony and all objections made were recorded stenographically by me and transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

I further certify that I am not a relative or employee of any attorney or party, nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this _____ day of _____, 2008.

_____

MONICA M. ARCHULETA, CSR NO. 471
Notary Public
P.O. Box 2636
Boise, Idaho 83701-2636
My commission expires August 3, 2012

RELEVANT PAGES FROM JULY 7, 2008
DEPOSITION OF LEON K. JENSEN

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) Case No. CV05-4848

JENNIFER SUTTON, individually,)

Defendants.)

_____)

CANYON COUNTY)

Third Party Defendant.)

_____)

DEPOSITION OF [redacted]

JULY 7, 2008

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

Notary Public

LEON K. JENSEN,
first duly sworn to tell the truth relating to said cause, testified as follows:

MR. PECK: Please let the record reflect that this is the time and place for the deposition of Leon Jensen. This deposition is taken pursuant to notice and the Idaho Rules of Civil Procedure.

I think originally we had noticed this up for 3:30. Luckily Mr. Jensen was available for this earlier setting.

Once again, we have Mr. Tim Walton with us on behalf of Luis Guzman. We have Megan Sullivan on behalf of co-defendant Jennifer Sutton. Mr. Saari on behalf of Canyon County. And my name is Ryan Peck, and I'm here representing Mr. Dale Piercy.

EXAMINATION

QUESTIONS BY MR. PECK:

Q. Now, would you please state your full name and spell your last name for the record.

A. My name is Leon Keith Jensen. My last name is spelled J-e-n-s-e-n.

Q. Have you ever had your deposition taken before?

A. Yes, sir.

Q. And when was the most recent occasion?

A. About two years ago as I recall.

Q. It's been a little while. As part of the deposition process, I'll be asking you questions, as well as the other attorneys. You're under oath today, and this oath has the same force and effect as if administered in a court of law.

As you answer the questions, the court reporter will take down everything that we say; therefore, we need to speak up and you need to give oral answers to my questions.

Do you understand?

A. Yes, sir.

Q. I may ask you a question that I don't state very well or that for some reason you don't understand. If that happens, don't answer the questions. Just tell me that you don't understand the question, and I'll try to ask a better question.

A. (Nods).

Q. Do you understand?

A. I do.

Q. Now, I want you to understand that if you need a break at any time or for any reason, tell me or tell your attorney and we'll finish your answer if we're in the middle of it and then we'll have a break.

A. Okay.

Q. Now, sometimes after answering a question to the best of your knowledge, you will remember additional information later in the deposition. If you do, just inform us that you would like to add something to an earlier answer, and we can do that before going forward.

A. Okay.

Q. Now, are you taking any medications or drugs of any kind which might make it difficult for you to understand and answer my questions?

A. No.

Q. Have you had anything alcoholic to drink in the last eight hours?

A. No.

Q. Are you sick at all today?

A. No.

Q. Is there any reason you can think of why you will not be able to answer my questions fully and truthfully?

A. I can think of no reason.

Q. Okay. Thank you.

Now, if you could just let me know what your job title is.

A. I'm the executive director of development services for Canyon County.

Q. And how long have you had that job?

A. I'm in my second year as the director.

Q. And what position did you have prior to that?

A. I've worked in -- for Canyon County as code enforcement officer, zoning officer, current planner, long-range planner, assistant director.

Q. Well, when did you first start working for Canyon County?

A. March of 1994.

Q. And what was your initial title?

A. Code enforcement officer.

Q. And how long did you do that?

A. About one year.

Q. Excuse me?

A. About one year.

Q. One year. And then what do you move on to?

A. And then I went to becoming a zoning officer.

Q. And how long were you a zoning officer?
A. Approximately four years.
Q. And then what was your position after that?
A. We had some changes internally in the office, and we then started calling some of our zoning officers "planners," and I became an assistant planner.
Q. How long were you an assistant planner?
A. Probably about two years.
Q. And then did you become an assistant director at that time?
A. Actually, I forgot one spot that I probably fulfilled -- probably -- I did fulfill. It was called principal planner.
Q. Okay.
A. The person who was my supervisor went to becoming the assistant director, and I became the principal planner.
Q. Okay. And then at some point you became the assistant director?
A. That's correct.
Q. And do you recall when that was?
A. 2000 -- probably about 2003, approximately.

Q. Now, as the executive director of development services, what are your responsibilities?
A. My responsibilities are to manage the department staff. Fully staffed, there's about 30 of us, including building departments and officials -- building department official and clerical staff for the building department, as well as clerical staff for our own department, our own development services department. Also building inspectors. There are five or six of those gentlemen. And code enforcement officer is one of the people who work in my office as well.
We have current -- we now have people that work in current planning, and they meet the public every day about regular issues, such as getting a zoning compliance permit, applying for building permits. And then we have long-range planners who deal specifically with the public hearing process, the writing of ordinances. Those are their main duties, plus public hearing.
We go to hearings -- we've been going to hearings virtually every Thursday night for the last four or five years.
I also report to the board of directors

directly for -- as a shock absorber between them and the public.
Q. And what records are maintained in your office?
A. We keep all records of public hearings. We keep a record of the findings, conclusions, and order for all public hearings, both at the planning and zoning commission or hearing examiner level, as well as copies of the FCOs -- findings, conclusions, and order -- for the Board of County Commissioners. We don't generate those, but we get copies of them and they become part of our record.
We keep copies of all the files for public hearings. We are currently scanning those into electronic format for the last several years. We keep all zoning compliance copies. We keep building permit copies, application permits.
Code enforcement information we keep. We've had to store some of that offsite, but we -- we're -- now with this scanning capability we're bringing those back and starting to scan those as well.
Q. Okay. Now, when you say you keep all files of public hearings, what do you mean by the

"public hearings"?
A. The land use hearings. Specifically it can be rezones. It can be variance hearings. When people want to divide their land, if they have no administrative outlet to divide their property, then we put them through the hearing process. If they want to rezone their property, it's a public hearing. If they have a need for a variance, that requires a public hearing. If businesses come in and want to put in certain business, those generally entail a public hearing.
Q. And who's involved in the public hearing?
A. Usually myself or one of my representatives. I have a long-range planning administrator who works that. We have a recording secretary who's there. We have a staff member or members who may represent various cases that night, and members of the planning and zoning commission.
Q. Okay. So this isn't hearings in front of the Canyon County Commissioners? This is just within your office?
A. That's correct. Appeals are different.

RELEVANT PAGES FROM JULY 7, 2008
DEPOSITION OF LINDA L. LANDIS

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	)	Case No. CV05-4848
JENNIFER SUTTON, individually,	)	
Defendants.	)	
	)	
CANYON COUNTY	)	
Third Party Defendant.	)	
	)	

DEPOSITION OF [redacted]

JULY 7, 2008

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

LINDA L. LANDIS,
first duly sworn to tell the truth relating to said cause, testified as follows:

MR. PECK: Please let the record reflect that this is the date and place for the deposition of Linda Landis.

We are starting about approximately an hour after we had originally determined to take this deposition, but we are all here now and we're beginning.

This deposition is taken pursuant to notice and the Idaho Rules of Civil Procedure.

EXAMINATION

QUESTIONS BY MR. PECK:

Q. Ms. Landis, if you would please state your full name and spell your last name for the record.

A. Linda Louise Landis, L-a-n-d-i-s.

Q. Thank you.

Have you ever had your deposition taken before?

A. No.

Q. Well, I'm going to be asking you questions, and you're under oath today, and this oath has the same force and effect as if

administered in a court of law.

As you answer the questions, the court reporter will take down everything that we say; therefore, we need to speak up and you need to give oral answers to my questions. The reporter cannot record a shake or a nod.

Do you understand?

A. Yes, I do.

Q. And we also like to avoid certain colloquialisms like "uh-huh" and "uh-uh." So even though the court reporter will actually take those down, it doesn't produce a very good record.

Do you understand that?

A. I understand.

Q. Now, I may ask you a question that I don't state very well or that for some reason you don't understand. If that happens, don't answer the question. Just tell me that you don't understand the question and I'll try and rephrase it. Is that fair?

A. That's fair.

Q. I also want you to understand that if you need a break at any time or for any reason, you should tell me or tell your attorney, and we

will finish your answer, if we are in the middle of it, and then we can take a break.

Do you understand?

A. I understand.

Q. Okay. Now, if you want to speak with your attorney, that's fine. I'd just ask that you finish your answer if we are in the middle of an answer, and then you may speak to your attorney.

Do you understand that?

A. Yes, I do.

Q. Thank you.

Now, sometimes after answering the question to the best of your knowledge you will remember additional information later on in the deposition that's responsive to the previous question. If that happens, just stop me where I'm at. We'll go back and fill in the additional information that you remembered, and then we'll proceed from that point.

Do you understand?

A. Yes, I do.

Q. Thank you.

Now, a few background questions, just some other things --

MR. WALTON: May I just make a comment.

MR. PECK: Oh, go ahead.

MR. WALTON: Just so know, you can talk to your lawyer anytime you want, whether it's before or after you answer the question, just so you know.

THE WITNESS: Thank you.

MR. WALTON: You're welcome.

Q. (BY MR. PECK) Are you taking any medications or drugs of any kind which might make it difficult for you to understand and answer my questions?

A. No.

Q. Have you had anything alcoholic to drink in the last eight hours?

A. No.

Q. Are you sick at all today?

A. No.

Q. Is there anything reason you can think of why you will not be able to answer my questions fully and truthfully?

A. No.

Q. Now, if you could, just tell me what your employment is.

A. I'm a legal secretary with the Canyon

County Prosecuting Attorney's Office.
Q. And how long have you worked in that position?
A. I've been there since October of 2005.
Q. And did you work with the County prior to that?
A. No, I did not.
Q. Okay. Where did you work prior to working for the prosecutor's office?
A. I was the city clerk/treasurer for the City of Notus.
Q. And how long were you in that position?
A. Just shy of 20 years.
Q. And if you could just describe for the record where the City of Notus is.
A. It is between the cities of Caldwell and Parma on Highway 20/26.
Q. So that's also in Canyon County?
A. Yes, it is.
Q. And what were your responsibilities with the city clerk's office there in Notus?
A. Maintain all records of the council. I maintained the records of all of the financial elements of the City. I billed all water and sewer accounts for the City. Those are the

primary things. There's smaller things that come from those.
Q. Okay. And what are your present responsibilities as a legal secretary for the prosecutor's office?
A. I'm a legal secretary with the civil division, and that job includes assisting all the attorneys in preparation of correspondence, preparation of contracts, the -- maintaining the records, keeping files of all of the issues that the civil attorneys work on.
Q. Any other responsibilities? And I recognize that's a lot, what you've said, so --
A. Without going into specific details, I -- maintaining the files, assisting in the preparation of the documents that -- that they are working on. I don't know how else to answer, I guess.
Q. Okay. And that's fine. Let's talk a little bit about your responsibility of maintaining records.
What records do you typically maintain?
A. Any of the issues that our civil attorneys do that will create a file in our office, I am one who will maintain those records,

try to keep them in order, make sure things are in their proper places.
Q. And what, I guess, typically warrants a file being created? How does it come to be that a file is created, and what warrants that? Is it an action against the County or -- or what kind of things generate files, I guess, what kind of matters?
A. Issues that the County will have to make a decision on. It is not limited to a filing against the County. It is what issues that our department is working on could create a new file.
Q. Okay. And so typically when -- I guess a hypothetical example, if the County Commissioners wanted advice on some particular issue and requested legal advice from the civil attorneys, would that warrant a file being created on that issue?
A. It could; yes.
Q. Okay. And when you say, "it could," sometimes it doesn't?
A. A lot of those are determined by the attorneys, not determined by me. So if -- if an issue, the attorney wants a file created, that's

when we will create a file.
Q. So you don't independently create a file unless an attorney requests that a file be created?
A. If there is not an existing file -- as a civil secretary if -- if we are given an issue that does not have an existing file to it, we can create a file, but the majority of the files are created at the request of an attorney.
Q. Okay. And when you say you can create a file, is that just a discretionary thing on your part?
Let's say an issue comes in and you don't have an existing file on it, yet there's been no request from an attorney to create a file, would there be circumstances where you would create a file anyway? I'm just trying to get the protocol here.
A. We will not create a file unless one of the attorneys comes to us and maybe they have given us a packet of paperwork that if they have not actually filled out a file request form, it is possible that we will open a file and give that paperwork back to them.
So it's -- it is possible that we would

documents that are currently being maintained in the prosecutor's office?
A. Yes, I believe they are.
Q. So let's see. Do you know -- let's see here. To your knowledge -- it looks to me from reviewing the documents that you received a response from -- let's see -- Mr. Wynkoop with regards to that letter on October 4, 2005; correct?
A. Yes.
Q. And do you know of any other written response by Mr. Wynkoop regarding the correspondence of September 1, 2005?
A. Not without reviewing every document in the file, no, I do not.
Q. Let's see. And if I understand it -- and then we also have a written response on October 19, 2005, by -- it's the last page there of Exhibit A -- by Mr. Gigray; is that correct?
A. Yes.
Q. Are those the only two written responses that are contained in Exhibit C from the -- correspondence from the prosecutor's office?
A. Those are the only two responses in

this Exhibit C packet; yes.
Q. And do you have any knowledge regarding whether there are any other written responses to these correspondences in Exhibit C elsewhere in the prosecutor's file?
A. Again, I would have to go through each file and check every document. I do not know that answer now.
Q. Okay. How many legal secretaries are there for the civil division?
A. Two.
Q. Yourself, and then who is the name of the other person?
A. Jodi Ruhs, R-u-h-s.
Q. And what was the name of the person that you replaced, I guess? Do you know?
A. Suzi White.
Q. And do you know the names of any of the legal secretaries for Canyon County that were employed in 1982 with the civil division?
A. No, I do not.
MR. PECK: Okay. I think that's all the questions I have.
MR. WALTON: I'll go.
MR. PECK: Go ahead.

EXAMINATION
QUESTIONS BY MR. WALTON:
Q. Ms. Landis, Exhibit B in front of you, page 1, I think you said that was a 1977 motion, is what you described it as. Do you remember saying that?
A. Yes, I do.
Q. And I just wanted to kind of establish one thing. Would it be more accurate to say that that's what that purports to be in terms of what you know from your own personal knowledge, whether it is or not? Do you know what I'm asking you?
A. I'm just reading it right off of the paper. It describes itself as a motion.
Q. Yeah. Were you here in 1977?
A. No. No, I was not.
Q. So it purports to be what you called it; correct?
A. Yes.
Q. Whether or not it actually is or what it is, it's just a document that was in the file; is that a fair statement?
A. That is true.
Q. But you have no personal knowledge

about that document, do you?
A. No, I do not.
Q. In fact, other than the two letters that you mentioned that you were involved in on October 7 of 2005, do you have any personal knowledge about any of the documents that we have looked at today?
A. No.
MR. WALTON: No further questions.
MS. SULLIVAN: I have no questions.
MR. SAARI: I have no questions.
MR. PECK: That's fine. I don't have any further questions either.
(Deposition concluded at 10:53 A.M.)
(Signature requested.)

RELEVANT PAGES FROM JULY 7, 2008
DEPOSITION OF MONICA N. REEVES

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	)	Case No. CV05-4848
JENNIFER SUTTON, individually,	)	
Defendants.	)	
	)	
CANYON COUNTY	)	
Third Party Defendant.	)	
	)	

COPY

DEPOSITION OF [redacted]

JULY 7, 2008

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

MONICA N. REEVES,
first duly sworn to tell the truth relating to said cause, testified as follows:

MR. PECK: Please let the record reflect that this is time and place for the deposition of Monica Reeves. This deposition is taken pursuant to notice and the Idaho Rules of Civil Procedure.

I believe the notice in this case actually had this deposition occurring at 1:30, but because of time with the shortness of the prior deposition, we're doing this one a little bit early.

Is that everyone's understanding?

MR. WALTON: Yes.

MR. PECK: Great.

MR. WALTON: Thanks for waking me up.

MR. PECK: For the record, we have Tim Walton with us on behalf of Mr. Guzman, Meghan Sullivan on behalf of co-defendant Sutton. My name is Ryan Peck, and I'm here on behalf of Mr. Piercy. And Mr. Saari is here with us on behalf of Canyon County.

MR. SAARI: Yes, sir.

EXAMINATION
QUESTIONS BY MR. PECK:

Q. All right. Now, Ms. Reeves, if you could please state your full name and spell your last name for the record.

A. Okay. Monica Nicole Reeves, R-e-e-v-e-s.

Q. (BY MR. PECK) And have you ever had your deposition taken before?

A. No, not that I recall.

Q. We're doing a lot of first-timers today.

A. Yeah.

Q. Well, I'm going to be asking you questions, and you're under oath today, and this oath has the same force and effect as if administered in a court of law.

As you answer questions, the court reporter will take down everything that we say; therefore, it's important that we speak up and that you give oral answers to the questions that I ask.

Now, the court reporter, even though he'll write down that you shook your head, that doesn't make a good transcript.

A. Okay.

Q. Do you understand?

A. I do.

Q. Thank you.

Now, I may ask you a question that I don't state very well or that for some reason you don't understand. And if that happens, don't answer the question. Just tell me that you don't understand it, and I'll try and ask a better question.

A. Okay.

Q. I also want you to understand that if you need a break at any time or for any reason, you should tell me or tell your attorney, and we'll finish your answer if we're in the middle of it and then we'll have a break.

A. Okay.

Q. Now, sometimes after answering a question to the best of your knowledge you will remember additional information later in the deposition. If you do, just let us know that you want to add something to a previous question, and we'll go back and fill in the additional information.

A. Okay.

Q. Now, are you taking any medications or drugs of any kind which might make it difficult for you to understand and answer my questions?

A. No.

Q. Have you had anything alcoholic to drink in the last eight hours?

A. No.

Q. Are you sick at all today?

A. No.

Q. Is there any reason you can think of -- or -- let me rephrase it.

Is there any reason you can think of why you will not be able to answer my questions fully and truthfully?

A. No.

Q. If you could tell me what your job title is.

A. I'm a deputy clerk in the Canyon County Commissioners' office.

Q. And how many deputy clerks are there?

A. There are three in that office.

Q. And how long have you had this job?

A. I've been in that office 19 years.

Q. Nineteen years as a deputy clerk?

A. Yes.

MR. PECK: You can go ahead and answer the question.
THE WITNESS: Could you restate it?
MR. PECK: Let me have the court reporter read it back so we have the exact question.
(Record read back.)
MR. WALTON: Okay. Now wait a minute. So you're saying you're not asking her about what was going on in 1982?
MR. PECK: No.
MR. WALTON: Okay. So we're stipulating that you're asking her about procedures that occurred since she began employment here; true?
MR. PECK: Yes.
MR. WALTON: Okay.
THE WITNESS: Okay. Since I began employment it would be typical that, yes, if a map was attached to some -- or if there was a map that was adopted, it would be attached to the minutes for ease of reference so that you can have in front of you what you're looking at.
MR. PECK: Okay. Thank you. And I believe that's all the questions I have.

MR. WALTON: I just have a few, if you don't mind.

EXAMINATION

QUESTIONS BY MR. WALTON:

Q. What you've talked about today is how procedures have been conducted in the County Commissioners' office, to your knowledge, since you began working there; true?
A. That's true.
Q. It's correct to say, is it not, that you have no knowledge of procedures as they were carried out in 1982?
A. That's true.
Q. Okay. And I think a question was asked of you whether there have been any changes since you began working for the commissioners' office in how you deal with commissioners' files, and I think you said there was no change; is that correct?
A. That's right.
Q. But in fact there have been changes, haven't there? Didn't you start out working with a steno pad and began using computers?
A. Yes. You're right. I would say that we are more -- more detailed. We keep more

detailed notes and files than -- in my opinion than they did when I first started because -- well, just because you have so many people asking to see things.
Q. So in reality there have been progressions and changes in your job since you began working here 19 years ago; true?
A. Yes.
Q. And, actually, you do do things differently today than what did you 19 years ago; true?
A. True.
Q. Okay. Now, if I understood correctly, there was a search conducted looking for herd district stuff?
A. That's right.
Q. And that search was conducted by Claudia Amaral?
A. Right.
Q. And you didn't conduct the search?
A. I did a search on my own. It's a limited -- it's not as broad of a program that she has, but I looked for things on my computer to see if there were minutes from meetings a couple of years ago that maybe I didn't recall.

I came up with nothing.
Q. Okay.
A. And I asked her to do a more extensive search.
Q. Okay. But you don't know what search she did, do you --
A. No.
Q. -- exactly?
A. Exactly, I don't.
Q. You don't know how she searched?
A. No.
Q. Okay. For example, would it be your understanding that if there was a herd district created in 1908, that the herd district search that Claudia did should have turned that up?
A. I don't know that her program goes back that far, so I don't know how she would --
Q. My point exactly. Do you know if her program even goes back to 1982 from your own personal knowledge?
A. I do not know that.
Q. Yeah. So the effectiveness of her search as respects what might have occurred in 1982, you just don't know; fair?
A. That's fair.

RELEVANT PAGES FROM JULY 7, 2008
DEPOSITION OF WILLIAM H. HURST

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	)	Case No. CV05-4848
JENNIFER SUTTON, individually,	)	
Defendants.	)	
	)	
CANYON COUNTY	)	
Third Party Defendant.	)	
	)	

DEPOSITION [redacted]

JULY 7, 2008

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

WILLIAM H. HURST,
first duly sworn to tell the truth relating to said cause, testified as follows:

MR. PECK: Please let the record reflect that this is the time and place for the deposition of William H. Hurst. This deposition is taken pursuant to notice and the Idaho Rules of Civil Procedure.

Once again, we have Mr. Tim Walton here on behalf of Luis Guzman. And Ms. Meghan Sullivan here on behalf of co-defendant Jennifer Sutton. And Mr. Charles Saari on behalf of Canyon County. And myself, Mr. Ryan Peck, on behalf of Dale Piercy.

EXAMINATION

QUESTIONS BY MR. PECK:

Q. Mr. Hurst, if I could have you state your full name and spell your last name for the record.

A. Okay. It's William H. Hurst, H-u-r-s-t.

Q. Have you ever had your deposition taken before?

A. Yeah, I have, several years ago. I don't know under what circumstances.

Q. So it was a long time?

A. It was a long time ago.

Q. Okay. Well, I'm going to be asking you questions today, and you're under oath today, and this oath has the same force and effect as if administered in a court of law.

As you answer my questions or answer the questions from the other attorneys, the court reporter will be taking down everything that we say. And, therefore, it's important that we speak up and that you give oral answers to my questions so the court reporter can take those down.

Do you understand?

A. Yes, I do.

Q. Now, I may ask you a question that I don't state very well or that for some reason you don't understand. If that happens, don't answer it. Simply state that you don't understand, and I'll try to ask a better question.

Do you understand that?

A. I do.

Q. I also want you to understand that if you need a break at any time for any reason, you should let me know or your attorney and finish

your answer if we're in the middle of it, and then we'll have a break.

Do you understand?

A. I do.

Q. Not that I anticipate that we'll need a break.

Sometimes after answering a question to the best of your knowledge you'll remember additional information later in the deposition. If you do, just inform us that you'd like to add something to an earlier response, and we'll stop right there and do that while it's on your mind.

Is that all right?

A. That's okay with me.

Q. Are you taking any medications or drugs of any kind which might make it difficult for you to understand and answer my questions?

A. No.

Q. Have you had anything alcoholic to drink in the last eight hours?

A. No.

Q. Are you sick at all today?

A. No.

Q. Is there any reason you can think of why you would not be able to answer my questions

fully and truthfully?

A. No.

Q. Okay. Thank you.

Now, if I could just get your -- what is your job title?

A. Do you want an informal, semi-formal, or formal?

Q. Let's start with the formal.

MR. WALTON: He's going to want all three before we're done.

THE WITNESS: The formal?

Q. (BY MR. PECK) Yes, sir.

A. Okay. I am the Clerk of the District Court for the Third Judicial District, in and for the County of Canyon, ex officio auditor and recorder. Then there are subtitles to that, too.

THE WITNESS: How did I do, Chuck?

MR. SAARI: Fine.

MR. PECK: Sounds good to me.

Q. (BY MR. PECK) And how long have you been a clerk?

A. Eighteen months.

Q. And did you work with Canyon County prior to that?

A. Not -- not immediately prior. I worked

RELEVANT PAGES FROM SEPTEMBER 22, 2008 DEPOSITION OF BILL A. STAKER

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF CANYON

---oooOooo---

LUIS J. GUZMAN, individually, Plaintiff, vs. DALE PIERCY, individaully, and JENNIFER SUTTON, individually, Defendants.	Case No. CV05-4248 Deposition of: BILL A. STAKER
CANYON COUNTY, Third Party Defendant	

---oooOooo---

The deposition of BILL A. STAKER, a witness in the above-entitled cause, taken at the instance of the Defendant Dale Piercy, at the offices of Horizon Reporting, 299 South Main Street, Salt Lake City, Utah, on September 22, 2008, at 11:00 a.m., before Jerry Martin, Registered Professional Reporter and Notary Public in and for the State of Utah.

HORIZON REPORTING & VIDEO, INC.
NATIONAL DEPOSITION SERVICE
(800) 570-DEPO (3376)

Job No. 092208JM

CONDENSED

HORIZON
REPORTING & Video, Inc.
299 South Main, Suite 1300
Salt Lake City, Utah 84111

APPEARANCES

For the Plaintiff TIMOTHY C WALTON, ESQ
(Via Telephone) CHASAN & WALTON LLC
1459 Tyrell Lane
P O Box 1069
Boise, ID 83701-1069

For the Defendant
Dale Piercy MICHAEL POPE, ESQ
SALTRUM LAW OFFICES
P O Box 7425
Boise, ID 83707

For the Defendant
Jennifer Sutton MEGHAN SULLIVAN, ESQ
ELAM & BURKE, P A
251 E Front Street, Ste 300
P O Box 1539
Boise, ID 83701

For the Defendant
Canyon County CHARLES I. SAARI, ESQ
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

INDEX

EXHIBITS

being said in case they need to make any objections or ask any questions. Okay?

A. Understood.

Q. Thank you.

Where is your current residence?

A. Salt Lake City.

Q. Okay. And how long have you lived here?

A. About eight years.

Q. Okay. Where did you live before that?

A. Nampa, Idaho.

Q. And how long did you live in Nampa?

A. Forty plus years.

Q. And what did you do while you were in Nampa?

A. I was in the insurance business, I was a county clerk, and I owned a bus company.

Q. How old are you, Mr. Staker?

A. Seventy-three.

Q. Anything preventing you from answering questions today? Are you on any medication or --

A. No.

Q. Okay. Great. Thank you very much.

How long were you the county clerk in Canyon County?

A. From 1978 to 1988. No. Yeah, 1978 to

PROCEEDINGS

BILL A. STAKER

was called as a witness, having been first duly sworn, was examined and testified on his oath as follows:

--oOo--

BY MR. POPE:

Q. Mr. Staker, my name is Michael Pope and I represent Dale Piercy in this lawsuit in Canyon County, Idaho. I appreciate you taking the time to meet with us today.

Have you ever had your deposition taken before?

A. Yes, I have.

Q. When was that?

A. I can't remember, but I've had more than one deposition taken.

Q. Okay. Just a couple of background things before we get started. As you know, we've got a few attorneys on the telephone, we've got a court reporter, so if you would be so kind as to wait until I've finished asking the question, and I will try and do the same as you answer the question, so we have a clear record with the court reporter and so that the other attorneys can hear what's

1988.

Q. And how did you come to become the county clerk?

A. I replaced Walter Fry and then I was elected.

Q. So did you serve two terms?

A. A little bit more than two terms. They were four-year terms, so I basically got in two and a half terms.

Q. What were your primary responsibilities as the county clerk?

A. The county clerk's job was a pretty big one. He was clerk of the district court, elections official, clerk of the board of county commissioners, recorder, auditor. Did I say elections?

Q. Yes.

A. Okay. That's about it.

Q. What kind of support staff did you have in the clerk's office?

A. About 40, 41 deputies.

Q. And how were the responsibilities divvied up?

A. Basically they were assigned to the various divisions. You know, there was court

that's how I remember it. They wanted to take the parcels that were not herd district and make them herd district so the whole county would be one. That's how I recall it anyhow.

Q. Do you recall being approached by any of the commissioners during that time for your input or any instructions on how to proceed?

A. No. No. They would have probably gone to the prosecuting attorney who also acted as their civil attorney.

MR. POPE: Let's have that marked was Exhibit 1.

(Exhibit 1 was marked.)

Q. Mr. Staker, I'm handing you what's been marked as Exhibit 1 for your deposition. This is part of the Idaho Code, 1968 edition. This is entitled 25, Chapter 24, concerning Herd Districts. I'm going to have you look at a couple of sections, and we'll talk about these for a moment. If you will look at the bottom of the page I've opened to, which is Page 436, entitled -- I'm sorry -- Section 25-2402, "Petition for district," do you have any personal knowledge of a petition for a herd district being submitted in 1980, '81, or '82?

A. No.

Q. Would the clerk's office have received any type of petition for a herd district?

A. I don't know.

Q. Would that have been a normal matter filed with the clerk's office for any reason?

A. I don't know that either.

Q. Okay. If you'd look across the column there on what is Page 437, Section 25-2403, "Notice of hearing petition," it states that the board of Canyon commissioners after a petition for a herd district is filed set a date and published a notice of hearing. Do you have any personal recollection of a notice of hearing being published by the county commissioners in the early '80s concerning herd districts?

A. No, I don't.

MR. POPE: Okay. Thank you.

Let's mark that Exhibit 2, please.

(Exhibit 2 was marked.)

Q. I'm handing you what's been marked as Exhibit 2, which are minutes from December 2, 1982. In the center of the page there it states, "Resolution Passed Regarding Herd District in Canyon County." Do you recall being present at a hearing of the county commissioners in December of 1982

where herd districts were discussed?

A. No, I don't, but this does look like one of our -- an entry out of one of our minute books.

Q. Would this have been one of those hearings, then, that you stated earlier where one of your support persons, deputy clerks, would have attended?

A. Yes.

Do you mind if I take time to read this?

Q. No. Please do.

(Mr. Staker reviews document.)

Mr. Staker, the first line of that particular paragraph says, "The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 2nd day of December, 1982." Do you remember what the resolutions were as far as how the county commissioners acted on those? I know that's a really bad question. Let me try that again. What was a resolution as far as the county commissioners were concerned?

MR. SAARI: Objection to the form of the question. It's very confusing.

THE WITNESS: I agree with that. I don't quite understand what you're asking.

Q. (BY MR. POPE) The commissioners say

here that this was a resolution which was considered. Do you have any knowledge or recollection of what resolutions were as far as how -- I'm still not getting that. Let me try it different.

Petitions would be filed by members of the public for the commissioners' consideration. This Exhibit 2 talks about a resolution. Do you know if there was any difference between the two?

A. No, I don't.

Q. And I believe you've already testified that you were not personally aware of any petition for herd districts by anyone in the early '80s.

A. I can't state whether there was one or whether there was not one. I don't have any memory of it.

Q. Do you know whether or not a resolution of the board of county commissioners would require a notice of hearing for the public's information?

MR. SAARI: Objection to the form of the question. The witness is being asked to express a legal opinion that's beyond his ability to do so.

Q. (BY MR. POPE) You can go ahead and answer it.

A. The board of county commissioners would

that type of stuff. I would assume it was done then. I read it in the newspaper now, so I assume they're following what I was doing then.

Q. Okay. Do you have any recollection of this particular order being published in the newspaper in Canyon County?

A. No, I don't.

Q. Would this be something that is also stored in some fashion in the clerk's office in Canyon County?

A. It would have been in the commissioners' minutes, yes.

Q. How much did you associate with the three members of the commissions listed here in Exhibit 3, Carlos Bledsoe, Del Hobza, and Glenn Coke (phonetic).

A. Koch.

Q. Koch. I'm sorry.

MR. SAARI: Objection to the form of the question as to "associate with."

MR. POPE: In his professional capacity as Canyon County clerk.

THE WITNESS: We would see each other on a daily basis. We were in the same building. I considered all three of those people to be friends.

We also were all from the same party, so when there was a party function, all of us would be at that. As far as personal associations after business hours, zero.

MR. POPE: Okay. Great.

Mr. Staker, that's all the questions I have. I thank you very much for your time.

Counsel, does anybody have any questions for Mr. Staker?

MR. WALTON: Just one question.

This is Tim Walton, Mr. Staker, and I think you answered this question, but I just wanted the record to be clear. The question was posed to you whether or not a notice of hearing was published in the newspaper with respect to the herd district that was created by the county commissioners in 1982. Do you recall that question?

THE WITNESS: Yes.

MR. WALTON: And as I understood your answer, you don't know if a notice of hearing was or was not published in the paper about that hearing. Is that your testimony?

THE WITNESS: Yes, it is.

MR. WALTON: That's all I have.

MR. POPE: Mr. Saari? Ms. Sullivan?

MS. SULLIVAN: I don't have any questions.

MR. POPE: Mr. Saari?

MR. SAARI: I have no questions.

MR. POPE: Mr. Staker, thank you very much.

THE WITNESS: You're welcome.

MR. POPE: We will conclude this deposition. Counsel, thank you very much for your time.

MR. SAARI: You're welcome.

(Concluded at 11:38 a.m.)

CERTIFICATE OF DEPONENT

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

I, BILL A. STAKER, deponent, HEREBY CERTIFY that I have read the foregoing testimony, numbered from 3 to 24, inclusive, and the same is a true and correct transcription of said testimony with the exception of the following corrections listed below giving my reasons therefor.

DATED THIS ____ DAY OF _____, 2008

(DEPONENT)

Page	Line	Change/Correction	Reason

SUBSCRIBED AND SWORN before me this

day of _____, 2008.

(Notary Public)

My Commission expires

RELEVANT PAGES FROM MAY 10, 2006
DEPOSITION OF DALE W. PIERCY

MAY 2006

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

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

Plaintiffs,

vs.

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

Defendants.

No. CV05-4848

COPY

[redacted]

MAY 10, 2006

REPORTED BY:

DEANN MORRIS, CSR No. 747, RPR

Notary Public

lands, we're talking about your cattle operations; right?
A. Yes.
Q. Just so that we're on the same page. All right.
Do you use different fences for pastures that house bulls than pastures that --
A. No.
Q. Same fencing?
A. Yes.
Q. You don't use stronger fences for bulls, for example?
A. No.
Q. Are you connected with Fort Boise Cattle Company?
A. Don't understand the question.
Q. Do you have any relationship with an outfit called Fort Boise Cattle Company?
A. No.
MS. MEIKLE: Objection to the form.
Q. (BY MR. WALTON): Do you know who that is?
A. Yes.
Q. Who is that?
A. Don Weilmunster.
Q. And you don't have any interest in that

operation, I take it.
A. No.
MS. MEIKLE: I just want to say that Mr. Piercy can take a break at any time, can't he, if he needs to?
MR. WALTON: Absolutely.
MS. MEIKLE: I don't think you told him so --
Q. (BY MR. WALTON): Please, if you get to a point to where you've got to take a break, that's not a problem, sir.
A. Okay.
Q. How do you keep track of your cattle?
A. Don't understand the question.
Q. Yeah, it was kind of a bad question.
I understand that there are some outfits now that use, like, digital scanners, almost like a grocery checkout, for example, to keep track of where the cattle are and if they've got the right number and that sort of thing. Do you use anything like that?
A. No.
Q. Does that exist? Do you know?
A. Not in beef cattle.
Q. Okay.
A. To my knowledge it doesn't exist in beef cattle.
Q. But as a cattleman, I assume one of the things

you want to keep track of is you want to know have I got all my cattle and do I have some cattle that aren't mine. Isn't that something you're interested in?
A. Yes.
Q. So how do you do that?
A. I know where my cattle are.
Q. Okay.
A. I know what my cattle look like.
Q. Because of the brand or for other reasons?
A. You know your cattle if you're there every day.
Q. You kind of know each and every one is what you're saying?
A. Close.
Q. Is it because your cattle are a different breed than the other guy's cattle?
A. Some of them.
Q. And what other ways are you able to distinguish your cattle from somebody else's?
A. Brand.
Q. Anything else?
A. Ear tags.
Q. Tell me about an ear tag. What's your ear tag all about?
A. It's a number you put in the cow's ear so you can distinguish her from the rest of the heard.

Q. And you know your numbering system, which is probably different from the next guy's?
A. Yes.
Q. The lands upon which you kept livestock in Canyon County were all enclosed by fences; correct?
A. Correct.
Q. The lands upon which you kept livestock in Canyon County were not lands upon which cattle were permitted to roam by custom, license, lease, or permit; correct?
MS. MEIKLE: Objection to the form of the question. And it calls for a legal conclusion.
Are you asking, Counsel, for him to come to a legal conclusion?
MR. WALTON: I'm asking just what I asked.
THE WITNESS: I don't understand.
Q. (BY MR. WALTON): Yeah, let me ask it again.
The lands upon which your cattle were pastured were all enclosed, as we've established; correct?
A. Yes.
Q. By fences.
A. Yes.
Q. And none of those lands were lands upon which cattle were permitted to roam free; correct?
MS. MEIKLE: Objection to the form.

Q. (BY MR. WALTON): In other words, outside of the enclosures.
A. I try to keep my cattle in the pasture.
Q. It's accurate to say, is it not, that you've been a cattleman in Canyon County for -- what did you tell me -- 50 years; right?
A. Yes.
Q. **As of March 20th, 2005, all lands upon which livestock are pastured in Canyon County are lands which are enclosed by fences; correct?
MS. MEIKLE: Objection to the form of the question and calls for a legal conclusion.
Counsel, if you're asking him all lands in Canyon County, you're asking for a legal conclusion. And I'm going to object --
MR. WALTON: Go ahead. Have at it.
MS. MEIKLE: -- and ask him not to respond.
MR. WALTON: Well, you're going to take a risk because I'm going to take this before the Court.
So you're instructing him not to respond?
MS. MEIKLE: I'm objecting to --
MR. WALTON: You're free to object.
MS. MEIKLE: It calls for a legal conclusion.
MR. WALTON: It actually doesn't. It's a factual question.

MS. MEIKLE: And it calls for a legal conclusion, "enclosed."
Q. (BY MR. WALTON): Go ahead and answer.
A. Should I answer?
MS. MEIKLE: And, again, I'm going to instruct you not to, because I think you're asking for a legal conclusion as to enclosed -- if the livestock are enclosed within Ada County.
MR. WALTON: First of all, it's Canyon County.
MS. MEIKLE: Canyon County, I'm sorry.
MR. WALTON: I think "enclosed by a fence" is something a third-grader understands, Sandra. It's a factual issue, and I'll ask the Court to rule on this.
We can come back another day, Mr. Piercy, and I'm sorry we'll have to do it. But that's fine.
MS. MEIKLE: Are you asking a different question than the one you asked before?
MR. WALTON: I asked what I asked. You objected. You instructed him not to answer. I'm moving on.
MS. MEIKLE: Well, I'm asking you to clarify your question.
MR. WALTON: What was difficult about it, Sandra? Really, honestly, what was difficult about that?
MS. MEIKLE: You're asking Mr. Piercy --
Q. (BY MR. WALTON): Mr. Piercy, let me ask you

Q. **To your knowledge are all lands upon which livestock are pastured in Canyon County enclosed by fences? It's that simple.
MS. MEIKLE: Objection to the form of the question. And I'm instructing him not to answer. It calls for a legal conclusion.
MR. WALTON: Okay.
Q. Mr. Piercy, are you aware of any lands in Canyon County where livestock is pastured that is not enclosed by a fence?
MS. MEIKLE: Objection to the form of the question. Again, it calls for a legal conclusion.
MR. WALTON: Whether or not there are lands that livestock are pastured that is not enclosed by a fence in Canyon County is a legal conclusion? That's a factual issue.
MS. MEIKLE: It depends on the definition of each one of those words. "Enclosed" -- you're asking for Mr. Piercy to --
MR. WALTON: Okay. Let me rephrase. Let me rephrase.
Q. **To your knowledge, is there any livestock in Canyon County that is not enclosed inside of a fence?
MS. MEIKLE: Objection to the form of the question.
Q. (BY MR. WALTON): Go ahead and answer.

this question.
All the cattle in Canyon County are fenced in, aren't they?
MS. MEIKLE: Objection to the form of the question.
THE WITNESS: Should I answer?
MS. MEIKLE: Do you know the answer to the question?
THE WITNESS: No.
Q. (BY MR. WALTON): What cattle are not fenced in?
A. There's different boundaries and fences on other different ranches.
Q. Well, when you say "not fenced in," you mean like there's sometimes rivers that keep the cattle in; right?
A. Yes.
Q. Let's rephrase it then.
You're not aware of any cattle in Canyon County that roam free, are you?
MS. MEIKLE: Objection to the form of the question.
THE WITNESS: I don't understand what you mean by "roam free." Where?
Q. (BY MR. WALTON): Outside of boundaries such as fences, rivers, or natural barriers that contain the livestock.
MS. MEIKLE: Objection to the form of the question.

You can answer if you understand.
THE WITNESS: No.
Q. (BY MR. WALTON): What do you mean "no"?
A. Everything is contained.
Q. Okay. That's what I thought. Thanks.
MR. EVETT: Would this be a good time to take a break?
MS. MEIKLE: I'd like to take one.
MR. WALTON: Fine by me.
(Recess taken.)
MR. WALTON: Let's go on the record.
Would you mark that as an exhibit for me.
(Exhibit 8 marked.)
Q. (BY MR. WALTON): Mr. Piercy, I'm handing you Exhibit 8. On Exhibit 8 there is a road going down the middle of the photograph that's colored in orange that is Wamstad Road; correct?
A. Correct.
Q. And then there's a road colored in yellow that is Lee Lane; correct?
A. Correct.
Q. And you have been kind enough to color in for me some lands both to the east and to the west of Wamstad Road and north of the Boise River; correct?
A. Correct.

A. North of [illegible]a on Highway 95.
Q. The lands to the west of Wamstad Road are leased lands, you've told me.
A. Yes.
Q. And approximately how many acres are colored in by you to the west of Wamstad?
A. Approximately 150.
Q. And how many lands -- how many acres do you lease for ranching?
A. Approximately 200.
Q. So where is the other 50 acres?
A. It's on the Snake River.
Q. South of here -- south of that map?
A. It would be northeast.
Q. Oh, northeast. Okay.
Now, the pasture from which this bull escaped is part of the orange that you've colored in on Exhibit 8, is it not?
A. Yes.
Q. Where were the rest of your cattle on March 20, '05?
A. I do not know.
Q. Would they have been in some of the lands depicted on Exhibit 8?
A. No.

Q. And what are those lands that you've colored in for me in orange?
A. Those are pasturelands.
Q. And are those lands then where you run cattle?
A. Yes.
Q. And how many acres of that is owned by -- what portion of that is owned by you?
A. The east side of the road.
Q. And do you lease the west side of the road?
A. Yes.
Q. And approximately how many acres are on the east side of the road?
A. The pasture alone is 60 acres.
Q. You say "the pasture alone." Is there something aside from the pasture on the east side of the road that you owned?
A. River and wildlife area.
Q. And I forget how many acres you told me you own that you ranch.
A. I'm thinking it was approximately 120.
Q. So this is about half of the land that you own that you ranch is shown on Exhibit 8?
A. Yes, sir.
Q. And the other lands that you own are where in relation to these lands?

Q. You're sure of that?
A. Yes.
Q. And when you say you don't know, what other possible locations could they have been in?
A. On the 50 acres that we referred to earlier.
Q. By the Snake River?
A. Yes. And on the home place and --
Q. Your home place is north of Parma; correct?
A. Correct.
Q. How many acres do you have there?
A. Four short 80s; approximately 300.
Q. So your belief is they were either on the 50 acres by the Snake River or on the home place, as you referred to it?
A. Not all of them. There may have been other pastures and hayfields that I had rented from other farmers and --
Q. I see. But were the pastures that you've colored in on Exhibit 8 devoid of any livestock aside from the nine bulls that were in this one pasture that we've referred to this morning?
A. There could have been mules and horses down there too.
Q. I see. In some of the pasturelands that you've colored in on Exhibit 8?

MS. MEIKLE: Of the law.
MR. WALTON: No. I'm asking what his understanding is as to whether this bull was pastured in a heard district.
MS. MEIKLE: A heard district is a law. You're asking Mr. Piercy to tell you whether he believes his cattle are within a legal heard district.
MR. WALTON: It's kind of like asking somebody who is going 90 in a 50-mile-an-hour zone as to whether they have an understanding what the speed limit is, Sandy.
MS. MEIKLE: I know. You're asking him what the law is in that district and --
MR. WALTON: Look, I'm not going to fight with you. We're going to come back and do this depo later anyway, we will finish it later anyway. So you're instructing him not to answer. Fine.
MS. MEIKLE: I'm saying if you're asking him --
MR. WALTON: I asked him what I asked him. Are you instructing him not to answer?
MS. MEIKLE: My understanding what you're asking him is -- are you asking him whether his cattle are within a legal heard district?
MR. WALTON: That's not what I'm asking.
MS. MEIKLE: What are you asking?
MR. WALTON: I just told you. I'm asking is it his

understanding that this bull was pastured in a heard district. That is not the same as asking him the ultimate legal question that you just suggested.
MS. MEIKLE: I'm going to object to the form.
But if you understand the question, you can answer it.
THE WITNESS: There is a question as to whether this is a legal heard district, which we are --
Q. (BY MR. WALTON): Let me rephrase it.
At the time this accident occurred on March 20, 2005, was it your understanding that this bull was pastured in a heard district?
A. No, I didn't know he was.
Q. You've only learned about a heard district since then, I take it.
A. Yes.
Q. At the time this accident occurred, you didn't know what a heard district was?
A. I didn't know Wamstad and Boise River was a heard district.
Q. What was your understanding what it was?
A. That was open range along the river.
Q. Where did you gain that understanding?
A. It was just an understanding we had, the neighbors down there. We found out different after this

took place.
Q. When you say it was open range down along the river, what does that mean to you?
A. Well, it would be a legal but --
MS. MEIKLE: And I'm going to object if you're asking for a legal conclusion.
MR. WALTON: Go ahead and object.
THE WITNESS: Ask me the question again.
Q. (BY MR. WALTON): Yes, sir.
What does that mean to you? You said you thought it was an open range down along the river. Is that what you told me?
A. Okay. Some of the old-timers that had cattle down there said that so far from the Boise River was still open range.
Q. What did that mean to you?
A. It meant that cattle that got out that did get hit, they were required to pay for the animal.
Q. The car owner?
A. Yes.
Q. So the pasture that this animal escaped from, was it your understanding that that was open range?
A. I did not know for sure.
Q. But you thought it was?
A. Yes.

Q. There's one thing that I've been thinking about is that the bulls that were in that pasture could get to that highway through the river, couldn't they?
MS. MEIKLE: Objection to the form of the question.
THE WITNESS: I'd say no.
Q. (BY MR. WALTON): Because why?
A. Because of the boulders and the steepness, the water.
Q. But if they can negotiate down to the water, they can get up on the highway from there, couldn't they?
A. If they could negotiate to the water.
Q. One reason you didn't fence that because you thought it was open range; true?
A. No.
Q. It wasn't fenced because you felt it was a sufficient barricade to keep the animals enclosed in the pasture?
A. Yes.
Q. And when I say "it," I was referring to the riverbank and the boulders that you've referenced.
A. Yes.
Q. Okay.
At the time this accident occurred, did you know what a heard district was? Did you have an

understanding what a heard district v
A. No.
Q. Would those words have made any sense to you at the time of this accident? Let me rephrase.
MS. MEIKLE: Objection.
MR. WALTON:
Q. Had you heard of those words before at the time of this accident?
A. Yes.
Q. But you didn't quite know what it meant?
A. That's correct.
MR. WALTON: Let me take a two-minute break. I think I may be done, Mr. Piercy.
(Recess taken.)
Q. (BY MR. WALTON): What do you call this pasture where the bull escaped? Do you have a name for it?
A. Spaghetti piece.
Q. Spaghetti piece.
A. Uh-huh.
Q. Because it's a little twisty?
A. Uh-huh.
Q. Have you ever had any livestock escape that pasture before?
A. Not that I recall.
Q. And how long have you owned that? I think you

told me you don't remember, if I'm recalling.
A. I don't remember for sure. Approximately ten years.
Q. And I think you told me -- am I remembering correctly all of your fences on all of the land you use for ranching are the same as the fences on this spaghetti piece?
A. No. I have open wire. Some are four strand, some are five. Some are electrified, some aren't.
Q. I see. Okay. Let's go at it this way then.
The March -- excuse me, the October 5, 2001 incident involving Jamie Hansen, do you remember that one?
A. Yes.
Q. And that was from the pasture just east of the spaghetti piece, wasn't it?
A. It would be southeast.
Q. Southeast of it.
What kind of fencing was involved with that pasture at that time?
A. That's five wire electrified fence.
Q. Like the spaghetti piece?
A. No. The center wire is electric.
Q. Got you. So five wires -- on the pasture that involved the October 5, 2001 incident, that was five

wires, one of whic s electrified.
A. Yes.
Q. The spaghetti piece is five wires plus an additional wire that's electrified.
A. Yes.
Q. And if I'm -- do I recall correctly you never did figure out how those calves escaped the southeast pasture that we just referred to on that 2001 incident?
A. No.
Q. Was that land completely enclosed in fence?
A. Yes.
Q. There was no boundary that was the Boise River that was used to contain the animals?
A. No.
Q. You know, I'm just noticing here, I'm looking at the interrogatory answers that your attorney filed yesterday. And you had mentioned to me you don't remember that after Ms. Hansen hit your calves on October 5, 2001 along came Mr. Allen and got another one. It's mentioned in these interrogatory answers that's what occurred.
A. I never knew that person until yesterday -- or day before yesterday.
Q. There's another incident referenced in your interrogatory answers. It says in approximately

April 2005 one cow belonging to Mr. Piercy was found in a barrow pit eating grass on the side of Wamstad Road.
Where was that on Wamstad Road? Was it near this incident that we're here --
A. Yeah, it was right at the bridge.
Q. And what pasture had that animal been in?
A. That was a pasture that I rented from another person to hold them until grass.
Q. And where was that pasture located in relation to the bridge and Wamstad Road?
A. It's on the southwest side of the bridge.
Q. I'm looking at Exhibit 8. Can you kind of point with a pen to where that was.
A. It would be right in here (indicating). It goes all the way back in (indicating).
Q. So it would be bordering the Boise River.
A. Yes.
Q. On the south side of the river.
A. Yes.
Q. Just west of Wamstad Road.
A. Yes.
Q. And this answer says that you found someone had cut five wires on your fence in an attempt to steal your calves.
A. That was an assumption.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26th day of August, 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

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

LUIS J. GUZMAN, individually Plaintiff, v. DALE PIERCY, individually and **JENNIFER SUTTON**, individually, Defendants,	**CASE NO. CV05-4848** **DEFENDANT CANYON COUNTY'S CLOSING ARGUMENT AND POST-TRIAL BRIEF**
DALE PIERCY, individually, Plaintiff, v. **CANYON COUNTY, LUIS GUZMAN,** individually, and **JENNIFER SUTTON**, individually, Defendants.	

I.
INTRODUCTION

Defendant Dale Piercy has failed to shoulder the strong burden imposed by on him by Idaho Code § 31-857 in his attempt to overturn Canyon County's December 10, 1982 herd district order. Idaho Code § 31-857's strong *prima facie* presumption burden is in place concerning the validity of the creation of school, road, herd or other districts. Herd districts are specifically called out in the statute. This serious presumption burden placed on Piercy is understandable because after the passage of time, the citizens of Canyon County, Idaho, regard by custom, practice or norm the validity of the longstanding creation of herd or other districts.

II.
COURSE OF PROCEEDINGS

This case began with a complaint filed by Erica Rivera and Luis J. Guzman against Defendants Dale Piercy and Jennifer Sutton. On October 9, 2007, the Court issued an order denying Defendant Piercy's Motion for Summary Judgment, who argued that no herd districts existed in the areas in question, thereby excusing Piercy from any liability. At this time, the Court also ordered the joinder of Canyon County as a third party defendant on the issue of whether a herd district was located at the place where Piercy's bull escaped and where Piercy's bull collided with the vehicle driven by Sutton. In accordance with the Court's order, Sutton filed an Action for Declaratory Relief naming Canyon County as a Third party Defendant. Sutton asked the Court to uphold the 1908 and 1982 Canyon County herd district orders.

As a result of the stipulation of the parties and approval of the Court, Defendant Piercy on

September 10, 2008 filed an Amended Action for Declaratory Relief against Canyon County, Luis Guzman and Jennifer Sutton which was answered by the defendants.

III.
IDAHO CODE § 31-857 IMPOSES A REBUTTABLE PRESUMPTIVE BURDEN AND THE BURDEN OF PROOF AGAINST THOSE WHO CHALLENGE THE VALIDITY OF THE CREATION OF HERD DISTRICTS.

Under Idaho Code § 31-857, Defendant Piercy carries the presumptive burden imposed by this statute and the burden of proof always remains with him in this action. Piercy shoulders the onerous burden of garnering enough cogent evidence to dissipate the *prima facie* presumption that supports the validity of the creation of Canyon County's 1982 herd district order. Idaho Code § 31-857 is set out below:

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

S.L. 1935, ch. 79, § 1; S.L. 1989, ch. 73, § 25.

Time clouds the memory of past events and documents may be discarded over time. Can it be said 100 years from today that the records of current events will be fully maintained? See

also Rule 301 of the Idaho Rules of Evidence. This Rule states:

> Rule 301. Presumptions in general in civil actions and proceedings
> (a) Effect. In all civil actions and proceedings, unless otherwise provided by statute, by Idaho appellate decisions or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence 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. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption.
>
> (b) Jury Instructions. When any presumption operates, the court shall instruct the jury that the fact has been proved without using the term "presumption."
> [Adopted January 8, 1985, effective July 1, 1985. Amended March 18, 1998, effective July 1, 1998.]

All of Canyon County is a herd district. By norm, custom, and practice, the citizens of Canyon County recognize all of the county to be in a herd district. Against this recognized norm, custom, and practice, Piercy's onerous burden was to try to convince the Court that the 1982 herd district order was invalid. Decisions of various Idaho courts strongly favor upholding the validity of statutes and ordinances. See City of Lewiston v. Mathewson, 78 Idaho 347, 303 P.2d 680 (1956).

In Mathewson, the Court stated:

> "There is always a presumption of the validity of an ordinance. Continental Oil Co. v. City of Twin Falls, 49 Idaho 89, 286 P. 353; Boise City v. Better Homes, 72 Idaho 441, 243 P.2d 303."

Id. at 350.

Additionally, efforts should be undertaken by a Court to provide interpretation to a statute, and arguably to an ordinance or regulation of the county commissioners, that would not render such a promulgation a nullity. The same deference to statutory enactments should apply to county ordinances or regulations. For example, the County Commissioners' herd district order of 1982 should be given every possible view of interpretation so as not to render it a nullity. See Hecla Mining Co. v. Idaho State Tax Commission where the Court stated:

> "Second, it is incumbent upon a court to give a statute an interpretation that will not render it a nullity. Magnuson v. Idaho State Tax Commission, 97 Idaho 917, 920, 556 P.2d 1197, 2000 (1976)."

Id. at 151.

The Idaho Supreme Court in Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948) emphasized that when construing statutes, the purpose is to "save and not destroy." Canyon County would argue the same maxim applies to county ordinances, rules or regulations. See Idaho Code § 31-714 which provides:

> **§31-714. ORDINANCES -- PENALTIES.** The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by the laws of the state of Idaho, and such as are necessary or proper to provide for the safety, promote the health and prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof, and for the protection of property therein, and may enforce obedience to such ordinances with such fines or penalties, including infraction penalties, as the board may deem proper; provided, that the punishment of any offense shall be by fine of not more than one thousand dollars ($1,000) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

The Court in Keenan, supra, focused on the Court's role in construing statutes:

> "The cardinal principle of statutory construction is to save and not destroy. State v. Enking, 59 Idaho 321, at page 345, 82 P.2d 649; and it is incumbent upon a court to give a statute an interpretation which will not nullify it if such construction is reasonable or possible. Intermountain Title Guaranty Co. v. Egbert, 52 Idaho 402, at page 410, 16 P.2d 390; Northern P. R. Co. v. Shoshone County, 63 Idaho 36, at page 40, 116 P.2d 221; Bel. v. Benewah County, 60 Idaho 791, at page 796, 97 P.2d 397." (Emphasis added.)

Id. at 437.

The Idaho Supreme Court in Hendricks v. City of Nampa, 93 Idaho 95, 456 P.2d 262 (1969) dealt with a challenge to the validity of Nampa's annexation ordinance. The Court declared that the "primary issue in this appeal goes to the quantum and nature of proof necessary to overcome the presumed validity of the annexing ordinance." Id. at 264.

The Hendricks Court discussed the rebuttable presumption concerning the validity of the enactment of a municipal ordinance possesses:

> "There exists a rebuttable presumption in favor of the validity of a municipal ordinance. White v. City of Twin Falls, 81 Idaho 176, 338 P.2d 778 (1959); City of Lewiston v. Mathewson, 78 Idaho 347, 303 P.2d 680 (1956); Boise City v. Better Homes, Inc., 72 Idaho 441, 243 P.2d 303 (1952); Continental Oil Co. v. City of Twin Falls, supra. The ultimate burden of persuasion is on the party attacking the validity of an ordinance. Boise City v. Better Homes, Inc., supra; cf. City of Idaho Falls v. Grimmett, 63 Idaho 90, 117 P.2d 461 (1941)."

Id. at 98, 99.

The Court also discussed the burden of going forward, which a municipality bears in defending its ordinance when a presumption is overcome, but the Court emphasized that the "ultimate burden or persuasion that the ordinance is invalid, of course would remain with he *[sic]* person attacking the ordinance." Id. at 99.

It is notable that Idaho Code § 31-857 was originally enacted in 1935 and amended in 1989 to reduce the number of years from five to two years which must pass before proceedings concerning the establishment of the listed districts would be cloaked with a rebuttal presumption of validity.

In Krebs v. Krebs, 114 Idaho 571, 759 P. 2d 77 (1988), the Court dealt with the undue influence presumptions concerning the procurement of a deed and discussed the gate keeping function of presumptions:

> "Normally, the party asserting that a deed was procured by means of undue influence has the burden of proving such influence. McNabb v. Brewster, 75 Idaho 313, 272 P.2d 298 (1954).
> ....
>
> [A] presumption imposes on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." (Emphasis added.)

Id. at 82.

The Court in Mauldin v. Sunshine Mining Co., 61 Idaho 9, 97 P. 2d 608 (1940) analyzed the use of negative evidence as opposed to the cogent evidence required to dispel the marriage presumption and stated:

> "The evidence offered by respondents to rebut the presumption of marriage appears to be negative in character, consisting of evidence of acts of appellant and John Mauldin purportedly indicating that the parties did not hold themselves out to the public as husband and wife.
> ....
>
> The evidence offered by respondents to rebut the presumption of marriage, or all

the evidence in the record which may be said to tend to rebut the presumption, is not so cogent and satisfactory as would rebut this strong presumption. It does not make plain against the constant pressure of the presumption of marriage the truth of law and fact that it is void." (Emphasis added.)

Id. at 612, 613.

Defendant Piercy has failed to provide cogent evidence compellingly showing that the 1982 herd district was not validly created.

IV.
DEFENDANT PIERCY FAILED TO ESTABLISH THAT CANYON COUNTY DID NOT VALIDLY CREATE A HERD DISTRICT IN 1982.

A. The Herd District Petition.

Piercy complains that there is no herd district petition. The county is not required to keep herd district petitions. Idaho Code § 31-708 describes the duties of the clerk and the only records the clerk is supposed to preserve are "accounts acted upon by the board" and "petitions and applications for franchises."

Idaho Code § 31-709 describes the records the board must keep. No where in Idaho Code § 31-709 does it state that counties are required to keep herd district petitions. The herd district statutes governing the creation of a herd district in 1982 are found in the 1963 version of the Idaho Code. There, Idaho Code § 25- 2402 described the requirements of a herd district petition but was silent about preserving or keeping the petitions. Idaho Code § 25-2403 describes the herd district order and contains no requirement that counties preserve herd district petitions. Therefore, failure to find a herd district petition is inconsequential.

B. Publication Notice for Board's December 10, 1982 Herd District Hearing.

Considering the number of years that have passed since 1982, it is not surprising that a hearing notice advertising the December 10, 1982 public hearing of the board has not yet been found. Moreover, there was no requirement to keep or maintain a hearing notice informing the public of the hearing date and time.

Jackie Germain, a long time county employee, was Defendant Piercy's first witness. Her lack of knowledge is indicative of others who presented testimony by deposition on the events surrounding the enactment of the County Commissioners' December 10, 1982 herd district order. Germain testified she had no knowledge of the publication notice procedure in the County Commissioners' office in December of 1982 when the order of the County Commissioners establishing the herd district for the remainder of the County was issued.

> "Q. So would you say that in December of – December of 1982, you had become familiar with the process of publishing notice and public hearings?
> A. No, sir." (Tr. p. 54, L. 16-19)

Defendant Piercy's witness, David Wagner Lloyd, formerly employed by Saetrum Law Offices, stated that he looked for legal notices in the Idaho Statesman advertising the Board's December 10, 1982 hearing on the creation of a herd district. From his research, he found that legal notices can be located in different places in the newspaper. He also noted also that your eyes will become quite tired during the process of looking for these notices:

> "A. You know, I had to, Chuck, actually. I started going through them, and being familiar with papers, I saw the public notices were in just one location. Within a week or two in January, I noticed that there was a paper that had public notices in separate locations, so I actually went back and looked through every page. I can't say

that I looked at every advertisement, but I recall being quite shocked at the price of cars in 1982 as compared to today." (Tr. p. 63, L. 15-23)

"Q. How many pages did you look at?
A. You know, I couldn't say. I didn't count the pages. Thousands upon thousands upon thousands, certainly.
Q. Yeah. If I understand correctly, most of the legal notices are kind of grouped together?
A. Correct.
Q. But sometimes they've got one kind of sitting off by its side on a page where there are no other legal notices?
A. What I saw it was a group, usually like half a page or something else, and that occurred maybe once or twice a month. It looked like it was a type of overflow.
Q. Are you looking at microfiche?
A. Correct.
Q. Did your eyes ever get tired while you were doing that?
A. Absolutely." (Tr. p. 65, L. 18-25; p. 66, L. 1-11)

Karen Whychell, currently with Saetrum Law Offices, talked about how small the newsprint was and that she could research only newspapers that were received by the Idaho State Historical Society in her search for the legal notices:

"Q. Now, with regard to this particular page, it is true, is it not, that the legal notices that appear on this page, like the remainder in the exhibit, are extremely difficult to read and don't know exactly what is there because the print is very small; isn't that correct?
A. The print on this particular page is small, that is correct.
Q. With regard to the newspapers that you reviewed at the Idaho Historical Society, you talked about in your direct testimony about the papers that you reviewed are those that were made available to you by the Idaho State Historical Society; is that correct?
A. That's correct.
Q. So whatever newspapers the Idaho side received from the newspapers, you would have had the ability to review on the microfilm with regard to the time and date requested; correct?
A. Correct.
Q. If by chance the newspaper did not have your particular editiion for a particular part of the newspaper for the time period in question for the Idaho State Historical

Society, you have not had the ability to review that; is that correct?
A. If that were the case." (Emphasis added.) (Tr. p. 75, L. 25; p. 76 L. 1-24)

Whychell mentioned she used a calendar to track the Idaho Press-Tribune daily editions but she could not rule out the possibility that not all the pages of the paper were received by the Idaho Historical Society. Whychell also admitted that she did not check for gaps in the Idaho Statesman with regard to any missing editions and noted:

"Q. What about with regards to the Idaho Statesman, did you do that with respect to the Idaho Statesman?
A. No, I did not, because I did not print those out.
Q. I'm sorry, because why?
A. I didn't print those out. I didn't have the hard copies. But to my knowledge, there weren't any gaps in the newspaper.
Q. But you didn't check to see if there were or weren't gaps; correct, in that paper?
A. There didn't appear to be any, no. I had all of these.
Q. Yes, but as I say, you did not check to see if there were any gaps?
A. No." (Emphasis added.) (Tr. p. 83, L. 15-25; p. 84, L. 1-3)

Whychell related how tiring it was searching for legal notices in the newspaper. She described the microfiche spools and said the whole process is tiresome on the eyes.

"Q. Okay. Now, how to you look at these newspapers when you are doing this research? Is it on microfiche?
A. It is on a spool of film.
Q. Are you looking at an illuminated screen?
A. Yes.
Q. Is it a tiresome job in terms of your eyes?
A. I would say yes." (Tr. p. 84, L. 4-10)

Whychell also indicated that legal notices were grouped together, sometimes on separate pages in the newspaper:

"Q. How many pages of newspaper do you believe you reviewed taking into consideration the Statesman, the Idaho Press-Tribune, and the Parma Review?

A. I couldn't speculate.
Q. Would it be tens of thousands of pages?
A. I have no idea.
Q. Were the legal notices grouped together?
A. There were groups together, but then there were some that were on separate pages." (Tr. p. 84, L. 11-19)

Whychell also stated that she did not keep notes of the copies that she made of the newspaper editions at the Idaho State Historical Society:

"Q. How did you make notes on a scratch paper?
A. They do provide pencils for you and their scratch paper.
Q. I see.
A. So I would make notes as to what I would need to go back and copy. So to that extent, yes, I did make notes.
Q. Did you keep any of the notes that you made?
A. No. Once I printed out the pages that I needed to, then, no, I didn't." (Emphasis added.) (Tr. p. 89, L. 7-16)

Finally, Whychell admitted that she did not know when she reviewed the last page of a newspaper because there was no notation on a page that it was the last page:

"Q. I'm curious, how did you know that the last page you were looking for, for a given day, was really the last page of that newspaper?
A. It was the last page that was provided.
Q. But there is not something on the last page that says "the end"? It is kind of a silly question, but there is nothing on a given day for the Idaho Press-Tribune that indicates that this is the last page in the newspaper?
A. Not that I recall." (Tr. p. 91, L. 4-13)

C. Searching for Canyon County Herd District Records.

Herd districts are created over time and require a thorough search of old county records. Memories of events surrounding the creation of the 1982 herd district are nonexistent. Glenn Koch is the only surviving member of the Board of County Commissioners that signed the herd

district order. He had no recall of the events regarding the adoption of the herd district order. See Glenn Koch Deposition Transcript, p. 36, L. 24-25; p. 36, L. 1-11.

Considering the evidentiary burden shouldered by Piercy, it is vital for Piercy to demonstrate and verify through independent research the location of herd districts in Canyon County. For example, Tim Fox, a licensed surveyor, testified at trial and stated that he performed no independent research of the status of the yellow areas on Defendant's Exhibit A-1.

> "Q. Just so I understand, the – well, first off, you did not go to Canyon County records and pull legal descriptions for the herd district you drew on this map, A-1?
> A. That is correct.
> Q. Okay. You relied upon some documents given to you by Mr. Peck – those are the documents from which you obtained the legal descriptions for the herd district you drew on this map, A-1?
> A. That is correct." (Tr. p. 105, L 10-18)

In considering Piercy's challenge to the 1982 Canyon County herd district order, it is important to determine the location from where the bull escaped. Dale Piercy testified at the time of the accident that he owned 260 cows, 20 bulls and ranched and farmed approximately 800 acres. See Tr. p. 34 L. 19-25; p. 35, L. 1-25; p. 36, L. 1-21. It is fair to say with such a large operation that consideration must be given as to how precisely at a particular point in time, any livestock owner would know where each of his cows or bulls were located.

Michael Bruse, a GIS supervisor in the plat room of the Canyon County Assessor's office, testified how difficult it was to find individual documents regarding herd districts in county records:

"Q. Now, if one has to go look for legal descriptions, what does one have to do?

Looking for legal descriptions for a herd district, how does one go about doing that?
A. Sir, I can answer that because I did that.
Q. What did you do?
A. I pulled out a hundred year old book, and I sat there and I read six or 700 pages until I accounted for every herd district. When I ran out of books, I went to microfiche and I did the same thing with microfiche.
Q. Is it hard work?
A. Yes, sir.
Q. Is it tiring?
A. Yes, sir.
Q. Is it difficult to find what you are looking for?
A. Yes, sir." (Tr. p. 139, L. 11-25; p. 140, L. 1-2)

Bruse also testified that some Canyon County herd districts were no longer in Canyon County because of the creation of Payette and Gem Counties out of Canyon County. Bruse also determined there were ten herd district numbers missing and he was able to account for quite a few of the missing sequential numbers. The herd district research was exhausting and very tiring on his eyes. He could find nothing in the legal descriptions in county records verifying how "Herd District #3" was assigned the number "3", even though the designation "Herd District #3" appears on the map legend on Joint Exhibit #1.

"Q. What did you say? I missed that. I didn't understand what you just told me.
A. In our legal description, this particular herd district right here, our map indicates and so does the original map that that was herd district No. 3. When I went back and I personally did all the research, when I pulled this legal up and ran this, there was no indication in the legal description that it was herd district No.3.
Q. Let's talk about that for a second. Do we know who named or labeled these herd districts as herd district No. 4 or herd district No. 9?
A. No, sir.
Q. That's lost to time?
A. Yes, sir." (Tr. p. 140, L. 19-25; p. 141, L. 1-8)

Bruse described the difficulties he encountered in searching for herd district records,

including records for missing sequential herd district numbers:

> Q. Okay. We've got on this Exhibit C-1, we have got herd districts 3, 5, 6, 7, 9, 10, 11, 12, 14, 15, 19, 21, 22, 24 and 26; right?
> A. Yes, sir.
> Q. There is a bunch of numbers missing out of there. Do we know where those herd districts all are?
> A. No, sir, we don't, and that's when the prosecuting attorney asked me to start taking a look at the missing herd districts. And so the only way that I could account for those missing sequential numbers was to start at the very beginning of Canyon County, and that's what I did. And I accounted for quite a few of them. I think there were ten total missing. I just ran out of eyeballs before I got completely finished.
> Q. In other words, you looked – are you telling the Court that those herd districts are not – those legal descriptions are not in the county records, or are you telling the Court that you looked and you couldn't find them, but they could be there?
> A. I looked, and I could not find them. I accounted for what I was able to find." (Tr. p. 141, L. 9-25; p. 142, L. 1-4)

Paul Kosterman testified for Defendant Guzman and described the difficulties he experienced in checking and reviewing legal notices in the 1982 editions of the Idaho Press-Tribune. Kosterman determined that in 1982, there was a total of 10,367 pages in all the editions published by the Idaho Press-Tribune.

> "A. My understanding is it contained the front page of each publication and the legal notice section.
> Q. Now, did you create some notes on this task?
> A. I did.
> Q. Are these your notes?
> A. Those appear to be them.
> Q. How many pages were published by the Idaho Press-Tribune in 1982?
> A. I would have to add these up. I have this column summarized, but believe it was in the neighborhood of 11,000 – 10,800-something.
> Q. Did you prepare a summary for me?
> A. I did prepare a summary for you.
> Q. Is this the summary that you prepared?
> A. That is the summary that I prepared. To answer your question, it was 10,367.
> Q. Okay. So over 10,000 pages were published for the Idaho Press-Tribune in 1982

is what you determined based on your research?
A. Correct." (Tr. p. 149, L. 19-25; p. 150, L. 1-13)

Kosterman noted that Saetrum Law Offices provided only 678 pages and asserted that these were the number of pages for legal notices in the Idaho Press-Tribune editions. This means that 93 percent of the pages were not provided to the Court.

"Q. How many pages were provided to us by the Saetrum firm containing the legal notices of the Idaho Press-Tribune?
A. Per my count, there would be 678.
Q. Would that be about 6 percent of the total?
A. You know, I think it comes out, 6, maybe 7 percent.
Q. So 93 percent of the newspaper pages have not been provided to the court?
A. That's what the numbers say, yes." (Emphasis added.) (Tr. p. 150, L. 14-23)

While searching for legal notices at the Idaho State Historical Society, Kosterman struggled with very blurry, magnified microfiche images:

"Q. If one is going to look at or look for legal notices in a newspaper maintained by the Idaho Historical Society, describe for the court the depth of that task.
A. Would you like me to begin with finding the appropriate microfiche reel?
Q. Let's assume you get there.
A. It's pretty much you find your microfiche, start flipping through it page by page. They are very small pages when they are projected on the particular screen you are looking at.
Q. If you are projecting the whole page, are you able to read easily the font?
A. No. Particularly not the fonts of, for instance, a legal notice, which are typically very small font. You can generally make out the head-lines, you know, things of that nature, advertisements.
Q. So how do you read the font of, let's say a legal notice?
A. Once you find what you think is something you might be interested in looking at, you have to dial in and focus, which brings it up to where humans can see it I guess you might say.
Q. Would it be fair to say that you zoom in?
A. Zoom in, exactly.
Q. Now, what kind of issues arise when you zoom in vis-a-vis other notices that might appear on that same page?

A. Well, they become blurry and easily mixed. They are columnized, so to read one – at that point, once you zoom in where you can read it easily enough, you are then moving the apparatus by hand, which changes the position of the article, if you will, on the screen. It is very easy to become disoriented, I guess, if you will, where you are once you zoom back out to know exactly where you were within that page." (Emphasis added.) (Tr. p. 151, L. 17-25; p. 152, L. 1-25; p. 153, L. 1-2)

Kosterman searched for the December 24, 1976 herd district legal notice and initially could not find it:

"Q. You knew that you had to look at December 24, 1976?
A. I did.
Q. You looked at that paper?
A. I did look at that paper.
Q. You didn't find it?
A. I did not find it.
Q. Why not?
A. It was in a place where I would not have expected to find it.
Q. What do you mean?
A. Through my research, obviously there is a pattern, it seem repeated – well, legal notices are typically on one page together. If they are a spill-over legal notices, they will typically be joined together on a page near the other ones, as I recall. What was interesting about this one, it was found at the very, very bottom of a page full of K-mart advertisements and a couple of articles totally unrelated to anything I was looking for. The last item on the bottom left-hand side of the page, not something that would have caught my eye." (Emphasis added.) (Tr. p. 154, L. 11-25; p. 155, L. 1-7)

Kosterman stated searching for legal notices caused eye strain and was like looking for a needle in a haystack. He indicated he found one legal notice at the bottom of a K-mart ad. See Joint Exhibit #11. It was a very tiring a process to ascertain whether there were legal notices published in the newspaper:

"...together on a page near the other ones, as I recall. What was interesting about this one, it was found at the very, very bottom of a page full of K-mart advertisements and a couple of articles totally unrelated to anything I was looking for. The last item

on the bottom left-hand side of the page, not something that would have caught my eye.
Q. Did you go end up going back and verifying it was there?
A. I did go back to verify it was there.
Q. Is it a tiresome job to look for this stuff, these notices that we've been talking about?
A. It is very tiresome.
Q. Why?
A. Again, because the script is so small, to begin with. You have to be very, very careful. Your eyes start to go a little haywire on you. You are going through literally hundreds of pages of items looking for one tiny, little item. It is kind of like a needle in a haystack proposition." (Emphasis added.) (Tr. p. 155, L. 1-20)

Defendant Piercy admitted into evidence the deposition of E.G. Johnson. In that deposition, E.G. Johnson noted that he did not make it a habit of looking for legal notices in the newspaper on a consistent basis and that he did not have a practice back in 1982 of searching for and reviewing the posted notices for the Board of County Commissioners regarding their meeting agendas. See E.G. Johnson's October 26, 2008 Deposition Transcript p. 41, L. 11-25; p. 42, L. 1-8.

In short, Defendant Piercy has neither successfully rebutted the Idaho Code § 31-857 presumption nor carried his burden of proof in this action.

V.
IT CANNOT BE PRESUMED THAT MERE SILENCE OF CERTAIN COUNTY RECORDS SHOWS THE COUNTY EXCEEDED ITS AUTHORITY OR DISREGARDED ORDER ENACTMENT REQUIREMENTS.

It cannot be presumed from the mere silence in county records of a 1982 herd district petition that the 1982 herd district was not validly created. The Clerk has no duty to preserve herd district petitions. See Idaho Code §§ 31-708 and 31-709 discussed on page 8 of this brief.

Interestingly, Canyon County's 1982 herd district order uses the words "again review." There is no clue as to what definitely sparked the early review or how many reviews preceded the December 10, 1982 herd district order.

A. Silence of Records.

In Re Dist. No. 1, 26 Idaho 311, 143 P.299 (1914), the Idaho Supreme Court considered the issue of silence regarding matters not addressed in legislative records and the effect silence has on the authority of the legislature to enact laws in light of the presumption of regularity of legislative proceedings. The Court stated:

> "After reviewing the authorities, the unquestioned weight of authority is to the effect that, unless the journal affirmatively shows that some requirement of the Constitution in the passage of a bill has been omitted, the presumption is that such requirement has been complied with, although the journal be silent in regard thereto, except when the Constitution commands that such act be entered on the journal.
> ....
>
> As stated by Judge Cooley, it will not be presumed in any case, from the mere silence of the journals, that the Legislature exceeded its authority or disregarded a constitutional requirement in the passage of legislative acts. The journal of the House, as above quoted, does not show that in the passage of said act the provisions of the Constitution, requiring it to be read on three several days in each House prior to its passage, had been dispensed with, but, since the provisions of the Constitution do not expressly require the entry of such suspension on the journal, it will not be presumed that the House disregarded said provisions of the Constitution in the passage of said act; but it will be presumed that said constitutional provision was complied with by the House in the passage of said act, and the rule laid down in the Cohn-Kingsley Case, supra, is hereby modified to the extent that the Legislature will be presumed to have done each act required by the Constitution in the passage of an act, unless it affirmatively appears by the journal that it has failed to do so. Since the journal of the House does not show affirmatively that said provisions of the Constitution were not complied with in the passage of the act under consideration, this court presumes that it did comply with said provisions in the passage of said act, and that said act was passed in accordance with the provisions of the Constitution

and is valid." (Emphasis added.)

Id. at 301, 302.

The Idaho Supreme Court in Garrett Transfer & Storage Co. v. Pfost, 54 Idaho 576, 33 P.2d 743 (1934) affirmed the silence rule regarding legislative records and stated:

> "In re Drainage District No. 1, 26 Idaho, 311, 143 P. 299, L. R. A. 1915A, 1210, announces the rule that it will not be presumed in any case from the mere silence of the journals that either house has exceeded its authority or disregarded a constitutional requirement in the passage of a legislative act, unless the Constitution has expressly required the journal to show the actions taken, as, for instance, where it requires the yeas and nays to be entered. Citing 36 Cyc. p. 950."

Id. at 746.

No witness has come forward and declared that the 1982 herd district was created without a petition and published notice. Piercy has failed to produce cogent evidence overcoming the rebuttable presumption that the herd district was validly created.

B. Metes and Bounds Description.

Piercy complains that 1963 version of Idaho Code § 25-2402 required a metes and bounds description of the herd district in the herd district order. Idaho Code § 25-2402 merely states that the "commissioners shall make an order creating such herd district, in accordance with the prayer of the petition, or with such other modifications as it may choose to make." (Emphasis added.) If a metes and bounds description was provided in the petition, there is no necessity to have the same metes and bounds description noted in the order establishing a herd district.

C. Published Hearing Notice.

Considering the complexities surrounding herd district boundaries, it does not seem unreasonable to require Piercy to definitively and positively establish that there was no hearing notice published in the newspaper. The record reflects that there were numerous editions of the Idaho Press-Tribune published in 1982. Searching for a herd district notice from 1982 was a tiring process using a microfiche machine as noted by Piercy's witnesses, David Wagner Lloyd and Karen Whychell; and Defendant Guzman's witness Paul Kosterman. An examination of Piercy's Exhibit A-3, consisting of editions of the Idaho Press-Tribune, shows how minute the size of the font is for each of the pages and reveals the legal notices are unreadable. Also, Piercy did not submit unequivocal proof verifying that every page in every 1982 edition of the Idaho Press-Tribune was presented to the Idaho State Historical Society. Therefore, there is a lack of foundation for the evidentiary findings urged by Piercy.

Also, there may be more items in the record than heretofore have been discovered. Joint Exhibit #4 is the County Commissioners' minute book version of Canyon County's 1982 herd district order. It indicates that the County Commissioners, on December 10, 1982, established the specified herd district. See Joint Exhibit #7 which is a copy of the actual herd district order showing that the order was signed by the County Commissioners on December 10, 1982. However, a review of Joint Exhibit #5 reveals a resolution that was considered and adopted by the County Commissioners on December 2, 1982, indicating that a herd district order would be issued by the Board "as of December 14, 1982."

D. Effective Date of 1982 Herd District Order.

When addressing the effective date of the County Commissioners' 1982 herd district order, it is necessary to examine the recent decision of District Judge Winmill for the District of Idaho in Rolando Perez Arguello v. O. Larry Lee and Carolyn Lee, 2008 WL 4544477 (D. Idaho 2008). There, the Court considered a motor vehicle accident involving a fatality and injuries. This accident occurred on a highway in Jefferson County, Idaho. The Defendants attempted to escape liability by arguing that the herd district in which the incident occurred was invalidly created. The Arguello Court discussed the Defendants' claim that the 1930 herd district order was not valid because there was no specified time for the order to take effect. The Court rejected that contention and stated:

> "However, "[t]he common rule in regard to legislation is that it shall take immediate effect unless otherwise provided, and this rule is applicable to ordinances." 5 McQuillin, The Law of Municipal Corporations § 15:36. It is not uncommon for a statute to prescribe that certain types of ordinances not take effect until a certain time-for example, 10, 20 or 30 days-after its approval. Id. Nevertheless, "invalidity as to the effective date of an ordinance ... does not render the ordinance void."

Id. at 5.

E. Interpretation of Ordinances.

The Arguello Court opined on the interpretation and enforcement of ordinances and noted courts are reluctant to strike down an ordinance that can be reasonably upheld. The Court declared:

> "This approach, to deem the ordinance valid but the effective date invalid, is consistent with general principles applicable to the interpretation and enforcement of ordinances. The power of a court to declare an ordinance invalid should be exercised

> cautiously, and, in fact, courts are reluctant to do so. 6 McQuillin, The Law of Municipal Corporations § 20:4 Thus, a court should not strike down any ordinance where that ordinance can be reasonably upheld, and the ordinance will be upheld if the validity of the ordinance is fairly debatable. Id. When an ordinance can be interpreted in two ways, one of which sustains its validity and the other which defeats it, a court will adopt the sustaining interpretation, "even if that construction is not the most obvious or natural." 6 McQuillin, The Law of Municipal Corporations 20:56. Significantly, "[c]ourts are loathe to construe an ordinance as invalid, where the ordinance has been in operation and unchallenged for many years, and where under it valuable rights have accrued which would be destroyed if the ordinance were held to be invalid." (Emphasis added.)

Id. at 6.

The Court used the "reasonably upheld standard" and rejected the challenge that the herd district order was invalid for lacking an effective date. The same principle should apply to county ordinances and regulations. Efforts should be undertaken to seek interpretations which will sustain the validity of county regulations establishing herd districts.

Also, Joint Exhibit #8 includes public hearing minutes and reveals on December 24, 1976, the Canyon County Commissioners created a herd district. The minutes date heading states "January 7, 1976" but the correct date is "January 7, 1977." This is clear because the minutes for the herd district hearing refer to newspaper publication dates of December 24, 1976 and January 1, 1977. Joint Exhibit #9, the January 12, 1977 resolution of the County Commissioners, shows that the County Commissioners rescinded their January 7, 1977 order establishing a herd district because the procedures had not been referred to the Canyon County Prosecuting Attorney for review. Old records must maintain their validity if they can be reasonably upheld.

F. Animals Regulated by the 1982 Herd District Order.

Piercy contends that there was no mention in the 1982 herd district order of the animals that would be regulated by the herd district. A listing of animals to be regulated by a herd district is not required by Idaho Code § 25-2404 to be contained in the order. Idaho Code § 25-2404 states the order creating a district should be in conformance with the prayer of the petition. It does not state that the actual order has to list the animals noted in the herd district petition.

G. Open Range Consideration.

Piercy attempts to characterize the Commissioners' action in this complex action as improperly attempting to include open range areas with the Board's December 10, 1982 order. The 1982 herd district order must be read in the context of the language of Idaho Code § 25-2402 as it existed in the 1963 version of the statute. For that statute, see Exhibit #1 attached to the August 25, 2008 deposition of Glenn O. Koch, published with the Court. Idaho Code § 25-2402 seems to state that the petition cannot include open range. However, the Idaho Supreme Court in Moreland v. Adams, 143 Idaho 687, 152 P.3d 558 (2007) cited to Maguire v. Yanke for a discussion of the history of laws relating to herd districts and the liability of the livestock owner regarding livestock straying on another's land and stated:

> "In Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1978), this Court discussed the history of laws relating to the liability of a livestock owner for damage caused by his stock straying on another's land. Under common law, it was the duty of a livestock owner to fence in stock to keep them from causing damage ("fence in" rule), but Idaho and other western cattle states rejected that concept for a rule allowing livestock to roam freely and imposing the duty on landowners to fence livestock out ("fence out" rule). Maguire, 99 Idaho at 832, 590 P.2d at 88. As this Court noted, "the 'fence out' rule prevails" in Idaho. Id. at 833, 590 P.2d at 89. There are important legislative

exceptions to the "fence out" rule and landowners may revert to a "fence in" rule by following statutory procedures to create a herd district. Id.; I.C. §§ 25-2401, -2402."

Id. at 690.

The Court in Moreland, supra, seemed to imply that it was not until Adamson v. Blanchard, that it was clear, in regard to the definition of open range, there was "no third hybrid area for land outside cities and villages." Id.

Piercy's deposition was filed with the Court by Guzman's attorney. An exchange occurred between Walton and Piercy at Piercy's deposition during which Piercy said that "everything is contained", meaning in Canyon County cattle are not roaming free outside of boundaries that contain livestock. See Dale W. Piercy May 10, 2006 Deposition Transcript p. 44, L. 2-25; p. 45, L. 1-5. Therefore, based upon the Maguire and Moreland decisions, supra, the County's December 10, 1982 herd district order was consistent with the governing law's identification of open range at that time.

IV.
CONCLUSION

The custom, norm, and practice and long recognition of herd district status throughout Canyon County cannot be ignored. Most importantly, Defendant Piercy has not successfully shouldered his burden to dissipate the power of the rebuttal presumption provided by Idaho Code § 31-857. Defendant Canyon County respectfully asserts that Defendant Piercy has not carried his Idaho Code § 31-857 burden and the burden of proof and requests that Defendant Piercy's Amended Action For Declaratory Relief be dismissed.

Dated this 1 day of December 2008.

DAVID L. YOUNG
Prosecuting Attorney
Canyon County, Idaho

Charles L. Saari

Charles L. Saari
Deputy Prosecuting Attorney
Attorney for Third Party Defendant Canyon County

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of December, 2008, I caused a true and correct copy of **DEFENDANT CANYON COUNTY'S CLOSING ARGUMENT AND POST-TRIAL BRIEF** to be served to the following by the method indicated below.

Ryan B. Peck Saetrum Law Offices 101 S. Capitol Blvd. Boise, Idaho 83702 Facsimile: (208) 336-0448 ryanpeck@saetrumlaw.com	[ ] U.S. Mail [✓] Hand Delivery [ ] Overnight Mail [✓] Facsimile [ ] Email
Timothy C. Walton Chasan & Walton, LLC 1459 Tyrell Lane P.O. Box 1069 Boise, Idaho 83701-1069 Facsimile: (208) 345-0288 timwalton2000@hotmail.com	[ ] U.S. Mail [✓] Hand Delivery [ ] Overnight Mail [✓] Facsimile [ ] Email
Stephen E. Blackburn Blackburn Law, PC 660 E. Franklin Road Suite 225 Meridian, Idaho 83642 Facsimile: (208) 898-9443 bburnlaw@aol.com	[ ] U.S. Mail [✓] Hand Delivery [ ] Overnight Mail [✓] Facsimile [ ] Email
Joshua S. Evett Elam & Burke, P.A. 251 East Front Street Suite 300 P.O. Box 1539 Boise, Idaho 83701 Facsimile: (208) 384-5844 jse@elamburke.com	[ ] U.S. Mail [✓] Hand Delivery [ ] Overnight Mail [✓] Facsimile [ ] Email

Charles L Saari

Charles L. Saari
Deputy Prosecuting Attorney
Attorney for Third Party Defendant Canyon County

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

LUIS J. GUZMAN, individually

Plaintiff,

v.

DALE PIERCY, individually and JENNIFER SUTTON, individually,

Defendants.

Case No. CV05-4848

POST-TRIAL MEMORANDUM

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually,

Defendants.

I. INTRODUCTION

This action arises out of a motor vehicle collision with a black bull occurring in the late evening hours of Sunday, March 20, 2005. Defendant Jennifer Sutton ("Sutton"), with Plaintiffs Erika L. Rivera and Luis J. Guzman (collectively "Plaintiffs") as passengers, was traveling northbound on Wamstad Road, just south of Parma. Upon approaching the Boise River bridge, Defendant Sutton's vehicle collided with a black bull. The bull was owned by Defendant Dale W. Piercy ("Piercy"). The bull involved in the collision was pastured in a field east of Wamstad Road, north of the Boise River bridge and south of Parma.

Piercy claims that the herd district where the animal was pastured was invalidly enacted and is, accordingly, void. Piercy argues that the Order Establishing Herd District of December 10, 1982, is invalid due to procedural irregularities in the ordinance's passage. Piercy claims that if the herd district ordinance at issue is invalid, the area would be open range and Piercy would not have any liability for the accident.

Sutton argues that the 1982 herd district ordinance is valid. First, Piercy's action is barred by the statutes of limitations set forth in Idaho Code §§ 5-224 and 5-221. Second, if the Court finds that the action is not barred by the aforementioned theory, Piercy has failed present evidence sufficient to overcome the presumption of the ordinance's validity pursuant to Idaho Code § 31-857.

The Bench Trial on the validity of the 1982 herd district ordinance occurred on October 8, 2008. The parties agreed to submit post-trial briefs in lieu of closing argument. On November 17, 2008, Piercy filed his Closing Memorandum. The response to the arguments made therein is as follows.

II. FACTS

On or about December 2, 1982, the Board of the Canyon County Commissioners approved a resolution establishing a herd district as set forth in the minutes:

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

(Joint Ex. No. 5.)

On December 10, 1982, the Board of Canyon County Commissioners issued the following Order:

> 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 hereto, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.
> 2. That map shows that over 95% of the land within the County is now in Herd District status.
> 3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.

4. Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.
5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County. Therefore,

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

(Joint Ex. No. 4.)

On December 20, 1982, the Idaho Press Tribune published the following notice:

RESOLUTION PASSED REGARDING HERD DISTRICTS IN CANYON COUNTY

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

(Joint Ex. No. 10.)

At the time the 1982 herd district ordinance was enacted, the 1963 version of the Idaho Herd District Law was in effect. *See* Idaho Code §§ 25-2401, et. seq. The Herd District Law was subsequently amended in 1983, 1985, 1990 and 1996.

The bull involved in the collision was pastured in a field east of Wamstad Road, north of the Boise River bridge and south of Parma. (Bench Trial ("Trial Transcript"), dated October 8,

2008, 113:7-114:6.) The parties agree that the field where the bull was pastured was not included in any of the legal descriptions of the herd districts created before 1982. (*See* Trial Transcript, 100:2-13; Joint Ex. No. 3.) However, the field at issue was included in the 1982 herd district ordinance. (Joint Ex. No. 4.)

Defendant Sutton has previously raised the equitable defenses of laches and estoppel to bar Piercy's claim that the 1982 herd district ordinance is invalid. At the Bench Trial, Defendant Sutton again raised the equitable defenses and attempted to present evidence on the same. The Court denied Sutton's motion and denied the admission of evidence. (Trial Transcript, 167:5-168:1.) Therefore, this brief will not address those issues.

III. LEGAL ANALYSIS

A. DEFENDANT PIERCY'S CLAIM IS BARRED BY STATUTES OF LIMITATIONS PURSUANT TO IDAHO CODE §§ 5-224 and 5-221.

The limitations of action statutes apply to all actions and special proceedings. The declaratory judgment action constitutes a type of "action" limited by Idaho Code §§ 5-224 and 5-221.

1. Even assuming that there were procedural irregularities in the passage of the herd district ordinance, Piercy's claim is barred by Idaho Code § 5-224.

Idaho Code § 5-201 sets forth the general statute of limitations provision:

> Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute.

IDAHO CODE § 5-201 (2008). There is no specific statute of limitations that applies to either a declaratory judgment action, or to the underlying claim, therefore, the catchall provision applies.

Idaho Code § 5-224 is the catchall statute of limitations provision, which provides:

> An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued.

IDAHO CODE § 5-224 (2008).

There is only one form of action in Idaho's civil courts: the "civil action." *See* I.R.C.P. 2. An "action" is further defined in Title 5, Chapter 2 to mean:

> The word "action" as used in this chapter is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

IDAHO CODE § 5-240 (2008).

An action seeking declaratory judgment is authorized pursuant to Rule 57 of the Idaho Rules of Civil Procedure and Title 10, Chapter 12, Idaho Code, and constitutes "[a]n action for relief..." under Idaho Code § 5-224. Rule 57 of the Idaho Rules of Civil Procedure states that the Rules of Civil Procedure apply to declaratory judgment actions. A declaratory relief claim is an "action;" the Supreme Court of Idaho has recognized this in writing "[t]his is a civil action, albeit for a declaratory judgment." *Smith v. State Board of Medicine of Idaho*, 74 Idaho 191, 194, 259 P.2d 1033, 1034 (1953). Furthermore, the Supreme Court of Idaho awarded attorney's fees in favor of a plaintiff in a declaratory judgment action under Idaho Code § 12-120(3). *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 423, 111 P.3d 100, 108 (2005). Idaho Code § 12-120(3) provides:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

IDAHO CODE § 12-120(3) (2008)(emphasis added). Based on the above, the declaratory judgment action is a "civil action" under Idaho Code § 5-201 and "an action for relief..." subject to the limitations set forth under Idaho Code § 5-224.

Where there is no fraud shown, neither the ignorance of a person of his rights to bring an action, nor the mere silence of a person liable to the action, prevents the running of the statute of limitations. *Coe v. Sloan*, 16 Idaho 49, 100 P. 354, 355 (1909).

The Idaho Supreme Court has set forth the policy underlying statutes of limitation:

> "The policy behind statutes of limitations is protection of defendants against stale claims, and protection of the courts against needless expenditures of resources." *Johnson v. Pischke,* 108 Idaho 397, 402, 700 P.2d 19, 25 (1985). Statutes of limitation are designed to promote stability and avoid uncertainty with regards to future litigation.

Wadsworth v. Department of Transp., 128 Idaho 439, 442, 915 P.2d 1, 4 (1996). Additional policy reasons for the imposition of statutory time limits for filing actions are set forth in *Renner v. Edwards*:

> It is eminently clear that statutes of limitations were intended to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard for want of seasonable prosecution. They are, to be sure, a bane to those who are neglectful or dilatory in the prosecution of their legal rights. 1 Wood, Limitation of Actions, s 4, p. 8. As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the

> wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time. Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 19 L.Ed. 257; 1 Wood, Limitation of Actions, supra, s 4; Spath v. Morrow, supra (174 Neb. 38, 115 N.W.2d 581). To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance. Cf. 34 Am.Jur., 'Limitation of Actions,' s 11, p. 20.

Renner v. Edwards, 93 Idaho 836, 838-839, 475 P.2d 530, 532 - 533 (1969), citing *Wood v. Carptenter*, 101 U.S. 135, 25 L.Ed. 807 (1879).

No matter how you look at the application of Idaho Code § 5-224, whether it applies to the declaratory judgment action itself, or to the underlying claim, there is no statute of limitations that would extend Piercy's right to bring the declaratory judgment action, or the underlying claim, nearly 25 years after the ordinance became effective.

Under Idaho Code § 5-224, an action "must be commenced within four (4) years after the cause of action shall have accrued." In this case, the cause of action accrued the date the herd district ordinance went into effect.

The Idaho Supreme Court holds that the statute of limitations in a case where the validity of an ordinance is challenged begins to accrue the date of the ordinance's passage. *Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830, 831 (1911). In *Canady* the Supreme Court held that the statute of limitations barred an action to declare an ordinance null and void filed nine years after the ordinance's enactment. *Id.* In *Canady*, the city of Coeur d'Alene enacted two ordinances in 1900, and another ordinance in 1905[1], generally for the purpose of vacating

---

[1]Ordinance No. 71 was approved March 10, 1900; No. 75 was approved November 6, 1900; and NO. 115 was approved March 29, 1905.

certain streets and alleys in the city, with the understanding that the Coeur d'Alene Lumber Company would establish and maintain a sawmill, planing mill and lumber yard on the vacated streets. *Id.* Thereafter, the Coeur d'Alene Lumber Company expended funds to build the lumber manufacturing establishment. *Id.* at 830. Plaintiff had notice of the enactment of the ordinances and the expenditure of money in the construction of the plant and did not object at that time. *Id.*

Plaintiff's husband owned certain lands bordering on or near the streets vacated by the ordinances. *Id.* at 832. At some point, plaintiff succeeded to the interest of her husband and brought action on June 15, 1909, to have the ordinances vacating the streets and alleys declared null and void, to compel the defendants to remove obstructions from the streets vacated by the ordinances, to enjoin the defendants from obstructing the streets in the future, and for damages. *Id.* at 831. Defendants answered the complaint and denied that plaintiff was damaged by the street vacation, denied that plaintiff's land was within the city limits, and asserted the statute of limitations and estoppel. *Id.* at 832.

At the close of plaintiff's evidence, defendants moved for a nonsuit, which was granted by the court. *Id.* at 832. The Supreme Court affirmed the decision of the district court and held, in part, that plaintiff's action was barred by the statute of limitations. *Id.* at 830. In support of its decision, the Court concluded:

> We think, under the facts of this case, that this action is barred by the statute of limitations: and that this action should have been brought at least within five years from the date such cause of action arose. We think it sufficiently appears that appellant sat by when Ordinances Nos. 71 and 75 were passed in 1900, and more than nine years before this action was commenced, and made no complaint of any damages having been sustained to her property by reason of said ordinances and the vacation of the streets. And, again, in 1905, when Ordinance No. 115 was passed, she made no protest or objection of any kind.

> She knew that the Coeur d'Alene Lumber Company was expending a great deal of money in establishing its lumber plant upon said blocks and a portion of one of the streets, and made no protest of any kind whatever to the city, and made no claim for damages to her property as resulting from the passage of said ordinances. The first time she complained of damage to her property, so far as the record shows, was when she commenced this action, June 15, 1909. *Howard Co. v. Chicago & A. R. Co.*, 130 Mo. 652. 32 S. W. 651; *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109.

Id. at 835.

Under *Canady*, Piercy's declaratory judgment is barred by the statute of limitations. The Order Establishing Herd District was enacted December 10, 1982, nearly 23 years before this action was commenced. Piercy did not raise this issue until after Guzman filed a Complaint against Piercy for damages arising from the collision between Sutton's vehicle and Piercy's black bull. Prior to the subject accident, Piercy never complained of any damages sustained by reason of the herd district ordinance.

Piercy knew or had reason to know that the field where his bull was pastured was included in a herd district by virtue of the notice posted in the Idaho Press Tribune on December 20, 1982, indicating that the resolution regarding herd district had been passed by the Canyon County Commissioners. (Joint Ex. No. 10.)

Moreover, E.G. Johnson, a rancher in the area where the accident occurred and an owner of land that is within the description of the 1982 herd district ordinance, knew that the area in question was in a herd district. On or about July 17, 2007, Mr. Johnson executed an Affidavit for another case that was subsequently made part of the record in this lawsuit. Therein, Mr. Johnson stated "[s]ometime in either late 1982 or early 1983, I discovered that the above property had

been placed into the herd district created by the Canyon County Commissioners in December 1982." (Affidavit of E.G. Johnson ("Johnson Aff."), dated July 19, 2008, ¶ 5.) Mr. Johnson testified at his deposition in this case, that he does not believe that he became aware of the herd district status in 1982 or early 1983; rather Mr. Johnson testified that he had been aware that the property was a herd district "for at least the last 12-15 years." (Deposition of E.G. Johnson ("Johnson Depo."), dated October 6, 2008, 15:14-15; *see also* 15:4-16:5.) Piercy by his own admission has been a cattle rancher in the area where the accident occurred for 50 years. (Deposition of Dale W. Piercy ("Piercy Depo."), dated May 10, 2006, 5:16-23; 41:4-7.)[2] It would seem unlikely that Mr. Johnson would know that his land was in a herd district, but that Piercy would not know that same information.

Furthermore, based on Piercy's presumed familiarity with the roadway where the accident occurred, he was aware that there were no open range or cattle warning signs along that section of roadway. He was aware that there were no cattle guards or other devices separating open range land from herd district land. To Piercy's knowledge all livestock in Canyon County are not allowed to roam free and are contained by fences and/or natural geographic barriers. (Piercy Depo., 44:17-45:4.)

The status and location of herd districts within Canyon County were of record. (Joint Ex. No. 2.) The herd district map could be found in the Canyon County recorder's office and the Canyon County Commissioner's office. Court employees were instructed that if asked, all of the land in Canyon County was included in a herd district. (Deposition of Monica Reeves ("Reeves

---

[2]At the Bench Trial, Piercy testified that he had been a rancher in Canyon County for over 30 years. (Trial Transcript, 116:10-12.)

Depo."), dated July 7, 2008, 16:16-17:3.) At the least, Piercy had constructive knowledge that the field where his bull was pastured was included in a herd district.

The Idaho Supreme Court holds that failure to acquire knowledge within reach does not toll the statute of limitation:

> While it is stipulated that the appellants did not know of their interest in those lots until about a year before this suit was brought, that makes no difference, for they had the means of acquiring that knowledge, as the deed conveying the title to said lots to their father was of record during all that time in the office of the county recorder of Ada county, where said lots were situated. The means of acquiring this knowledge was open to them, and, under the facts of this case, that places them in the same position as though they had such knowledge. When one by his own carelessness or negligence fails to acquire knowledge that is within his reach, and such information is upon the proper records which impart constructive notice, the person cannot protect himself behind the plea that he did not know facts of which the law imputes knowledge to him and thus suspend the running of the statute. It was held in *State v. Walters*, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244, that neither the ignorance of a person of his right to bring an action, nor the mere silence of a person liable to the action, prevents the running of the statute of limitation. *Ala., etc., Ry. Co. v. Jones*, 73 Miss. 110, 19 South. 105, 55 Am. St. Rep. 488. See, also, *Ames v. Howes*, 13 Idaho, 756, 93 Pac. 35.

Coe v. Sloan, 16 Idaho 49, 100 P. 354, 357 -358 (1909).

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 roadway 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 roadways throughout Canyon County.

The public benefits and influence on public and private behavior of Canyon County's 26 year herd district status are significant. Cattle are not allowed on Canyon County roads, and the county's police and sheriff's officers have confirmed that repeatedly in deposition. For 26 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 26 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 26 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.

Piercy should have acted promptly if he considered that his rights were invaded by the passage of the herd district ordinance. He should not have sat passively by and permitted the Canyon County officials and the citizens of Canyon County to order itself under the belief that all of Canyon County was in a herd district. *See Canady*, 120 P. at 832.

As stated above, the purpose of statutes of limitations is to prevent litigation of stale claims. *See Wadsworth v. Department of Transp.*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996); *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969). In this case, the sole living Commissioner from 1982, Glen Koch, is 80 years old and has no recollection regarding the details of the passage of the herd district ordinance. (Deposition of Glen Koch ("Koch Depo."), dated August 25, 2008, 19:23-20:10; 20:11-17; 21:18-22:1; 23:6-10; 25:12-20; 26:2-25; 27:14-22; 28:10-22; 33:5-14; 33:15-34:4. *See also*, 36:5-16.) Similarly, the clerk of the district court and the commissioner's office from 1982 is now 73 and has no recollection regarding the passage

of the ordinance. (Deposition of Bill A. Staker ("Staker Depo."), September 22, 208, 14: 22-15:6; 15:12-16; 17:11-16; 18:6-19:17; 20:6-21:8; 23:11-23.)

There are strong policy reasons supporting statute of limitations provisions for actions attacking the validity of an ordinance based upon alleged irregularities in the ordinance's passage. At some point a statute has to have finality. If ordinances can be attacked at anytime based on procedural irregularities, without limitation as to time, then the door is open to anyone to attack any ordinance no matter how old and no matter how much evidence has been lost by time. There is no policy rationale supporting turning over a now 26+ year old statute on grounds of procedural irregularity. After the passage of so much time, these types of issues are a waste of judicial economy and resources.

Memories have lapsed, witnesses have died, and evidence has possibly been destroyed with the passage of time. Under the statute of limitations, Piercy should have brought his claim no later than December 10, 1986. Based on the above, Piercy's claim to set aside the ordinance based upon irregularities in its creation is barred by the application of Idaho Code § 5-224.

2. In the alternative, Piercy's claim is barred by Idaho Code § 5-221.

Idaho Code § 5-221 sets forth the limitation of actions against counties:

> Actions on claims against a county which have been rejected by the board of commissioners must be commenced within six (6) months after the first rejection thereof by such board.

IDAHO CODE § 5-221 (2008).

Sutton respectfully refers the Court to the arguments made above regarding whether a declaratory judgment action is an "action" subject to the aforementioned statutes of limitations.

There is no case law on point that construes Idaho Code § 5-221. The Supreme Court of Idaho briefly addressed the application of Idaho Code § 5-221 in determining whether the two-year statute of limitations under the Idaho Tort Claims Act, or the six-month limitation of actions on claims against a county under Idaho Code § 5-221, applied to a wrongful death action arising from an inmate's suicide. *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987). In the Court's review of Idaho Code § 5-221, it stated that the statute "has been on the books since 1881 and has no counterpart with respect to suits brought against the state, cities or municipalities. This statute has never been discussed in any prior decision in Idaho, and therefore, the issue presented today is a question of first impression." *Id.* at 993.

As discussed above, the Order Establishing Herd District was enacted December 10, 1982. The time to bring an action seeking to void the herd district ordinance against the County would have been on or about June 10, 1983. Piercy failed to object until nearly 26 years after the ordinance was enacted. Therefore, the claim is barred by the application of Idaho Code § 5-221.

Sutton respectfully refers the Court to the public policy arguments made above.

B. PIERCY HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO REBUT THE PRESUMPTION OF THE HERD DISTRICT ORDINANCE'S VALIDITY. THEREFORE, THE PRESUMPTION STANDS AS A MATTER OF LAW.

The Court's power to declare an ordinance invalid should be exercised cautiously. 6 McQuillin Mun. Corp. § 20:4 (3rd ed.). A Court should not invalidate an ordinance that can be reasonably upheld. *Id.*

> [A]n ordinance will be upheld if the validity of the ordinance is fairly debatable; an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves constitutional validity.

Id.

1. Presumption of Validity of Herd District Ordinance.

Idaho Code § 31-857 provides a rebuttable presumption as to the validity of a herd district after a lapse of two years:

> 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 (2008) (emphasis added).

The herd district was established December 10, 1982. Approximately twenty-six (26) years have passed since the ordinance was enacted. Therefore, Piercy has the burden of proving that any of the "preceding proceedings or jurisdictional steps" in creating the herd district "were not properly or regularly taken." (*Id.*)

Rule 301(a) of the Idaho Rules of Evidence generally sets forth the effect of presumptions in civil actions and proceedings as follows:

> In all civil actions and proceedings, unless otherwise provided by statute, by Idaho appellate decisions or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence 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. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption.

I.R.E. 301(a)(emphasis added).

There is Idaho authority standing for the proposition that a party seeking to invalidate an ordinance must overcome the presumption of validity by something more than preponderance of the evidence. The Supreme Court of Idaho has stated that "clear, convincing and uncontradicted evidence in opposition to the presumption will prevail as a matter of law over the presumption..." *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 563, 468 P.2d 290, 295 (1970)(additional citations omitted). Additionally, the Supreme Court of Idaho stated that the presumption of validity may be overcome by "clear proof of great force." *Simmons v. City of Moscow*, 111 Idaho 14, 19, 720 P.2d 197, 202 (1986) *citing* 14 McQuillin, *supra* at § 38.186. There is additional authority that suggests that the presumption can only be overcome by an affirmative showing of invalidity:

> The burden of proving facts to establish invalidity of an ordinance is sustained and the presumption of validity of the ordinance is overcome only by an affirmative showing of invalidity. To sustain the burden, one must overcome the presumption of the validity of the ordinance. One must prove the facts that make the ordinance invalid and do more than establish a mere suggestion of discrimination, not proved. One must make it clearly appear that an ordinance is invalid before a court will strike it down. If one asserts that the council has exceeded its powers or has acted in bad faith or has abused its discretion, the facts must be clearly established to sustain the assertion.

6 McQuillin Mun. Corp. § 20:8 (3rd ed.).

The evidentiary presumption of the herd district ordinance's validity has the effect of

placing the burden of going forward on Piercy. Piercy's facts must be supported by evidence. Under the facts of this case, the absence of evidence to prove that certain procedural requirements under the Idaho Herd District Law did not occur, when such documents were not required by statute or policy to be kept, is not sufficient to overcome the presumption and shift the burden of going forward to Sutton. *See Garrett Transfer & Storage Co. v. Pfost*, 54 Idaho 576, 33 P.2d 743, 746 (1933).

In general there is a presumption that the County substantially complied with the statutory requirements set forth in the Herd District Law. *See* I.C. § 31-857. Based on the aforementioned authority, in order to overcome the presumption, Piercy must make an affirmative showing of the County's failure to comply with the Herd District Law. Piercy has failed to make an affirmative showing sufficient to overcome the presumption of the ordinance's validity that the County did not substantially comply with the Herd District Law.

2. Idaho Code provisions in effect on December 10, 1982.

When the December 10, 1982, Order Establishing Herd District was passed, the 1963 version of Idaho Code § 25-2402 setting forth the requirements for establishing a herd district was in effect, as follows:

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

> or stray from open range into the district unless the district shall be enclosed by lawful fences and cattle guards in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Provided, any herd district heretofore established shall retain its identity, geographic definition and remain in full force and effect, until vacated or modified hereafter as provided by Section 25-2404, Idaho Code as amended. Open range means all unenclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam.

1963 Idaho Sess. Laws ch. 264, § 1, pg. 674.

Idaho Code § 25-2403 sets forth the herd district publication requirements, which statute has not been amended since 1907:

> § 25-2403. Notice of hearing petition. --It shall be the duty of the board of county commissioners, after such petition has been filed, to set a date for hearing said petition, notice of which hearing shall be given by posting notices thereof in three (3) conspicuous places in the proposed herd district, and by publication for two (2) weeks previous to said hearing in a newspaper published in the county nearest the proposed herd district.

IDAHO CODE § 25-2403 (2008).

Finally, Idaho Code § 25-2404, sets forth the requirements for the Order creating the herd district. This statute has not been amended since 1953 and reads as follows:

> § 25-2404. Order creating district.--At such hearing, if satisfied that a majority of the landowners owning more than fifty percent (50%) of the land in said proposed herd district who are resident in, and qualified electors of, the state of Idaho are in favor of the enforcement of the herd law therein, and that it would be beneficial to such district, the board of commissioners shall make an order creating such herd district, in accordance with the prayer of the petition, or with such modifications as it may choose to make. Such order shall specify a certain time at which it shall take effect, which time shall be at least

> thirty (30) days after the making of said order; and said order shall continue in force, accordifng to the terms thereof, until the same shall be vacated or modified by the board of commissioners, upon the petition of a majority of the landowners owning more than fifty percent (50%) of the land in said district who are resident in, and qualified electors of, the state of Idaho.

IDAHO CODE § 25-2404 (2008).

Piercy has argued that the 1982 herd district ordinance is invalid because the Canyon County Commissioners improperly included "open range" land (§25-2402); did not act pursuant to a petition from a majority of land owners in the district or area (§25-2402); failed to include an effective date in the Order (§25-2404); failed to publish notice of a public hearing (§25-2403); failed to adequately describe the metes and bounds of the proposed herd district (§25-2402); and failed to designate the animals to be controlled by the herd district (§ 25-2402).

3. Piercy has failed to set forth any evidence indicating that the land subject to the 1982 herd district ordinance included "open range" land.

Piercy has argued that the December 10, 1982, Order Establishing Herd District is invalid because it improperly incorporated "open range" land in violation of Idaho Code §25-2402. Idaho Code § 25-2402 provides: "[a] majority of the land owners in any area or district described by metes and bounds *not including open range* and who are also resident in, and qualified electors of, the state of Idaho may petition the board of county commissioners in writing to create such area a herd district." Open range is defined therein to mean "all unenclosed lands outside cities and villages upon which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam." (Emphasis added).

Prior to 1963 herd districts were allowed to be created in any part of Idaho. *Maguire v. Yanke*, 99 Idaho 829, 836, 590 P.2d 85, 92 (1978). Idaho Code § 25-2402 was amended in 1963

to add a definition of "open range" and provided that herd districts could not be created in such area. *Id.* In *Yanke*, the Supreme Court of Idaho interpreted the 1963 amendment to Idaho Code § 25-2402 as follows:

> It is clear the amendment of I.C. s 25-2402 by the inserting of a definition of "open range" was designed to protect the rights of livestock owners by prohibiting herd districts in areas where they historically grazed stock, rather than limiting the area where livestock owners were free to let their stock roam at large. Under our decision, herd districts may still be created in any area not within "open range" as defined in I.C. s 25-2402. The passage of I.C. ss 25-2402 and 25-2118, with their accompanying definition of "open range" in terms of historical use, was not intended to and does not change the law of this state that with the exception of cities, villages, and herd districts, livestock may run at large and graze upon unenclosed lands in this state.

Id.

The Court interpreted the amendment to mean that herd districts could not be created in open range areas. Open range was a defined term. Therefore, herd districts could be created in areas where livestock were not grazed or permitted to roam by custom, license or otherwise, or in other words, areas that did not fall within the definition of open range. There is no evidence that the Legislature in 1963 intended to prevent the further elimination of open range, since open range was not defined until 1963.

The December 10, 1982 Order evidenced an intent to establish a herd district in the three remaining *open range* areas in Canyon County as shown on an attached survey map. The County may have incorrectly used the term *open range* to mean land that was not in a herd district. Piercy has failed to put forth any evidence that the County commissioners used the term open range in the Order as defined in Idaho Code § 25-2402. Furthermore, there is simply no evidence

that the area in question constitutes open range by definition. There is no evidence, proving that the pastures in the area in question were used by custom, license or otherwise for roaming livestock. In sum, there is no evidence in the record that the 1982 herd district ordinance included "open range" land as defined and prohibited by the statute. Piercy has failed to present evidence to rebut the presumption of the ordinance's validity on this ground.

4. Piercy has failed to present evidence that the Board of County Commissioners did not comply with the Idaho Code provisions governing the establishment of a herd district. Therefore, the ordinance is valid.

Piercy argues that the 1982 herd district ordinance is invalid because the Order failed to contain specific information in contravention of the Idaho Code. First, Piercy asserts that the 1982 herd district ordinance is invalid because the Canyon County Commissioners did not act pursuant to a petition from a majority of land owners in the district or area. Second, Piercy argues that the herd district ordinance is invalid because it failed to include an effective date in the Order. Third, Piercy argues that the herd district ordinance is invalid because it failed to adequately describe the metes and bounds of the proposed herd district. Finally, Piercy asserts that the herd district ordinance is invalid because it failed to designate the animals to be controlled by the herd district.

At the time the December 10, 1982 Order Establishing Herd District was enacted, the 1963 version of the Idaho Code required a written petition to be filed by a majority of land owners to create a herd district. I.C. § 25-2402. Such petition required a metes and bounds description of the proposed herd district area, the boundaries of the herd district and a designation of what animals were to be prohibited from running at large. *Id.*

On the other hand, the Order creating the herd district does not require the same information as the petition. In fact, "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.*" I.C. § 25-2404 (emphasis added). In addition, the 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." *Id.* There is no requirement that the Order specifically reference the petition, contain a metes and bounds description of the proposed herd district, or designate what animals the petitioners desired to prohibit.

Idaho Code § 31-709 sets forth, with specificity, which records must be kept by the Board of County Commissioners:

> The board must cause to be kept permanently and indefinitely, in accordance with the provisions of sections 9-331 and 9-332, Idaho Code:
>
> 1. Minute records, in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special meetings.
>
> 2. Allowance records, in which must be recorded all orders for the allowance of money from the county treasury, to whom made, and on what account, dating, numbering and indexing the same through each year.
>
> 3. Road records, containing all proceedings and adjudications relating to the establishment, maintenance, change and discontinuance of roads, road districts, and overseers thereof, their reports and accounts.
>
> 4. Franchise records, containing all franchises granted by them, for what purpose, the length of time and to whom granted, the amount of bond and license tax required.
>
> 5. Warrant records, to be kept by the county auditor, in which

must be entered, in the order of drawing, all warrants drawn on the treasury, with their number and reference to the order on the minute book, with the date, amount, on what account, and name of payee.

6. Ordinance records, containing all ordinances, stating the date enacted.

7. Resolutions records, containing all resolutions, stating the date adopted.

IDAHO CODE § 31-709 (2008).

A. Absence of a petition, or a reference to a petition in the Order, is insufficient to overcome the presumption of the herd district ordinance's validity.

Based on Idaho Code § 31-709, the Board of County Commissioners was not required to keep petitions for the formation of herd districts. Because the Commissioners were not required to keep herd district petitions, absence of such evidence offered as proof that the document did not exist is insufficient to overcome the presumption of the ordinance's validity.

Additionally, there was no requirement that a reference to a petition be contained in the Order. None of the parties know whether the Canyon County Commissioners acted pursuant to a petition in creating the 1982 herd district. The meaning of the lack of a reference to the petition in the Order is purely speculative. Parsing the language of Joint Exhibits #4 and #5 without considering outside factors does not create evidence sufficient to rebut the presumption. The notes taken by the clerk are gone. There is no evidence that the clerk who took the minutes was experienced or knowledgeable about the creation of herd districts. It is further possible that the clerk failed to mention the petition because she was not familiar with the Commissioners acting pursuant to a petition. The mere fact that the Commissioners signed a statement indicating that

the minutes were "read and approved and found to be a proper record of the proceedings of the Board of County Commissioners of Canyon County" does not prove the absence of a petition. (Joint Exhibit No. 6).

The burden of going forward is on Piercy. Sutton is not required to present evidence supporting the validity of the herd district ordinance until Piercy overcomes the presumption. A determination of whether or not a petition existed is pure speculation. Speculation cannot be the basis for overcoming the presumption.

Piercy misconstrues the value of the testimony of Glenn O. Koch and Bill A. Staker. Neither Mr. Koch nor Mr. Staker have any recollection, one way or the other, whether a petition was filed. Mr. Koch is the sole living commissioner from 1982 and is now 80 years old. He has been asked to recall specific events that occurred almost 26 years ago. Mr. Koch became a Canyon County Commissioner in March of 1982. (Koch Depo.,10:7). Mr. Koch expressly stated in his deposition that he did not recall one way or the other the passage of the 1982 herd district ordinance, the Idaho Code herd district provisions, whether a petition was filed, the meeting on December 2, 1982, whether a notice was published, whether it was the Commissioner's typical practice to include a reference in the minutes about a public notice, signing the December 10, 1982 Order, the herd district map, the effective date of the ordinance, and the designation of animals. (*Id.* at 19:23-20:10; 20:11-17; 21:18-22:1; 23:6-10; 25:12-20; 26:2-25; 27:14-22; 28:10-22; 33:5-14; 33:15-34:4. *See also*, 36:5-16.)

The fact that Mr. Koch vaguely remembers a conversation about herd districts with Commissioners Hozba and Bledsoe, but does not remember whether a petition was filed does not prove anything. As noted above, Mr. Koch did not remember anything about the passage of the

herd district ordinance. Furthermore, there is no way of knowing when this conversation occurred. Simply because Commissioners Bledsoe and Hozba explained what a herd district was to Mr. Koch, that does not lead to the conclusion that the herd district was an idea formed and carried out by those Commissioners.

Similarly, the testimony of Bill A. Staker, the clerk of the commissioner's office at the time the 1982 herd district was created, does not lead to the conclusion that the Commissioners failed to act pursuant to a petition. Mr. Staker is 73 years old and was asked to recall specific events that occurred almost 26 years ago. In his deposition, Mr. Staker was asked if he recalled "back in the late '70s and early '80s discussions amongst the Commissioners about the herd districts in Canyon County." (Staker Depo., 13:17-20.) In his response, Mr. Staker did not indicate with whom he discussed the issue, nor did he narrow down a time-frame in which the conversation occurred. (Staker Depo., 13:17-14:25.) Furthermore, Mr. Staker testified that he did not have any personal knowledge as to whether a petition had been filed, whether a notice of hearing was published, the creation of the December 10, 1982 Order, and whether he had seen the herd district map. (Staker Depo., 14:22-15:6; 15:12-16; 17:11-16; 18:6-19:17; 20:6-21:8; 23:11-23.) In fact, Mr. Staker testified that it was not his signature, or his stamp on the December 10, 1982 Order Establishing Herd District and that he had never seen the Order before. (Staker Depo., 18:6-19:4.)

The testimony of Mr. Staker and Mr. Koch should be given little weight in determining whether the Commissioners acted pursuant to a petition.

Mr. Johnson's testimony does not prove whether a petition existed. While Mr. Johnson does not recall seeing a petition, he does not have any proof that a notice of hearing was not

published, or that a petition was not circulated. (Johnson Depo., 30:5-15.) Mr. Johnson could not recall whether the Cattlemen's Association or the Cattle Feeders Association had ever notified its members of the creation of a herd district, or the proposed creation of a herd district. (Johnson Depo. 31:11-19.) There is no evidence that Mr. Johnson's signature as a landowner was required in order to present the petition to the Commissioners. Again, the fact that Mr. Johnson did not see or hear about the petition is insufficient evidence to overcome the presumption. Assuming that the reason that Mr. Johnson did not see the petition was that one did not exist is pure speculation. Speculation is insufficient evidence to overcome the presumption.

The burden of going forward is not on the County to provide evidence that a petition existed. The only evidence Piercy has presented to show that the Commissers failed to act pursuant to a petition is the absence of the petition, and lack of reference to a petition in the minutes. Such evidence is insufficient to show by 51% that the petition did not exist. The fact of the matter is that the absence of a petition nearly 26 years after the fact to support a claim of technical irregularities in an ordinance's passage is unreliable evidence.

B. The Idaho Code does not require the Order Establishing Herd District to contain a metes and bounds description.

While the petition must contain a metes and bounds description, there is no requirement in the Idaho Code that the Order must contain such description. Nonetheless, the Commissioners made it clear in the Order which land it intended to be part of the herd district. The Order provides that "[a] survey map attached [to the Order], prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range." The Order then provides that a "Herd District be established in the three remaining open range areas

in Canyon County as shown on the attached survey map (marked in black), to the end that the entire land area of Canyon County be placed in Herd District status." To everyone's knowledge there is only one herd district map. That being said, the Order references an attached survey map; however, that map has disappeared in the last 26 years. It is difficult to go back in time and to try and figure out what was done in 1982, when the supporting documents have since disappeared.

Furthermore, the Idaho Code requires a metes and bounds description to be in the petition, however, the Idaho Code does not require the Board to maintain a copy of the petition. Furthermore, there is no requirement that a metes and bounds description appear in the Order. In sum, the absence of a metes and bounds description in the Order is insufficient to overcome the presumption of the herd district ordinance's validity. Too much time has passed and memories have faded. There is no evidence either way that a metes and bounds description was not included in the petition. Since there is no evidence to make the determination of whether a petition was filed or not, the mere assertion that such evidence is absent is simply insufficient to overcome the presumption.

C. Lack of a date stating when the Order Establishing Herd District should have become effective is insufficient to render the Order invalid.

Piercy argues that the Order Establishing Herd District never became effective because the Order lacked a date at which it became effective, rendering the herd district ordinance invalid.

Generally, invalidity as to the effective date of an ordinance does not render the ordinance void. 5 McQuillin Mun. Corp. § 15.36 (3rd ed.). "Where a definite time is prescribed before an

ordinance shall take effect or go into force, the ordinance is effective from the expiration of the time prescribed..." *Id.* Idaho Code § 25-2404 provides that the "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..." The plain reading of the statute indicates that if a time certain is not specified in the order, the effective date of the ordinance is 30 days after its passage.

This issue is moot, since no one attempted to attack the validity of the ordinance after its passage, or within 30 days of its passage.

Furthermore, the citizens of Canyon County were provided notice regarding the passage of a resolution relating to herd districts on December 20, 1982, when the notice was published in the Idaho Press Tribune. Additionally, the clerks of the court and local government have operated under the belief that the ordinance was enacted. As noted above, the failure to provide an effective date is not sufficient to void the ordinance. It can be assumed that the statute would have taken effect after the passage of thirty days.

5. Piercy has failed to present any admissible evidence that the Board of Commissioners failed to comply with the notice of hearing requirements set forth in Idaho Code § 25-2403.

Piercy has failed to present any evidence showing that the notice requirements set forth in Idaho Code § 25-2403 were not complied with by the Board of Commissioners. As noted above, Idaho Code § 31-709 does not require the Board to maintain copies of the herd district hearing notices.

Alternatively, after nearly 26 years, no one can recall, either way, whether hearing notices were published as required by the Idaho Code. Many of the people that were around in 1982

have since passed away, and memories of that particular ordinance have faded. Mr. Koch, the sole surviving commissioner from 1982 does not recall whether a notice was published or not.

Furthermore, it appears that the Commissioners may have addressed the issue of the herd district prior to December 1982. The Order Establishing Herd District specifically states that "[t]he Board has again reviewed the complexity of the Herd District Boundaries throughout the County . . . ." (Emphasis added). The minutes from Book 22, dated on or about January 7, 1976, contain public hearing minutes related to the herd district:

> Chairman Craven called to order the Public Hearing at 9:00 a.m. He read aloud, the Notice of Public Hearing, which was advertised in the newspaper December 24, 1976 and January 1, 1977; stating that the purpose of this hearing was to determine whether or not all of the unincorporated area of Canyon County should be declared a Herd District.
>
> He further stated that it was the feeling of the Board of County Commissioners that in view of the fact, that approximately 94% of Canyon County was presently within a Herd District. That it would be a benefit to the general public to declare all of the unincorporated area of Canyon County to be within a Herd District.
>
> There being no one present to protect or no written testimony; Commissioner Pilcher made a motion that: All of the unincorporated area of Canyon County be declared as a Herd District, to prohibit animals from running at large in the unincorporated area of Canyon County, and that the animals referred to are as follows: Horses, Mules, Asses, Cattle, Swine, Sheep, and Goats; That said animals shall be prohibited from running at large at all times.
>
> The motion was seconded by Commissioner Craven, and passed. Commissioner Craven declared the Public Hearing adjourned at 9:30a.m.

(Emphasis added).

Even though the resolution indicates that the hearing notices published on December 24, 1976, and January 1, 1977, were read aloud, only the December 24, 1976, notice was found. Therefore, the fact that hearing notices for the December 10, 1982, hearing on the herd district cannot be found is not dispositive of the fact that the notices did not get published.

Ms. Whychell testified at the Bench Trial that she reviewed The Parma Review, The Idaho Press-Tribune, and the Idaho Statesman. (Trial Transcript, 68: 24-25). Ms. Whychell further testified that she did not print out the legal notices in the Idaho Statesman (Trial Transcript, 83:15-21). She further testified that she did not personally verify whether the Historical Society had all of the issues of the Idaho Statesman. *Id.* Ms. Whychell also testified that it was possible that she could have failed to observe legal notices simply because of the sheer volume of documents reviewed and conditions under which she was researched. (Trial Transcript, 85:3-8).

Lack of reference to the notices in the minutes is not dispositive. Minutes are an abbreviated summary, not a verbatim transcript. Because the minutes are not verbatim, relying on them for accuracy as to what occurred at the meeting is flawed. No one knows exactly what was said on the record. The Commissioners may have discussed everything that Piercy claims to have not occurred. In sum, the minutes do not inform us of everything that transpired during the meeting.

Based on the above, Piercy has not met the burden of going forward and is not able to overcome the presumption of the validity of the herd district statute.

VI. CONCLUSION

Sutton respectfully requests that the Court uphold the validity of the 1982 herd district ordinance.

DATED this 1st day of December, 2008.

ELAM & BURKE, P.A.

By: _____
Joshua S. Evett, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 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
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

J. S. Evett

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

LUIS J. GUZMAN, individually, Plaintiff, v. DALE PIERCY, individually, and JENNIFER SUTTON, individually, Defendants.	Case No. CV05-4848 **DEFENDANT PIERCY'S REPLY BRIEF**
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

The Court received approximately 89 pages of briefing from the other parties in this matter along with some last minute attachments. Amazingly, in those 89 pages of text there is not one paragraph, passage or period devoted to pointing to any evidence which would even infer that the

Canyon County Commissioners in 1982 properly followed mandatory statutory procedures for the creation of a herd district. All the actual evidence presented to the Court proves that the Canyon County Commissioners in 1982 failed to properly follow mandatory statutory procedures in attempting to create a herd district.

Thus, the veritable well of ink splashed across those pages is a desperate attempt by the other parties to convince the Court that they do not need to provide any evidence. The other parties take an untenable legal stance by pinning all their hopes on a bare legal presumption of validity. It is not surprising therefore, that all their arguments amount to attempts to characterize a simple presumption as an unassailable legal truth and to take each piece of evidence in isolation and say it is not enough to overcome the presumption.

The other parties' arguments are similar to a defending wartime general stating that if any one of an opposing forces navy, air force and ground troops attacked his position alone it would not be adequate enough to overrun his defenses; and then claiming that alone proves that a coordinated attack of all three forces would not be adequate to overrun those same defenses.

When the Court takes into account all the evidence showing that the Canyon County Commissioners in 1982 failed to follow proper statutory procedures, there can be little doubt that this 1982 herd district was and always has been invalid.

I. THE TRIAL EVIDENCE PROVES THAT THE CANYON COUNTY COMMISSIONERS DID NOT ESTABLISH A VALID HERD DISTRICT

A. The Presumption of Validity is Overcome by a Preponderance of the Evidence

The law regarding the presumption of validity in this case is clear. The Idaho Legislature provided us with the presumption in I.C. § 31-857. The law regarding legal presumptions is similarly set forth in I.R.E. 301(a), which states: "a presumption imposes on the party against whom it

is directed the burden of going forward with evidence to rebut or meet the presumption ..." I.R.E. 301(a). The Rule also states that, "If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption." I.R.E. 301(a). This Rule governs presumptions unless otherwise provided by statute, Idaho appellate decisions and other rules. Nothing in the language of I.C. § 31-857 suggests that the presumption of validity is any stronger than a general presumption interpreted under I.R.E. 301(a).

This is supported by the Idaho Appellate decisions on point regarding general municipal ordinances. The Idaho Supreme Court in *Hendricks v. City of Nampa* dealing with an annexation order describes the bounds of these types of presumptions stating:

> [I]f the complaining party comes forward with satisfactory, substantial competent evidence to show that the particular tract of land is greater in extent than five acres, and that the present owner, proprietor or person action with his authority or acquiescence has not laid off, subdivided or platted the land into lots or blocks of more than five acres each, and that the present owner, proprietor or person acting with his authority or acquiescence has not sold or begun to sell the land by metes and bounds in tracts not exceeding five acres, then such party will have satisfied the burden of coming forward with sufficient evidence to rebut the presumption of validity. Thereafter the burden of coming forward with other evidence to show that the ordinance in fact is valid will devolve upon the municipality.

Hendricks v. City of Nampa, 93 Idaho 95, 99, 456 P.2d 262, 266 (1969).

The Idaho Supreme Court confirmed its position one year later by stating, "Once the respondent overcame the presumption of validity of introducing evidence tending to show that the ordinance in question had been unreasonably applied to his property, the burden was then shifted to Boise City to come forward with evidence to rebut the respondent's evidence and to show that the ordinance was valid." *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 563, 468 P.2d 290, 296 (1970).

It is true that in this action Mr. Piercy would maintain the ultimate burden of persuasion. *Id.* However, that ultimate burden of persuasion is also defined by the Idaho Supreme Court which held, "If the evidence were in a state of equilibrium, then under the presumption of validity attached to the ordinance, the party attacking its validity would lose." *Id.* If the person attacking the ordinance establishes that the evidence tips the scales in their favor beyond mere equilibrium, then the presumption of validity is overcome and the burden of persuasion is met. The party defending the ordinance at that point cannot just sit back and do nothing, but must come forward with evidence to restore the equilibrium of the evidence or the ordinance will be held to be invalid. As the Court stated, the burden is upon Mr. Piercy to establish by a preponderance of the evidence that the ordinance is invalid.

The other parties have not cited to any authority suggesting that the presumption of validity in I.C. § 31-857 places a greater burden upon Mr. Piercy than a preponderance of the evidence. Mr. Guzman inappropriately contends that *City of Lewis v. Knieriem*, 107 Idaho 80 (1984) stands for the proposition that a city ordinance must be overcome only by clear and convincing evidence. No where in *Knieriem* can that holding be found. The holding actually states, "the presumption in favor of validity can be overcome only by a clear showing that the ordinance applied is confiscatory, arbitrary, unreasonable and capricious." *City of Lewis v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984). A "clear showing" is not equivalent to "clear and convincing." The former is synonymous with the preponderance of the evidence standard and the latter is a completely different standard of proof.

Further, *Knieriem* is fundamentally different from the present case as it involved zoning ordinances which are not included in the statutory presumption found in I.C. § 31-857. The cases

involving zoning ordinances involve different standards and facts than the present case and their case holdings are not applicable in this matter.

Mr. Guzman also cites to *Simmons v. City of Moscow*, 111 Idaho 14 (1986), which holding is similarly confusing and inapplicable in this matter. The Supreme Court in *Simmons* states, "Only "clear proof" of great force will warrant a conclusion that an assessment is erroneous so as to overcome the presumption of validity." *Simmons v. City of Moscow*, 111 Idaho 14, 19, 720 P.2d 197, 202 (1986). Citing *McQuillin,* the Court seems to state a standard that is not apparently equivalent to either the preponderance of the evidence standard or a clear and convincing standard. The Supreme Court, however, was dealing with an assessment of a public improvement's benefits. This case is not analogous to the present case and is of no benefit in determining the proper standard of care when challenging a herd district ordinance.

B. The Evidence Establishes That Canyon County Failed to Take Proper Jurisdictional Steps in Attempting to Enact the 1982 Herd District

Mr. Piercy has provided conclusive and persuasive evidence that several of the procedures and steps set forth in I.C. §§ 25-2402-2404 were not followed by the Canyon County Commissioners in 1982 when attempting to form the subject herd district. The Canyon County Commissioners: (1) did not act pursuant to a petition; (2) failed to publish notice of a public hearing regarding the formation of the 1982 herd district for two weeks prior to the hearing; (3) failed to designate the animals to be controlled by the herd district; (4) failed to adequately describe the metes and bounds of the proposed herd district; (5) failed to include in the order an effective date and (6) impermissibly included open range in the proposed herd district.

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

In Mr. Piercy's initial closing brief the evidence is set forth establishing that there was no landowner petition. Mr. Piercy provided documents and witness testimony showing that the Canyon County Commissioner's were acting on their own in attempting to create the 1982 herd district. Not only do the minutes of the meetings of December 2 and December 10, 1982, state that the Commissioners were acting pursuant to a motion and not a petition, but Mr. Johnson, who was a landowner in the effected area at the time, has testified that he never received a petition and he would have known about it if one had been going around.

In the face of all the evidence, the other parties have one unified response. They state that they do not have any evidence of a petition and do not need to supply any evidence of a petition. Strangely, the other parties want to use the complete lack of evidence of a petition to claim that Mr. Piercy cannot prove there was not a petition. The main argument stated by the other parties is that because Canyon County was not statutorily required to keep a copy of the petition Mr. Piercy cannot prove a petition did not exist. This argument simply attempts to avoid the ample evidence that there was no petition.

Under I.C. § 31-709(1), the Board of County Commissioners is required to keep minute records which are to include, "the daily proceedings had at all regular and special meetings." It is these required minutes that give strong evidence that there was no landowner petition. Mr. Piercy is not relying solely on the lack of mention of a petition, but on the affirmative statements in the minutes to show the lack of a petition.

Joint Exhibit #3 contains several copies of the official Canyon County Commissioner's meeting minutes regarding the formation of herd districts throughout Canyon County's history. These minutes uniformly identify in the first line of the minutes that the proposed herd district was

being proposed pursuant to a petition of a landowner. These minutes also use the language that they are granting a petition.

The language of the minutes in regard to the passage of the 1982 herd district affirmatively state that the commissioners were passing a resolution that came from a motion of Commissioner Hobza.

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

(Joint Exhibit #5 at 1.)(Emphasis added) These minutes do not mention a landowner petition, but instead indicate that this action was pursuant to a motion by Commissioner Hobza. It would not be necessary for a commissioner to make a motion when acting pursuant to a petition. The commissioners would simply grant or allow the petition. This shows that the commissioners were not acting pursuant to a petition, but rather had come up with this course of action on their own.

The other parties try to confuse the issue by claiming that perhaps there were prior minutes that discussed the petition. This argument should be completely disregarded. As stated above, Commissioners are required to keep records of their minutes. Mr. Piercy requested in discovery and pursuant to depositions *duces tecum* any minutes relating to this county-wide herd district in Canyon County. The minutes the Court has were all that were provided or found. The idea that there are other minutes out there regarding the 1982 herd district is pure speculation.

The testimony of certain witnesses further shows that the commissioners were not acting pursuant to a petition. It is true that it is more difficult for a person to remember that something did

not exist versus something that did. Therefore, Mr. Koch and Mr. Staker cannot say for sure that a petition did not exist, but that is to be expected from someone trying to remember the non-existence of a document. The testimony of these two would likely not be enough to establish the non-existence of a petition, but this testimony is supported by the testimony of Mr. Johnson.

Mr. Johnson was an interested person who owned a large amount of land in the effected area of the 1982 herd district. Mr. Johnson states that he did not see or even hear of a petition regarding establishing a herd district in his area and that he would have remembered it had he seen or heard of it. This testimony is compelling considering that it would have been a significant and memorable event if certain people had been attempting to obtain enough landowner signatures to reach the over 50% mark required by the statute to create a herd district. This would especially be true if the effort was to secure enough signatures to place all of Canyon County into one herd district. It defies reason to suggest that a petition was being circulated without Mr. Johnson being made aware personally, by a neighbor or through his connections at the cattle associations.

The absence of any statement of a petition in the record is evidence that no petition existed. Canyon County and Mr. Guzman rely on two cases to convince the Court it should ignore the lack of mention of a petition in the record. These cases are *In re Drainage District No. 1*, 26 Idaho 311, 143 P. 299 (1914), which was then cited for the relevant holding in *Garrett Transfer & Storage Co. v. Pfost*, 54 Idaho 576, 33 P.2d 743 (1933). These cases are simply not applicable to the present case. Both cases dealt with the identical issue of a whether the silence of legislative journals was sufficient evidence by itself to prove that a legislative action was not taken. The relevant holding is that, "it will not be presumed in any case from the mere silence of the journals that either house has exceeded its authority or disregarded a constitutional requirement in the passage of a legislative act, unless the Constitution has expressly required the journal to show the actions taken, as, for instance, where it

requires the yeas and nays to be entered." *Garrett Transfer & Storage Co. v. Pfost*, 54 Idaho 576, 579, 33 P.2d 743, 746 (1933); quoting: *In re Drainage District No. 1*, 26 Idaho 311, 143 P. 299 (1914). These two cases are dealing with the Idaho Legislative body and not a County Board of Commissioners enacting herd districts. Mr. Piercy has found no case law suggesting that these holdings go beyond there specific application. In fact, following the original statement of this rule in 1914, the Idaho Supreme Court in *State v. Catlin*, 33 Idaho 437, 195 P. 628 (1921) and *Smith v. Canyon County*, 39 Idaho 222, 224, 226 P. 1070, 1072 (1924), provide the opposite requirement. These cases provide that in regards to county commissioners enacting herd districts the requirements must be set forth in the record. *Id.* This standard has not been overruled. Where the Idaho Supreme Court did not specifically overrule either case in the later *Garrett Transfer* case, it is certain that the holding does not apply to the record of the county commissioners when enacting herd districts. The more specific holdings in *Smith* and *Catlin* should apply to the present case.

Finally, if there had been a petition it would have been evident in some County record or someone's recollection. We have the minutes of the meetings which do not even infer by the style of the minutes that there was a petition let alone mentioning one. All the living witnesses presented recall the event, but do not recall a petition. And a significant landowner in the effected area never saw a petition. All the evidence weighs in favor of the conclusion that there was no petition.

2. The Canyon County Commissioners failed to publish notice of a hearing on the proposed creation of the 1982 herd district.

The Canyon County Commissioner's failure to publish notice of the hearing on the 1982 herd district is evident from the uncontested testimony at the trial along with Exhibits A-2 and A-3. The Idaho Code in 1982 as quoted above requires that the commissioner's notify the public of a hearing on the petition "by publication for two (2) weeks previous to said hearing in a newspaper published in

the county nearest the proposed herd district." I.C. § 25-2403 (1963). The common sense meaning of this requirement is that for the two weeks immediately preceding the hearing on the herd district, the commissioner's should publish notice of the hearing in the newspaper.

The other parties fail to recognize the significance of this requirement. The only relevant time frame for looking for notice of a petition would be the two weeks leading up to the December 2, 1982 meeting and the two weeks leading up to the December 10, 1982, meeting. This time frame would take in most of December and the latter half of November. In providing evidence that no notice was published in Canyon County in 1982 regarding the creation of the herd district, Mr. Piercy went far beyond what was necessary. Mr. Piercy embarked on that research because it was intimated by the other parties during the motion for summary judgment proceedings on this issue that perhaps there were other meetings regarding the formation of this herd district that occurred earlier in 1982. There is absolutely no evidence that there were any other meetings in 1980, 1981 or 1982 by the county commissioners regarding this herd district. Therefore, the only time frame that is currently relevant is December and November of 1982.

The other parties spent much time trying to disregard the uncontroverted evidence submitted by the Ms. Whychell and Mr. Lloyd. The other parties point to their statements that the newspaper print was small or that their eyes would get tired to suggest perhaps they missed a notice. Because the other parties supplied no evidence whatsoever that Ms. Whychell or Mr. Lloyd missed a notice, there discussions are nothing but speculation. The fact that Ms. Whychell and Mr. Lloyd were cognizant that there eyes would get tired and that the print was small supports the veracity of their research. Because of their recognition of the difficulties they could compensate for the difficulties by taking breaks and making sure nothing was missed in the small print.

Ms. Whychell provided copies of all the legal notices posted in the Idaho Press Tribune and the Parma Review for 1982. The other counsel could not even point to one legal notice or newspaper edition that was not contained in the exhibits provided to the Court in order to discredit Ms. Whychell's research. As the record stands, the Court can verify through the exhibits that no notice of the December hearings were published in either of the two papers circulating in Canyon County in December and November of 1982. The other parties have not shown the Court any evidence to doubt the testimony of Ms. Whychell and Mr. Lloyd. Mr. Guzman's own researcher supports the testimony that there was no notice published.

A recent decision by Judge Winmill in the case of *Arguello v. Lee* shows the importance and significance of the testimony provided by Ms. Whychell and Mr. Lloyd in this matter. In *Arguello*, the Defendant on Summary Judgment argued that a herd district ordinance established in 1930 was invalid. Mr. Piercy at one time made this case known to this Court due to the federal land issues being litigated. Since this Court already ruled on the federal land issues in the present case that part of *Arguello* is no longer relevant. The Defendant also argued that the proper procedures were not taken to create the herd district. The Defendant presented evidence that one newspaper, the Rigby Star did not have a published notice. To prove this the Defendant submitted evidence that they had looked at preserved editions of the Rigby Star not unlike the evidence presented before this Court. The Judge did not find fault with the means or methods of the proof, but the Plaintiffs provided evidence to contradict the Defendant's findings.

The Plaintiffs in that case provided the following evidence. A public record showing that the petition for a herd district was presented to the Jefferson County Commissioners on October 14, 1929. The record also showed that the commissioners ordered that notice of hearing be issued in conformity with Idaho law. It was established that another newspaper, the Roberts Sentinel, which

was distributed closer to the effected area, was being published at the time. Receipts were provided showing that the commissioner's office paid for printing in the Roberts Sentinel, including the days leading up to the hearing. The Defendants were unable to provide copies of the Roberts Sentinel as it was not available from any known source. Faced with this convincing evidence, the Judge stated that he found the notice had been published.

In the present case, the other parties have failed to provide any evidence showing that notice of a hearing was published in 1982. Interestingly, the Plaintiffs in *Arguello* were able to find proof in the minute record of both a petition and that notice was published. No such evidence was provided by the other parties in this matter. Mr. Piercy has provided evidence regarding all the newspapers being published in Canyon County during November and December of 1982. Mr. Piercy's researchers have provided unchallenged evidence that no notice was published regarding the hearing for the 1982 herd district.

3. The Canyon County Commissioners did not accomplish obvious requirements to properly form a herd district.

As more fully covered in our initial briefing, the Canyon County Commissioners in 1982 failed to follow the simplest of requirements for the formation of a herd district. They did not properly include a metes and bounds description, they did not include an effective date in the order and they did not include the names of the animals that were going to be restricted. These oversights emphasize and establish that the Canyon County Commissioners were not attempting to follow statutory procedure, in that they failed to accomplish the simplest of requirements.

Admittedly proof of one such error would likely not be sufficient to overturn an ordinance. In *Arguello*, the Court found that a missing effective date alone did not invalidate the ordinance in light of all the evidence the Plaintiff provided that they had followed several of the procedures. In

the present case, unlike *Arguello*, the Canyon County Commissioners not only failed to put an effective date on the ordinance, but failed to give notice, failed to act pursuant to a petition, failed to include the names of animals and failed to include a proper metes and bounds description.

The other parties suggest that the statute does not require the Commissioners to include a metes and bounds description or the designation of animals in the order. This suggestion comes through a strained interpretation of I.C. § 25-2404. This section states: "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." (Emphasis added) I.C. § 25-2404. The other parties ignore the emphasized language. This language mandates that the commissioners include all the elements of a herd district that are required in the petition. The subsequent language, simply gives the commissioners the right to make some modifications, but would not allow them to completely ignore one of the necessary elements, such as designating what animals would be controlled by the herd district.

4. The Canyon County Commissioners improperly attempted to include open range areas in their 1982 ordinance.

In 1963 the italicized language was included to the following portion of I.C. § 25-2402: "A majority of the land owners in any area *or district described by metes and bounds not including open range* and who are also resident in, and qualified electors of, the state of Idaho may petition the board of county commissioners... ." This version of I.C. § 25-2402 was being used in 1982. The language forbids landowners in open range areas from petitioning for a herd district to include open range. The Idaho Legislature in 1963 intended to prevent the further elimination of open range.

The Canyon County Commissioners in their 1982 order specifically say that they are attempting to eliminate all open range areas. The other parties attempt to claim that the

commissioners did not mean what they were saying. They have absolutely no evidence to even suggest that the commissioners meant something other than what they stated in the order. The testimony of Glenn Koch on that issue was clear. The commissioners were attempting to eliminate open range from Canyon County. This was an impermissible action at the time. This fact alone establishes that the commissioners were not properly following the statutory mandates for creating a herd district.

Mr. Piercy has provided undisputed and overwhelming evidence that the Canyon County Commissioners in 1982 did not properly form a herd district. The other parties have failed to provide one piece of evidence that would suggest that the commissioners did anything right in attempting to form the 1982 herd district.

Mr. Guzman and Ms. Sutton spent considerable effort in attempting to raise a statute of limitation defense, which is addressed below.

II. ANALYSIS OF STATUTE OF LIMITATIONS DEFENSE

In order to analyze this defense, we must include a brief procedural history of this matter. This case began as a lawsuit against Mr. Piercy on May 10, 2005. Mr. Piercy raised the issue of the validity of the 1982 herd district as an affirmative defense in his Answer filed on June 20, 2005. Mr. Piercy then pursued the issue of the validity of the 1982 herd district as a motion for summary judgment on May 5, 2007. As part of the Court's ruling on Mr. Piercy's motion for summary judgment issued October 9, 2007, the Court ordered that Ms. Sutton bring in Canyon County as a party in the action. Ms. Sutton complied by filing an Action for Declaratory Relief against Canyon County on October 16, 2007. Canyon County filed its Answer on November 8, 2007, but did not plead a statute of limitations defense. Mr. Guzman did not file any pleading in response to the Action for Declaratory Relief.

In order to simplify the pleadings the parties entered into and filed a Stipulation to Amend Pleadings and Scheduling on September 3, 2008. This stipulation included the following provision: "That Canyon County, Mr. Guzman and Ms. Sutton waive any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief."

The Amended Action for Declaratory Relief was filed by Mr. Piercy on September 10, 2008. Mr. Guzman filed his Answer on September 18, 2008. Mr. Guzman pled a statute of limitations defense as an affirmative defense. Ms. Sutton filed her Answer on September 23, 2008. Ms. Guzman pled a statute of limitations defense as an affirmative defense. Canyon County filed its Answer on September 24, 2008. Canyon County *did not* plead a statute of limitations defense.

A. The Statute of Limitations Arguments are Moot

Both Mr. Guzman and Ms. Sutton spend considerable space in their briefing arguing that Mr. Piercy's declaratory action is barred by a statue of limitations. These arguments are moot because Canyon County did not raise or argue for a statute of limitations defense.

Idaho Rule of Civil Procedure 8(c) states: "In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ...." Idaho Rule of Civil Procedure 9(h) states: "In pleading the statute of limitations it is sufficient to state generally that the action is barred, and allege with particularity the Session Law of the section of the Idaho Code upon which the pleader relies."

The Idaho Court of Appeals has held that, "Under the civil rules, compliance with the governing statute of limitations is not a requirement for subject matter jurisdiction; rather, the time bar of the statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant." *Anderson v. State*, 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct.App. 1999).

Canyon County waived any statute of limitation defense it had by failing to plead the defense in answer to either the Action for Declaratory Relief or the Amended Action for Declaratory Relief.

Therefore, Mr. Guzman's and Ms. Sutton's attempt to raise a last minute statute of limitations defense is moot. Any ruling by the Court will bind Canyon County and a ruling that the 1982 herd district is invalid will be the law in Canyon County. This ruling will, therefore, apply to Mr. Guzman's underlying action against Mr. Piercy.

B. Mr. Guzman and Ms. Sutton Waived any Statute of Limitation Defenses

Mr. Guzman and Ms. Sutton waived any statute of limitation defense both by agreement of the parties and by failing to timely assert the defenses. Neither Mr. Guzman nor Ms. Sutton raised statute of limitations arguments prior to impermissibly including them in their Answers to Mr. Piercy's Amended Action for Declaratory Relief. The Action for Declaratory Relief was filed on October 16, 2007. This action was filed by Ms. Sutton and she did not raise a statute of limitations defense. Similarly, Mr. Guzman did not respond to the Action for Declaratory Relief. This has been an issue in the case for over a year and both Ms. Sutton and Mr. Guzman have failed to raise a statute of limitations defense.

Finally, the parties determined that it made better sense to have Mr. Piercy be the Plaintiff in the declaratory action. After some discussion, Mr. Piercy agreed that Mr. Guzman and Ms. Sutton could be defendants in the action so that they could appropriately appear at the trial of this matter. Partially in exchange for that concession, the attorneys for Ms. Sutton and Mr. Guzman signed the stipulation agreeing to waive any defenses that resulted from the timing of the filing of the Amended Action for Declaratory Relief. This provision of the stipulation includes any statute of limitation defenses.

Mr. Guzman and Ms. Sutton both voluntarily waived any statute of limitations defenses, but also waived them through not raising them timely.

C. The Statute of Limitations Defenses do not Have Merit

Finally, the statute of limitation defenses raised by Mr. Guzman and Ms. Sutton do not have merit in that one is inapplicable and the other is not available in this type of case.

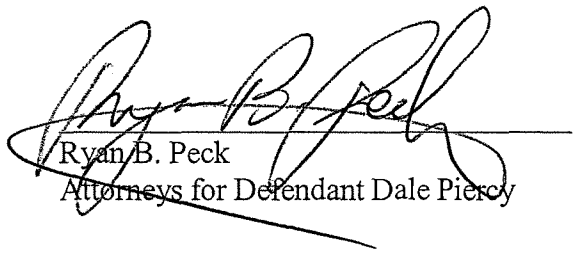
Ms. Sutton raises the defense under I.C. § 5-221. This provision is not applicable as Mr. Piercy is not making a claim against Canyon County. Mr. Piercy is asking the Court to declare that the 1982 herd district ordinance was invalid and void. I.C. § 5-221 is clearly a tort claim limitation. The one case cited by Ms. Sutton even suggests that this is a tort claims provision. Further, Ms. Sutton does not have standing to argue a defense that would only be a defense for Canyon County. Canyon County itself has not raised this defense.

Mr. Guzman and Ms. Sutton also make a claim under I.C. § 5-224. This provision was not designed to bar claims that a ordinance is invalid. If one wishing to contest an ordinance only had four years until being barred, then the case of *Brown v. Board of Education* would never have been litigated. Also unjust voting laws would have been protected under the guise of claims being stale. Further, this is an action that includes proof that the Canyon County Commissioners failed to give proper notice to the citizens of Canyon County. This is unlike the *Canady* case, where the Plaintiff had knowledge of the case and its effect prior to the action taking place. The Plaintiff watched as the lumber company expended a lot of resources in reliance upon the city's actions. This is not so with Mr. Piercy. Canyon County failed to give the required notice and prejudiced Mr. Piercy's ability to respond to the proposed action.

The statute of limitations arguments are moot, waived or not applicable. Mr. Piercy requests that this Court rule that the 1982 herd district is void based upon the evidence presented.

DATED this 15th day of December 2008.

SAETRUM LAW OFFICES



Ryan B. Peck
Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of November 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