11-15-2012

Guzman v. Piercy Clerk's Record v. 8 Dckt. 39708

(VOLUME 8)

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

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SAETRUM LAW OFFICES
Attorneys for Appellant

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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

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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

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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.

DALE PIERCY, individually,

Plaintiff,

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

Defendants.

Case No. CV05-4848

JENNIFER SUTTON'S REPLY TO DALE PIERCY'S RESPONSE TO MOTIONS TO RECONSIDER

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Jennifer Sutton ("Sutton") respectfully refers this Court to the Factual History and Procedural Background section set forth in the Memorandum in Support of Defendant Jennifer Sutton's Motion for Reconsideration filed July 30, 2009. In general, Sutton agrees with the summary factual and procedural background as set forth in Dale Piercy's ("Piercy") Response to Motions to Reconsider except as set forth herein.

On or about October 9, 2007, the District Court entered its Order Denying Defendant Percy's [sic] Motion for Summary Judgment, Joining Canyon County, and Holding all Other Motions in Abeyance Until the Herd District's Validity is Resolved ("Order Denying Defendant Piercy's Motion for Summary Judgment"). Therein, the District Court denied Piercy's motion for summary judgment on the validity of the herd districts on the grounds there existed genuine issues of material fact. (Order Denying Defendant Piercy's Motion for Summary Judgment at 23.) The Court further concluded the validity of the herd districts was a legal issue that required resolution prior to litigating the damages issues. (*Id.* at 22.) To fully resolve the herd district issues, the Court further concluded it was necessary to join Canyon County as a party. (*Id.* at 22-24.) The Court directed Sutton's counsel "to prepare and serve the necessary pleadings to join Canyon County...as a third-party defendant."[1] (*Id.* at 24.) The Order Denying Defendant Piercy's Motion for Summary Judgment did not address Sutton and Plaintiff/Defendant Luis J.

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[1] Procedurally, joining Canyon County as a third-party defendant was not entirely proper. Idaho Rule of Civil Procedure 14(a) provides a defendant may bring in a third-party "who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Canyon County was not, nor could it have been liable to Piercy or Sutton for Guzman's tort claim.

Guzman's ("Guzman") affirmative defenses of equitable estoppel, estoppel by laches or quasi-estoppel.

Guzman, joined by Sutton, moved the Court to reconsider its Order Denying Defendant Piercy's Motion for Summary Judgment on the grounds the Court failed to consider the estoppel arguments. Contrary to statements made in Piercy's Response to Motions to Reconsider, Guzman and Sutton did not move for summary judgment on the estoppel/laches defenses, nor did the Court consider the motion to reconsider as a motion for summary judgment.

On April 30, 2008, the Court entered its Order on Motion to Reconsider, denying "assertion of the doctrine of quasi estoppel and the doctrine of laches against Defendant Piercy's attempt to invalidate Canyon County's Herd District ordinances." (Order on Motion to Reconsider at p. 20)

Pursuant to the Order Denying Defendant Piercy's Motion for Summary Judgment, on October 15, 2007, Sutton's counsel filed the Action for Declaratory Judgment, adding Canyon County as a defendant and requesting the Court determine the validity of the herd districts. On November 8, 2007, Canyon County filed its Answer of Third Party Defendant Canyon County, Idaho. As pleaded, the Action for Declaratory Judgment did not require an Answer from Sutton, Guzman, or Piercy.

On March 27, 2008, the Court entered the Order From Scheduling Conference Setting Bench Trial On Challenge to Canyon County Herd Districts ("Scheduling Order"), setting the trial on the validity of the 1982 herd district ordinance for a two day bench trial commencing October 8, 2008. Therein the Court ordered the parties to submit an amended stipulation

regarding various scheduling dates, including setting the deadlines for the filing of amendments or the joinder of parties.

On April 11, 2008, the parties filed an Amended Stipulation for Scheduling and Planning which included a provision requiring all amendments to pleadings or joinder of parties be filed 120 days before trial.

The parties to the declaratory judgment action were not properly aligned. Although Sutton's counsel filed the original declaratory judgment action by order of the trial court, it was actually Piercy that was seeking a determination from the court regarding the validity of the herd district. Approximately one month before trial, but after the amendment cut-off date, the parties agreed to realign. As a procedural house-keeping measure, on September 3, 2008, the parties entered into a Stipulation to Amend Pleadings and Scheduling ("Stipulation"). Therein, the parties agreed to "waive any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief" with regard to the amendment cut-off date. (Stipulation at pg. 2.) The Stipulation further provided "[i]t is the purpose and intent of this stipulation to simplify the procedural posture of the case and to have the pleadings accurately reflect the positions of the different parties." (*Id.*)

The Amended Action for Declaratory Relief was subsequently filed on or about September 11, 2008. On or about September 23, 2008, Sutton filed her Answer to Amended Action for Declaratory Relief, asserting the affirmative defenses of estoppel by laches, estoppel by waiver, equitable estoppel, and statute of limitations pursuant to Idaho Code § 5-224. This

was Sutton's first opportunity to file a responsive pleading on the issues set forth in the declaratory relief action.

The bench trial on the declaratory judgment action occurred as scheduled on October 8, 2008. Sutton attempted to again raise the equitable defenses of laches and estoppel at trial, and to present evidence on the same. The Court did not allow the defenses, and denied the admission of evidence. Sutton's Post-Trial Memorandum was filed on December 3, 2008. Because of the Court's ruling on the equitable defenses, the equitable issues of estoppel and laches were not briefed in the Post-trial Memorandum. However, Sutton did fully brief the issue of whether Piercy's challenge to the 1982 herd district ordinance was barred by the statute of limitations. (Post-Trial Memorandum at pp. 5-15.)

On January 21, 2009, the Court issued its Findings of Facts, Conclusions of Law and Judgment in Bifurcated Portion of Trial ("Judgment"), holding the 1982 herd district ordinance invalid. The Court's Judgment failed to address the equitable defenses of laches or estoppel, nor did it address the statute of limitations defense.

On July 30, 2009, Sutton filed a Motion for Reconsideration, and was later joined by Guzman. The Court entered its Order on Motion to Reconsider on December 7, 2009. Consistent with the Court's Order on Motion to Reconsider, Guzman and Sutton presented testimony from Paul Axness, the insurance adjuster that investigated a 2001 accident between two vehicles and Piercy's livestock in the same area where this accident occurred.

As further ordered by the Court in its order dated December 7, 2009, a hearing is currently set for June 14, 2010, for purposes of adjudicating the "validity of the 1982 Canyon

County herd district in light of the asserted statute of limitations and estoppel defenses." (Order on Motion to Reconsider, p. 9). In preparation for the hearing, the parties have filed additional briefing on the affirmative defenses at issue.

Additionally, Guzman filed a motion to dismiss and noticed the same for hearing on June 14, 2010. Guzman's motion is based on a legislative change to Idaho Code § 31-857 that prevents a challenge to the proceedings or jurisdictional steps preceding an order creating a herd district seven years after the date of the order. *See* Idaho Code § 31-857. Sutton joins in Guzman's motion to dismiss. Piercy has failed to timely respond to the motion to dismiss.

II. LEGAL ANALYSIS

A. Defendant Piercy's Challenge to the 1982 Herd District is Barred by the Statute of Limitations Pursuant to Idaho Code § 5-224.

Idaho Code § 5-224 bars Piercy from challenging the validity of the 1982 herd district ordinance. This statute of limitation defense[2] was timely raised, properly plead and preserved for trial. A decision on the validity of the herd district will be binding on all parties. Sutton did not waive this defense by entering into the Stipulation.

1. The Court's Ruling on the Validity of the Herd District Will be Binding on All Parties Despite Canyon County's Failure to Plead the Statute of Limitations Defense.

It is important to review why Canyon County was brought into this lawsuit as a necessary party. In the Order Denying Defendant Piercy's Motion for Summary Judgment dated October 9, 2007, the Judge stated "[t]he fact that the proponent of herd districts on Canyon County is absent

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[2] Sutton agrees Idaho Code § 5-221 is not applicable to the facts of this case and will not be raised at oral argument.

from this litigation exacerbates the lack of resolution. Hence, Canyon County should be joined as a third-party defendant, though not for the purpose of liability. Rather, Canyon County needs to be a part of this litigation for the limited purpose of fully developing the validity of herd districts in the area Piercy's bull escaped and in the area where the collision with the bull took place." (Pg. 23). Thus, Canyon County was added to the lawsuit for the limited purpose of providing information. Furthermore, Canyon County's addition to this lawsuit ensures the County will be bound by the Court's determination on the validity of the herd district ordinance.

It does not matter that Canyon County did not plead or has not argued the statute of limitations defense because Canyon County will be bound by the Court's determination in this case. This case is procedurally complex and Canyon County's role in the litigation is expressly limited pursuant to the Court's order. The herd district ordinance is either valid or invalid. It would not make sense to allow the Court to allow the ordinance to be valid as applied to one party and invalid as applied to another.

2. Sutton Did Not Waive the Statute of Limitations Defense.

a. Sutton timely asserted the statute of limitations defense.

Pursuant to the Order Denying Defendant's Motion for Summary Judgment, on October 15, 2007, Sutton's counsel filed the Action for Declaratory Judgment, adding Canyon County as a defendant and requesting the Court to determine the validity of the herd district ordinance. Procedurally, Sutton could not have filed an answer to that original Action for Declaratory Relief because the complaint was solely for the purpose of bringing Canyon County into the lawsuit.

Therefore, the first opportunity to plead the statute of limitations defense was in the answer to Piercy's Amended Action for Declaratory Relief filed on or about September 11, 2008.

Piercy incorrectly contends that in order to have avoided waiving the statute of limitations defense, Sutton would have had to plead the statute of limitations defense in her response to Piercy's original motion for summary judgment. A response to a motion for summary judgment is not a pleading. Furthermore, Piercy's affirmative defense challenging the validity of the herd district ordinance is not a cause of action requiring a responsive pleading. Again, the first opportunity to plead the statute of limitations defense was in the answer to Piercy's Amended Action for Declaratory Relief filed on or about September 11, 2008.

Finally, the statute of limitations argument has been fully briefed for over a year, and Piercy has had adequate time to respond to the arguments; therefore, Piercy has suffered no prejudice.

b. Sutton did not waive the statute of limitations defense by entering into the Stipulation.

Contrary to Piercy's assertions, the purpose and intent of the Stipulation was not to waive the statute of limitations defense; rather, it was to waive any defenses regarding the timing of the filing of the Amended Action for Declaratory Relief with regard to the amendment cut-off date in the Amended Stipulation for Scheduling and Planning. As stated above, the parties filed the Amended Stipulation for Scheduling and Planning on April 11, 2008, which included a provision requiring all amendments to pleadings or joinder of parties be filed 120 days before trial, which was set to commence on October 8, 2008. Procedurally, the declaratory judgment action should

have been filed by Piercy since Piercy was seeking a determination from the Court regarding the validity of the herd district ordinance. Approximately one month before trial, but after the amendment cut-off date, the parties agreed to realign. As a house-keeping measure, on September 3, 2008, the parties entered into a Stipulation, and in part, agreed to "waive any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief." (Stipulation at p. 2.) This waiver only related to any defenses Sutton may have regarding the timing of the filing of the Amended Action for Declaratory Relief with regard to the amendment cut-off date.

Sutton did not intentionally waive her right to raise the statute of limitations defense, or any other defenses she may have to Piercy's challenge to the herd district ordinance.

> A waiver is a voluntary, intentional relinquishment of a known right and "the party asserting the waiver 'must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment.'

Ada County Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 370, 179 P.3d 323, 333 (2008) (additional citations omitted). Furthermore, Piercy has not presented any evidence indicating that he reasonably relied upon Sutton's alleged waiver of her statute of limitations defense or that he altered his position to his detriment.

To follow Piercy's logic, the waiver contained in the Stipulation would also preclude Sutton from arguing her laches defense, which Sutton has argued from the beginning and obviously had no intention of waiving. Counsel cannot take the broad language contained in the Stipulation meant to waive any defenses arising as a result of the late filing of the Amended

Action for Declaratory Relief and construe it as a waiver of all defenses to Piercy's challenge to the herd district ordinance. Sutton did not intend to waive any defenses to Piercy's substantive arguments, nor was such a broad waiver contemplated by the parties when the Stipulation was executed. The statute of limitations defense was timely plead in the answer to the Amended Action for Declaratory Relief, and the issues were fully briefed. Piercy is attempting to take unfair advantage of the language contained in the Stipulation to assert Sutton waived the statute of limitations defense when that was not the agreement that was made by counsel.

The only purpose of the Stipulation was to allow Piercy to amend at a later date. The Court should interpret the Stipulation in light of its purpose.

3. Idaho Code § 5-224 Applies To the Facts of This Case.

Idaho Code § 5-224 applies to a challenge of an ordinance. *See Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830, 831 (1911). Piercy challenged the validity of the order creating the 1982 herd district on a number of procedural grounds; however, Piercy has not challenged the constitutionality of the order. Therefore, Piercy's examples of unjust voting laws and *Brown v. Board of Education* are inapposite.

Contrary to Piercy's assertions, he did have notice of the order creating the herd district. 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.

At the least, Piercy is charged with having constructive knowledge of the order establishing the herd district since 1982, and could have timely challenged the order. Piercy should not be rewarded for sleeping on his rights and choosing to challenge the order establishing the herd district only after being potentially liable for an injury causing accident.

B. Defendant Piercy is Estopped from Challenging the Validity of the Order Establishing the 1982 Herd District.

As noted above, any decision as to the validity of the herd district ordinance will be binding on the County regardless of the defenses and arguments raised or not raised by the County. Any other result would defy logic.

1. The Testimony of Paul Axness Is Relevant To the Estoppel and Laches Defenses.

Based on the testimony of Paul Axness, the Court may reasonably conclude Piercy was aware the geographic area at issue in this lawsuit was in a herd district. As an insurance adjuster, Mr. Axness's duties included investigating, evaluating and concluding claims. (Affidavit of Joshua S. Evett in Support of Defendant Jennifer Sutton's Motion for Reconsideration ("Evett Aff."), ¶ 3, Ex. A, 7:1-2.) As part of investigating claims, Mr. Axness spoke with his insureds and documented his file. (*Id.* at ¶ 3, Ex. A, 7:13-15; 8:10-12.) Admittedly, Mr. Axness had no independent recollection of adjusting the 2001 motor vehicle accident between Piercy's livestock and two vehicles. However, Mr. Axness learned there was no open range at the location where

the accident occurred from somewhere. (*Id.* at., ¶ 3, Ex. A, 21:11-14.) Based on Mr. Axness's notes, and the indication therein that he had just spoken with Piercy, it is reasonable to conclude Mr. Axness learned the area was not open range from Piercy. (*Id.* at ¶ 3, Ex. A., 23:21-25; 24:3-8; 27:22-28:2; 35:1-15.) In fact, there could be no other reasonable source for this information.

Mr. Axness's testimony indicates Piercy was aware the 2001 accident occurred in an area that was not open range. Combined with Piercy's deposition testimony wherein he admits to being a cattle rancher in the area where the accident occurred for fifty years, and testifying that to his knowledge all livestock in Canyon County are not allowed to roam free and are contained by fences and/or natural geographic barriers, such as rivers, it is more than reasonable to conclude Piercy knew the pasture where the bull escaped from was in a herd district. (*Id.* at ¶ 4.)

Furthermore, Piercy's motivations in 2001 differ from this case. At the time of the 2001 accident the claims were only for property damage; the stakes were much lower than those that exist in the current lawsuit. Therefore, the information Piercy provided to Mr. Axness is more reliable than statements made to create a defense in this action.

Finally, Mr. Axness's testimony proves Piercy's insurer paid under Piercy's policy for the property damage to the vehicles and paid for the loss of Piercy's livestock, which the insurer would not have done had the accident occurred in an open range area. (*Id.* at., ¶ 3, Ex. A, 31-34.)

In sum, there is evidence Piercy knew the subject land was in a herd district.

2. <u>Sutton has Provided Evidence To Support Her Claim of Estoppel By Laches</u>.

Estoppel by laches precludes Piercy from challenging the 1982 herd district ordinance. This issue was extensively briefed in Jennifer Sutton's Brief Regarding Defenses on

Reconsideration filed June 2, 2010, and is incorporated into this brief. (*See* Jennifer Sutton's Brief Regarding Defenses on Reconsideration, dated June 2, 2010, pgs. 13-19.)

3. Sutton has Provided Evidence To Support Her Claim of Estoppel or Quasi-Estoppel.

As set forth above, pursuant to Mr. Axness's testimony, it is reasonable to conclude Piercy told Mr. Axness the area where the 2001 accident occurred was not open range. Now, Piercy asserts the area where the subject accident occurred, which is geographically close to where the 2001 accident occurred, is open range. Based on Mr. Axness's testimony, Piercy has not always believed the pasture in question was open range.

Furthermore, based on the notice published in the Idaho Press Tribune on December 20, 1982, Piercy had, at the very least constructive knowledge, if not actual knowledge, the County was claiming his land was in a herd district.

This issue was extensively briefed in Guzman's brief, and is incorporated into this brief. (*See* Memorandum in Support of Plaintiff/Defendant Luis Guzman's Motions for Reconsideration and Motion to Dismiss, dated May 26, 2010, pgs. 15-22.)

III. CONCLUSION

Jennifer Sutton respectfully requests this Court allow the affirmative defenses of estoppel, quasi-estoppel, estoppel by laches, statute of limitations and the statutory amendment to Idaho Code § 31-857, and preclude Dale Piercy's untimely challenge to the validity of the 1982 herd district ordinance.

DATED this 10th day of June, 2010.

ELAM & BURKE, P.A.

By: Meghan E. Sullivan
Meghan E. Sullivan, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June, 2010, 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
John T. Bujak Carlton R. Ericson Canyon County Prosecutor Canyon County Courthouse 1115 Albany Caldwell, ID 83605	___ ___ ___ ✓	U.S. Mail Hand Delivery Overnight Mail Facsimile

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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 AFFIDAVIT OF JOSHUA S. EVETT IN SUPPORT OF JENNIFER SUTTON'S REPLY TO DALE PIERCY'S RESPONSE TO MOTIONS TO RECONSIDER
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

STATE OF IDAHO)
) ss.
County of Ada)

Joshua S. Evett, having first been duly sworn, upon his oath deposes and says as follows:

1. I am over the age of 18 years and make this affidavit of my own personal knowledge. I am one of the attorneys for Defendant Jennifer Sutton ("Defendant") in the above-captioned case.

2. I make this affidavit based on knowledge of the facts in this case, and in support of the Defendant Jennifer Sutton's Reply to Dale Piercy's Response to Motions to Reconsider, filed concurrently herewith.

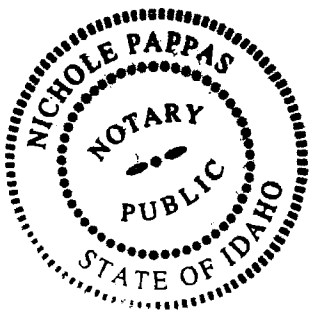
3. Attached hereto as Exhibit A are true and correct copies of excerpts from the transcript of the Motion Hearing ("Hearing Transcript"), before the Honorable Bradly S. Ford, dated May 3, 2010: 7:1-2; 7:13-15; 8:10-12; 21:11-14; 23:21-25; 24:3-8; 27:22-28:2; 31-34; and 35:1-15.

4. Attached hereto as Exhibit B are true and correct copies of excerpts from the deposition of Dale W. Piercy ("Piercy Depo."), dated May 10, 2006: 5:16-23, 41:4-7 and 44:17-45:4.

DATED this 10th day of June 2010

Joshua S. Evett

SUBSCRIBED AND SWORN to before me this 10th day of June 2010.



Nichole Pappas
Notary Public for Idaho
Residing at Meridian
Commission expires: 01-10-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June 2010, 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
John T. Bujak Carlton R. Ericson Canyon County Deputy Prosecutor Canyon County Courthouse 1115 Albany Caldwell, ID 83605	___ ___ ___ ✓	U.S. Mail Hand Delivery Overnight Mail Facsimile

Joshua S. Evett

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

LUIS J. GUZMAN, individually, Plaintiff, vs. DALE PIERCY, individually, and JENNIFER SUTTON, individually, Defendants.	Case No. CV05-4848
DALE PIERCY, individually, Plaintiff, vs. CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

MOTION HEARING

May 3, 2010

BEFORE THE HONORABLE BRADLY S. FORD

REPORTED BY:
YVONNE L. HYDE GIER, C.S.R. #73, R.P.R.

EXHIBIT A

5

THE COURT: That will be fine.
MR. PECK: Thank you.
MR. EVETT: Josh Evett on behalf of Jennifer Sutton.
MR. WALTON: Tim Walton for plaintiff Guzman.
MR. ERICSON: Carlton Ericson on behalf of Canyon County.
THE COURT: Okay. If I recall, it was Suttons' - Sutton was the one who originally wanted to present this testimony; is that correct?
MR. EVETT: Oh, I suppose so, but I think Mr. Walton is going to question Mr. Axness.
THE COURT: Okay. We will call the witness, and start with Mr. Walton and work our way around.
MR. EVETT: Okay.
THE COURT: And, Mr. Ericson, do you have enough room back there? Do you need a chair up here or not?
MR. ERICSON: No, Your Honor. That's fine. I can sit here.
THE COURT: Okay. Alright, sir, if you'd come forward and raise your right hand and take an oath.

6

Thereupon,

PAUL AXNESS,

was duly sworn, was examined, and testified as follows:

THE COURT: Mr. Walton, you may proceed.
MR. WALTON: Thank you, Your Honor. So that I may see the witness, can I come around this way?
THE COURT: Yes.

DIRECT EXAMINATION

QUESTIONS BY MR. WALTON:

Q. Good morning, Mr. Axness.
A. Good morning.
Q. Would you state your name for the record.
A. My name is Paul Axness.
Q. What's your job now?
A. I have the best job now - I am now retired.
Q. How long have you been retired?
A. Four years.
Q. Before you retired, what did you do?
A. I worked for Mutual of Enumclaw Insurance Company in the claims department.
Q. How long did you work for Mutual of Enumclaw?
A. 18 years.
Q. What did you do for them?

7

A. It would be the investigation, evaluation, conclusion of claims.
Q. Would your job title commonly be known as insurance adjuster?
A. Sure.
Q. How did you refer to your job title?
A. I think we are called claims representatives, but claims adjuster would be the...
Q. Is an apt description?
A. Sure.
Q. Okay. Did your duties include investigating claims?
A. Yes, it did.
Q. In the course of investigating claims, did you commonly talk to your insureds?
A. Oh, yes.
Q. Did you do things like talk to the claimants?
A. Sure.
Q. And a claimant would be somebody who had a claim against your insured?
A. Right.
Q. Did you do things like review police reports pertaining to incidents?
A. Yes.
Q. Would you generally gather information pertaining to a claim from other people?

8

A. Could you repeat that?
Q. Yes. Did your job generally entail gathering information pertaining to a claim from other people?
A. Yes.
Q. Did you have a law library that you used?
A. No.
Q. If you had a legal issue, did you consult with a lawyer?
A. We would.
Q. When you adjusted a claim -- let me rephrase. When you investigated a claim, did you document your file?
A. Yes.
Q. Why would you do that?
A. Just so -- you couldn't always recall everything, you would want to document your investigation.
Q. So that if somebody came back nine years later, you could try to recall how things happened at the time you adjusted the claim?
A. Sure, based on review of the file.
Q. Would you authorize payment of claims?
A. Yes.
Q. Would those payments sometimes be to your own insured?
A. Yes.
Q. That would be a first party claim?

21

THE COURT: It is leading.
MR. WALTON: Yes, it is.
THE COURT: Do you want to try again, Mr. Walton?
MR. WALTON: I will do my best. Thanks, Judge.
Q. BY MR. WALTON: You wrote in your file, "no open range."
A. I wrote, "zero open range," that's right.
Q. Zero open range. Did that mean to you that there was no open range at the location of this incident?
A. I think that's fair, yes.
Q. Did that mean -- the fact that you wrote that entry in your file, does that tell you that you must have gained that information from somewhere?
A. From somewhere, yes.
Q. Then you write, "call Tolsma." Who is Tolsma?
A. A body shop.
Q. Okay. So we have a call on October 12 to Mr. Piercy, and you document it?
A. Yes.
Q. The next call you document is a call to Tolsma, a body shop?
A. Yes.
Q. You wrote in your file, no open range between the time - within the time frame of when you called Piercy and when you called Tolsma?

22

A. That's rig
Q. Let's go down to the next line where it says, "Hansen pd total." Is it correct to say that that means that the Hansen vehicle was totaled by the wreck?
A. Right.
Q. Okay. Would that have been per Tolsma?
A. I believe it would be.
Q. Okay. Do you see where it says, "call Tolsma -"?
A. Yes.
Q. And then "Hansen pd total"?
A. Yes.
Q. So within the call with Tolsma, you learned that Hansen's vehicle was totaled?
A. Right.
Q. The reason I think - I am taking a little time on that is because earlier you said -- do you see where it says, "two calves got through fence after being weaned - no open range"?
A. Yes.
Q. And you interpreted the "- no open range" to mean some new call or something; correct?
A. I don't know what you mean.
Q. Let me rephrase.
A. Okay.
Q. On October 12, you called Mr. Piercy, and he told

23

you that a couple of calves got out and got through the fence after being weaned?
A. Right.
Q. Then there is a "- no open range"?
A. Right.
Q. You interpreted that "-" to be significant, and to have interrupted the phone call with Piercy?
A. Yeah.
Q. Okay. But the next five, six words, you have, "call Tolsma - Hansen pd total"; correct?
A. That's right.
Q. Yet, that is not a new phone call, that is one phone call; correct?
A. I assume that would be, yeah.
Q. Okay. So it may well have been one phone call that you had with Mr. Piercy where he told you two calves got out, and that there was no open range; correct?
MR. PECK: Objection; leading.
THE COURT: He can answer the question.
THE WITNESS: Can you repeat that again?
Q. BY MR. WALTON: It may well have been one phone call where you called Mr. Piercy, and he said two calves got out through the fence after being weaned, and there was no open range?
A. It could be.

24

Q. Okay.
A. All I can rely on is what is here.
Q. Right. In fact, when you make a call, you document that you made the call?
A. Correct.
Q. And you didn't document a new call when you wrote, "zero open range"?
A. Right.
Q. Let's keep reading. After you write, "Hansen pd total - ", what do you write there, sir?
A. "Refer to John."
Q. Who is John?
A. John would be an auto appraiser in our office.
Q. So John would go confirm that the Hansen car was a total loss?
A. Right, he would settle it then.
Q. And then your next entry, "call from Shane at Enterprise"; right?
A. That's right.
Q. That's just to confirm that Ms. Hansen had rented a vehicle at a certain rate per day, and so forth?
A. That's right.
Q. Let me get to that in a second. But that rental rate was fine with you, is what you wrote in your file?
A. I assume, yeah.

25

Q. Because you said it was okay; right?
A. Right.
Q. And then you authorized five additional days at that rate?
A. That's what it says, yeah.
Q. To Ms. Hansen?
A. Yeah, authorized, I guess, for the car rental five additional days, yes. Right.
Q. Then continuing on through this October 12 work, you note in your file that Mutual of Enumclaw insures Don Allen; right?
A. Yes.
Q. And that that was the second property damage claim pertaining to this incident; correct?
A. Right.
Q. And that Scott in your office was handling that second claim. That's the next thing you write there on October 12; right?
A. Yes.
Q. And then the next entry, "call Allen," and then a phone number. That just documents that you attempted to reach Mr. Allen by telephone?
A. Right.
Q. And that you left a message on his recorder to call you back; right?

26

A. Right.
Q. And then on October 15, does that just document -- well, just tell me what that says, if you would?
A. October 15, returned call to second claimant, Linda Hansen, and then her phone number. Apparently, that's an extension of her's, "#402, leave voice mail, call from claimant, car at Tolsma, car is totaled."
Q. Does that all pertain to Linda Hansen's claim for damage, then?
A. I assume it does.
Q. That's your handwriting; right?
A. Yes.
Q. Is that how you would interpret your notes?
A. Yes.
Q. Okay. So Linda Hansen had called you, and you returned her call and left her a voice mail, is that what that says?
A. Right. Returned call to her, yes.
Q. And then the next entry under October 15, it says call from claimant.
A. October 15?
Q. We are on the second line of the October 15 entry, begins with "leave voice mail."
A. Leave voice mail, call from claimant, which I assume would be Linda Hansen.

27

Q. Okay. What's the next?
A. Car totaled from Tolsma. I didn't say how I found that out. Maybe I called Tolsma. I don't know.
It says, 1985 Dodge Aries, advised her that John will inspect and settle.
Q. So, would you interpret that actually now that you have read that whole note, does it mean to you that you got a call from claimant, that she told you that the car was at Tolsma, that the car was totaled, that it was a 1985 Dodge Aries, and that you told her that John in your office will inspect and settle?
A. Yes.
Q. The thing I want to mention right there and visit with you about is, in between all of those little notes, call from claimant - car at Tolsma - car totaled, 1985 Dodge Aries - advised her that John will inspect and settle. That was all one phone call, was it not?
A. I assume it would be, yes.
Q. But you used the dashes in between to separate subject matters; correct?
A. Yeah, I think so.
Q. So you may have used that dash on the October 12th visit, then, when Piercy told you a couple of calves got through his fence after being weaned - no open range -- you may have used that dash to separate subject matters in your

28

phone call with Mr. Piercy; right?
A. Could be, yes.
Q. Below the October 15 entry, you have written, "Hansen vehicle = total loss $1,275." Does that mean that the value of the vehicle was 1,275 bucks?
A. It is, but that's not my handwriting on there.
Q. Okay. But that's what you would understand that to be?
A. Yes.
Q. What does that say below that?
A. First report.
Q. What does that mean?
A. That means whoever it was made a first report to the home office to establish reserves.
Q. In other words, when you say 'establish reserves,' that means you put a number on what you think you are going to end up paying out total on this?
A. Exactly.
Q. And that's done for accounting purposes for insurance companies?
A. Sure.
Q. Then your next entry, is that your handwriting on November 5?
A. It is, yes.
Q. What do you write there?

29

A. It says, "received APD," which is [illegible] property damage, "rental bill."
Q. Okay. So that would have been one of the claimants had rented a car, and you got a bill for it; correct?
A. That's right.
Q. And then on November 13, what does that say?
A. (reading:) Received auto property damage final bill, issue checks.
Q. Okay. What is that next entry?
A. It says, close file.
Q. What's the November 14 entry say?
A. November 14, received bill for tires, discussed with John, wheel alignment, wheel and tire.
Q. My page is cut off at the bottom.
A. I think it probably says, called claimant and conclude, but I don't know.
Q. So one of the claimants had some follow-up matters to resolve in terms of tires, and so forth?
A. Right.
Q. Okay. Let's go to the next page of the Exhibit 1. Do you see the January 3 entry?
A. Right.
Q. What does that say?
A. It says, (reading:) Call from Merce at Tolsma - Hansen pd, auto still there - call Rick at Barger Mattson,

30

will check and call [illegible].
Call from Nancy Allen, motor mounts on their car needed to be replaced from accident per Westphal.
She will forward estimate, and I will review with John.
Call from Rick at Barger. He has taken care of salvage problem. Received -- whatever that is. Is it a fax? I don't know. I don't know what that would be.
Q. That's okay. Mr. Axness, just review, in your own words, what that was all about?
A. We got a call from Merce at Tolsma Auto. I think I testified earlier that Tolsma Auto had one or both of the cars there, and it was still sitting there. It hadn't been moved, because it was totaled, and it builds up charges.
Q. Usually when a car is totaled, you move it to an auto salvager, like Barger Mattson, so you can sell the car to them and quit the storage charges?
A. Yes.
Q. And for some reason, that hadn't been done?
A. That's right.
Q. Okay. And then Nancy Allen, presumably Don Allen's wife, had called and complained that she thought there was more damage to the motor mount from the accident?
A. Right.
Q. And you were going to take a look at that?

31

A. Right.
Q. Okay. And then on January 7, what happened?
A. Discuss with John, okay to pay Westphal estimate, issue check.
Q. Now, go to the last two pages of Exhibit 1 -- last three pages, excuse me, what are these pages?
A. These would be copies of the checks that were issued on this.
Q. So check No. 1, does it show that Mutual of Enumclaw paid Nancy Allen $426.47?
A. Right.
Q. That would be under Mr. Piercy's policy; correct?
A. That's right.
Q. Because it shows insured, Dale Piercy, on the check; right?
A. Right.
Q. And check No. 2 shows Mutual of Enumclaw paid 430 bucks to Barger Mattson?
A. That's right.
Q. Under Mr. Piercy's policy again?
A. Right.
Q. Presumably for storage?
A. Let's see. (Reading:) Advance tow and storage charges, right.
Q. Okay. And then check No. 3 was 128 bucks to

32

Nancy Allen under Mr. Piercy's policy; correct?
A. Right, $128.
Q. For property damage to the Allen's 1991 Chrysler?
A. Right.
Q. Okay. And then if we go to the next page, you paid -- Mutual of Enumclaw paid $1,215 to Dale Piercy; correct?
A. Right.
Q. For what?
A. The two calves valued at - it shows there 675 pounds at 90 cents a pound.
Q. And then the next check was for $1,479.30 to Art's Service; correct?
A. That's right.
Q. Again, paid under Mr. Piercy's policy?
A. Yes.
Q. Do you know what that is for, can you tell?
A. It just says an invoice for Nancy Allen.
Q. So that would have been to repair Nancy Allen's vehicle?
A. I assume, yes.
Q. Okay. And then the next check is for $425.09 to Enterprise Rent-A-Car?
A. Right.
Q. Under Mr. Piercy's policy?

33

A. Yes.
Q. That would have been for a rental vehicle for one of the two, either Ms. Hansen or Ms. Allen; correct?
A. That's right.
Q. And then the last page of the exhibit, a check for $150 payable to Tracy Hansen under Mr. Piercy's policy; correct?
A. Right.
Q. And, again, that would be for some type of damage sustained by Hansen as a result of this incident?
A. Right.
Q. And then the final check is $1,125 payable to Tracy Hansen under Mr. Piercy's policy; is that correct?
A. Yes.
Q. And, again, that would be -- well, you have got for the total loss of her Dodge Aries; correct?
A. That's right.
Q. And you were holding back 150 bucks until she gave you the title to the vehicle?
A. That's right.
Q. So, would you conclude from all of this that Mutual of Enumclaw paid under Mr. Piercy's policy for all of the damages caused to the Allens and the Hansens?
A. Right.
Q. And would you also conclude that Mutual of Enumclaw

34

paid Mr. Piercy for the loss of the two calves?
A. Right.
Q. That is how you would handle the claim if the claim had occurred within a herd district; correct?
MR. PECK: Objection.
MR. WALTON: Let me rephrase.
THE COURT: Foundation is the same.
Q. BY MR. WALTON: Would that suggest to you that you interpreted -- let me rephrase.
We have already talked about how you need to determine whether this incident happened within a herd district or an open range; correct?
A. Right.
Q. And you determined, based on what we have just gone through, that it happened in which one?
A. I determined that it was not open range.
Q. And that it was?
A. What I am getting to is, it can be an area set aside for open range. But if they fence them in, it is my understanding it is no longer open range and, therefore, the rancher is responsible to keep his cattle off the road.
And all I said here, it was not open range. I made no reference to any herd district.
Q. You concluded it was not open range; fair?
A. Yes. Yes.

35

Q. When you talk to insureds about claims involving auto/livestock collisions, was it your practice when you were an adjuster with Mutual of Enumclaw to discuss with the insureds the distinction between herd district and open range so that the insured would know whether the insurance policy was going to pay or the insured was going to be paid by the other guy's insurance?
A. I am sure that came up in conversation, yes.
Q. That's part of what you do when you are talking to your insureds?
A. Right.
Q. So you feel confident you probably had that conversation with Mr. Piercy during the handling of this claim?
A. I would think so.
Q. Just let me review my notes, and I may be done.
A. Sure.
Q. Have you and I ever talked about this claim?
A. Never.
Q. Have you talked to Mr. Saetrum's office about this claim?
A. Yes, I did.
MR. WALTON: Mr. Axness, thank you very much. That's all I have. And I apologize for disturbing you for your well-earned retirement.

36

THE COURT: Mr. Evett?
MR. EVETT: I have no questions, Your Honor.
THE COURT: Mr. Peck?

CROSS-EXAMINATION

QUESTIONS BY MR. PECK:
Q. I am going to be fairly brief, Mr. Axness. I think you explained yourself fairly well.
So if my understanding is correct at the time of October 5, 2001, it was your understanding that if the rancher was involved in an incident that had fenced in his cows, that that created a situation where there was no longer open range status?
A. That's right.
Q. And now on your note in your - that we went over in Exhibit 1, on the, let's see, down at the bottom, MOE, No. 3, it is your handwritten notes about the call you had with Mr. Piercy on there, evidently you gained the information that the cattle --
MR. WALTON: Which date are you looking at?
MR. PECK: This is the October 12th call.
MR. WALTON: Thank you.
Q. BY MR. PECK: October 12 call with insured, and it states that the cattle - or the two calves got through a fence; is that correct?

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

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

ERIKA L. RIVERA, by and through LOREE RIVERA her mother and natural guardian, et al.,	
Plaintiffs,	
vs.	No. CV05-4848
DALE W. PIERCY, individually, and JENNIFER SUTTON, individually,	
Defendants.	

COPY

DEPOSITION OF DALE W. PIERCY

MAY 10, 2006

REPORTED BY:

DEANN MORRIS, CSR No. 747, RPR

Notary Public

DALE W. PIERCY,
first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

QUESTIONS BY MR. WALTON:

Q. Would you state your name for the record, please.

A. Dave Piercy.

Q. And what's your age, Mr. Piercy?

A. 57.

Q. Where do you reside?

A. Parma, Idaho.

Q. Give me a little bit of -- what do you do? Let me ask you that first.

A. I'm a farmer and rancher.

Q. And how long have you been a farmer and a rancher?

A. Since I was probably seven years old, so 50 years.

Q. Where have you farmed and ranched?

A. Parma area.

Q. All your life?

A. Yes.

Q. Did you go to school?

A. Yes.

Q. Where did you go to school?

A. In Parma.

Q. Graduated high school?

A. Yes.

Q. And then did you have any post high school education?

A. Yes. I graduated the University of Idaho.

Q. What was your study up there?

A. Agriculture and teaching.

Q. So did you get a degree in agriculture and teaching or --

A. Ag education, yes.

Q. What does that prepare you for?

A. Basically to teach.

Q. And who do you teach? Who would you teach with that degree is what I really meant to ask?

A. High school students.

Q. Have you taught?

A. Yes.

Q. Where have you taught?

A. I substitute taught, in Fruitland, Adrian, Parma.

Q. So you never were a full-time teacher?

A. No.

Q. What years did you substitute teach?

A. Probably '71 through probably '80, 1980.

Q. And did you teach ag education or did you teach lots of different stuff?

A. Lots of different stuff.

Q. Kind of did what substitute teachers do?

A. Yeah. When they needed you, you went.

Q. Did you ever teach ag education?

A. Yes.

Q. What is ag education? What kind of topics are covered by that discipline?

A. It covers mechanics and maintenance and farming, cattle. I assume that's the basics.

Q. You're married?

A. Yes.

Q. To Ramona Plaza?

A. Yeah.

Q. How do you say that name?

A. It's Ramona Plaza.

Q. As I understand, you were married in May 28, 1994.

A. Sounds right.

Q. I wasn't going to ask you the date because I didn't want to embarrass you if you didn't remember. How many kids you got?

A. None.

Q. First marriage?

A. Yes.

Q. Okay. So you've live -- you lived and grew up in the Parma area.

A. Yes.

Q. Been there all your life essentially.

A. Yes.

Q. Except you went away to University of Idaho.

A. Yeah.

Q. Served in the military?

A. Yes.

Q. And I think I cut you off there. You went to the University of Idaho and you were going to say something.

A. Well, when I was seven years old, we moved to Parma.

Q. Where were you born?

A. Ontario, Oregon.

Q. Do you remember May 20th -- excuse me, March 20th, 2005? Which I'll tell you is the date of this accident that we're here today for.

A. Yes.

Q. Got a pretty good memory of the events of that day?

A. Yes.

Q. (BY MR. WALTON): I[redacted]r 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.

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.

MS. MEI[redacted] 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

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.

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?

A. North of Parma 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. 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?

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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 MEMORANDUM IN OBJECTION TO PLAINTIFF'S MOTION TO DISMISS AND FOR RECONSIDERATION**
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

COMES NOW the above-entitled Defendant Dale Piercy, by and through his counsel of record, and responds to Co-Defendant Sutton's Motion for Reconsideration and Plaintiff Guzman's Motion to Reconsider.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual background has been established by the evidence at the trial in this matter and the subsequent offering of the testimony of Mr. Axness. The relevant factual background has been submitted to this Court in a number of briefs including Defendant Piercy's recent Response

to Motions to Reconsider. The parties had a hearing on the issues relating to the validity of the Canyon County herd district established in 1982 (1982 ordinance) on June 14, 2010. Due to the fact that a new argument was raised by Plaintiff regarding an amendment to I.C. § 31-857 this Court allowed additional time for briefing to be submitted on that issue.

This Court also stated that it wanted to have the entire matter regarding herd districts submitted to it for decision at a subsequent hearing set for August 11, 2010. This hearing will include Defendant Piercy's Second Motion for Summary Judgment. For the convenience of the Court, Defendant Piercy is attaching its previous briefing relating to issues regarding his Second Motion for Summary Judgment and incorporates his previous briefing into the present brief. (See Exhibit 4) The issues and arguments addressed in that brief have not changed since it was filed approximately a year ago.

Therefore, the present Memorandum will be limited to addressing the amendment to I.C. § 31-857. Prior to a 2009 amendment to I.C. § 31-857, it read:

> **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.

The 2009 amendment to I.C. § 31-857 simply added another sentence to the statute as follows: "No challenge to the proceedings or jurisdictional steps preceding such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order."

The 2009 amendment went into effect on July 1, 2009. See attached Exhibit 1, Idaho Session Laws Ch. 43, p. 124

II. LEGAL ANALYSIS

This Court should deny Mr. Guzman's motion to dismiss relating to the 2009 amendment to I.C. § 31-857 (2009 amendment) because (1) the 2009 amendment is not retroactive and (2) the 2009 amendment is unconstitutional.

A. The 2009 Amendment to Idaho Code § 31-857 is Not Retroactive, and the Seven-Year Statute of Limitations Begins From the Date of Enactment, July 1, 2009

Based upon a reading of the 2009 amendment, a review of the legislative history and relevant case law, the 2009 amendment is not retroactive and is no bar to Defendant Piercy's challenge of the 1982 ordinance.

Judge Petrie has ruled that the 1982 ordinance was invalid. This ruling was the result of the trial of the declaratory judgment action which bifurcated the issue of the validity of the 1982 ordinance from the main negligence and damages part of the present lawsuit. In hindsight, it would have probably have been more practical to have assigned a separate case number to the declaratory judgment action. However, there can be no doubt that Judge Petrie did bifurcate the matter because a separate court trial was held.

Plaintiff now asserts that the 2009 amendment acts to void Judge Petrie's decision and to make the 1982 ordinance valid by making it immune to any challenge.

1. Standard of Adjudication

Plaintiff's argument is an affirmative defense. It is axiomatic that Plaintiff has the burden of proving his affirmative defense. Idaho Code § 73-101 states, "No part of these compiled laws

is retroactive, unless expressly so declared." Plaintiff must prove that the 2009 amendment itself was expressly declared to be retroactive.

2. Legal Reasoning

Mr. Guzman has failed to show that the 2009 amendment includes an express declaration of retroactivity or that Idaho case law supports making this type of amendment retroactive.

There has been no evidence provided or showing made by Plaintiff Guzman that the 2009 amendment was expressly declared to be retroactive. The 2009 amendment only adds a seven-year (7) statute of limitations to original statute (where no previous statute of limitations had existed before) by adding a second sentence to the statute. The second sentence does not mention that it relates back to the previous version of Idaho Code § 31-857 which applies a two-year rebuttable presumption of procedural and jurisdictional validity to the creation or modification of districts done at any time. The language of the 2009 amendment does not include language that the year statute of limitations should be retroactive. There is no reason to interpret the language of the amendment to suggest that the Idaho legislature wanted the amendment to apply retroactively. Therefore, the language emphasized by Mr. Guzman in the first paragraph of Idaho Code § 31-857 is irrelevant to a determination of whether the new statute of limitations was intended by the legislature be considered retroactive.

The legislative history also fails to show any intent by the legislature to apply the 2009 amendment retroactively. There is no indication in the legislative history of H.B. 102 declaring that the amendment is to be retroactive. See, Exhibit 1, Idaho Session Laws Ch. 43, p. 124 and Exhibit 2, the minutes of the Idaho House and Senate legislative committees which considered and discussed H.B. 102. There is no indication in the title to H.B. 102, Exhibit 1, the first

paragraph which is all in capital letters, stating that the amendment is to be applied retroactively. There is nothing recorded in the minutes of either of the two committees which states that the amendment is to apply retroactively. See, Exhibit 2, attached.

Finally, there is no indication or other reference, in the Statement of Purpose for H.B. 102, that the amendment is to apply to causes of action which have already accrued. The Statement of Purpose reads:

> This bill establishes a standard seven year statute of limitations for procedural and jurisdictional challenges to the creation of governmental districts under Idaho law. This will eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county.

Statement of Purpose RS18452 (H.B. 102), attached as Exhibit 3.

In fact, looking at the Statement of Purpose, it appears that the amendment was intended to apply only to the creation of future governmental districts. Based upon the language in the Statement of Purpose, the amendment applies only to those districts created after the enactment of the amendment. Furthermore, the amendment took effect on July 1, 2009, the date when all approved legislation in the 2009 session took effect, except for those acts in which the Legislature declared an emergency and were enacted immediately upon the signing of the act by the Governor. Thus, the legislative history and Statement of Purpose of H.B. 102 supports only a prospective application of the amendment.

Idaho case law establishes that the 2009 amendment should only be applied prospective. Idaho Code § 73-101 states, "No part of these compiled laws is retroactive, unless expressly so declared." Numerous Idaho cases cite this statute and state that a statute will not be applied retroactively without clear legislative intent to that effect. *See, e.g., University of Utah Hosp. on*

Behalf of Harris v. Pence, 104 Idaho 172, 174, 657 P.2d 469, 471 (1982) and cases cited therein. It is also the case that Idaho appellate courts have held that statutory changes which materially affect substantial rights should only apply prospectively. Statutory changes which are only procedural can be applied retroactively. *Esquivel v. State,*128 Idaho 390, 392, 913 P.2d 1160, 1162 (1996)(five-year statute of limitations on applications for post-conviction relief). However, analysis of these cases shows that the application of a newly amended statute of limitation begins from the date the legislation took effect.

The facts in *University of Utah Hosp. on Behalf of Harris v. Pence,* 104 Idaho 172, 174, 657 P.2d 469, 471 (1982), are similar to those in the present case. In the present case, the Idaho Legislature amended Idaho Code §31-857 to add a statute of limitations where none had existed before. The amendment became effective on July 1, 2009, nearly six months after Judge Petrie's decision invalidating the 1982 Ordinance. In *University of Utah Hosp. on behalf of Harris v. Pence,* Plaintiff hospital filed an application for aid for the medically indigent with the Twin Falls County Clerk within a year of the hospital admission. The medical indigency statute, Idaho Code § 31-3504, was then amended reducing the one-year statute to a 45-day period of limitations from the date of admission to file the application. This statutory provision became effective July 1, 1976 (1976 Idaho Sess. Laws, ch. 121), a time subsequent to the admission and release of the Harrises' child from the hospital. The hospital's claim for payment was denied; suit was filed; and summary judgment was granted to defendant. The hospital then appealed.

The Idaho Supreme Court stated:

> Applied retroactively, the 1976 version of I.C. § 31-3504 would have required the application to have been made by April 10, 1976, some two and a half months before the effective date of the law. Clearly, such retroactive application would unfairly penalize

the appellant for failure to comply with a statute of which it had no notice. This court could not countenance such a result inasmuch as there is no expression of legislative intent that the 1976 version of I.C. § 31-3504 be applied retroactively. Nonetheless, it does not follow that the prior version of the statute would remain in effect after July 1, 1976. From that date forward the appellant had fair notice of the new requirements of when an application for medical indigency benefits had to be filed and had forty-five days in which to make such application.

An examination of the relevant case law from other jurisdictions indicates that a statute is not made retroactive merely because it draws upon facts antecedent to its enactment for its operation. *Holt v. Morgan*, 128 Cal.App.2d 113, 274 P.2d 915 (1954); *Hill v. City of Billings*, 134 Mont. 282, 328 P.2d 1112 (1958); *Earle v. Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P.2d 264 (1938; *Lewis v. City of Medina*, 13 Wash.App. 501, 535 P.2d 150 (1975). As the California Supreme Court reasoned in *Holt v. Morgan*, supra, "[t]he contention [as here made by the appellant] is based on a misunderstanding of 'retroactive' as a legal concept." 274 P.2d at 917. In this regard, it is to be observed further that there is almost universal agreement that when a statutory period of limitation is amended to reduce the limitation period, the party whose right accrues before the effective date of the amendment cannot be heard to complain if he is given the full time allowed for action according to the terms of the amended statute from and after the effective date of the amended statute. *Olivas v. Weiner*, 127 Cal.App.2d 597, 274 P.2d 476 (1954); *Greenhalgh v. Payson City*, 530 P.2d 799 (Utah 1975); *Day & Night Heating Co. v. Ruff*, 19 Utah 2d 412, 432 P.2d 43 (1967); *O'Donoghue v. State*, 66 Wash.2d 787, 405 P.2d 258 (1965); *Earle v. Froedtert Grain & Malting Co., supra.*

University of Utah Hosp. on Behalf of Harris v. Pence, 104 Idaho at 174, 175, 657 P.2d at 471, 472 (1982).

The Idaho Supreme Court then quoted from *Olivas v. Weiner*, 127 Cal.App.2d 597, 274 P.2d 476 (1954) as follows:

It has repeatedly been held that the Legislature may reduce a statute of limitations and that the new period applies to accrued causes of action provided a reasonable time is allowed within which to assert the cause. *Estate of Whiting*, 110 Cal.App. 399, 294 P. 502; *Estate of Venners*, 119 Cal.App. 417, 419, 6 P.2d 544; *Thompson v. County of Los Angeles*, 140 Cal.App. 73, 76, 35 P.2d 185; *Norton v. City of Pomona*, 5 Cal.2d 54, 65, 53 P.2d 952; *Kline v. San Francisco U. School Dist.*, 40 Cal.App.2d 174, 176, 104 P.2d 661, 105 P.2d 362; *Scheas v. Robertson*, 38 Cal.2d 119, 125, 238 P.2d 982; *Crothers v. Edison Elec. Co., C.C.*, 149 F. 606; Terry v. Anderson, 96 U.S. 628, 24 L.Ed. 365.

. . ..

A statute is not made retroactive merely because it draws upon facts existing prior to its enactment. Thus changes in procedural law have been held applicable to existing causes

> of action. The effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. *National Automobile & Cas. Ins. Co. v. Downey*, 98 Cal.App.2d 586, 590, 220 P.2d 962; *Argues v. National Superior Co.*, 67 Cal.App.2d 763, 778, 155 P.2d 643; *Earle v. Froedtert Grain & Malting Co.,* 197 Wash. 341, 85 P.2d 264. *Olivas v. Weiner*, 274 P.2d at 478, 479.

University of Utah Hosp. on Behalf of Harris v. Pence, 104 Idaho at 175, 657 P.2d at 472 (1982).

Finally, the Idaho Supreme Court quoted from the above-cited Washington case stating, "Similarly, in *Earle v. Froedtert Grain & Malting Co., supra*, the court stated that '[t]he limitation prescribed by the new statute commenced when the cause of action was first subjected to the operation of the statute, that is, upon its effective date.' 85 P.2d at 266."

Applying the reasoning of the Idaho Supreme Court in *University of Utah Hosp. on Behalf of Harris v. Pence*, to the facts of the present case, it is clear that the amendment to Idaho Code § 31-857 is not retroactive, but actually prospective in operation. The seven-year statute of limitations added by the amendment begins on the date of enactment, July 1, 2009. To apply the seven-year statute of limitations from the date of the 1982 Ordinance to the facts of this case would unfairly penalize Defendant Piercy for failure to comply with a statute of which he had no notice.

The reasoning of *University of Utah Hosp. on Behalf of Harris v. Pence*, has been followed by Idaho's appellate courts in cases involving Idaho Code § 14-4902, Idaho's version of the Uniform Post-Conviction Procedure Act [UPCPA]. *Esquivel v. State,* 128 Idaho 390, 391, 913 P.2d 1160, 1161 (1996); *Martinez v. State,* 130 Idaho 530, 534, 944 P.2d 127, 131(Ct. App. 1997); *LaFon v. State,* 119 Idaho 387, 389-90, 807 P.2d 66, 68-69 (Ct. App. 1991); and *Mellinger v. State,* 113 Idaho 31, 32, 740 P.2d 73,74 (Ct. App. 1987). Effective July 1, 1979, the UPCPA was amended to provide a five-year limitation period for filing an application for post-conviction relief. Prior to 1979, the UPCPA, like Idaho Code § 31-857 prior to 2009, had no

period of limitations at all. In *Mellinger,* the Idaho Court of Appeals decided the issue of whether the five-year limitation period mandated by the amendment applied to a conviction entered before the effective date of the amendment. In finding that it did, the Court of Appeals cited and followed *University of Utah Hosp. on Behalf of Harris v. Pence* agreeing with the district court that the five-year period of limitations for filing an application began on the date of July 1, 1979, the effective date of the amended statute. The Court of Appeals stated further that the amendment was being applied prospectively because retroactive application of such a time limitation would be contrary to general principles of law and Idaho Code § 73-101. *Mellinger v. State*, 113 Idaho 31, 33-34, 740 P.2d 73, 74-75 (Ct. App. 1987).

Thus, following the reasoning of *Mellinger* and the other cases construing the amendment to the UPCPA adding a period of limitations, the amendment to Idaho Code § 31-857 should construed the same way. The seven-year period of limitations should begin on July 1, 2009, the day of enactment. Therefore, Defendant Piercy's challenge to the 1982 Ordinance was made within the newly-enacted period of limitations, and is not foreclosed or barred by the period of limitations. The amendment to Idaho Code § 31-857 is to be applied prospectively. To do otherwise would mean that no one could ever challenge the validity of the 1982 Ordinance or any other governmental district prior to July 1, 2002, as the period of limitations would have already run. To do so would unfairly penalize litigants, including Defendant Piercy, for failure to comply with a statute of which they and he had no notice.

Plaintiffs have cited the case of *Chase Securities Corporation v. Donaldson,* 325 U.S. 304, 65 S. Ct. 1137 (1945) for the rule that the Minnesota Legislature's "fix" of their period of limitations in their securities fraud statute which revived a cause of action for securities fraud for

Donaldson and other claimants, should be applied to Judge Petrie's decision invalidating the 1982 Ordinance. However, the facts in *Chase* are distinguishable from the facts in our case. Plaintiff Donaldson wanted to rescind a purchase of securities as void under the Minnesota Blue Sky Laws. Defendant Chase argued that the action was barred by the existing statute of limitations. Defendant argued that once it had a decision in its favor, the state legislature could not revive Plaintiff's cause of action and put a new statute of limitations in place. The new statute of limitations allowed actions under the Blue Sky Laws to be brought within six years after delivery of the securities, or where delivery had occurred more than five years prior to the effective date of the act, one year after the date of enactment.

The U.S. Supreme Court pointed out that the Minnesota Supreme Court, in the initial appeal, had ruled only that the Blue Sky Law six-year statute of limitations had not been tolled on the grounds that Chase was absent from the state. All other issues were remanded without prejudice to the trial court. While the proceedings were pending in the trial court, the Minnesota legislature amended the Blue Sky Law adding a specific statute of limitation applicable to actions raised by plaintiff in the suit based on violations of the Blue Sky Laws as above. The effect of the amendment was to abolish any defenses Chase might make under the previous statute of limitation. In a second appeal, the Minnesota Supreme Court found that securities had to be registered, and this was violated by the sale. It also held that the action was one for damages in tort to recover the purchase price of unregistered securities, that the newly enacted statute of limitations was applicable, and that this had the effect of lifting the bar of the general limitation statute, and in doing so, did not violate the Fourteenth Amendment.

The U. S. Supreme Court held that as the case stood in the state court, Chase's statutory immunity was not fully judged. Thus, the action of the legislature in amending the statute of limitations did not deprive it of a judgment in its favor. The Supreme Court relied upon the case of *Campbell v. Holt*, 115 U.S. 62, 5 S.Ct. 209 (1885), which had held that a lapse of time had not invested a party with title to real or personal property, and a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after the right of action had been barred. The plaintiff was then restored his remedy, and the defendant was deprived of his defense that the action was barred by the previous statute of limitations. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation.

So, the facts in *Chase* were that a securities purchaser tried to get his money back because defendant sold him unregistered securities. Purchaser waited longer that the general statute of limitations to bring his action against defendant. While the case was pending, the state legislature amended the specific securities statute of limitation to, in effect revive plaintiff's cause of action. In our case, instead of reviving a cause of action, Plaintiffs would have this Court extinguish the defense of Defendant Piercy by retroactively applying a newly enacted statute of limitations when Defendant Piercy had no notice of the statute. Also, instead of a case pending on procedural motions prior to a trial, as in *Chase*, in our case, there has been a full trial and a decision by the finder of fact and law, Judge Petrie. Both the facts and the application of the law in *Chase* are distinguishable from the facts and law in the present case. *Chase* should not be followed.

The net effect of the 2009 amendment to Idaho Code § 31-857 is to extend the Canyon

County Commissioners' liability on the 1982 Ordinance for seven years until 2016. The amendment to Idaho Code § 31-857 is not retroactive not only because there is no evidence of legislative intent to do so, but because Idaho's appellate courts have ruled that it is prospective beginning on the date of its enactment on July 1, 2009. Defendant Piercy requests this Court deny Plaintiffs' motions to reconsider, and move forward with the remainder of the case.

B. The 2009 Amendment is Unconstitutional

The 2009 amendment violates the substantive and procedural due process rights guaranteed by the Idaho and U.S. Constitutions.

1. The 2009 Amendment Violates Mr. Piercy's Rights to Procedural Due Process

The Idaho Supreme Court has stated:

Procedural due process requires that "there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999); quoting: *State v. Rhoades*, 121 Idaho 63, 72, 822 P.2d 960, 969 (1991).

The Idaho Supreme Court also held, "Due process 'is not a concept to be applied rigidly in every matter. Rather, it 'is a flexible concept calling for such procedural protections as are warranted by the particular situation.'" *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91; quoting: *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 910, 935 P.2d 169, 173 (1997); quoting: *In re Wilson*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996).

"A procedural due process inquiry is focused on determining whether the procedure employed is fair. The due process clause of the Fourteenth Amendment 'prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends

the community's sense of justice, decency and fair play.'" *Bradbury v. Idaho Judicial Council*, 136, Idaho 63, 72, 28 P.3d 1006, 1015 (2001); quoting: *Maresh v. State of Idaho Dep't of Health and Welfare*, 132 Idaho 221, 225-226, 970 P.2d 14, 19-20 (1998); citing: *Moran v. Burbine*, 475 U.S. 412, 432-34, 106 S.Ct. 1135, 1146-47, 89 L.Ed.2d 410, 428-29 (1986).

The courts must engage in a two-step analysis in determining whether there has been a violation of procedural due process. *Bradbury v. Idaho Judicial Council*, 136, Idaho 63, 72, 28 P.3d 1006, 1015 (2001). The first step is to ascertain either a liberty or property under the Idaho Constitution or under the U.S. Fourteenth Amendment. *Id.* Once a court has determined that a property interest exists, it can determine what process is due. *Id.* A court must determine if sufficient notice and hearing were afforded to meet the due process requirements. *Simmons v. Board of Trustees of Independent School Dist. No. 1*, 102 Idaho 552, 553, 633 P.2d 1130, 1131 (1980).

"Whether a property interest exists can be determined only by an examination of the particular statute, rule or ordinance in question." *Bradbury*, 136 Idaho at 72, 28 P.3d at 1015; *See also*: *Fergusen v. Board of Trustees of Bonner County Sch.*, 98 Idaho 359, 363, 564 P.2d 971, 975 (1977).

In the present matter, Mr. Piercy has more than one property interest at stake. Mr. Piercy has an interest in being able to have his cattle roam in open range without being subject to liability for accidents caused when his cattle wander onto the roadway. Idaho statutes allow the state to abrogate that right by the creation of a herd district. *See*: I.C. § 25-2402-2404. In taking away this property right, the Idaho Legislature required that counties provide notice and an opportunity to be heard prior to the property right being taken by creation of a herd district. *See*: I.C. § 25-2402-2404.

By providing for the right to have notice and an opportunity to be heard, Mr. Piercy gained the right to challenge that process. The 2009 amendment essentially abrogates the process provided under the state herd district laws by making it impossible to challenge the lack of the process after seven years have expired. The legislature is impermissibly stating in one section that there is a right to due process, but then eliminating that right by not allowing for enforcement of that right. A right that cannot be enforced is no right at all.

Mr. Guzman may argue that the right to process may be enforced within the first seven years after the ordinance is enacted. This argument begs the question as to whether allowing a mere seven years to enforce a right to due process is adequate process. Looking at the 2009 amendment to Idaho Code § 31-857, it is clear that it violates the notions of fair play which underpin the idea of due process. For the more egregious the violation of due process in passing a herd district ordinance, the more likely the ordinance will ultimately be upheld. Under the 2009 amendment, if county commissioners can keep an ordinance in complete secret for seven years, then it is unassailable.

It is not difficult to see that the 2009 amendment actually encourages violations of due process. A simple example may be illustrative. County commissioners wanting to create or modify a school district could simply meet in secret and pass the ordinance they wish to pass. The commissioners would simply include in the ordinance that the ordinance would not be enforced until seven years had transpired from the date of enactment. Thereby the commissioners successfully insulate their ordinance from any challenges. The other parties may argue that this would not occur, but it already has occurred in the present case.

Mr. Piercy proved at the trial in this matter that the Canyon County Commissioners failed to

provide notice or an adequate opportunity for the residents of Canyon County to be heard on the 1982 ordinance. Mr. Piercy was oblivious of the creation of the herd district due to the commissioners acting in secret. Now, following the trial of this matter, Mr. Guzman states that the 2009 amendment makes the 1982 ordinance untouchable despite the fact that Mr. Piercy was not provided the due process the herd district statutes require.

It would be frightening to think that a statute that essentially allows a legislative body to bar challenges to laws passed without due process could be interpreted as being constitutional. The legislature could use such laws to dismantle the rights of its citizens by making their rights unenforceable. In the present case, the 2009 amendment violates Mr. Piercy's due process right to a notice and hearing before having his property rights diminished and an additional liability imposed upon him.

2. The 2009 Amendment Violates Substantive Due Process

The Idaho Court of Appeals has held that, "Substantive due process includes, inter alia, a general protection against state action that is arbitrary and capricious." *Nelson v. Hayden*, 138 Idaho 619, 622, 67 P.3d 98, 101 (Ct.App. 2003). "Due process of law is not necessarily satisfied by any process which the Legislature may by law provide, but by such process as safeguards and protects the fundamental, constitutional rights of the citizen." *Abrams v. Jones*, 35 Idaho 532, 535, 207 P. 724, 727 (1922).

"Substantive due process is guaranteed by both the Idaho and United Stated Constitutions, and requires that 'a statute bear a reasonable relationship to a permissible legislative objective.'" *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999); quoting: *In re McNeely*, 119 Idaho 182, 189, 804 P.2d 922, 918 (Ct.App. 1991).

The stated legislative reason for the 2009 amendment is to, "eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county." The 2009 amendment is not rationally related or does it bear a reasonable relationship to the stated goal. By enacting an absolute bar on challenges to the due process requirements of county ordinances, the legislature has capriciously cut off legitimate due process challenges without allowing any inquiry into whether a challenge has been unreasonably delayed. Also, using a statute of limitation's bar in this context makes the unreasonable and arbitrary assumption that any challenge to an ordinance after seven years is unreasonable, and that any ordinance in existence for seven years has become relied upon by the county and its citizens.

The 2009 amendment is as reasonable a statute for eliminating delayed challenges to ordinances as cutting off someone's foot is a reasonable way to ensure that a person will not get ingrown toenails. Just because a suggested method is effective does not make it reasonable. The 2009 amendment tramples upon the very notions of fair play and justice upon which is the basis of the fundamental rights of due process. A citizen's right to challenge a law which has been enacted through a deprivation of due process should not receive a judicial stamp of approval.

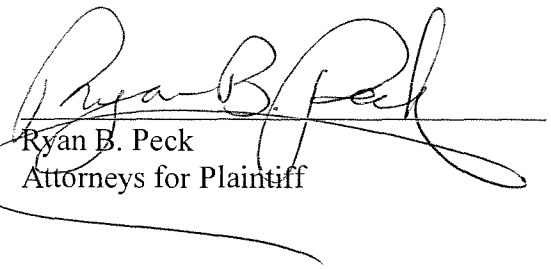
The 2009 amendment should be found to violate both substantive and procedural due process and be declared unconstitutional.

IV. CONCLUSION

The 2009 amendment has no bearing on this matter as it is prospective in effect, and it is unconstitutional as it violates substantive and procedural due process.

DATED this 30th day of July 2010.

SAETRUM LAW OFFICES

By 
Ryan B. Peck
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of June 2010, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton CHASAN & WALTON LLC 1459 Tyrell Lane P.O. Box 1069 Boise, ID 83701-1069	_____ U.S. Mail _X_ Hand Delivery _____ Overnight Mail _____ Facsimile
Stephen E. Blackburn BLACKBURN LAW PC 660 E. Franklin Road Suite 255 Meridian, ID 83642	_X_ U.S. Mail _____ Hand Delivery _____ Overnight Mail _____ Facsimile
Joshua S. Evett ELAM & BURKE, P.A. 251 East Front Street, Suite 300 P.O. Box 1539 Boise, ID 83701	_____ U.S. Mail _X_ Hand Delivery _____ Overnight Mail _____ Facsimile
Carlton R. Ericson Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail _X_ Hand Delivery _____ Overnight Mail _____ Facsimile

Ryan B. Peck

EXHIBIT "1"

CHAPTER 43
(H.B. No. 102)

AN ACT

RELATING TO COUNTIES; AMENDING SECTION 31-857, IDAHO CODE, TO PROVIDE THAT CHALLENGES TO PROCEEDINGS AND JURISDICTIONAL STEPS PRECEDING ORDERS RELATING TO THE CREATION, ESTABLISHMENT, DISESTABLISHMENT, DISSOLUTION OR MODIFICATION OF CERTAIN DISTRICTS SHALL NOT BE HEARD OR CONSIDERED FOLLOWING THE LAPSE OF A SPECIFIED PERIOD OF TIME.

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

SECTION 1. That Section 31-857, Idaho Code, be, and the same is hereby amended to read as follows:

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. No challenge to the proceedings or jurisdictional steps preceding such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order.

Approved March 23, 2009.

EXHIBIT "2"

MINUTES

HOUSE JUDICIARY, RULES AND ADMINISTRATION COMMITTEE

DATE: February 11, 2009

TIME: 1:30 p.m.

PLACE: Room 240

MEMBERS: Chairman Clark, Vice Chairman Smith(24), Representatives Nielsen, Shirley, Wills, Hart, McGeachin, Bolz, Labrador, Luker, Kren, Boe, Burgoyne, Jaquet, Killen

ABSENT/ EXCUSED: Representative Wills

GUESTS: Representative Lake; Patricia Tobias, Administrative Director of the Courts; Bill von Tagen, Deputy Attorney General; Hannah Saona, ACLU of Idaho; Erin Armstrong, Lobbyist; LaMont Anderson, Deputy Attorney General

Chairman Clark called the meeting to order at 1:30 p.m. and asked the members to review two sets of minutes.

MOTION: **Representative Luker** moved to approve the minutes of the meeting held on February 5, 2009, as written. Motion carried by voice vote.

MOTION: **Representative Bolz** moved to approve the minutes of the meeting held on February 9, 2009, as written. Motion carried by voice vote.

RS18452: Chairman Clark recognized **Representative Lake** to explain the proposed legislation. This bill establishes a standard seven year statute of limitations for procedural and jurisdictional challenges to the creation of governmental districts under Idaho law. This will eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county.

MOTION: **Representative Luker moved to introduce RS18452. Motion carried by voice vote.**

RS18491: The Chairman recognized **Patricia Tobias**, Administrative Director of the Courts, to explain. This piece of legislation has a long history of legislative support and interest in monitoring the assets of those persons who need protection under a conservatorship or guardianship case filed in the district court. In 2005 the Legislature adopted H 131, which established the Guardianship Pilot Project, requiring annual reports to the Legislature and providing a sunset clause.

Section 1 of this legislation repeals the sunset provision relating to the Guardianship Pilot Project fund, allowing the pilot project fees and funding to go forward after July 1, 2009.

MINUTES

HOUSE LOCAL GOVERNMENT COMMITTEE

DATE: February 18, 2009

TIME: 1:30 p.m.

PLACE: Room 316

MEMBERS: Chairman Barrett, Vice Chairman Bilbao, Representatives Collins, Clark, Bayer, Chadderdon, Henderson, Palmer, Boe, Burgoyne, Higgins

ABSENT/ EXCUSED:

GUESTS: Justin Ruen, Association of Idaho Cities; Barbara Jorden, Idaho Trial Lawyers Association; Ken Howard, Association of Idaho Cities

Chairman Barrett called the meeting to order at 1:31 p.m.

Meeting minutes from February 16, 2009, were introduced for approval.

MOTION: **Representative Higgins** moved to approve the minutes of February 16, 2009 as written. **Motion passed on a voice vote.**

H0143: **Chairman Barrett** welcomed **Representative Luker** to the committee. He shared that **H0143** is a fix-it bill that makes it clear that implied consent to annexation was not to apply to Category A. He stated that as per Representative Clark's request, he had given Representative Clark a copy of the court case that brought to light the need for this legislation.

MOTION: **Representative Clark** moved to send **H0143** to the floor with a **DO PASS** recommendation. **Motion carried on a voice vote.**

H0102: **Representative Lake** was welcomed to the committee, to present H0102. He stated that this bill began in Judiciary and Rules because of a Jefferson County court case alleging that a Herd District had not been created appropriately.

H0102 establishes that if a district is created, established, disestablished, dissolved, or modified, challenges shall not be heard or considered following the lapse of a certain period of time.

MOTION: **Representative Burgoyne** moved to send **H0102** to the floor with a **DO PASS** recommendation. Arguing in favor of the motion, Representative Clark stated that he and other Representatives on the committee had heard this bill presented in the Judiciary and Rules committee, and that it is a great idea. Chairman Barrett called for a vote on the motion; **motion carried on a voice vote.**

MINUTES

SENATE LOCAL GOVERNMENT AND TAXATION COMMITTEE

DATE:	February 26, 2009
TIME:	3:00 p.m.
PLACE:	Room 211
MEMBERS PRESENT:	Chairman Hill, Vice Chairman Heinrich, Senators Corder, McKague, Jorgenson, Werk, and Bilyeu
MEMBERS ABSENT/ EXCUSED:	Senators McKenzie and Stegner
CONVENED:	**Chairman Hill** called the meeting to order at 3:02 p.m. on Thursday, February 26, 2009 with a quorum present.
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
MINUTES:	**Senator Werk** moved to accept the minutes of February 17, 2009. **Senator Jorgenson** seconded the motion. The motion carried by unanimous voice vote.
HB 102	RELATING TO COUNTIES to establish a statute of limitations for challenges to the creation of governmental districts under Idaho law. **Senator Jorgenson** explained that, in Idaho, all areas of the State outside a city or incorporated area, are considered to be open range unless the county commissioners make a determination of a herd district. The difference between open range and a herd district is very important. In open range, an animal is free to roam wherever it may choose and the owner has no liability. When a herd district is created, the animal owner has the responsibility to keep the animals fenced in and is liable for damages the animals may cause outside the fenced area. In cases involving a herd district, the validity of the district has been questioned due to the historical circumstances of the determination. This bill clarifies the issue of whether a district is either established or disestablished and that the duty of proof falls on anyone but the county. If the county has acted and gone through the process of establishing a district, it is a matter of law. **Senator Werk** asked if the bill was about statute of limitation issues regarding whether or not the district was properly created. **Senator Jorgenson** concurred.
MOTION:	**Senator Werk** moved to send HB 102 to the floor with a do pass recommendation. **Senator Heinrich** seconded the motion.
VOTE:	The motion carried by unanimous voice vote. **Senator Jorgenson** will sponsor this bill.

EXHIBIT "3"

STATEMENT OF PURPOSE

RS18452

This bill establishes a standard seven year statute of limitations for procedural and jurisdictional challenges to the creation of governmental districts under Idaho law. This will eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county.

FISCAL NOTE

This bill will have no negative impact.

Contact:
Name: Representative Dennis M. Lake
Office:
Phone: (208) 332-1000

EXHIBIT "4"

001370AA

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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 **REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT**
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

COMES NOW the above-entitled Third Party Plaintiff Dale Piercy, by and through its counsel of record, and responds to Plaintiff's and Co-Defendant Sutton's Objections to Third Party Plaintiff Piercy's Second Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual background was provided in Mr. Piercy's original memorandum. In addition, the following facts and procedural background are relevant due to the objections made by Co-Defendant Sutton and Plaintiff Guzman.

At the time of the accident, Mr. Piercy was cited for violation of Canyon County Code §03-05-17. Mr. Piercy contested the citation in Canyon County Criminal Case No. CR-2005-7773. Mr. Piercy was found not guilty of this offense. (Affidavit of Ryan B. Peck, Exhibit A.)

For purposes of the Mr. Piercy's Second Motion for Summary Judgment, Mr. Piercy is not disputing that the accident occurred within a herd district created by an ordinance enacted in 1908 or that the 1908 herd district is valid.

There is also no dispute that there are no cattle guards or fences enclosing the 1908 herd district in particular at the border where Wamstad Road crosses over the Boise River.

II. STANDARD OF ADJUDICATION

The standard on summary judgment is set forth in Mr. Piercy's original memorandum and is not in dispute. The objections to Mr. Piercy's Second Motion for Summary Judgment require some additional analysis of laws regarding statutory interpretation.

The construction of a legislative act presents a pure question of law for this Court to decide. *Crawford v. Dept. of Corrections*, 133 Idaho 633, 635, 991 P.2d 358, 360 (1999). Courts also exercise free review over the interpretation of statutes. *Adamson v. Blanchard*, 133 Idaho 602, 605, 990 P.2d 1213, 1216, (1999)(construing Idaho Code § 25-2118 and Idaho Code § 25-2119 together as they were adopted at the same time.)

"Courts are empowered to resolve ambiguities in statutes by ascertaining and giving effect to legislative intent." *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986) citing: *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951). " The act should be construed in its entirety and as a whole for the purpose of ascertaining the legislative intent, and where different sections reflect light upon each other they are regarded as *in pari materia*." *Id.*

The Idaho Supreme Court has also held, "'all parts of a statute should be given meaning,' and the Court 'will construe a statute so that effect is given to its provisions, and no part is rendered superfluous or insignificant.'" *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007) citing: *Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 226, 108 P.3d 370, 373 (2005).

III. Legal Analysis

Mr. Piercy is immune from liability in this lawsuit because: (1) this Court ruled that Mr. Piercy's bull was being pastured in an open range area; (2) I.C. § 25-2118 in conjunction with Idaho range law and I.C. § 25-2402, create immunity for Mr. Piercy's bull being in the 1908 herd district; and (3) Mr. Piercy cannot be held civilly liable under Canyon County Ordinance 03-05-17.

I. Mr. Piercy's Bull was Being Pastured in an Open Range Area

Based upon this Court's decision from the trial on Mr. Piercy's Amended Declaratory Judgment Action the 1982 herd district ordinance was invalid, and therefore, the area upon which Mr. Piercy pastured his bull is open range. (Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial.) Mr. Piercy is aware that Plaintiff Guzman and Co-Defendant Sutton are attempting to revisit this Court's decision, but that is a separate motion. (See: Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions)

II. Mr. Piercy is Immune from Liability in the 1908 Herd District

Mr. Piercy is protected from liability by the open range laws and policy of Idaho as expressed in Idaho Supreme Court cases and the Idaho Code.

Idaho has always been a state that follows the 'fence out' rule of open range. *Moreland v. Adams*, 143 Idaho 687, 689, 152 P.3d 558, 560 (2007). The 'fence out' rule places upon landowners the duty to construct fences to keep open range cattle from entering their property. *Id.* After the enactment of legal fence laws, landowners in open range areas could hold another landowner liable if they enclosed their property in a legal fence. Then, if a cattle owner's livestock broke through the fence, the owner of the cattle could be liable to the landowner.

The Idaho Legislature later made it possible for landowners to impose the 'fence in' rule in certain areas by creating a herd district. *Id.* The 'fence in' rule makes it the responsibility of cattle owners to enclose their animals.

The Idaho Legislature enacted I.C. § 25-2118 and I.C. § 25-2119 in 1961. These statutes were enacted to specifically address the liability of livestock on a highway. Idaho Code § 25-2118 specifically addresses the liability to an owner regarding cattle upon a highway in an open range area. Idaho Code § 25-2119 generally deals with livestock on highways in herd district areas. Neither of these statutes specifically addresses the issue of an open range cow that wanders into an unenclosed herd district.

Two years later in 1963, the Idaho Legislature filled the gap between I.C. § 25-2118 and I.C. § 25-2119, by enacting a revision to I.C. § 25-2402 which "exclude[s] liability for livestock roaming into a herd district from open range unless the district is inclosed by a lawful fence." *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986). The Idaho Supreme Court

interpretation of the Idaho Legislature's intent in amending I.C. § 25-2402 is controlling in this case. Further, it is supported by the common law of Idaho. Essentially, I.C. § 25-2402 as amended in 1963 reasserts the 'fence out' rule regarding boundaries between herd districts and open range.

Without this rule, the designation of open range becomes meaningless. It is well settled that one of the policies of open range is to save owners of livestock the expense of maintaining fences around their property. If a livestock owner in open range were liable for livestock that wandered into an adjacent herd district, then the livestock owner would be required to fence the border between open range and the herd district area. This would run precisely contrary to the longstanding 'fence out' rule of open range.

A herd district neighbor is also required to 'fence out' from open range livestock. The amendment of I.C. § 25-2402 in 1963 made it clear that it was the Idaho Legislature's intent that the common law 'fence out' rule applied whether the neighbor was a single landowner or a herd district. The cost to maintain a fence around the herd district is the responsibility of the landowners within the herd district as indicated by the provisions of I.C. § 25-2402-2408, which allow for the taxing of landowners in a herd district to construct a fence enclosing the herd district.

Co-Defendant Sutton argues that the 1908 herd district is exempt from the 'fence out' rule. This argument is based upon the idea that the amendment to I.C. § 25-2402 came in 1963, and therefore, does not apply to the 1908 herd district. This argument would not only run contrary to the long-standing 'fence out' rule of open range, but would make the statutes regarding open range meaningless. The Idaho Supreme Court has held that, "'all parts of a statute should be given meaning,' and the Court 'will construe a statute so that effect is given to its provisions, and no part

is rendered superfluous or insignificant.'" *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007) citing: *Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 226, 108 P.3d 370, 373 (2005).

Almost all herd districts in Canyon County, and in other counties in this state, were created prior to 1963. This Court has been provided with all the herd district ordinances in Canyon County and with the exception of the invalid 1982 ordinance, they were all passed prior to 1963. Therefore, if all herd districts created prior to 1963 were exempt from the 'fence out' rule with regard to open range livestock, then all the statutes governing open range would be meaningless. Even those livestock owners within open range would have to fence in their livestock or construct and maintain a fence around the entire open range area for fear their livestock would roam into a herd district that was not created after 1963. This would nullify the open range statutes designed to protect owners of livestock in open range.

The Idaho Supreme Court in *Easley*, stated that the intention of the Idaho Legislature was to "exclude liability for livestock roaming into a herd district from open range." *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986). Idaho law is designed to maintain the protections of open range by enforcing the 'fence out' rule with any landowner in open range or herd district bordering open range despite when it was created.

III. Mr. Piercy Cannot be Negligent Per Se under Canyon County Ordinance 03-05-17

Canyon County Ordinance 03-05-17 only provides a criminal penalty and cannot be used to support a civil claim of negligence. Canyon County Code 03-05-03, "Purpose and Authority", states in pertinent part, "This article is also designed to help solve the problems caused by 'livestock', . . . from running at large in the county." Both sections 03-05-17 (2) and (4) state that

"it shall be unlawful" for livestock (subsection 2) and animals (subsection 4) for animals to be at large on county roads, and section 03-05-29 (1) states that "violations of the provisions of this article shall be a misdemeanor and shall be punished as set forth in Idaho Code 18-113". In other words, Canyon County has made it a misdemeanor crime to have livestock or other defined animals at large on the roads of the county.

This is a similar approach taken by the Benewah County Commissioners which was discussed in *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 105 Idaho 209, 668 P.2d 85 (1983). In *Benewah County*, the county commissioners enacted an ordinance which prohibited livestock running at large in the county. As noted by the Supreme Court of Idaho, "The ordinance expressly leaves unaffected civil liability arising from trespassing livestock." *Id.* at 211, 688 P.2d at 87, *see also* 105 Idaho 213, 214, 688 P.2d 89, 90.

While agreeing that Canyon County validly exercised its police power to create the above sections of its Code, the status of this ordinance is similar to that found in *Benewah County* which precluded civil liability for violation of the ordinance. As a result of the *Benewah County* decision, a livestock owner could be criminally liable for violation of the county ordinance by allowing his livestock to run at large within Benewah County, but would not be civilly liable should that livestock be hit by a vehicle and cause damages because the livestock was in open range and I.C. § 25-2118 coupled with I.C. § 25-2402 provides complete immunity. Co-Defendant Sutton and Plaintiff Guzman cannot rely on the *Benewah* case for the proposition that Mr. Piercy is negligent because state statute specifically provides civil immunity for Mr. Piercy.

It is the same with the present case and the above Canyon County Code sections. Canyon County has made it a misdemeanor crime to have livestock running at large within the county.

However, for those portions of the county still in "open range" status, such as where Defendant Piercy resides, there is no civil liability for any damages caused by livestock running at large under sections 25-2118 and 25-2402.

A Canyon County ordinance cannot place liability upon a person who is specifically free from liability under State Statute. It would be absurd to hold that a county has more power than the Idaho Legislature.

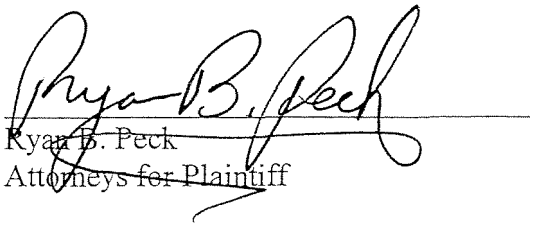
Mr. Piercy was cited for violation of Canyon County Ordinance 03-05-17. Mr. Piercy contested the charge and was found not guilty. As discussed, there is no civil penalty for a violation of this ordinance where a party is provided immunity by Idaho State statute.

III. CONCLUSION

Mr. Piercy is immune from liability in this lawsuit under Idaho common law, I.C. § 25-2118 in conjunction with I.C. § 25-2402. Mr. Piercy requests that this Court grant summary judgment on his behalf.

DATED this 6th day of August 2009.

SAETRUM LAW OFFICES

By 
Ryan B. Peck
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of August 2009, 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
Carlton R. Ericson Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ Facsimile

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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 JENNIFER SUTTON'S MEMORANDUM IN RESPONSE TO DEFENDANT PIERCY'S MEMORANDUM IN OBJECTION TO PLAINTIFF'S MOTION TO DISMISS AND FOR RECONSIDERATION
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

JENNIFER SUTTON'S MEMORANDUM IN RESPONSE TO DEFENDANT PIERCY'S MEMORANDUM IN OBJECTION TO PLAINTIFF'S MOTION TO DISMISS AND FOR RECONSIDERATION – 1

I. INTRODUCTION

Defendant Jennifer Sutton ("Sutton"), by and through her counsel of record, Elam & Burke, P.A., hereby responds to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Sutton respectfully refers this Court to the Factual History and Procedural Background section set forth in the Memorandum in Support of Defendant Jennifer Sutton's Motion for Reconsideration filed July 30, 2009. Sutton generally agrees with the summary of the recent procedural history as set forth in Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration.

Because the hearing set for August 11, 2010 will include argument regarding Defendant Piercy's Second Motion for Summary Judgment, Sutton respectfully refers this Court to Defendant Sutton's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment, filed May 22, 2009, and the argument commencing on page 19 of Jennifer Sutton's Brief Regarding Defenses on Reconsideration, filed June 2, 2010, and incorporates the previous briefing into this brief.

As instructed by the Court, this Memorandum will only address arguments regarding the amendment to Idaho Code § 31-857.

III. LEGAL ANALYSIS

A. THE AMENDMENT TO IDAHO CODE § 31-857 APPLIES RETROACTIVELY AND BARS PIERCY'S CHALLENGE TO THE ORDER ESTABLISHING THE 1982 HERD DISTRICT.

Sutton respectfully refers to and incorporates the arguments on this issue made in the Memorandum in Support of Plaintiff/Defendant, Luis J. Guzman's Motions for Reconsideration and Motion to Dismiss, filed on or about May 26, 2010. In addition, Sutton makes the following arguments.

Idaho Code § 73-101 states "[n]o part of these compiled laws is retroactive, unless expressly so declared." Idaho Code § 73-101. "[A] statute is not applied retroactively unless there is 'clear legislative intent to that effect.'" *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987). It has long been held by the Idaho Supreme Court that a statute does not have to use the word "retroactive" to evidence clear legislative intent:

> We think it is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared within the meaning of [Idaho Code § 73-101].

Peavy v. McCombs, 26 Idaho 143, ____, 140 P. 965, 968 (1914).

In order to interpret and give effect to the intent of the legislature,

> [N]ot only must the literal wording of the statute be examined, but also account must be taken of other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like. In re Gem State Academy Bakery, 70 Idaho 531-541, 224 P.2d 529, 535. Generally,

> effect must be given, if possible, to every word, clause and sentence of a statute. *State v. Alkire*, 79 Idaho 334, 317 P.2d 341.

Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963).

The plain, unambiguous language of Idaho Code § 31-857 sets forth clear legislative intent that the statute applies retroactively and bars Dale Piercy's ("Piercy's") challenge to the 1982 herd district order.

Idaho Code § 31-857 was originally enacted in 1935, and included language making it applicable to certain orders of the board of county commissioners made prior to the statute's enactment:

> 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 five 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.

1935 Idaho Sess. Laws ch. 79, § 1, p.134 (emphasis added).

The statute was subsequently amended in 1989 and in 2009. The 2009 amendment added the following: "No challenge to the proceedings or jurisdictional steps preceding such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order." Idaho Code § 31-857; *see also*, 2009 Idaho Sess. Laws ch. 43, § 1, p. 124-125.

The 2009 amendment did not include additional language evidencing retroactive application; however, since the original version of Idaho Code § 31-857 expressly applied to certain orders passed by the county commissioners prior to the effective date of the statute, so too does the 2009 amendment. *See, Stuart v. State*, 149 Idaho 35, ____, 232 P.3d 813, 822 (2010) (Amendments to statute did not include language indicating retroactive application; however, original enactment of statute included language making it applicable to convictions prior to the statute's enactment. Court concluded retroactive language applied to amendments.) It would not make sense to review and analyze the amendatory language in a vacuum. To interpret the amendment as not applying retroactively would have the effect of nullifying the retroactive language in the pre-2009 statute. *See, Stuart*, 149 Idaho at ___, 232 P.3d at 822.

Even though the statutory language indicating retroactive application is clear and unambiguous, a review of the legislative history only bolsters this conclusion. Contrary to Piercy's assertions, a review of the legislative history leads to only one conclusion: the legislature intended to apply the 2009 amendment retroactively. First, Representative Lake asserted the purpose of the proposed amendment was to "eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county." Minutes from the House Judiciary, Rules and Administration Committee, February 11, 2009.

Representative Lake later expressly stated this amendment was the result of a "Jefferson County court case alleging that a Herd District had not been created appropriately." Minutes from the House Local Government Committee, February 18, 2009 (emphasis added).

Additionally, Senator Jorgenson stated the purpose of the amendment as follows:

> In cases involving a herd district, the validity of the district has been questioned due to the historical circumstances of the determination. This bill clarifies the issue of whether a district is either established or disestablished and that the duty of proof falls on anyone but the county. If the county has acted and gone through the process of establishing a district, it is a matter of law.

Minutes from the Senate Local Government and Taxation Committee, February 26, 2009.

Finally, the Statement of Purpose states:

> This bill establishes a standard seven year statute of limitations for procedural and jurisdictional challenges to the creation of governmental districts under Idaho law. This will eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county.

Taken together, the legislative intent is clear. The enactment of the statute of limitations is to preclude challenges to old districts, and can only be read to apply retroactively. Many districts, like the herd district at issue in this case, were established twenty-five plus years ago, and society has ordered itself around the existence of these districts. To assert the statute of limitations begins to run on the effective date of July 1, 2009, does not make sense when the purpose of the amendment is to preclude challenges to old districts. It was not the legislature's intent to grant another seven years to challenge procedural defects in a one hundred year old herd district statute - such interpretation would not solve the problem sought to be fixed by the amendment to Idaho Code § 31-857[1].

---

[1]This absurd result is precisely what Piercy seeks here, as he has repeatedly challenged the validity of the 1905 herd district where the accident in this case occurred.

Piercy relies on *University of Utah Hosp. on Behalf of Harris v. Pence*, which is distinguishable on its facts since the statute at issue in that case was not expressly retroactive. 104 Idaho 172, 657 P.2d 469 (1983).

Based on the foregoing, the statute of limitations in Idaho Code § 31-857 applies to this case, and Piercy is barred from challenging the order establishing the1982 herd district.

Alternatively, should this Court determine the amendment to Idaho Code § 31-857 does not have retroactive application, Piercy is still barred from challenging the order establishing the 1982 herd district because, if the amendment is not retroactive, it is inapplicable, and Idaho Code § 5-224 has already barred Piercy's challenge.

The Idaho Supreme Court has previously held that a new statute of limitations cannot revive old claims. As fully briefed and argued to this Court, Piercy's challenge to the order establishing the 1982 herd district is barred by the application of Idaho Code § 5-224, the four-year general statute of limitations. Accordingly, the 2009 amendment cannot be applied to resurrect Piercy's challenge to the herd district order.

In Idaho, a new statute of limitations does not revive an old time barred claim. In *Gailey v. Jerome County*, 113 Idaho 430-431, 745 P.2d 1051-1052 (1987), a minor son and an adult son sustained personal injuries in an automobile accident. On November 7, 1984, one hundred and seventy-one (171) days after the accident, the injured parties and their parents (hereafter the "Gaileys") filed a notice of tort claim against Jerome County. *Id.* at 431, 745 P.2d at 1052. On July 1, 1985, an amendment to the tort claim statute went into effect *extending* the claim filing period from 120 to 180 days. *Id.* (Emphasis added.) The complaint was filed on September 5, 1985. *Id.*

Jerome County moved for summary judgment on the ground the notice of claim was not timely filed. *Id.* The district court granted summary judgment, and the Gaileys appealed. *Id.*

The Idaho Supreme Court held the 1985 amendment extending the time to file the notice of claim could not be applied retroactively. *Id.* at 433, 745 P.2d at 1054. The time for filing the notice of claim had expired long before the 1985 amendment became effective. *Id.* at 432, 745 P.2d at 1053. The Court concluded, in part, that the Gaileys failed to timely file the notice of claim within 120 days as required by the statute effective at the time; therefore to apply the amendment to those claims would improperly enlarge the rights of the Gaileys whose claims had been barred under the former statute. *Id.* at 433, 745 P.2d at 1054. Furthermore, the Court found defendants had a vested right under the prior statute to an absolute defense to the Gaileys claims, which retroactive application of the amendment would destroy. *Id.* The Court concluded the 1985 amendment extending the time to file a notice of claim was inapplicable, and affirmed the trial court's dismissal of the Gaileys claims. *Id.*

Following the rationale in *Gailey*, and assuming the Court finds the 2009 amendment to Idaho Code § 31-857 is not retroactive, this Court should find the amendment to Idaho Code § 31-857 is inapplicable. Piercy mistakenly asserts no statute of limitations applies to challenging the validity of a county order based on procedural deficiencies. As previously argued at length, the "catch-all" statute of limitations applies to the facts of this case. Idaho Code § 5-224; *see also Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830 (1911) (applied the statute of limitations to preclude challenge to an ordinance.)

Idaho Code § 5-224, provides 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 order establishing the 1982 herd district went into effect. *See*, *Canady*, 21 Idaho 77, 120 P. 830. Therefore, Piercy's time to challenge the order establishing the 1982 herd district expired long before the 2009 amendment to Idaho Code § 31-857 went into effect. Under *Gailey*, the 2009 amendment does not revive his challenge, which was already barred by § 5-224 when he made it.

B. THE 2009 AMENDMENT IS CONSTITUTIONAL.

1. Statutory Construction.

The constitutionality of a statute is a question of law over which this Court exercises free review. *Stuart v. State*, 149 Idaho 35, ____, 232 P.3d 813, 818 (2010) (additional citations omitted). The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." *Doe I v. Doe*, 138 Idaho 893, 903, 71 P.3d 1040, 1050 (2003) (additional citations omitted). Every reasonable presumption must be indulged in favor of the constitutionality of a statute. *State v. Pontier*, 95 Idaho 707, 711, 518 P.2d 969, 973 (1974) (additional citations omitted). The legislature is presumed to have acted within its constitutional power. *Worthen v. State*, 96 Idaho 175, 179, 525 P.2d 957, 961 (1974) (additional citations omitted).

The party challenging a statute on constitutional grounds must show the statute is unconstitutional "on its face" or "as applied." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. Water Res.*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007) (additional citations omitted). A facial challenge requires a showing that the statute in question is unconstitutional in all applications and is purely a

question of law. *Id.* (additional citations omitted). By contrast, an "as applied" challenge requires a showing that the statute is unconstitutional as applied to the offending conduct. *Id.* (Additional citations omitted). It appears Piercy is solely making an "as applied" challenge.

2. The 2009 Amendment to Idaho Code § 31-857 Does Not Violate Procedural Due Process.

The due process clause of the Fourteenth Amendment "prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends the community's sense of justice, decency and fair play." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 225-226, 970 P.2d 14, 18-19 (1998) (additional citations omitted). Furthermore, "due process is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Id.* at 226, 970 P.2d at 19. (Additional citations omitted).

For purposes of determining whether an individual's due process rights under the Fourteenth Amendment have been violated, a court must engage in a two-step analysis. *Id.* It must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment. *Id.* (Additional citations omitted).

Only after a court finds a liberty or property interest will it reach the next step of analysis, in which it determines what process is due. *Id.* (Additional citations omitted).

Whether a property interest exists can be determined only by an examination of the particular statute or ordinance in question. *Id.* (Additional citations omitted.) A person must have more than an abstract need or desire for a benefit in order to have a property interest therein. *Id.* at 227, 970

P.2d at 20. (Additional citations omitted.) Further, that person must have more than a unilateral expectation in the benefit; instead, she must have a "legitimate claim of entitlement to it." *Id.* (Additional citations omitted.)

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Id.* at 226, 970 P.2d at 19, *citing Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Examples of potentially protected property interests include drivers' licenses, welfare benefits, unemployment insurance, homestead exemptions, Social Security, workers' compensation and medical licenses. *See*, Ides, Allan and Christopher N. May, Examples & Explanations: Constitutional Law - Individual Rights, 2nd Ed., Aspen Law & Business, 2001.

Piercy has failed to support his argument that open range status is a clearly protected property interest. Furthermore, title 25, chapter 24, Idaho Code demonstrates there is no such constitutional right because it grants counties the right to create herd districts. Idaho Code § 25-2401. The statutes simply do not entitle Piercy to certain benefits, nor do they create an expectation that property is open range. Piercy has no legitimate claim of entitlement to open range property status. Consequently, he does not have a property interest protected by the constitution.

Even assuming Piercy does have a protected property interest, Piercy has failed to show the statutes providing notice and an opportunity to be heard violate due process. Rather, Piercy asserts the 2009 amendment to Idaho Code § 31-857 somehow violates the statutory provision regarding notice and an opportunity to be heard. This argument is flawed.

It is well established that the Due Process Clause of the Fourteenth Amendment does not prohibit a state from attaching reasonable time limitations to the assertion of federal constitutional rights. *Martinez v. State*, 130 Idaho 530, 534, 944 P.2d 127, 131 (Ct. App.1997) (additional citations omitted). The test is whether the defendant has had "a reasonable opportunity to have the issue as to the claimed right heard and determined." *Id.* (Additional citations omitted.) The current statute of limitations for a challenge to the validity of an ordinance is four (4) years pursuant to Idaho Code § 5-224. The 2009 amendment expanded the statute of limitations to seven (7) years. Even applied retroactively, four or seven years is more than a reasonable amount of time in which to pursue a claim for relief. *See, Martinez*, 130 Idaho at 535, 944 P.2d at 132 (reaffirming that a one year statute of limitations is a reasonable amount of time within which to file an application for post-conviction relief.) Therefore, there is no merit to Piercy's argument that procedural due process was violated.

3. The 2009 Amendment to Idaho Code § 31-857 Does Not Violate Substantive Due Process.

The United States and Idaho Constitutions protect against state deprivation of a person's "life, liberty, or property, without due process of law." *Idaho Dairymen's Ass'n, Inc. v. Gooding County*, 148 Idaho 653, ____, 227 P.3d 907, 915 (2010), *citing* U.S. Const. amend. XIV, § 1; Idaho Const. art. 1, § 13. In order to prevail on a substantive due process claim, the state action that deprives a person of life, liberty, or property must be arbitrary, capricious, or without a rational basis. *Idaho Dairymen's Ass'n Inc.*, 148 Idaho at ____, 227 P.3d at 915, *citing Pace v. Hymas,* 111 Idaho 581, 586, 726 P.2d 693, 698 (1986). Conversely, a substantive due process violation will not be found

if the state action "bears a reasonable relationship to a permissible legislative objective." *Id., citing McNeely v. State,* 119 Idaho 182, 189, 804 P.2d 911, 918 (Ct.App.1990) (citing *State v. Reed,* 107 Idaho 162, 167, 686 P.2d 842, 847 (Ct.App.1984)).

Piercy's claim the 2009 amendment to Idaho Code § 31-857 violates substantive due process is without merit. First, as argued above, there is no evidence or case law supporting Piercy's claim that he has a constitutionally protected property interest. Second, even if the Court finds Piercy has a property interest, the 2009 amendment to Idaho Code § 31-857 bears a reasonable relationship to a permissible legislative objective.

The 2009 amendment precludes a challenge to the proceedings or jurisdictional steps preceding certain orders of the board of county commissioners after seven (7) years from the date of the order. The purpose of the amendment, as discussed in greater detail above, is to protect existing school, road, herd, or other districts from stale claims. Similar to the facts of this case, many of these districts have been in existence for decades. A challenge to the creation of such districts would require review of evidence that through the passage of time no longer exists due to destruction or death, and/or reliance on faded memories. Therefore, the amendment is valid because the government has sufficient reason to want to avoid stale claims. Furthermore, the expressed legislative purpose of the 2009 amendment is to "eliminate unreasonably delayed legal challenges to the procedures sued by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens and the county." Statement of Purpose. Such purpose clearly bears a reasonable relationship to a permissible legislative objective.

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Finally, it is well-established the legislature may establish statutes of limitations. *Stuart v. State*, 149 Idaho 35, ____, 232 P.3d 813, 820 (2010). Because such authority is vested with the legislature, there cannot be a substantive due process violation.

IV. CONCLUSION

The Idaho Legislature has provided us with a bright line test to determine whether the 1982 herd district challenged by Piercy is valid. Under § 31-857, the herd district is valid, as more than seven years have passed since the order creating the district. The amendments to § 31-857 simply express the unifying characteristic of the common law and statutory defenses asserted by Guzman and Sutton, which is that at some point a statute, ordinance, or law is immune from procedural challenge. Idaho counties should not have to worry about countering procedural challenges to old herd, school, road, and other districts. § 31-857 does not allow it, nor do the common law and statutory defenses asserted by Guzman and Sutton.

DATED this 6th day of August 2010.

ELAM & BURKE, P.A.

By: _____
Joshua S. Evett, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August 2010, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

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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.	Case No. CV05-4848 PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND FOR RECONSIDERATION
DALE W. PIERCY, individually, Plaintiff, vs. CANYON COUNTY, LUIS GUZMAN, Individually AND JENNIFER SUTTON, Individually, Defendants.	

In his July 30, 2010 legal memorandum, Defendant Piercy raises two arguments in opposition to Plaintiff's motion to dismiss his Eighth Affirmative Defense (which defense alleges that the 1982 herd district is invalid):

1. That the July 1, 2009 legislative amendment to I.C. 31-857 is not retroactive; and
2. That applying such statute retroactively violates Piercy's rights to due process.

Both of Piercy's arguments are without merit. Piercy's Eighth Affirmative Defense must be dismissed, and the 1982 herd district must be declared valid pursuant to I.C. 31-857.

RETROACTIVE APPLICATION OF 31-857

"...[I}f the language (of the statute) clearly refers to the past as well as the future, then the intent to make the law retroactive is expressly declared..." and the statute will be applied retroactively. **Peavy v. McCombs**, 26 Idaho 143, 149 P. 965 (1914), at p. 968.

By clear, unequivocal and express language I.C. 31-857 (as amended July 1, 2009) applies to herd districts "**heretofore**" or "**hereafter**" created. The statute clearly refers to both the past as well as the future. I.C. 31-857 therefore applies retroactively. Since it has been more than 7 years since the creation of the herd district, Piercy's defense that the herd district was not validly created must be dismissed, because I.C. 31-857 prohibits any "challenge to the proceedings or jurisdictional steps preceding" the order creating the herd district.

PIERCY'S DUE PROCESS RIGHTS

Piercy's rights to due process have not been violated by the legislative amendment to I.C. 31-857.

A legislature may alter the statute of limitations without violating a litigant's rights of due process. No less than the U.S. Supreme Court has so held. **Chase v. Donaldson**, 325 U.S. 304 (1945).

The irony of Piercy's position is worth mentioning. Piercy complains loudly that his rights to contest the validity of the 1982 herd district were unfairly taken away by the legislative amendment to I.C. 31-857. Piercy cleverly ignores that he had some 23 years to contest the validity of the statute. Though Piercy claims he didn't know of the enactment of the 1982 herd district, it is uncontested that when the herd district was created, notice of creation of the herd district was published in the primary Canyon County newspaper.

And Piercy knew of the herd district, his protestations to the contrary notwithstanding. It is undisputed that Piercy has farmed and ranched in Canyon County for some 50 years (some 25 years before, and some 25 years after the herd district was created). It can not be seriously contested that Piercy told his insurer that the area was "not open range" in 2001. It is undisputed that Piercy's insurer paid for damage caused by Piercy's livestock in this exact same area, because the area was "not open range". And under Idaho law, if an area is not open range, it is herd district. Piercy's neighbor and witness, E. G. Johnson (another long time Canyon County rancher) knew of the 1982 herd district. It is undisputed that all of Canyon County has been treated as a herd district since 1982.

Piercy has had plenty of time to contest the validity of the herd district. He elected to sit on his rights for 23 years. He lived and operated for 23 years under the 1982 herd district rule of law, keeping all his livestock enclosed (as one would do in a herd district, and as **all** ranchers did throughout Canyon County, per Piercy's own testimony). He may not now contest the validity of the herd district. Per I.C. 31-857, the 1982 herd district is now unassailable.

SUTTON'S BRIEF

Plaintiff adopts and incorporates herein the additional arguments advanced by Sutton in her brief filed in response to Piercy's brief of August 6, 2010.

CONCLUSION

For the reasons enumerated herein, and for the additional reasons enumerated in Plaintiff's May 25, 2010 Memorandum in Support of Plaintiff's Motions to Dismiss and for reconsideration, Plaintiff Guzman requests that the Court declare the 1982 herd district valid, and that the Court Dismiss Piercy's Eighth Affirmative Defense.

DATED this 6TH day of August, 2010.

CHASAN & WALTON, L.L.C.

By _____
Timothy C. Walton, of the firm
Attorneys for Plaintiff Louis J. Guzman

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 6th day of Augusut, 2010, a true and correct copy of the above and foregoing document was served upon by:

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CHASAN & WALTON, LLC

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

LUIS J. GUZMAN, individually, Plaintiff, vs. DALE PIERCY, individually and JENNIFER SUTTON, individually, Defendant.	Case No. CV-05-4848 WRITTEN ORDER MEMORIALIZING ORAL RULING ON PLAINTIFF/ DEFENDANT, LUIS J. GUZMAN'S MOTION FOR RECONSIDERATION AND MOTION TO DISMISS AND DEFENDANT JENNIFER SUTTONS MOTION FOR RECONSIDERATION
DALE PIERCY, individually, Plaintiff, vs. CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

Procedural History

The relevant facts and procedural history of this action have been reiterated multiple times in the pleadings filed in the action. A procedural history relevant to this particular order is recited in this court's Order on Motion to Reconsider filed December 7, 2009. On December 7, 2009, this court issued the Order on Motion to Reconsider which allowed the parties to revisit limited issues regarding Judge Petrie's ruling on the validity of the 1982 Canyon County herd district ordinance. The court is reconsidering the Co-Defendant Jennifer Sutton (Sutton) and Plaintiff Luis J. Guzman's (Guzman) assertion that the Defendant, Dale Piercy's (Piercy) attack on the validity of the Canyon County's 1982 Herd District Ordinance is barred by equitable estoppel, estoppel by laches and applicable statutes of limitations.

On January 21, 2009, Judge Petrie filed his Findings of Fact, Conclusions of Law and Judgment In Bifurcated Portion of Trial declaring Canyon County's 1982 Herd District Ordinance invalid. Judge Petrie subsequently retired and on April 15, 2009 this court was assigned to preside over this case. Guzman and Sutton appealed Judge Petrie's declaratory action order. The appeals were dismissed by the Idaho Supreme Court without prejudice on the grounds that the appeals constituted interlocutory appeals of the trial court's declaratory action ruling. On May 5, 2009, Piercy filed a second Motion for Summary Judgment. Guzman's May 22, 2009 response to Piercy's summary judgment motion reasserted the estoppel and statute of limitation defenses. Although not captioned as a motion to reconsider, Guzman's opposition alleged that those issues had not been fully addressed by Judge Petrie in his order. On July 30, 2009 Sutton filed a Motion to Reconsider pursuant to IRCP 11(a)(2)(B). The court subsequently entered the above referenced Order on Motion to Reconsider. On May 3, 2010, the court heard testimony from Paul Axness, a former insurance adjustor who handled claims made by and

against Piercy in the past. On May 26, 2010, Guzman filed a Motion for Reconsideration and Motion to Dismiss, along with supporting memorandum and affidavit. Guzman's May 26, 2010 Motion did not cite any particular Rule of Civil Procedure as a basis for the motion, but did indicate it was based on Idaho Code §31-857. The court will treat Guzman's motion to reconsider as an IRCP 11(a)(2)(B) motion. The procedural basis for Guzman's motion to dismiss Piercy's Eighth Affirmative Defense is not as easily identified. Sutton filed her Brief Regarding Defenses on Reconsideration on June 2, 2010. Piercy filed a Response to Motions to Reconsider and supporting affidavit on June 8, 2010. Sutton filed a Reply and supporting affidavit on June 10, 2010. Oral argument was held on June 14, 2010, however, the argument on the Motion to Dismiss was continued. On July 30, 2010, Piercy filed a Memorandum in Objection to Plaintiff's Motion to Dismiss and For Reconsideration, along with supporting affidavit. Sutton filed a Memorandum in Response on August 6, 2010, and Guzman filed a Reply Memorandum on August 9, 2010. Oral argument was held on August 11, 2010. The court attempted to schedule a telephonic hearing to rule on the pending issues in October 2010. Because of participant availability issues, the court scheduled the pending issues for December 9, 2010 oral ruling. On December 9, 2010, the court entered its oral ruling on the record regarding the pending motions to reconsider and the motion to dismiss affirmative defense. This written memorialization of the court's December 9, 2010 oral ruling has been prepared and filed to provide a written record of the court's ruling for appellant purposes. This written memorandum is consistent with and reiterates the oral ruling. During the December 9, 2010 hearing, the court also raised the issue of whether the ruling rendered Piercy's May 5, 2009 second motion for summary judgment moot. After discussion, this court allowed that Piercy's attorney could

provide supplemental briefing and reschedule that motion for summary judgment for hearing if he and his client determined that the motion for summary judgment remained viable.

Motion for Reconsideration – The Estoppel Issues

Quasi-estoppel

Guzman and Sutton have asserted the defense of Quasi-Estoppel and Estoppel by Laches to Piercy's declaratory action. This court, as a matter of discretion, has allowed the parties to present evidence on and reassert these doctrines in order to ensure that these issues have been fully considered and addressed by the court.

Quasi-estoppel is a doctrine applicable to situations in which it would be unconscionable to allow a party to assert a right that is inconsistent with a previously asserted position in such a manner to impose prejudice or harm on another party, the party asserting the doctrine. *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010) *citing, Willig v. State, Dept. of Health & Welfare,* 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). In order for quasi-estoppel to apply, a party must show: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 235 P.3d 387 (2010), *citing Terrazas v. Blaine County,* 147 Idaho 193, 200 n. 3, 207 P.3d 169, 176 n. 3 (2009). In adopting the doctrine of quasi-estoppel the Idaho Supreme Court in *KTVB, Inc. v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971) found that "[t]he requirements for proper application of quasi estoppel are, then, that the person against whom it is sought to be applied has previously taken an

inconsistent position, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine." *Id,* at 282,995. In more recent cases, the Court has required evidence that "the party to be estopped must have either gained some advantage against the other party, produced a disadvantage to the other party, or the other party must have been induced to change positions." *Grover v. Wadsworth*, 147 Idaho 60, 205 P.3d 1196 (2009), *citing C & G, Inc. v. Canyon Highway Dist. No. 4,* 139 Idaho 140, 145, 75 P.3d 194, 199 (2003).

The court has considered the evidence presented as well as the extensive briefing and arguments presented by the parties and concludes that the Piercy was not barred by the doctrine of quasi-estoppel from challenging the legitimacy of the 1982 Canyon County Herd District Ordinance. In reaching this conclusion, the court considered all relevant evidence presented to the court including the articulated history of Piercy residing in and ranching in Canyon County, the propounded deposition testimony and the testimony of Paul Axness, retired insurance adjuster. In his testimony, Mr. Axness acknowledged the entry of notations in his adjuster's notes indicating that he had concluded the Wamstad Lane location of the October 12, 2001 collision between two motor vehicles and cattle belonging to Piercy did not occur on open range. One of the notations was made at approximately the same time as he had engaged in a conversation with Mr. Piercy. Axness did not recall whether Piercy advised him that the location of the accident was not open range. He opined that he would have reached the "not open range" conclusion if he had been advised that the cattle had escaped from a fenced-in location. In this case, Mr. Axness received information that the cattle had escaped from a fenced-in area. This testimony suggests the Mr. Axness could have reached the "not open range" conclusion based on his conversation with Mr. Piercy or someone else and based on being advised of the same or because he had been advised that the struck livestock had escaped from a fenced-in area. He was

uncertain why he had reached that conclusion. The livestock struck in that circumstance as well as in this case had escaped from a fenced-in location. None of the evidence presented before the court suggests that Mr. Piercy intentionally allowed his cattle to roam the countryside unfenced. Mr. Piercy is a Canyon County rancher, who has continuously resided and worked in Canyon County for approximately fifty years. He has resided and worked in Canyon County for as long as the challenged 1982 ordinance has been in effect. He contends he was uncertain, but believed the bull in question was pastured in an open range district. Despite Piercy's testimony, it would be logical to assume that he would investigate and determine with certainty the open range or herd district status of his lands.

However, the court does not find that quasi-estoppel applies to Piercy's challenge to the 1982 Canyon County herd district because there has not been sufficient evidence presented of record to establish: (1) that Piercy had previously taken an inconsistent position (although the evidence of record suggests that his insurance company may have taken an inconsistent position) to the detriment of a person seeking to enforce the doctrine; and (2) that Piercy gained an advantage or caused a disadvantage to another other party or that the other party was induced to change positions or that it would be unconscionable to allow him to take an inconsistent position to one that he had previously benefitted from.

With regard to the first alternative quasi-estoppel theory, there was no evidence presented to the court that the parties to this action have ever had a prior relationship with each other in which Piercy could have taken or did take an inconsistent position on the herd district issue. Furthermore, the evidence presented to the court was insufficient to establish that Piercy, rather than his insurance company, asserted an inconsistent position regarding the existence of a herd district relative to prior cattle/vehicle collision claims handled by his insurance company.

Similarly the evidence presented to the court is insufficient to support the "unconscionability" alternative of the quasi-estoppel defense to Piercy's attack on the 1982 Canyon County herd district ordinance. The argument that Piercy "unconscionably" benefitted from the herd district by not having free roaming livestock trespass on his property or that he has been able to operate his motor vehicles on Canyon County public roadways with the confidence that he was safe from free roaming cattle while simultaneously maintaining silence on the validity of the herd district ordinance until this case arose is a far too broad and speculative assertion to satisfy the specific element of "benefitting from a prior inconsistent position" to satisfy that particular element of the quasi-estoppel doctrine. An example of the type of evidence that might be sufficient to meet the "unconscionabilty" theory of quasi-estoppel would be an injured person asserting a claim against another person on the basis that he or she should have been protected by compliance with the herd district restrictions while simultaneously or subsequently asserting the opposite position in a lawsuit in with he or she is the respondent to a similar claim. That is not the situation in this case. The evidence is not clear as to what Piercy knew regarding the existence or validity of the challenged herd district.

Guzman and Sutton's argument that the court should reconsider Judge Petrie's October 9, 2007 order regarding the validity of the 1982 Canyon County herd district ordinance on the basis of quasi-estoppel is denied.

Estoppel by Laches

Estoppel by laches has often been referred to as a defense created in equity and is related to equitable estoppel. *Sword v. Sweet*, 140 Idaho 242, 92 P.3d 386 (2004). The determination of the applicability of laches to an action is a question of fact within the province of the trial court

and thus, the trial court's determination is reviewed for abuse of discretion. *Id.* The Idaho Supreme Court has found that "[b]ecause application of laches is discretionary, the standard of review on appeal is whether the trial court properly found (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Id. citing Preservation Coalition, Inc. v. Pierce,* 667 F.2d 851, 854 (9th Cir.1982). The elements of laches are (1) the defendant's invasion of plaintiff's right; (2) a delay in the assertion of the plaintiff's right; (3) a lack of knowledge by the defendant that the plaintiff would assert that right; and (4) injury or prejudice to the defendant in the event relief is granted to the plaintiff or the suit is not held to be barred. *Thomas v. Arkoosh Produce, Inc.* 137 Idaho 352, 48 P.3d 124 (2002). *See also Winn v. Eaton,* 128 Idaho 670, 917 P.2d 1310 (Ct. App.1996). Laches is derived from disfavor for "antiquated or stale demands" or "long acquiescence in the assertion of adverse rights" *Abrams v. Porter*, 128 Idaho 869, 920 P.2d 386 (1996), citing *Johnson v. Strong Arm Reservoir Irrigation Dist.,* 82 Idaho 478, 487, 356 P.2d 67, 72 (1960).

Sutton and Guzman have long relied on *Alexander v. Trustees of Village of Middleton*, 92 Idaho 823, 452 P.2d 50 (1969) in support of their claim that estoppel by laches is applicable to Piercy's position on the validity of the 1982 Canyon County herd district ordinance. In *Alexander*, the plaintiffs challenged Middleton's annexation of the plaintiffs' land because the ordinance allowing the annexation violated state law. In upholding the trial court's dismissal of plaintiffs' claims, the Idaho Supreme Court relied on McQuillin, Municipal Corporations, Volume 2, Section 7.09, which states "If the elements of estoppel are present, the owners of land over which the municipal corporation has exercised the powers and functions of government for a long period of time will be estopped from questioning the location of the municipal boundaries." *Id.* at 826, 452, P.2d at 53. The *Alexander* court also relied on a prior ruling in

Finucane v. Village of Hayden, 86 Idaho 199, 284 P.2d 236 (1963) in which the court held the following:

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

The court in *Alexander* found that that the plaintiffs were estopped from challenging the annexation because the annexation had occurred more than two years prior to the action, the plaintiffs were given notice of the intent to annex and the plaintiffs' land benefitted from the annexation. One of the considerations before the court in this case is the lapse of time that has passed since the ordinance was adopted, given that laches is designed to prevent or limit stale or antiquated claims. While this element is not controlling, it is an important consideration before the court. *Winn, supra.*

Guzman and Sutton have also relied on *Telfer v. School District No. 31 of Blaine County*, 50 Idaho 274, 295 P. 632 (1931). In that case, the landowners attempted to challenge a school district that was alleged to have been created without the proper procedures. However, the Idaho Supreme Court stated "We hold school district No. 31 having existed, exercising all the functions of a public school district of the state over its present well-defined territory as a public corporation for the past ten years, its legal entity is not subject to attack by a landowner within the district in an injunction proceeding against its officers." *Id.* at 634.

Estoppel by laches is the more compelling of the two estoppel arguments asserted by Guzman and Sutton regarding Piercy's challenge to the 1982 Canyon County herd district ordinance. There has been a substantial lapse of time since the purported enactment of the 1982 Canyon County herd district. Although the lapse of time is not to be controlling, this court must give the long passage of time since the enactment of the 1982 Canyon County herd district ordinance due regard along with considering the other relevant facts, circumstances and conduct of the parties. Given Mr. Piercy's fifty year history of residing and ranching in this county, his testimony that he believed the bull at issue in this case was pastured in an open range district stretches the bounds of credibility. However, to invoke estoppel by laches, the proponent must present sufficient substantial evidence of all the elements of the doctrine. The passage of time alone is not sufficient to prevail under this equitable argument. In considering all the circumstances and conduct of the parties, the court cannot find that Guzman and Sutton have established by substantial and competent evidence all of the elements necessary to establish estoppel by laches. In particular, the propounded evidence regarding Piercy's insurance company's prior position is inconclusive at best. The evidence of record is insufficient to establish that Piercy ever asserted or benefitted from a prior inconsistent position regarding the challenged ordinance or that he had actual knowledge of the existence or status of the asserted ordinance or otherwise engaged in any interaction with Canyon County or any of the parties regarding the enforcement of or acquiescence in the application of the ordinance in question. At best, the evidence demonstrates that he was simply silent on the issue. In light of this lack of evidence, Guzman and Sutton's request that this court reconsider and reverse Judge Petrie's October 9, 2007 ruling on the validity of the 1982 Canyon County herd district ordinance on the basis of estoppel by laches is denied.

Motion for Reconsideration – The Statute of Limitations Issue

Sutton and Guzman assert that the statutes of limitations set forth in Idaho Code §31-857 and/or Idaho Code §5-224 preclude Piercy's challenge to the validity of the 1982 Canyon County herd district ordinance. This argument was presented in the context of Sutton and Guzman's motions to reconsider as well as Guzman's motion to dismiss Piercy's eighth affirmative defense. Pursuant to a ruling on a motion for summary judgment and Sutton's request, Judge Petrie directed Sutton to bring Canyon County into this case as a defendant in a interrelated, but independent declaratory action pursuant to Idaho Code §10-1201 and IRCP 57. The declaratory action was intended to provide a procedure for determining the validity of Canyon County's 1982 herd district ordinance. Judge Petrie concluded that Canyon County was a necessary party to such a proceeding. Although Sutton was originally directed to bring the action against Canyon County, the parties subsequently stipulated to realign the parties in the declaratory action to properly and logically address the issues presented by that action. This was accomplished pursuant to the Stipulation to Amend Pleadings and Scheduling filed on September 4, 2008. Piercy was the named Plaintiff in the amended declaratory action against Canyon County. The stipulation realigning the parties included a provision purportedly limiting the assertion of timeliness defenses to Piercy's filing of the amended declaratory action complaint. The provision in question read as follows: "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" Piercy contends that this language precluded Guzman, Sutton and Canyon County from asserting any statute of limitations defense to Piercy's complaint. Guzman and Sutton disagree, contending that provision was only included to address problems that might arise as result of the late realignment of parties and the filing of the amended action. This

stipulation was filed approximately one month before the October 8, 2008 bench trial commenced. Paragraph four of the stipulation also provided that Canyon County, Guzman and Sutton would be allowed to Answer the Amended Action for Declaratory Relief as provided for in the Idaho Rules of Civil Procedure. Paragraph four appears to be inconsistent with the assertion that the responding parties knowingly agreed not to assert a statute of limitations affirmative defense particularly in light of their vigorous assertion of other affirmative defenses including the estoppel arguments. The analysis of the statute of limitations issue is further complicated by the fact that Canyon County never asserted a specific statute of limitations defense, which Piercy contends is dispositive of the issue in that Canyon County is the real party defendant in the declaratory action. Canyon County did assert a "limited statute of limitation by burden shifting" defense as its Fourth Affirmative Defense. Piercy argues that Sutton and Guzman lack independent standing to assert statute of limitations defenses to the declaratory action in light of the fact that Canyon County waived such a defense by failing to specifically assert it in its pleadings. Finally, although Sutton and Guzman specifically asserted the statute of limitations defense prior to Judge Petrie's ruling on the validity of the 1982 Canyon County Herd District, his order did not address the issue. Therefore, this court will consider and address the statute of limitations defense at this time.

This court has determined that Sutton and Guzman did not waive their right to assert the statute of limitations defense when they entered the stipulation to realign the parties. If the litigants intended that the stipulation include a specific waiver by the respondents of their right to assert a statute of limitations defense, the stipulation should have specifically stated that the respondents waive all statute of limitations defenses. Canyon County waived the right to assert that defense to the declaratory action by failing to specifically plead it in its answer to the

amended declaratory action complaint. Sutton and Guzman have an articulated and identifiable financial interest in the outcome of the declaratory action and so this court will consider their statutes of limitations defense. Guzman has also filed a motion to dismiss Piercy's eighth affirmative defense which alleges Piercy is immune from liability in this case because the struck bull escaped from an open range location.

Idaho Code §31-857

In its analysis, the court will address the statute of limitations provided for by Idaho Code §31-857 prior to addressing the statute of limitation set forth by Idaho Code 5-224. The applicability of Idaho Code §31-857 to the facts of this case was fully addressed by the attorneys as a part of the motion to reconsider Judge Petrie's declaratory action order as well as pursuant to Guzman's motion to dismiss Piercy's eighth affirmative defense. The statute of limitations set forth in Idaho Code §31-857 did not exist at the time Judge Petrie considered and entered his order following the bench trial on Piercy's declaratory action. This court can consider new evidence or information in the process of reconsidering interlocutory orders entered by the court or its predecessor. The Idaho Supreme Court's dismissal of the parties' appeals confirm that Judge Petrie's order on the declaratory action was not a final appealable order. Therefore the court is treating it as an interlocutory order subject to a IRCP 11(a)(2)(B) motion to reconsider. For the reasons set forth below, the statute of limitations created by the Idaho State Legislature's 2009 amendment to Idaho Code §31-857 will be applied by this court retroactively to time bar Piercy's challenge to the validity of the 1982 Canyon County herd district ordinance.

The 2009 Amendment

Idaho Code §31-857 provides that:

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. **No challenge to the proceedings or jurisdictional steps preceding such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order.**

This statute was enacted in 1935 and amended in 1989. The Idaho legislature further amended the statute in 2009 (effective July 1, 2009) by adding the last sentence "No challenge to the proceedings or jurisdictional steps preceding such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order." Guzman and Sutton argue that the statute of limitations provision added by the 2009 amendment applies retroactively while Piercy argues the 2009 amendment only applies prospectively. Piercy also argues that a retroactive application of the newly adopted statute of limitations would violate his procedural and substantive due process rights.

Retroactivity

Idaho Code 73-101 provides that no statute is to be considered retroactive unless "expressly so declared." I.C. 73-101. However, the Idaho appellate courts have determined that a statute need not make an express statement of retroactivity but that the legislature's intent that a statute be applied retroactively may be implied from the language of the statute. *Kent v. Idaho Public Utilities Commission*, 93 Idaho 618, 621, 469 P.2d 745, 748 (1970). In Idaho, a statute is not applied retroactively unless there is 'clear legislative intent to that effect." *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 207 P.3d 988 (2009). "A retrospective or retroactive law is one which takes away or impairs vested rights acquired under existing laws, or

creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Id, citing* 82 C.J.S. *Statutes* § 407 (1999).

In determining the intent of the legislature, a court may look to the literal wording of the statute along with "the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like." *Messenger v. Burns*, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963). Guzman relies on *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914) in which the Idaho Supreme Court stated that "it is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared...." Thus, Guzman argues that the statute read as a whole specifically refers to herd districts created before and after July 1, 2009 and therefore is specifically retroactive. Sutton agrees, arguing that the language "heretofore created" indicates that the legislature intended that the code section be applicable to all districts created at or before the time I.C. 31-857 was enacted and that the language from legislative history of the amendment indicates that the legislature was concerned about limiting "unreasonably delayed legal challenges" to the districts impacted by I.C. 31-857.

Piercy disagrees, citing the court to the *University of Utah Hosp. on Behalf of Harris v. Pence*, 104 Idaho 172, 174, 657 P.2d 469, 471 (1982) in support of his argument that the 2009 amendment to Idaho Code 31-857 is not to be applied retroactively because there is not an "express declaration" of retroactivity. He argues that the rationale in that case has been applied to the amendment of the statute of limitations set forth in I.C. 31-3504 and I.C. 14-4902. In *University of Utah Hospital*, the Idaho Supreme Court recognized the following principle:

> [T]here is almost universal agreement that when a statutory period of limitation is amended to reduce the limitation period, the party whose right accrues before the

> effective date of the amendment cannot be heard to complain if he is given the full time allowed for action according to the terms of the amended statute from and after the effective date of the amended statute.
>
> 104 Idaho at 175, 657 P.2d at 472.

Piercy argued the amendment adding the statute of limitations language should be read without consideration of the preexisting "heretofore or hereafter" language contained in the first sentence of the statute. Thus Piercy is arguing that that the statute of limitations enacted by the 2009 amendment should not bar any proceeding challenging districts created before the passage of the amendment or at the very least until seven (7) years after the July 1, 2009 effective date of the amendment. Sutton argues that this interpretation would lead to an absurd result because most of the herd districts in the state were created more than 25 years ago and the specific language of the statute provides the prescribed statute of limitations commences running on the date of the order creating the district. Given the stated legislative purpose of eliminating stale claims challenging the validity of such districts, it would not make sense to limit the applicability of the amendment to districts created after July 1, 2009 or even to add another seven years to challenge districts created more than seven years prior the effective date of the amendment. This interpretation is supported by the literal, plain meaning of the language of the statute as well as the relevant legislative committee minutes and stated purpose for the amendment.

All the parties rely on the legislative history of the 2009 amendment. On July 30, 2010, Piercy filed a Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration with attached exhibits detailing the steps taken by the Idaho Legislature when enacting the amendment. Exhibit 1 is a copy of H.B. No. 102 which states

> AN ACT RELATING TO COUNTIES; AMENDING SECTION 31-857, IDAHO CODE, TO PROVIDE THAT CHALLENGES TO PROCEEDINGS AND JURISDICTIONAL STEPS PRECEDING ORDERS RELATING TO THE CREATION, ESTABLISHMENT, DISESTABLISHMENT, DISSOLUTION OR

MODIFICATION OF CERTAIN DISTRICTS SHALL NOT BE HEARD OR CONSIDERED FOLLOWING THE LAPSE OF A SPECIFIED PERIOD OF TIME.

Chapter 43, H.B. No 102, Exhibit 1 to Piercy July 30, 2010 Memorandum.

Exhibit 2 to Piercy's Memorandum is a series of minutes for the House Judiciary, Rules and Administrative Committee held on February 11, 2009. The minutes indicate that Representative Lake was asked to explain the proposed legislation and provided:

> This bill establishes a standard seven year statute of limitation for procedural and jurisdictional districts under Idaho law. This will eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied on by the citizens and the county.
>
> Exhibit 2 to Piercy July 30, 2010 Memorandum.

Also included in Exhibit 2 is a minute for the House Local Government Committee held on February 18, 2009 in which Representative Lake presented House Bill 102 and the minutes state the following:

> He stated that this bill began in Judiciary and Rules because of a Jefferson County court case alleging that a Herd District had not been created appropriately. HO102 establishes that if a district is created, established, disestablished, dissolved or modified, challenges shall not be heard or considered following the lapse of a certain time period.
>
> Exhibit 2 to Piercy July 30, 2010 Memorandum.

Finally, Exhibit 2 contains a minute from the Senate Local Government and Taxation Committee in which the following is stated:

> HB 102. RELATING TO COUNTIES to establish a statute of limitations for challenges to the creation of governmental districts under Idaho law. Senator Jorgenson explained that, in Idaho, all areas of the State outside a city or incorporated areas, are considered to be open range unless the county commissioners make a determination of a herd district. The difference between open range and a herd district is very important. In open range, an animal is free

> to roam wherever it may choose and the owner has no liability. When a herd district is created, the animal owner has the responsibility to keep the animals fenced in and is liable for damages the animals may cause outside the fenced area. In cases involving a herd district, the validity of the district has been questioned due to the historical circumstances of the determination. This bill clarifies the issue of whether a district is established or disestablished and that the duty of proof falls on anyone but the county. If the county has acted and gone through the process of establishing a district, it is a matter of law.
>
> Senator Werk asked if the bill was about statute of limitations issues regarding whether the district was properly created. Senator Jorgenson concurred.
>
> Exhibit 2 to Piercy July 30, 2010 Memorandum.

Finally, this court looks at the Statement of Purpose for the amendment provided by Exhibit 3 to Piercy's Memorandum in which the legislature states:

> This bill establishes a standard seven year statute of limitations for procedural and jurisdictional challenges to the creation of governmental districts under Idaho law. This will eliminate unreasonably delayed legal challenges to the procedures used by the County Commission after seven years have passed, the districts are in place and have been relied upon by the citizens of the county.
>
> Exhibit 3 to Piercy July 30, 2010 Memorandum.

The court understands the parties' disparate interpretation of the applicability of this statutory amendment. However, this court finds that the Idaho legislature expressed, and a literal reading of the plain language of the statute confirms, the intent that the 2009 amendment creating a seven year statute of limitations was to be applied retroactively to existing enumerated districts. To hold otherwise would eviscerate the stated purpose of eliminating "unreasonably delayed legal challenges" to the districts. Pursuant to IRCP 11(a)(2)(B), the court has reconsidered Judge Petrie's January 21, 2008 order invalidating the 1982 Canyon County herd district ordinance and concludes the statute of limitations set forth in Idaho Code §31-857 bars Piercy's challenge to the validity of the ordinance. To that extent, Judge Petrie's January 21, 2009 Findings of Fact,

Conclusions of Law and Judgment In Bifurcated Portion of Trial is vacated and reversed and the declaratory relief action filed by Piercy in this case is dismissed.

Guzman also filed a motion to dismiss Piercy's eighth affirmative defense which asserts open range immunity. Guzman's attorney did not cite any particular procedural basis for this motion to dismiss an affirmative defense other than his reference to Idaho Code §31-857. It appears that the most appropriate procedure for seeking dismissal of an opposing party's affirmative defense would be an IRCP 56(b) motion for summary judgment. Since it may be disputed by the parties whether the Guzman's motion to dismiss Piercy's affirmative defense met the requirements of a IRCP 56(b) summary judgment proceeding, the court simple finds the motion has merit for the reasons set forth in this order and enters an order in limine precluding the presentation of evidence or argument of such affirmative defense during the jury trial of this action. The court will schedule a status conference to determine how and if the parties wish to further address the procedural appropriateness of the court granting an order dismissing this affirmative defense in the manner requested by Guzman.

Idaho Code §5-224

Prior to raising the issue of the 2009 amendment to Idaho Code 31-857, Sutton and Guzman asserted a statute of limitations defense to Piercy's challenge to the 1982 Canyon County herd district ordinance pursuant to Idaho Code §5-224. If it is determined that the I.C. §31-857 statute of limitations does not apply to Piercy's declaratory action, Sutton and Guzman maintain that the declaratory action is alternatively subject to the statute of limitations set forth by I.C. §5-224. Although timely raised, this issue was not addressed by Judge Petrie in his declaratory action order so this court will also consider and decide the applicability of I.C. §5-

224 to Piercy's declaratory action in the alternative circumstance that I.C. §31-857 does not apply. Otherwise, the applicability of Idaho Code §5-224 is moot.

Idaho Rule of Civil Procedure 57 and Idaho Code §10-1201 *et seq.* both refer to the process of obtaining declaratory relief as an "action." Idaho Code §5-240 defines an "action" as a special proceeding of a civil nature. Idaho Code §5-201 provides that "[c]ivil 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 §5-224 provides that, "[a]n action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued."

The Idaho Supreme Court has treated cases before it involving declaratory actions as "civil actions." *See Smith v. State Board of Medicine of Idaho*, 74 Idaho 191, 194, 259 P.2d 1033, 1034 (1953)("this is a civil action, albeit for a declaratory judgment."); *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 423-24, 111 P.3d 100, 108-109)(2005)(award of attorney fees in declaratory judgment action pursuant to Idaho Code §12-120(3) which allows for the recovery of attorney fees in "any civil action.").

Thus if it is determined upon appellate review that the statute of limitations set forth in Idaho Code §31-857 does not apply to the facts of this case, this court concludes that as a civil action, declaratory actions fall within the "catch all" statute of limitations provision of I.C. §5-224.

Assuming I.C. §5-224 alternatively applies to Piercy's declaratory relief action, the court must also determine when the declaratory cause of action accrued. Sutton relies on *Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830, 831 (1911). As noted by Sutton in her

brief, the Idaho Supreme Court granted a "nonsuit" at the conclusion of the plaintiff's case at trial stating:

> 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.
>
> *Id*, at 835.

Piercy has denied specific knowledge of the status of the 1982 Canyon County herd district ordinance prior to the accident that spawned this lawsuit. He has acknowledged farming in Canyon County for essentially his entire life, including the time period during which the 1982 Canyon County herd district ordinance was enacted by the Canyon County Board of Commissioners. He also admits involvement with local cattle ranching associations and other cattle ranchers residing in Canyon County prior to and since 1982. Paul Axness' testimony suggests that Piercy has had to consider herd district versus open range concerns prior to the accident at issue in this case. While the testimony of Paul Axness was insufficient to meet the required elements of the estoppel claims, it still suggests that Piercy should have and may have considered whether his property was subject to herd district restrictions prior to the accident that is the basis of this action. Piercy has argued that he was unaware of the 1982 Canyon County herd district ordinance because of the deficiency in notice provided by the Board of

Commissioners at the time the 1982 herd district ordinance was created. There was actual public notice given of the Board of Commissioners intent to consider and possibly adopt the ordinance. Following the enactment of this ordinance in 1982, Canyon County's public institutions recognized and disseminated information indicating that lands located in Canyon County were subject to the purported herd district. This status would have also been confirmed by the relevant public records regarding this challenged ordinance. This court finds that there was sufficient evidence that Piercy should have been aware of the enactment of the 1982 Canyon County herd district ordinance at the time of its enactment that his declaratory action accrued and the four year statute of limitations established by I.C. §5-224 commenced to run on the date the 1982 Canyon County herd district ordinance was adopted by the Canyon County Board of Commissioners. This statute of limitations would have run in 1986. Therefore, Piercy was alternatively time barred from filing the declaratory action challenging the validity of the 1982 Canyon County herd district by Idaho Code §5-224.

Piercy's Due Process Arguments

Piercy raises a due process objection to the retroactive application of the amended Idaho Code 31-857 seven year statute of limitations to Piercy's declaratory action. He argues that such an interpretation of the amendment violates both his procedural and substantive due process rights. The general rule is that a party challenging a statue on constitutional grounds "must overcome a strong presumption of validity." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 68, 28 P.3d 1006, 1011 (2001) *citing Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999). A second applicable general rule is that "a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that the law

should not be held to be void for repugnancy to the Constitution in a doubtful case." *Id, citing Sanderson v. Salmon River Canal Co.*,45 Idaho 244, 256, 263 P.32, 35 (1927). Whenever possible, a trial court should construe a statute in such a manner to achieve a constitutional result. *Id.*

In analyzing a procedural due process claim, the court must determine whether the procedure meets the minimal requirements of notice and a hearing if a potential deprivation of a significant life, liberty, or property interest may occur. *Id.* Minimal requirements are met when the process ensures that the individual is not "arbitrarily deprived of his rights in violation of the state or federal constitutions." *Id, citing Aberdeen-Springfield, supra.* This determination involves a two-step analysis in which the court must first determine whether the threatened interest is a liberty or property interest under the relevant Constitution and if the court finds such an interest exists, the court must then determine which process is due. *Id.*

In this case, Piercy claims that he has a protected property interest that has been impacted by the enactment of the seven year statute of limitations amendment to Idaho Code §31-857. He argues that he has property interest in the ability to allow his cattle to roam on open range without being subject to liability. He next argues that if the Idaho legislature is going to be allowed to deprive him of that right, he should be afforded the proper notice and opportunity to be heard on the issue. His argument is misguided. First, he has failed to demonstrate that he has a protected property right in preserving or maintaining open range status on his property. The Idaho Code clearly allows the regulation of such matters in its statutory provisions authorizing counties to create herd districts.

However, even assuming Piercy has a protected property interest in preserving open range status, his argument that the 2009 amendment to Idaho Code §31-857 as applied violated

his right to notice and to be heard does not survive careful scrutiny. The test to be applied to such argument is whether the person asserting the constitutional violation has had a reasonable opportunity to have the disputed issue heard and determined. The right identified is his right to protect or preserve open range status for his lands. Since the 1982 Canyon County herd district ordinance was adopted approximately 29 years ago, Piercy has fully had an opportunity to challenge the ordinance whether the four year or seven year statute of limitations is applied.

The 2009 amendment to Idaho Code §31-857 likewise does not violate Piercy's substantive due process rights. A substantive due process claim requires that the challenged statute "bear a reasonable relationship to a permissible legislative objective." *Aberdeen-Springfield, supra.* When a statute is challenged on this ground, the court must determine if the statute deprives a person of life, liberty, or property and if so, whether that deprivation has a rational basis. *Id.* As set forth above, the court does not find the statute deprives Piercy of life, liberty or a protected property interest. If it does involve such a deprivation, the court must determine if the statutory provision bears a reasonable relationship to a permissible legislated objective.

Piercy argues that the seven year statute of limitations is not rationally related to the State of Idaho's stated goal of reducing the number of stale, unreasonably delayed legal challenges to the procedures utilized to create herd and other districts. This court disagrees. The legislative history set forth above clearly sets out the rational legislative objective of the 2009 amendment which is the protection of long existing districts created pursuant to the statute from stale claims contesting the validity of the district. Such stale challenges present difficulties for obtaining and reviewing important evidence that may no longer exist due to the loss or destruction of records and the death, unavailability or faded memories of important witnesses. Likewise there is

rationale basis in confirming the legitimacy of such entities that citizens have relied upon for a number of years and if disputed, to encourage timely challenges to the entities existence. The legislature's 2009 amendment to Idaho Code §31-857 fulfills the rationale basis requirement by bearing a reasonable relationship to a permissible legislative objective and does not violate substantive due process rights. Piercy's procedural and substantive objections to the court's application of the amended Idaho Code §31-857 to the facts of this case are denied.

CONCLUSION AND ORDER

For the reasons set forth above, this court has reconsidered Judge Petrie's January 21, 2009 Findings of Fact, Conclusions of Law and Judgment In Bifurcated Portion of Trial and vacates and reverses his decision on the basis that Dale Piercy's September 11, 2008 Amended Action For Declaratory Relief is time barred by Idaho Code §31-857 and/or in the alternative by Idaho Code §5-224. Dale Piercy's September 11, 2008 Amended Action For Declaratory Relief is hereby dismissed with prejudice. Canyon County's 1982 herd district ordinance is valid. This ordinance has been in effect for nearly twenty nine years. Piercy's declaratory action challenging its validity was not filed within seven years or four years of its enactment. Jennifer Sutton and/or Luis J. Guzman's attorneys shall submit a proposed judgment in compliance with IRCP 54(a) within ten days of this order. Any request for an award of costs and attorney fees shall be submitted pursuant to applicable Idaho rule, statute or precedent.

Dated this 4th day of September 2011

BRADLEY S. FORD
DISTRICT JUDGE

CERTIFICATE OF SERVICE

OCT 05 2011

The undersigned certifies that on _____ day of September 2011 s/he served a true and correct copy of the original of the foregoing document on the following individuals in the manner described:

Joshua S. Evett
Attorney at Law
P.O. Box 1539
Boise, Idaho 83701

Timothy C. Walton
Attorney at Law
P.O. Box 1069
Boise, Idaho 83701

Ryan Peck
Attorney at Law
P.O. Box 7425
Boise, Idaho 83707

Carl Ericson
Canyon County Prosecutor's Office
1115 Albany
Caldwell, Idaho 83605

when s/he caused the same to be deposited into the U.S. Mails, sufficient postage attached.

CHRIS YAMAMOTO, Clerk of the Court

By: _____
Deputy Clerk of the Court

Rodney R. Saetrum, ISB: 2921
Ryan B. Peck, ISB: 7022
SAETRUM LAW OFFICES
3046 S. Bown Way
Boise, Idaho 83706
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 **STIPULATION TO ALLOW A IRCP 54(b) CERTIFICATION**
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiff Luis Guzman, Co-Defendant Jennifer Sutton, Co-Defendant Dale Piercy and Third-Party Defendant Canyon County, through their attorneys of record:

1. That the judgment to be issued by this Court dismissing the Amended Action for Declaratory Relief should be certified as a final judgment pursuant to IRCP 54(b);

2. That there is no just reason for delay in certifying the judgment as a final judgment pursuant to IRCP 54(b);

3. That allowing the requested certification and appeal of the judgment regarding the Amended Action for Declaratory Relief is in the interests of judicial efficiency and justice;

4. That the final judgment attached hereto as Exhibit A should be executed by this Court.

DATED this 10 day of ~~December~~ January 2011.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorneys for Defendant Dale Piercy

DATED this ____ day of December 2011.

CHASAN & WALTON LLC

Timothy C. Walton
Attorney for Plaintiff Luis Guzman

DATED this ____ day of December 2011.

ELAM & BURKE, P.A.

Joshua S. Evett
Attorney for Co-Defendant Sutton

DATED this ____ day of December 2011.

CANYON COUNTY PROSECUTING ATTORNEY'S OFFICE

Carlton R. Ericson
Attorney for Canyon County

4. That the final judgment attached hereto as Exhibit A should be executed by this Court.

DATED this ____ day of December 2011.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorneys for Defendant Dale Piercy

DATED this 21st day of December 2011.

CHASAN & WALTON LLC

Timothy C. Walton
Attorney for Plaintiff Luis Guzman

DATED this ____ day of December 2011.

ELAM & BURKE, P.A.

Joshua S. Evett
Attorney for Co-Defendant Sutton

DATED this ____ day of December 2011.

CANYON COUNTY PROSECUTING ATTORNEY'S OFFICE

Carlton R. Ericson
Attorney for Canyon County

4. That the final judgment attached hereto as Exhibit A should be executed by this Court.

DATED this ____ day of December 2011.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorneys for Defendant Dale Piercy

DATED this ____ day of December 2011.

CHASAN & WALTON LLC

Timothy C. Walton
Attorney for Plaintiff Luis Guzman

DATED this 5th day of ~~December 2011~~ January 2012.

ELAM & BURKE, P.A.

Joshua S. Evett
Attorney for Co-Defendant Sutton

DATED this ____ day of December 2011.

CANYON COUNTY PROSECUTING ATTORNEY'S OFFICE

Carlton R. Ericson
Attorney for Canyon County

4. That the final judgment attached hereto as Exhibit A should be executed by this Court.

DATED this ____ day of December 2011.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorneys for Defendant Dale Piercy

DATED this ____ day of December 2011.

CHASAN & WALTON LLC

Timothy C. Walton
Attorney for Plaintiff Luis Guzman

DATED this ____ day of December 2011.

ELAM & BURKE, P.A.

Joshua S. Evett
Attorney for Co-Defendant Sutton

DATED this 19th day of December 2011.

CANYON COUNTY PROSECUTING ATTORNEY'S OFFICE

Carlton R. Ericson
Attorney for Canyon County

Rodney R. Saetrum, ISB: 2921
Ryan B. Peck, ISB: 7022
SAETRUM LAW OFFICES
3046 S. Bown Way
Boise, Idaho 83706
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 **FINAL JUDGMENT AND IRCP 54(b) CERTIFICATE**
DALE PIERCY, individually, Plaintiff, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants.	

This matter having come before this Court pursuant to Defendant Luis Guzman's Motion for Reconsideration and Motion to Dismiss and Co-Defendant Jennifer Sutton's Motion for Reconsideration and this Court having heard oral arguments on the matter and having reviewed the entire record and pursuant to this Court's order issued on October 5, 2011, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That Defendant Dale Piercy's Amended Action for Declaratory Relief is dismissed with prejudice.

DATED this 12th day of January 2012.

Honorable Bradley S. Ford
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), IRCP, that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 12th day of January 2012.

Honorable Bradley S. Ford
District Judge

State of Idaho
County of Canyon } ss.
Certificate of Service all parties
I, the undersigned, do hereby certify that I served a copy of the above on Plf. ___ Def. ___ by mailing this date, same by U.S. Mail, with proper address and sufficient postage affixed.
Dated this 13 day of Jan 2012
Canyon County Clerk
By ___ Deputy

Rodney R. Saetrum, ISB: 2921
Ryan B. Peck, ISB: 7022
SAETRUM LAW OFFICES
3046 S. Bown Way
Boise, Idaho 83706
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/Respondent, v. DALE PIERCY, individually, Co-Defendant/Appellant and JENNIFER SUTTON, individually, Co-Defendant/Respondent.	Case No. CV05-4848 **NOTICE OF APPEAL**
DALE PIERCY, individually, Plaintiff/Appellant, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants/Respondents.	

TO: The above named RESPONDENTS, CANYON COUNTY, and its attorneys Canyon County Prosecuting Attorney's Office, 1115 Albany, Caldwell, ID 83605, LUIS GUZMAN, and his attorneys of record, Chasan & Walton, LLC, P.O. Box 1069, Boise, ID 83707, and JENNIFER SUTTON, and her attorneys of record, Elam & Burke, P.A., 251 East Front Street, Suite 300, Boise, ID 83701, and the CLERK of the above-entitled Court.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, DALE PIERCY, appeals against Respondents to the Idaho Supreme Court from the:

FINAL JUDGMENT AND IRCP 54(b) CERTIFICATE, entered in the above-entitled action on the 13th day of January, 2012, the HONORABLE Bradley S. Ford presiding.

WRITTEN ORDER MEMORALIZING ORAL RULING ON PLAINTIFF/DEFENDANT, LUIS J. GUZMAN'S MOTION FOR RECONSIDERATION AND MOTION TO DISMISS AND DEFENDANT JENNIFER SUTTONS MOTION FOR RECONSIDERATION, entered in the above-entitled action on the 5th day of October, 2011, the HONORABLE Bradley S. Ford presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the orders described in paragraph 1 above are appealable under and pursuant to I.A.R. 11(a)(3) or (4).

3. The preliminary statement of issues on appeal which the Appellant intends to assert, are:

(1) Whether the District Court erred in dismissing Appellant's Amended Action for Declaratory Relief and overturning the results of the trial on the merits.

(2) Whether the District Court erred in allowing Respondents Guzman and Sutton to raise certain statute of limitations defenses.

(3) Whether the District Court erred in preventing Appellant from challenging Canyon County's herd district despite statute of limitations defenses raised by Respondents Guzman and Sutton.

(4) Whether the District Court erred in finding that the amendment to I.C. § 31-857 was to be applied retroactively and that the statute of limitations created by that amendment should run from the time of the creation of the herd district.

(5) Whether the District Court erred in finding that the amendment to I.C. § 31-857 was constitutional under the Idaho and U.S. Constitution.

4. No order has been entered sealing all or any portion of the record.

5(a). Appellant requests the preparation of a reporter's standard transcript as defined in the Idaho Appellate Rule 25(c).

5(b). Appellant requests the preparation of the following portions of the reporter's transcript:

(a) The transcript of the hearing on Motion for Summary Judgment of September 6, 2007.

(b) The transcript of the Trial of October 8, 2008.

(c) The transcript of the hearing on Second Motion for Summary Judgment of October 13, 2009.

(d) The transcript of the Evidentiary Hearing where Paul Axness testified on May 3, 2010.

(e) The transcript of the hearing on motions of June 14, 2010.

(f) The transcript of the hearing on motions of August 11, 2010.

(g) The transcript of the Oral Ruling of December 9, 2010.

6. Appellant requests the following documents to be included in the CLERK'S record in addition to those automatically included under Idaho Appellate Rule 28:

(1) Complaint;

(2) Amended Complaint;

(3) Answer and Demand for Jury Trial;

(4) Second Amended Complaint;

(5) Answer to Plaintiffs' Second Amended Complaint and Demand for Jury Trial;

(6) Answer to Complaint and Demand for Jury Trial;

(7) Defendant Piercy's Motion for Summary Judgment;

(8) Memorandum in Support of Defendant Piercy's Motion for Summary

Judgment;

(9) Affidavit of Ryan B. Peck;

(10) Affidavit of Michael A. Pope;

(11) Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment;

(12) Affidavit of Jerry Deal;

(13) Affidavit of Dennis Sorrell;

(14) Affidavit of Dale Piercy;

(15) Third Amended Complaint and Demand for Jury Trial;

(16) Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment;

(17) Affidavit of Glenn Koch;

(18) Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment;

(19) Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment;

(20) Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment;

(21) Affidavit of Walton in Opposition to Defendant Piercy's Motion for Summary Judgment;

(22) Affidavit of Rosemary Thomas in Opposition to Defendant Piercy's Motion for Summary Judgment;

(23) Affidavit of Linda Hansen in Opposition to Defendant Piercy's Motion for Summary Judgment;

(24) Affidavit of Glenn O. Koch in Opposition to Defendant Piercy's Motion for Summary Judgment;

(25) Affidavit of Don Allen in Opposition to Defendant Piercy's Motion for Summary Judgment;

(26) Affidavit of Bill A. Staker in Opposition to Defendant Piercy's Motion for Summary Judgment;

(27) Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment;

(28) Affidavit of Jennifer Sutton;

(29) Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment;

(30) Second Affidavit of Dale Piercy;

(31) Second Affidavit of Ryan B. Peck;

(32) Affidavit of Dawn McClure;

(33) Amended Notice of Hearing;

(34) Third Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment;

(35) Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment;

(36) Defendant Sutton's Answer to Third Amended Complaint and Demand for

Jury Trial;

(37) Answer to Plaintiffs' Third Amended Complaint;

(38) Plaintiffs' Memorandum in Support of Motion to Strike, or in the Alternative, Plaintiffs' Second Memorandum Opposing Piercy's Motion for Summary Judgment;

(39) Defendant Sutton's Supplement Brief in Opposition to New Arguments and Facts Raised by Piercy;

(40) Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment;

(41) Reply to Plaintiffs' and Co-Defendant's Responding Memorandum and Motion to Strike Co-Defendant's Supplemental Brief;

(42) Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved;

(43) Action for Declaratory Judgment;

(44) Plaintiffs' Memorandum in Support of Motion to Reconsider;

(45) Answer of Third Party Defendant Canyon County, Idaho;

(46) Defendant Sutton's Response and Joinder in Plaintiffs' Motion to Reconsider;

(47) Defendant Piercy's Objection to Plaintiffs' Motion to Reconsider;

(48) Order for Dismissal with Prejudice;

(49) Order for Dismissal with Prejudice of Claims by Erika Rivera Only;

(50) Order from Scheduling Conference Setting Bench Trial on Challenge to Canyon County Herd Districts;

(51) Plaintiff's Motion to Reconsider (No Hearing);

(52) Response to Plaintiff's Motion for a Ruling on Plaintiff's Motion to Reconsider;

(53) Order on Plaintiff's Motion to Reconsider;

(54) Plaintiff's Supplemental Memorandum in Support of Motion for Reconsideration;

(55) Order on Motion to Reconsider;

(56) Order of Clarification;

(57) Third Party Defendant Canyon County's Pre-Trial Statement;

(58) Pretrial Memorandum;

(59) Plaintiff's Pre-Trial Conference Statement;

(60) Defendant Sutton's Pretrial Memorandum;

(61) Stipulation to Amend Pleadings and Scheduling;

(62) Order to Amend Pleadings and Scheduling;

(63) Amended Action for Declaratory Relief;

(64) Plaintiff Guzman's Answer to Amended Action for Declaratory Relief;

(65) Third Party Defendant Sutton's Answer to Amended Action for Declaratory Relief;

(66) Supplemental Pretrial Memorandum;

(67) Third Party Defendant Canyon County's Answer to Plaintiff Piercy's

Amended Action for Declaratory Relief;

(68) Stipulation Regarding Exhibits, Undisputed Facts and Witnesses;

(69) Defendant Piercy's Closing Memorandum;

(70) Plaintiff Guzman's Post Trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District;

(71) Defendant Canyon County's Closing Argument and Post Trial Brief;

(72) Post-Trial Memorandum;

(73) Defendant Piercy's Reply Brief;

(74) Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial;

(75) Defendant Piercy's Second Motion for Summary Judgment;

(76) Memorandum in Support of Defendant Piercy's Second Motion for Summary Judgment;

(77) Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment;

(78) Plaintiff Guzman's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment;

(79) Defendant Sutton's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment;

(80) Defendant Sutton's Motion for Reconsideration;

(81) Memorandum in Support Defendant Sutton's Motion for Reconsideration;

(82) Affidavit of Joshua S. Evett in Support of Defendant Sutton's Motion for Reconsideration;

(83) Reply to Plaintiff's and Co-Defendant Sutton's Objections to Defendant Piercy's Second Motion for Summary Judgment;

(84) Second Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment;

(85) Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions;

(86) Plaintiff/Defendant Guzman's Motion for Reconsideration;

(87) Reply Brief in Support of Defendant Sutton's Motion for Reconsideration;

(88) Order on Motion to Reconsider;

(89) Plaintiff/Defendant Guzman's Motions for Reconsideration and Motion to Dismiss;

(90) Memorandum in Support of Plaintiff/Defendant Guzman's Motions for Reconsideration and Motion to Dismiss;

(91) Affidavit of Timothy C. Walton in Support of Plaintiff/Defendant Guzman's Motions for Reconsideration and Motion to Dismiss;

(92) Jennifer Sutton's Brief Regarding Defenses on Reconsideration;

(93) Response to Motions to Reconsider;

(94) Affidavit of Ryan B. Peck;

(95) Sutton's Reply to Piercy's Response to Motions to Reconsider;

(96) Affidavit of Joshua S. Evett in Support of Sutton's Reply to Piercy's Response to Motions to Reconsider;

(97) Plaintiff's Reply Memorandum in Support of Motion to Dismiss and for

Reconsideration;

(98) Sutton's Memorandum in Response to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration;

(99) Written Order Memorializing Oral Ruling on Plaintiff/Defendant Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Suttons Motion for Reconsideration; and

(100) Stipulation to Allow a IRCP 54(b) Certification.

(101) Judgment and 54(b) Certification.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter.

(b) That the clerk of the Third Judicial District Court as been paid the estimated fee of $1,543.75.00 for preparation of the reporter's transcript.

(c) That the estimated fee of $100.00 for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Idaho Appellant Rule 20.

DATED this 22nd day of February 2012.

SAETRUM LAW OFFICES

Ryan B. Peck

Ryan B. Peck
Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd of February 2012, 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
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
Carlton R. Ericson Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ Facsimile

Ryan B. Peck

Rodney R. Saetrum, ISB: 2921
Ryan B. Peck, ISB: 7022
SAETRUM LAW OFFICES
3046 S. Bown Way
Boise, Idaho 83706
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/Respondent, v. DALE PIERCY, individually, Co-Defendant/Appellant and JENNIFER SUTTON, individually, Co-Defendant/Respondent.	Case No. CV05-4848 **AMENDED NOTICE OF APPEAL**
DALE PIERCY, individually, Plaintiff/Appellant, CANYON COUNTY, LUIS GUZMAN, individually and JENNIFER SUTTON, individually, Defendants/Respondents.	

TO: The above named RESPONDENTS, CANYON COUNTY, and its attorneys Canyon County Prosecuting Attorney's Office, 1115 Albany, Caldwell, ID 83605, LUIS GUZMAN, and his attorneys of record, Chasan & Walton, LLC, P.O. Box 1069, Boise, ID 83707, and JENNIFER SUTTON, and her attorneys of record, Elam & Burke, P.A., 251 East Front Street, Suite 300, Boise, ID 83701, and the CLERK of the above-entitled Court.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, DALE PIERCY, appeals against Respondents to the Idaho Supreme Court from the:

FINAL JUDGMENT AND IRCP 54(b) CERTIFICATE, entered in the above-entitled action on the 13th day of January, 2012, the HONORABLE Bradley S. Ford presiding.

WRITTEN ORDER MEMORALIZING ORAL RULING ON PLAINTIFF/DEFENDANT, LUIS J. GUZMAN'S MOTION FOR RECONSIDERATION AND MOTION TO DISMISS AND DEFENDANT JENNIFER SUTTONS MOTION FOR RECONSIDERATION, entered in the above-entitled action on the 5th day of October, 2011, the HONORABLE Bradley S. Ford presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the orders described in paragraph 1 above are appealable under and pursuant to I.A.R. 11(a)(3) or (4).

3. The preliminary statement of issues on appeal which the Appellant intends to assert, are:

(1) Whether the District Court erred in dismissing Appellant's Amended Action for Declaratory Relief and overturning the results of the trial on the merits.

(2) Whether the District Court erred in allowing Respondents Guzman and Sutton to raise certain statute of limitations defenses.

(3) Whether the District Court erred in preventing Appellant from challenging Canyon County's herd district despite statute of limitations defenses raised by Respondents Guzman and Sutton.

(4) Whether the District Court erred in finding that the amendment to I.C. § 31-857 was to be applied retroactively and that the statute of limitations created by that amendment should run from the time of the creation of the herd district.

(5) Whether the District Court erred in finding that the amendment to I.C. § 31-857 was constitutional under the Idaho and U.S. Constitution.

4. No order has been entered sealing all or any portion of the record.

5(a). Appellant requests the preparation of a reporter's standard transcript as defined in the Idaho Appellate Rule 25(c).

5(b). Appellant requests the preparation of the following portions of the reporter's transcript:

(a) The transcript of the hearing on Motion for Summary Judgment of September 6, 2007.

(b) The transcript of the Trial of October 8, 2008.

(c) The transcript of the hearing on Second Motion for Summary Judgment of October 13, 2009.

(d) The transcript of the Evidentiary Hearing where Paul Axness testified on May 3, 2010.

(e) The transcript of the hearing on motions of June 14, 2010.

(f) The transcript of the hearing on motions of August 11, 2010.

(g) The transcript of the Oral Ruling of December 9, 2010.

6. Appellant requests the following documents to be included in the CLERK'S record in addition to those automatically included under Idaho Appellate Rule 28:

(1) Complaint;

(2) Amended Complaint;

(3) Answer and Demand for Jury Trial;

(4) Second Amended Complaint;

(5) Answer to Plaintiffs' Second Amended Complaint and Demand for Jury Trial;

(6) Answer to Complaint and Demand for Jury Trial;

(7) Defendant Piercy's Motion for Summary Judgment;

(8) Memorandum in Support of Defendant Piercy's Motion for Summary

Judgment;

(9) Affidavit of Ryan B. Peck;

(10) Affidavit of Michael A. Pope;

(11) Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment;

(12) Affidavit of Jerry Deal;

(13) Affidavit of Dennis Sorrell;

(14) Affidavit of Dale Piercy;

(15) Third Amended Complaint and Demand for Jury Trial;

(16) Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment;

(17) Affidavit of Glenn Koch;

(18) Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment;

(19) Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment;

(20) Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment;

(21) Affidavit of Walton in Opposition to Defendant Piercy's Motion for Summary Judgment;

(22) Affidavit of Rosemary Thomas in Opposition to Defendant Piercy's Motion for Summary Judgment;

(23) Affidavit of Linda Hansen in Opposition to Defendant Piercy's Motion for Summary Judgment;

(24) Affidavit of Glenn O. Koch in Opposition to Defendant Piercy's Motion for Summary Judgment;

(25) Affidavit of Don Allen in Opposition to Defendant Piercy's Motion for Summary Judgment;

(26) Affidavit of Bill A. Staker in Opposition to Defendant Piercy's Motion for Summary Judgment;

(27) Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment;

(28) Affidavit of Jennifer Sutton;

(29) Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment;

(30) Second Affidavit of Dale Piercy;

(31) Second Affidavit of Ryan B. Peck;

(32) Affidavit of Dawn McClure;

(33) Amended Notice of Hearing;

(34) Third Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment;

(35) Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment;

(36) Defendant Sutton's Answer to Third Amended Complaint and Demand for

Jury Trial;

(37) Answer to Plaintiffs' Third Amended Complaint;

(38) Plaintiffs' Memorandum in Support of Motion to Strike, or in the Alternative, Plaintiffs' Second Memorandum Opposing Piercy's Motion for Summary Judgment;

(39) Defendant Sutton's Supplement Brief in Opposition to New Arguments and Facts Raised by Piercy;

(40) Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment;

(41) Reply to Plaintiffs' and Co-Defendant's Responding Memorandum and Motion to Strike Co-Defendant's Supplemental Brief;

(42) Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved;

(43) Action for Declaratory Judgment;

(44) Plaintiffs' Memorandum in Support of Motion to Reconsider;

(45) Answer of Third Party Defendant Canyon County, Idaho;

(46) Defendant Sutton's Response and Joinder in Plaintiffs' Motion to Reconsider;

(47) Defendant Piercy's Objection to Plaintiffs' Motion to Reconsider;

(48) Order for Dismissal with Prejudice;

(49) Order for Dismissal with Prejudice of Claims by Erika Rivera Only;

(50) Order from Scheduling Conference Setting Bench Trial on Challenge to Canyon County Herd Districts;

(51) Plaintiff's Motion to Reconsider (No Hearing);

(52) Response to Plaintiff's Motion for a Ruling on Plaintiff's Motion to Reconsider;

(53) Order on Plaintiff's Motion to Reconsider;

(54) Plaintiff's Supplemental Memorandum in Support of Motion for Reconsideration;

(55) Order on Motion to Reconsider;

(56) Order of Clarification;

(57) Third Party Defendant Canyon County's Pre-Trial Statement;

(58) Pretrial Memorandum;

(59) Plaintiff's Pre-Trial Conference Statement;

(60) Defendant Sutton's Pretrial Memorandum;

(61) Stipulation to Amend Pleadings and Scheduling;

(62) Order to Amend Pleadings and Scheduling;

(63) Amended Action for Declaratory Relief;

(64) Plaintiff Guzman's Answer to Amended Action for Declaratory Relief;

(65) Third Party Defendant Sutton's Answer to Amended Action for Declaratory Relief;

(66) Supplemental Pretrial Memorandum;

(67) Third Party Defendant Canyon County's Answer to Plaintiff Piercy's

Amended Action for Declaratory Relief;

(68) Stipulation Regarding Exhibits, Undisputed Facts and Witnesses;

(69) Defendant Piercy's Closing Memorandum;

(70) Plaintiff Guzman's Post Trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District;

(71) Defendant Canyon County's Closing Argument and Post Trial Brief;

(72) Post-Trial Memorandum;

(73) Defendant Piercy's Reply Brief;

(74) Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial;

(75) Defendant Piercy's Second Motion for Summary Judgment;

(76) Memorandum in Support of Defendant Piercy's Second Motion for Summary Judgment;

(77) Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment;

(78) Plaintiff Guzman's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment;

(79) Defendant Sutton's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment;

(80) Defendant Sutton's Motion for Reconsideration;

(81) Memorandum in Support Defendant Sutton's Motion for Reconsideration;

(82) Affidavit of Joshua S. Evett in Support of Defendant Sutton's Motion for Reconsideration;

(83) Reply to Plaintiff's and Co-Defendant Sutton's Objections to Defendant Piercy's Second Motion for Summary Judgment;

(84) Second Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment;

(85) Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions;

(86) Plaintiff/Defendant Guzman's Motion for Reconsideration;

(87) Reply Brief in Support of Defendant Sutton's Motion for Reconsideration;

(88) Order on Motion to Reconsider;

(89) Plaintiff/Defendant Guzman's Motions for Reconsideration and Motion to Dismiss;

(90) Memorandum in Support of Plaintiff/Defendant Guzman's Motions for Reconsideration and Motion to Dismiss;

(91) Affidavit of Timothy C. Walton in Support of Plaintiff/Defendant Guzman's Motions for Reconsideration and Motion to Dismiss;

(92) Jennifer Sutton's Brief Regarding Defenses on Reconsideration;

(93) Response to Motions to Reconsider;

(94) Affidavit of Ryan B. Peck;

(95) Sutton's Reply to Piercy's Response to Motions to Reconsider;

(96) Affidavit of Joshua S. Evett in Support of Sutton's Reply to Piercy's Response to Motions to Reconsider;

(97) Plaintiff's Reply Memorandum in Support of Motion to Dismiss and for

Reconsideration;

(98) Sutton's Memorandum in Response to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration;

(99) Written Order Memorializing Oral Ruling on Plaintiff/Defendant Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Suttons Motion for Reconsideration; and

(100) Stipulation to Allow a IRCP 54(b) Certification.

(101) Judgment and 54(b) Certification.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on the following court reporter:

Yvonne Hyde Gier
3902 Rushmore Way
Boise, Idaho 83709

(b) That the clerk of the Third Judicial District Court as been paid the estimated fee of $1,543.75.00 for preparation of the reporter's transcript.

(c) That the estimated fee of $100.00 for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Idaho Appellant Rule 20.

DATED this 13th day of March 2012.

SAETRUM LAW OFFICES

Ryan B. Peck
Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th of March 2012, 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
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
Carlton R. Ericson Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail __X__ Facsimile

Ryan B. Peck

Joshua S. Evett, ISB #5587
Meghan Sullivan Conrad, ISB #7038
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msc@elamburke.com

Andrew M. Chasan, ISB #2100
Timothy C. Walton, ISB #2170
Chasan & Walton, LLC
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andrew.chasan@chasanwalton.com
timwalton2000@hotmail.com

Attorneys for Defendants/Respondents/Cross-Appellants
Jennifer Sutton and Luis 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, individually, Plaintiff/Respondent/Cross-Appellant, vs. DALE PIERCY, individually Co-Defendant/Appellant/Cross-Respondent, and JENNIFER SUTTON, individually, Co-Defendant/Respondent/Cross-Appellant.	Case No. CV05-4848 DEFENDANTS LUIS GUZMAN AND JENNIFER SUTTON'S NOTICE OF CROSS-APPEAL

DALE PIERCY, individually,

Plaintiff/Appellant/Cross-Respondent,

vs.

CANYON COUNTY,

Defendant/Respondent,

and

LUIS GUZMAN, individually and JENNIFER SUTTON, individually,

Defendants/Respondents/ Cross-Appellants.

TO: The above named Cross-Respondent, Dale Piercy and his attorneys Rodney R. Saetrum and Ryan B. Peck, Saetrum Law Offices, 101 S. Capitol Blvd., Suite 1800, P.O. Box 7425, Boise, Idaho 83707, and the Clerk of the above entitled Court.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross-Appellants, Luis Guzman and Jennifer Sutton, appeal against the above named Cross-Respondent Dale Piercy to the Idaho Supreme Court from: (1) the Final Judgment and IRCP 54(b) Certificate, entered in the above-entitled action on the 13th day of January 2012, the Honorable Judge Bradley S. Ford presiding; and (2) the Written Order Memorializing Oral Ruling on Plaintiff/Defendant, Luis J. Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Jennifer Sutton's Motion for Reconsideration, entered in the above-entitled action on October 5, 2011, the Honorable Judge Bradley S. Ford presiding.

2. That the parties have a right to cross-appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) of the Idaho Appellate Rules.

3. A preliminary statement of the issues on appeal, as currently identified and which the Cross-Appellants intend to assert, are:

(1) Whether the district court erred in denying the Cross-Appellants' motion to reconsider and reverse the Court's Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved, entered on or about October 9, 2007, based on estoppel by laches; and

(2) Whether the district court erred in denying the Cross-Appellants' motion to reconsider and reverse the Court's Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved, entered on or about October 9, 2007, based on quasi-estoppel.

(3) Whether the district court erred in denying the Cross-Appellants' motion to reconsider and reverse the Court's Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved, entered on or about October 9, 2007, based on equitable estoppel.

4(a). Is an additional reporter's transcript requested? No.

5. I certify that:

(a) The cross-appellate filing fee has been paid; and

(b) Service has been made upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 14th day of March, 2012.

ELAM & BURKE, P.A.

By: _____
Joshua S. Evett, of the firm
Attorneys for Defendant Jennifer Sutton

DATED this 13th day of March, 2012.

CHASAN & WALTON, LLC

By: _____
Andrew M. Chasan, of the firm
Attorneys for Plaintiff Luis Guzman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

Timothy C. Walton Chasan & Walton, LLC P.O. Box 1069 Boise, ID 83701 *Attorneys for Luis Guzman*	✓ U.S. Mail ____ Hand Delivery ____ Federal Express ____ Facsimile
Ryan B. Peck Saetrum Law Offices P.O. Box 7425 Boise, ID 83707 *Attorneys for Dale Piercy*	✓ U.S. Mail ____ Hand Delivery ____ Federal Express ____ Facsimile
Carlton R. Ericson Canyon County Deputy Prosecutor 1115 Albany Caldwell, ID 83605 *Attorneys for Canyon County*	✓ U.S. Mail ____ Hand Delivery ____ Federal Express ____ Facsimile

Joshua S. Evett

Andrew M. Chasan, ISB #2100
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

Attorneys for Plaintiff/Respondent
Cross-Appellant 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, individually,

Plaintiff/Respondent/Cross-Appellant,

vs.

DALE PIERCY, individually,

Co-Defendant/Appellant/Cross-Respondent,

and

JENNIFER SUTTON, individually,

Co-Defendant/Respondent/Cross-Appellant.

DALE PIERCY, individually,

Plaintiff/Appellant/Cross-Respondent,

vs.

CANYON COUNTY,

Defendants/Respondent,

Case CV05-4848

REQUEST FOR ADDITIONAL RECORD

and)
)
LUIS GUZMAN, individually and)
JENNIFER SUTTON, individually,)
)
Defendants/Respondents/Cross-Appellants.)
)

TO: THE ABOVE NAMED APPELLANT/CROSS-RESPONDENT, Dale W. Piercy, and his attorneys, Ryan Peck and Rodney R. Saetrum, Saetrum Law Offices, 3046 S. Bown Way, P.O. Box 7425, Boise, Idaho 83707, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN, that DALE W. PIERCY, Respondent/Cross-Appellant in the above entitled proceeding, hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the Notice of Appeal:

1. Clerk's or Agency's Record:

Affidavit of E. G. Johnson (and any and all exhibits attached thereto) filed on or about July 19, 2007

Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment (and any and all exhibits attached thereto) filed on or about July 20, 2007

Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment (and any and all exhibits attached thereto) filed on or about July 20, 2007

Plaintiffs' Motion to Strike and Notice of Hearing filed on or about August 24, 2007

Affidavit of Deborah Schrecongost in Support of Plaintiffs' Motion to Strike filed on or about August 24, 2007

Third Party Defendant Canyon County's First Amended Pre-Trial Statement (8/29/2008)

Third Party Defendant Canyon County's Third Amended Pre-Trial Statement (10/3/2008)

Third Party Defendant Canyon County's Fourth Amended Pre-Trial Statement (10/6/2008)

Third Party Defendant Canyon County's Fifth Amended Pre-Trial Statement (10/7/2008)

Order Denying Defendant Piercy's [sic] Motion for Summary Judgment, joining Canyon County, and Holding all Other Motions in Abeyance Until the Herd District's Validity is Resolved, filed on or about October 9, 2007

Notice of Hearing on Plaintiffs' Motion to Reconsider, filed on or about November 8, 2007

Plaintiffs' Memorandum in Support of Motion to Reconsider, filed on or about November 8, 2007

Defendant Jennifer Sutton's Response and Joinder in Plaintiffs' Motion to Reconsider, filed on or about November 28, 2007

Plaintiff's Motion to Reconsider, filed on or about March 27, 2008

Plaintiff's Supplemental Memorandum in Support of Motion for Reconsideration, filed on or about April 21, 2008

Plaintiffs' Memorandum in Opposition to Piercy's Motion to Reconsider, filed on or about August 27, 2008

Order Denying Defendant Piercy's Motion to Reconsider, filed on or about September 23, 2008

Defendant Sutton's Post-Trial Memorandum, filed on or about December 2, 2008

Joint Exhibit #1, black and white map of herd districts

Joint Exhibit #2, a geographical representation of herd districts (in color) that are of record in the County Recorder's Office

Joint Exhibit #3, Canyon County Commissioner's Minutes, designated by book and page numbers listed on Joint Exhibit #2, which are herd district descriptions

Joint Exhibit #4, Canyon County Commissioner's Minutes of December 10, 1982

Joint Exhibit #5, Canyon County Commissioner's Minutes of December 2, 1982

Joint Exhibit #6, Idaho Code §§ 25-2401, 25-2402

Joint Exhibit #7, Canyon County Commissioner's Minutes regarding the approval of the minutes for fiscal term of December 1982

Joint Exhibit #11, published notice of hearing on herd district

Joint Exhibit #A-2, copies from the Parma Review

Joint Exhibit #A-3, copies from the Idaho Press Tribune

Defendant's Exhibit #A-1, compilation of herd districts

Defendant's Exhibit #C-1, a map of the area

Plaintiff's Exhibit #1, Canyon Herald Newspapers (Mr. Kosterman's notes

The deposition of William H. Hurst and any and all exhibits attached thereto

The deposition of Leon K. Jensen and any and all exhibits attached thereto

The deposition of E. G. Johnson and any and all exhibits attached thereto

The deposition of Glenn Koch and any and all exhibits attached thereto

The deposition of Linda Landis and any and all exhibits attached thereto

The deposition of Monica Reeves and any and all exhibits attached thereto

The deposition of Bill Staker and any and all exhibits attached thereto

The deposition of Dale Piercy and any and all exhibits attached thereto

Defendant Jennifer Sutton's Notice of Appeal (3/4/2009)

4. I certify that a copy of this request was served upon the following court reporter:

Yvonne Hyde Gier
3902 Rushmore Way
Boise, ID 83709

and upon the Clerk of the Third Judicial District Court and upon all parties required to be served pursuant to Rule 20 (and upon the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.).

Dated this 21st day of March, 2012.

CHASAN & WALTON, L.L.C.

By _____
Andrew M. Chasan, of the firm
Attorneys for Plaintiff/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2012, a true and correct copy of the foregoing PLAINTIFF/CROSS-APPELLANT'S REQUEST FOR ADDITIONAL RECORD/TRANSCRIPT was served upon each of the following:

Rodney R. Saetrum
Ryan Peck
SAETRUM LAW OFFICES
P. O. Box 7425
Boise, ID 83707
Phone No: 336-0484
By Fax: 336-0448

Joshua S. Evett
Elam & Burke, P.A.
P.O. Box 1539
Boise, ID 83701-1539
Phone No: 343-5454
By Fax: 384-5844

Carlton R. Ericson
Canyon County Deputy Prosecutor's Office
1115 Albany St.
Caldwell, ID 83605
Phone No.: 454-7391
By Fax: 455-5955
Attorney for Canyon County

VIA: ✓ First Class Mail _____ Facsimile Transmission

Andrew M. Chasan

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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.	Case No. CV-05-04848*C CERTIFICATE OF EXHIBITS

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following are being sent as exhibits as requested from the Court Trial on 10-8-08:

Joint Exhibits:

1	**Map**	**Admitted**	**Sent**
2	**Colored Map**	**Admitted**	**Sent**

CERTIFICATE OF EXHIBITS

3–4	**Commissioners Minutes**	**Admitted**	**Sent**
5	**Resolution**	**Admitted**	**Sent**
6	**Signatures of Parties**	**Admitted**	**Sent**
7	**Order**	**Admitted**	**Sent**
8	**Minutes**	**Admitted**	**Sent**
9	**Vote Results**	**Admitted**	**Sent**
10	**Notice in Paper**	**Admitted**	**Sent**
11	**Notice in Paper**	**Admitted**	**Sent**

Plaintiff's Exhibit:

1	**Notes from Newspapers**	**Admitted**	**Sent**

Defendant's (Canyon County) Exhibit:

C-1	**Map**	**Admitted**	**Sent**

Defendant's (Piercy) Exhibits:

A-1	**Map**	**Admitted**	**Sent**
A-2	**Copies-Parma Review**	**Admitted**	**Sent**
A-3	**Copies-ID Press Tribune**	**Admitted**	**Sent**

Also being sent as exhibits were the Depositions requested of the following, however, they were not offered or admitted:

William H. Hurst
E. G. Johnson
Linda Landis
Bill Staker
Leon K. Jensen
Glenn Koch
Monica Reeves
Dale Piercy

CERTIFICATE OF EXHIBITS

Also being sent as an exhibit is the following:

CD (Exhibit as attached to Affidavit of Dawn McClure, filed on 7-31-07)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 7 day of November, 2012.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Randall Deputy

CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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.	Case No. CV-05-04848*C CERTIFICATE OF CLERK

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including documents requested.

CERTIFICATE OF CLERK

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 2 day of Aug., 2012.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: Randall Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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 CERTIFICATE OF SERVICE

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each Party as follows:

Rodney R. Saetrum and Ryan B. Peck, SAETRUM LAW OFFICES

Joshua S. Evett and Meghan Sullivan Conrad, ELAM & BURKE, PA

CERTIFICATE OF SERVICE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 2 day of Aug., 2012.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Randall Deputy

CERTIFICATE OF SERVICE