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Guzman v. Piercy Appellant's Brief Dckt. 39708

IN THE SUPREME COURT OF THE STATE OF IDAHO

LUIS JESUS GUZMAN, individually,

Plaintiff-Defendant-
Respondent-Cross Appellant,

v.

DALE PIERCY, individually,

Defendant-Plaintiff-
Appellant.-Cross Respondent

v.

CANYON COUNTY

Defendant-Respondent,

JENNIFER L. SUTTON, individually

Defendant-Defendant-
Respondent-Cross Appellant.

Supreme Court Case No.: 39708-2012

Case No. CV05-4848

Appealed from the District Court of the Third Judicial District in and for the County of Canyon

APPELLANT BRIEF

HONORABLE BRADLEY S. FORD District Judge

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

In 1982, the Canyon County Commissioners violated State Statutes and enacted a herd district ordinance. The commissioners violated the Idaho State Statutes by (1) failing to obtain a landowner petition, (2) failing to give notice of the proposed action and an opportunity for the citizens to be heard, (3) not designating the animals that the herd district regulated, (4) failing to include a metes and bounds description and (5) failing to include a date when the ordinance would take effect.

This legality of the 1982 Ordinance was challenged in the subject lawsuit and a bench trial on the issue was conducted. The judge presiding at the bench trial, Judge Petrie, ruled that the evidence proved that the Canyon County Commissioners had failed to follow Idaho State Statutes in attempting to create a herd district by ordinance. Judge Petrie therefore ruled that the ordinance was illegal and void at inception.

Judge Petrie retired after the bench trial and Judge Ford assumed the subject lawsuit. Judge Ford allowed Respondent Luis Guzman (Mr. Guzman), Respondent Jennifer Sutton (Ms. Sutton) and Respondent Canyon County (Canyon County) who all argued in favor of the validity of the herd district to raise statute of limitations defenses. Judge Ford ultimately ruled that Appellant, Mr. Dale Piercy (Mr. Piercy) was barred from challenging the validity of the herd district based upon the statute of limitations.

Mr. Piercy now challenges Judge Ford's decision on appeal. Judge Ford's decision failed to properly analyze the issue regarding the waiver of statute of limitations defenses by Mr. Guzman, Ms. Sutton and Canyon County. Judge Ford recognized, but disregarded a more specific statute when ruling that the catchall statute of limitation applied. Judge Ford failed to correctly analyze the

application of a newly amended statute of limitations. Finally, Judge Ford improperly ruled that the statute of limitations as applied to Canyon County were constitutional.

Judge Ford's ruling would allow any county commissioners to enact a county ordinance illegally, without proper jurisdiction and in complete secret and that ordinance would be unassailable after four to seven years. This result is certain since Judge Ford's ruling legitimized a herd district ordinance that was proven to have been enacted in secret without proper jurisdiction and in violation of Idaho State Statute.

B. COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

While this appeal primarily involves issues of law, the background facts involved in this litigation as well as its procedural development are extremely important. Judge Petrie adopted the following facts in his Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial: "Piercy ranches and farms near Parma, Idaho, a small community located in Canyon County. He has followed this profession for most of his life. In March 2005, Piercy pastured several bulls in a field north of the Boise River, south of Parma, and immediately to the east of Wamstad Road. One of the bulls got out. Defendant Jennifer Sutton [] struck the bull as she drove down the road, injuring her passengers." R. Vol. 6, p. 961.

Respondent, Luis Guzman (Mr. Guzman), was also one of the passengers in the vehicle being driven by Respondent, Jennifer Sutton (Ms. Sutton) when the vehicle struck Mr. Piercy's bull.

Mr. Guzman was a co-plaintiff in filing a lawsuit against Mr. Piercy regarding the accident. R. Vol. 1, p. 20 – 25. This lawsuit was filed against Mr. Piercy on May 10, 2005. R. Vol. 1, p. 20. Mr. Guzman claimed that Mr. Piercy was liable for the accident because Mr. Piercy failed to properly control his livestock in a herd district. R. Vol. 1, p. 24.

Mr. Piercy filed his Answer and Demand for Jury Trial on June 20, 2005. R. Vol. 1, p. 26. Mr. Piercy claimed that he was entitled to immunity due to Idaho's open range statutes as an affirmative defense. R. Vol. 1, p. 29. Mr. Piercy also alleged that Ms. Sutton was a potentially negligent party as an affirmative defense. R. Vol. 1, p. 29.

Mr. Guzman filed a Second Amended Complaint and Demand for Jury Trial on August 30, 2005, joining Ms. Sutton as a co-defendant in the litigation. R. Vol. 1, p. 32. Mr. Piercy responded to this complaint on September 15, 2005. R. Vol. 1, p. 36. Mr. Piercy's relevant defenses remained unchanged in his answer. R. Vol. 1, p. 36-41. Ms. Sutton filed her Answer to Complaint and Demand for Jury Trial on October 11, 2005. R. Vol. 1, p. 42.

On May 2, 2007, Mr. Piercy filed a motion for summary judgment challenging the validity of a herd district ordinance allegedly enacted by the Canyon County Commissioners on December 10, 1982 (1982 Ordinance). R. Vol. 1, p. 46-60. During this portion of the litigation, Mr. Piercy also challenged the validity of another ordinance passed in 1908. That matter is not before this Court.

Mr. Piercy's primary contention was that the Canyon County Commissioner's had violated the I.C. §25-2401 et. seq. in failing to follow the proper procedural steps required to enact a herd district in 1982. R. Vol. 1, p. 46-60. The motion for summary judgment included other arguments that are not relevant to this appeal. *Id.*

Following the initial filing of Mr. Piercy's motion for summary judgment, Mr. Piercy, Mr. Guzman and Ms. Sutton filed seven briefs, a number of motions, and several affidavits in support of or in opposition to Mr. Piercy's motion for summary judgment. R. Vol. 1, p. 75 - R. Vol. 3, p. 417. Neither Mr. Guzman nor Ms. Sutton mentioned or raised any argument that Mr. Piercy's defense

regarding the validity of the 1982 Ordinance was barred by the statute of limitations found in I.C. § 5-224. *Id.*

Mr. Guzman did cite the then current version of I.C. § 31-857, which stated:

> **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 such preceding proceedings or jurisdictional steps were not properly or regularly taken; such prima facie presumption shall be a rule of evidence in all courts in the state of Idaho.

I.C. § 31-857 (1989 version); R. Vol. 2, p. 196. Mr. Guzman correctly identified I.C. § 31-857 as a specific statutory time limitation to challenges to the creation of herd districts. R. Vol. 2, p. 196. Following the two-year time limitation set forth in I.C. § 31-857, a presumption of validity attaches to any district created by a board of county commissioners.

Ms. Sutton also objected to Mr. Piercy's motion for summary judgment. R. Vol. 2, p. 272-290. Ms. Sutton argued in much detail that Judge Petrie should refrain from ruling on Mr. Piercy's motion for summary judgment until such time that Canyon County could be brought into the case to defend its own ordinance. *Id.* Ms. Sutton stated in her brief, "The more appropriate avenue for challenging the ordinance is a declaratory relief action pursuant to I.C. § 10-2101, et seq. and I.R.C.P. 57, which would afford Canyon County the opportunity to defend its ordinance." R. Vol. 2, p. 274-275. Ms. Sutton also argued that Canyon County should be a part of the litigation to ensure the matter of the ordinance's validity was settled as to all potential future litigants. R. Vol. 2, p. 281-282.

Judge Petrie issued his Order Denying Defendant Percy's (sic) Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance Until Canyon County Herd District Validity is Determined on October 9, 2007. R. Vol. 3, p. 468. As part of this order, Judge Petrie ordered that Ms. Sutton, "to prepare and serve the necessary pleadings to join Canyon County, through its Board of Commissioners, as a third-party defendant." R. Vol. 3, p. 468. Judge Petrie ruled that the issue of the validity of the 1982 Ordinance should be the subject of a "trial within the trial" with Canyon County participating to allow it to defend its ordinance. R. Vol. 3, p. 466.

Ms. Sutton complied with Judge Petrie's order by filing an Action for Declaratory Relief against Canyon County on October 16, 2007. R. Vol. 3, p. 470. Ms. Sutton did not object to being ordered to join Canyon County. R. Vol. 3, p. 471-475. Ms. Sutton also did not raise a statute of limitations defense to Mr. Piercy's challenge to the 1982 Ordinance despite the fact that she noted in her Action for Declaratory Judgment that she opposed the invalidation of the 1982 Ordinance. *Id.*

Canyon County filed its Answer on November 8, 2007. R. Vol. 3, p. 524. Canyon County did not plead that a statute of limitations barred Mr. Piercy from challenging the 1982 Ordinance. R. Vol. 3, p. 524-528. Canyon County did cite the limitation creating a rebuttable presumption of validity in I.C. § 31-857. R. Vol. 3, p. 527.

Mr. Guzman failed to file any pleading in response to the Action for Declaratory Relief and did not raise a statute of limitations defense at that time.

Mr. Guzman filed Plaintiffs' Motion to Reconsider on November 7, 2007. R. Vol. 3, p. 505. Mr. Guzman was seeking to have Judge Petrie specifically rule on Mr. Guzman's and Ms. Sutton's arguments regarding equitable estoppel, estoppel by laches, and quasi-estoppel. R. Vol. 3, p. 505-515. Ms. Sutton joined in the motion to reconsider the issues of estoppel. R. Vol. 3, p. 530.

Mr. Piercy objected to the motion and responded by filing Defendant Piercy's Objection to Plaintiff's Motion to Reconsider on December 3, 2007. R. Vol. 3, p. 540.

A period of time transpired where the parties engaged in settlement negotiations and one of the plaintiffs, Ms. Erika Rivera was dismissed from the case on February 12, 2008. R. Vol. 3, p. 549. On March 27, 2008, Judge Petrie issued an order setting the declaratory action for a trial on October 8, 2008. R. Vol. 3, p. 552.

Mr. Guzman's motion to reconsider was initiated again by Mr. Guzman who filed another supporting brief on March 26, 2008. R. Vol. 3, p. 557. Mr. Piercy again objected and filed a response on March 28, 2008. R. Vol. 3, p. 560.

Judge Petrie ruled on Mr. Guzman's motion to reconsider in an order filed on April 30, 2008. R. Vol. 4, p. 572. Judge Petrie ruled that Mr. Piercy was not estopped from moving forward on the challenge to the 1982 Ordinance. R. Vol. 4, p. 591. In his ruling, Judge Petrie took the opportunity to state that, "it is time for Canyon County to step up and fight for its Herd District," and that, "it is time for Canyon County to become decisively engaged in this litigation." R. Vol. 4, p. 591.

As the trial on the validity of the 1982 Ordinance approached, each party filed a pre-trial memorandum. R. Vol. 4, p. 599; R. Vol. 4, p. 603; R. Vol. 4, p. 612; and R. Vol. 4, p. 648. Not one of the parties raised the issue of a statute of limitations defense as an absolute bar to the challenge to the validity of the 1982 Ordinance. *Id.*

On September 4, 2008, approximately one month prior to the trial on the validity of the 1982 Ordinance, the parties filed a Stipulation to Amend Pleadings and Scheduling. R. Vol. 4, p. 662. This stipulation included the following provision: "That Canyon County, Mr. Guzman and Ms. Sutton waive any defenses they may have regarding the timing of the filing of Mr. Piercy's

Amended Action for Declaratory Relief." R. Vol. 4, p. 663. The stipulation also contains the following statement, "It is the purpose and intent of this stipulation to simplify the procedural posture of the case and to have the pleadings reflect accurately the positions of the different parties." *Id.* The stipulation reoriented Mr. Piercy to be the plaintiff in the declaratory action instead of Ms. Sutton since Ms. Sutton was opposing the requested action.

Judge Petrie agreed with the stipulation and issued an order on September 5, 2008. R. Vol. 4, p. 671-672. Judge Petrie's order included the waiver of defenses regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief. *Id.*

The Amended Action for Declaratory Relief was filed by Mr. Piercy on September 10, 2008. R. Vol. 4, p. 667. Mr. Guzman filed his Answer on September 18, 2008. R. Vol. 4, p. 700. Mr. Guzman pled a statute of limitations defense under I.C. § 5-224 as an affirmative defense. R. Vol. 4, p. 702.

Ms. Sutton filed her Answer on September 23, 2008. R. Vol. 4, p. 715. Despite having waived these defenses and having been the party who originally filed declaratory action, Ms. Sutton pled a statute of limitations defense as an affirmative defense. R. Vol. 4, p. 718.

Canyon County filed its Answer on September 24, 2008. R. Vol. 4, p. 723. Canyon County *did not* plead a statute of limitations defense. R. Vol. 4, p. 723-727.

The trial was held on October 8, 2008. Tr., p. 79. The parties filed a Stipulation Regarding Exhibits, Undisputed Facts and Witnesses. R. Vol. 4, p. 743. The stipulation included many submissions of evidence, exhibits, and depositions. R. Vol. 4, p. 742-744. Judge Petrie adopted the stipulation and the depositions were entered into evidence on the day of trial. Tr. Transcript of Bench Trial, p. 87-90.

At the trial, Ms. Sutton attempted to introduce evidence regarding the estoppel issues. Tr. Transcript of Bench Trial, p. 160-168. Mr. Piercy objected to the evidence being introduced based upon the Court's prior ruling on these issues. *Id.* The Court sustained the objection agreeing that the issue had been determined, and the evidence Ms. Sutton desired to introduce was not going to make a difference. *Id.*

At no point during the trial did Mr. Guzman, Ms. Sutton or Canyon County raise the issue of a statute of limitations that would bar Mr. Piercy from challenging the validity of the 1982 Ordinance.

Following the trial, the parties agreed to submit post-trial briefs in lieu of closing arguments. Tr. Transcript of Bench Trial, p. 243-244. Mr. Piercy filed his memorandum on November 17, 2008. R. Vol. 4, p. 747. Mr. Piercy presented evidence on five separate defects showing that the Canyon County Commissioners in 1982 violated Idaho State Statutes in passing the 1982 Ordinance. R. Vol. 4, p. 747-767. Mr. Guzman filed his post-trial brief on November 28, 2009. R. Vol. 5, p. 769. Canyon County filed its closing brief on December 1, 2008. R. Vol. 5, p. 880. Ms. Sutton filed her closing brief on December 3, 2008. R. Vol. 5, p. 907. Canyon County did not raise any arguments regarding a statute of limitations defense that would prevent Mr. Piercy's challenge to the 1982 Ordinance. R. Vol. 5, p. 880-905. Both Mr. Guzman and Ms. Sutton included arguments in their post-trial briefing regarding the statute of limitation found in I.C. § 5-224, despite having never raised the issue by pleading or by motion to the court prior to the trial or during the trial. R. Vol. 5, p. 795; R. Vol. 5, p. 911.

Mr. Piercy filed his closing brief on December 15, 2008. R. Vol. 5, p. 940. Mr. Piercy pointed out in the brief that Mr. Guzman's and Ms. Sutton's arguments regarding the statute of limitations were moot since Canyon County failed to raise a statute of limitations defense on

behalf of the 1982 Ordinance. R. Vol. 5, p. 954-955. Mr. Piercy also noted that Mr. Guzman and Ms. Sutton had waived their statute of limitations defenses by failing to raise them timely and by the Stipulation to Amend Pleadings and Scheduling cited above. Further, Judge Petrie's order, also cited above, adopting the language of the stipulation also included the waiver of defenses regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief.

On January 21, 2009, Judge Petrie issued his Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial. R. Vol. 6, p. 959. Judge Petrie ruled that, "the Canyon County Commissioners in 1982 did not follow the statutory procedures in creating or consolidating Herd Districts in Canyon County, ..." R. Vol. 6, p. 965. Judge Petrie then stated that, "since the County Commissioners did not follow statutory procedures, the purported ORDER ESTABLISHING HERD DISTRICT is illegal, hence void, ..." *Id.* Judge Petrie retired after issuing his decision. Judge Ford took over the case after Judge Petrie retired.

Based upon Judge Petrie's decision, Mr. Piercy filed a second motion for summary judgment requesting dismissal from Mr. Guzman's complaint. R. Vol. 6, p. 975 and p. 976. Both Mr. Guzman and Ms. Sutton filed objections to Mr. Piercy's second motion for summary judgment on May 22, 2009. R. Vol. 6, p. 988; R. Vol. 6, p. 995.

Ms. Sutton then filed a motion for reconsideration of Judge Petrie's decision on July 30, 2009. R. Vol. 6, p. 1007. Ms. Sutton included arguments regarding the statute of limitation in I.C. § 5-224. R. Vol. 6, p. 1081. Mr. Piercy filed a response to Ms. Sutton's motion to reconsider on August 7, 2009. Tr. Vol. 6, p. 1114. Ms. Sutton responded with a brief on August 12, 2009. R. Vol. 6, p. 1132.

A hearing was held on October 13, 2009, where the parties argued their respective

positions regarding the issues of estoppel and statute of limitations. R. Transcript for Hearing on Second Motion for Summary Judgment, p. 250.

Judge Ford issued an order regarding the motion to reconsider on December 7, 2009. R. Vol. 6, p. 1141. The order allowed Mr. Guzman and Ms. Sutton to present additional testimony on their estoppel defenses and to present additional arguments regarding the I.C. § 5-224 statute of limitations defense. R. Vol. 6, p. 1141-1149.

Mr. Paul Axness testified at an evidentiary hearing on May 3, 2010. Tr. Transcript of Evidentiary Hearing, p. 287.

Mr. Guzman then filed a brief in support of the motion to reconsider and a motion to dismiss. R. Vol. 7, p. 1154. Mr. Guzman repeated his estoppel arguments and his argument regarding the statute of limitations found in I.C. § 5-224. R. Vol. 7, p. 1154-1177. Mr. Guzman also included an argument regarding a 2009 amendment to I.C. § 31-857 that established a seven-year statute of limitations on challenges to any district formed under I.C. § 31-857. R. Vol. 7, p. 1159-1160. Mr. Guzman argued that the statute limitations in I.C. § 31-857 prevented Mr. Piercy from challenging the validity of the 1982 Ordinance. *Id.*

Ms. Sutton filed a brief on June 2, 2010, regarding the motion to reconsider. R. Vol. 7, p. 1274.

Mr. Piercy filed a response to the motions to reconsider on June 8, 2010. R. Vol. 7, p. 1323. Mr. Piercy argued that the statute of limitations arguments were waived, unconstitutional as applied to this case, and that they did not otherwise bar Mr. Piercy from challenging the 1982 Ordinance. R. Vol. 7, pp. 1323-3141.

Ms. Sutton responded with a brief on June 10, 2010. R. Vol. 8, p. 1343.

A hearing was held on June 14, 2010 to argue the motions to reconsider. Tr. Hearing on

Motions, p. 327. At that hearing, Judge Ford was decided that additional briefing and another hearing was required to fully address the issues.

Mr. Piercy filed Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and For Reconsideration on July 20, 2010. R. Vol. 8, p. 1370A. Mr. Piercy addressed the issues of the statute of limitations defenses raised by Ms. Sutton and Mr. Guzman. R. Vol. 8, p. 1370A-1370Q. Mr. Piercy raised the constitutional challenges the application of statute of limitations to county ordinances creating districts. *Id.*

Ms. Sutton filed a responsive brief on August 6, 2010. R. Vol. 8, p. 1371. Mr. Guzman filed his responsive brief on August 9, 2010. R. Vol. 8, p. 1388.

A hearing was held on August 11, 2010, covering the arguments involved in the motions to reconsider. R. Hearing on Motions, p. 379.

Judge Ford made a preliminary oral ruling on December 10, 2010. Tr. Oral Ruling, p. 406. Judge Ford then issued a written memorandum decision on October 5, 2011. R. Vol. 8, p. 1393. Judge Ford's ruled that Mr. Guzman and Ms. Sutton could raise the statutes of limitation found in I.C. § 5-224 and the Amended I.C. § 31-857. R. Vol. 8, p. 1417.

A final judgment and a separately signed Rule 54(b) Certificate were filed on January 13, 2012. R. Vol. 8, p. 1424. Mr. Piercy filed his notice of appeal on February 3, 2012, and then an Amended Notice of Appeal on March 13, 2012. R. Vol. 8, p. 1426; R. Vol. 8, p. 1437. Mr. Guzman and Ms. Sutton filed notice of cross-appeal on March 14, 2012. R. Vol. 8, p. 1448.

II. ISSUES ON APPEAL

A. WHETHER JUDGE FORD ERRED WHEN RULING THAT I.C. § 5-224 AND THE AMENDED I.C. § 31-857 PREVENTS MR. PIERCY FROM CHALLENGING THE 1982 ORDINANCE?

1. WHETHER JUDGE FORD ERRED IN RULING THAT MS. SUTTON AND MR. GUZMAN DID NOT WAIVE STATUTE OF LIMITATION DEFENSES EVEN THOUGH (1) THEY FAILED TO RAISE ANY SUCH DEFENSES DESPITE HAVING HAD SEVERAL OPPORTUNITIES TO RAISE THESE DEFENSES AFTER THREE YEARS OF LITIGATION; (2) SIGNED A STIPULATION WAIVING THEIR DEFENSES AND (3) JUDGE PETRIE'S ORDER ADOPTING THE STIPULATION?

2. WHETHER JUDGE FORD ERRED IN NOT RULING THAT MS. SUTTON'S AND MR. GUZMAN'S STATUTE OF LIMITATION ARGUMENTS ARE MOOT.

3. WHETHER JUDGE FORD ERRED IN RULING THAT I.C. § 5-224 APPLIES TO CHALLENGES TO COUNTY ORDINANCES ESTABLISHING HERD DISTRICTS WHEN THERE WAS A MORE SPECIFIC STATUTE LIMITING SUCH ACTIONS?

4. WHETHER JUDGE FORD ERRED IN RULING THAT THE 2009 AMENDMENT TO I.C. § 31-857 APPLIED RETROACTIVELY DESPITE THERE BEING NO LANGUAGE STATING THAT THE AMENDMENT ITSELF WOULD APPLY RETROACTIVELY?

5. WHETHER JUDGE FORD ERRED IN RULING THAT STATUTE OF LIMITATIONS APPLY TO MR. PIERCY'S AFFIRMATIVE DEFENSE CHALLENGING THE ENFORCEMENT OF THE 1982 ORDINANCE?

B. WHETHER JUDGE FORD ERRED IN RULING THAT STATUTE OF LIMITATIONS THAT LIMIT A PERSON'S RIGHT TO CHALLENGE AN ILLEGAL ORDINANCE ARE CONSTITUTIONAL?

III. ARGUMENT

A. THE STANDARD OF REVIEW

The issues raised by Mr. Piercy regarding the district court's application of two statutes of limitation to Mr. Piercy's challenge to the 1982 Ordinance present mixed questions of law and

fact. This Court defers to facts supported by substantial evidence. In a bench trial, the credibility of weight given to the evidence is in the province of the trial judge and the findings will not be set aside unless clearly erroneous. *American Pension Services v. Cornerstone Home Builders,* 147 Idaho 638, 641, 213 P.3d 1038, 1041(2009) . Nevertheless, this Court freely reviews the district court's application of law to the facts found. *LaFon v. State,* 119 Idaho 387, 389, 807 P.2d 66, 68 (Ct.App. 1991) (rehearing denied); citing *LaGrand Steel v. A.S. C. Constructors, Inc.,* 108 Idaho 817, 818, 702 P.2d 855, 856 (Ct. App. 1985).

This Court also freely reviews questions on the construction, interpretation, and application of statutes and ordinances. The determination of the applicable statute of limitation is a question of state law over which this Court has free review." *Hayden Lake Fire Protection Dist. v. Alcorn,* 141 Idaho 388, 403, 111 P.3d 73, 87 (2004); *cf. Oats v. Nissan Motor Corp. in the U.S.A.,* 126 Idaho 162, 164-72, 879 P.2d 1095, 1097-1105 (1994).

B. JUDGE FORD ERRED BY RULING THAT I.C. § 5-224 AND THE AMENDED I.C. § 31-857 PREVENTED MR. PIERCY FROM CHALLENGING THE 1982 ORDINANCE?

Judge Ford's application of I.C. § 5-224 and the Amended I.C. § 31-857 in this matter is legally and procedurally incorrect and is not in line with notions of fair play and justice. It was only after three years of litigation that Mr. Guzman and Ms. Sutton raised I.C. § 5-224 and it was only after a trial on the merits proved that the 1982 Ordinance was illegally enacted that Mr. Guzman raised the issue of the Amended I.C. § 31-857 and Ms. Sutton joined that argument. Canyon County at no time raised the defense of either I.C. § 5-224 or the Amended I.C. § 31-857 despite the fact that Canyon County was joined in the lawsuit for the sole purpose of defending the 1982 Ordinance. Judge Ford should not have allowed Mr. Guzman, Ms. Sutton and Canyon County to sit on their hands while a great deal of judicial time and resources were expended and

then only after the matter had been decided on the merits to argue new statute of limitation defenses.

Even if the new statute of limitation defenses were properly raised, Judge Ford erred in applying them to this case. I:C. § 5-224 does not apply in this case due to the more specific limitation set forth in I.C. § 31-857. The Amended I.C. §31-857 does not apply to this case because it is prospective in application. Further, since Mr. Piercy raised the validity of the 1982 Ordinance as an affirmative defense, therefore, no statute of limitations is applicable.

1. JUDGE FORD SHOULD HAVE RULED THAT MS. SUTTON AND MR. GUZMAN WAIVED THE STATUTE OF LIMITATION DEFENSES BECAUSE (1) THEY FAILED TO TIMELY RAISE THESE DEFENSES; (2) THEY SIGNED A STIPULATION WAIVING THEIR DEFENSES AND (3) JUDGE PETRIE'S ISSUED AN ORDER ADOPTING THE LANGUAGE OF THE STIPULATION?

Idaho Rule of Civil Procedure 8(c) states: "In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ...." Idaho Rule of Civil Procedure 9(h) states: "In pleading the statute of limitations it is sufficient to state generally that the action is barred, and allege with particularity the Session Law of the section of the I.C. upon which the pleader relies."

The Idaho Court of Appeals has held that, "Under the civil rules, compliance with the governing statute of limitations is not a requirement for subject matter jurisdiction; rather, the time bar of the statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant." *Anderson v. State*, 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct.App. 1999).

Neither Mr. Guzman nor Ms. Sutton raised the argument that Mr. Piercy was barred from challenging the 1982 Ordinance due to a statute of limitation until approximately one month prior to the trial on the validity of the 1982 Ordinance.

Mr. Piercy raised the challenge to the validity of the 1982 Ordinance as an affirmative defense in June of 2005. Mr. Guzman could have at that time challenged the affirmative defense

and raised a statute of limitation defense. After Ms. Sutton was joined to the case, she could have likewise challenged Mr. Piercy's affirmative defense based upon timeliness.

The obvious time to raise a statute of limitation defense would have been in response to Mr. Piercy's motion for summary judgment specifically challenging the validity of the 1982 Ordinance in May of 2007.

Mr. Guzman did raise the statute of limitation in I.C. § 31-857 at that time, which limitation created a presumption of validity for the 1982 Ordinance. Mr. Guzman and Ms. Sutton, however, failed to raise I.C. § 5-224 or any other statute of limitation defense that would completely bar Mr. Piercy from challenging the 1982 Ordinance.

In response to the motion for summary judgment, Ms. Sutton argued strenuously that Judge Petrie should make Canyon County a part of the lawsuit in order to allow Canyon County to defend the 1982 Ordinance. R. Vol. 2, p. 272-290. Judge Petrie agreed and ordered Ms. Sutton to file the necessary documents to bring in the county and that the matter of the 1982 Ordinance would be handled by a trial on the merits.

All the parties acquiesced in Judge Petrie's determination to proceed with a trial on the merits. Ms. Sutton chose to file a declaratory judgment action to bring in Canyon County. Ms. Sutton did not raise a statute of limitations defense in filing the action. Mr. Guzman chose not to respond to the declaratory judgment action and did not raise a statute of limitation defense. Canyon County answered the declaratory judgment action filed by Ms. Sutton, but did not raise a statute of limitation defense other than the statute of limitation in I.C. § 31-857 shifting the burden of proof.

The record makes it clear that Ms. Sutton, Mr. Guzman and Canyon County waived any ability they had to raise a statute of limitation defense as an absolute bar to Mr. Piercy's challenge to the 1982 Ordinance.

Judge Ford's order failed to address the fact that Mr. Guzman, Ms. Sutton and Canyon County had failed to raise and thereby waived the statute of limitation defenses. R. Vol. 8, p. 1403-1404. Judge Ford simply stated 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." R. Vol. 8, p. 1404. Judge Ford's order therefore embodies the dual holdings that the stipulation to realign the parties resurrected the previously waived statute of limitations defenses and that the stipulation failed to act as a written waiver of those defenses.

It is certain from the record that the stipulation to realign the parties was not intended to lead to such a result. The stipulation's stated intention was to "simplify the procedural posture of the case..." R. Vol. 4, p. 663. Judge Petrie's order requiring Ms. Sutton to file an action against Canyon County to which she was opposed created an awkward procedural posture. The parties recognized the logic to realign the parties. It was never the intention of the parties to resurrect waived arguments or to create new arguments. It was a month before the trial. Therefore, the parties included in the stipulation 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." R. Vol. 4, p. 663. Judge Ford failed to recognize that Judge Petrie also included the above language in the Court's order. R. Vol. 4, p. 672. This was not simply a stipulation, but a judicial order acknowledging the waiver of timeliness defenses.

Judge Petrie's order also included the language that, "all rulings, orders, decisions and scheduling dates and deadlines which have been entered by the Court in the above-captioned case be applied to the action created by Dale Piercy's filing of the Amended Action for Declaratory Relief as they applied to the original Action for Declaratory Relief filed by Co-Defendant Sutton." *Id.* This order shows that that the Judge and the parties were simply switching the parties around

and not resurrecting waived defenses or creating new arguments. Judge Petrie's orders requiring a trial on the merits were still in effect.

The intention of the parties and Judge Petrie is emphasized by the fact that none of the parties presented any motion or evidence, at the trial of this case, regarding the statute of limitation defenses.

Judge Ford's decision improperly, and it appears unintentionally, ignored Judge Petrie's order by only addressing the underlying stipulation of the parties. Therefore, Mr. Piercy requests that this Court overturn Judge Ford's decision allowing Mr. Guzman, Ms. Sutton and Canyon County to raise statute of limitations defenses as an absolute bar to Mr. Piercy's challenge to the 1982 Ordinance.

2. JUDGE FORD ERRED IN RULING THAT MR. GUZMAN AND MS. SUTTON COULD RAISE STATUTE OF LIMITATION DEFENSES WHEN CANYON COUNTY FAILED TO RAISE ANY SUCH DEFENSE.

Canyon County waived any statute of limitation defense it had by failing to plead the defense in answer to either the Action for Declaratory Relief or the Amended Action for Declaratory Relief. Judge Ford even ruled that Canyon County had waived raising I.C. § 5-224 and the Amended I.C. § 31-857 as a defense. R. Vol. 8, p. 1404.

Judge Ford then ruled that Mr. Guzman and Ms. Sutton could essentially raise the defenses and prevent Mr. Piercy from continuing to challenge the 1982 Ordinance. Mr. Guzman and Ms. Sutton have no standing; nor have they attempted to raise a statute of limitations defense on behalf of Canyon County. Judge Petrie ordered that Canyon County be made a party and defend the 1982 Ordinance. That ordered changed the nature of the case to one where Canyon County was the main proponent of the 1982 Ordinance. Mr. Piercy's ability to maintain Judge Petrie's ruling in the declaratory judgment action against Canyon County should not have been ruled ineffective simply

because Mr. Guzman and Ms. Sutton raised statute of limitations defenses. A trial on the merits had occurred. The 1982 Ordinance had been found illegal. Canyon County did not raise a defense to this finding. Mr. Guzman's and Ms. Sutton's untimely argued defenses should not be allowed to change the result against Canyon County.

Mr. Guzman's and Ms. Sutton's attempt to raise a last minute statute of limitations defense is moot. The ruling by Judge Petrie against Canyon County is binding in Canyon County. This ruling should, therefore, apply to Mr. Guzman's underlying action against Mr. Piercy since the matter occurred in Canyon County. The entire point of the trial was to involve Canyon County to defend the 1982 Ordinance, not to have Canyon county be a disinterested bystander..

Mr. Piercy requests that this Court rule that the 1982 Ordinance remains invalid because Judge Petrie's ruling is effective against Canyon County since it did not raise a statute of limitation defense that would bar Mr. Piercy from challenging the herd district.

3. JUDGE FORD ERRED IN RULING THAT I.C. § 5-224 APPLIES TO CHALLENGES TO COUNTY ORDINANCES ESTABLISHING HERD DISTRICTS WHEN THERE WAS A MORE SPECIFIC STATUTE LIMITING SUCH ACTIONS.

Ironically, Judge Ford included all the facts and law in his decision that show that his decision applying I.C. § 5-224 to challenges to county district ordinances is improper. Judge Ford cited I.C. § 5-201, which states, "Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, ***except when, in special cases, a different limitation is prescribed by statute.***" I.C. § 5-224 (2012) (Emphasis added). Also, the Idaho Supreme Court has stated the rule that courts apply the more specific statute of limitations when there is more than one which could apply. *Farmers Nat'l. Bank v. Wickhap Pipeline,* 114 Idaho 565, 569, 759 P.2d 71, 75 (1988). Prior to citing this statute, Judge Ford identified the very statute that takes Mr. Piercy's challenge out of the strictures of I.C. § 5-224 by

pointing out that Canyon County had pled a statute of limitation defense in raising the pre-2009 version of I.C. § 31-857. R. Vol. 8, p. 1404. Prior to a 2009 amendment, I.C. § 31-857 stated:

> **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 such preceding proceedings or jurisdictional steps were not properly or regularly taken; such prima facie presumption shall be a rule of evidence in all courts in the state of Idaho.

I.C. § 31-857 (1989 version). This statute applies specifically to challenges to herd districts and other districts and creates a two-year statute of limitations. This statute was originally enacted in 1935. The limitation is not a complete bar to a challenge, but creates a legal prima facie presumption. Despite having specifically limited challenges to herd districts, the Idaho Legislature determined not to create an absolute bar to challenging these districts. Having specifically legislated the limits for challenging the creation of districts by counties, the Idaho Legislature removed these type of challenges from the limit found in I.C. § 5-224.

The legislative history also shows that prior to the 2009 amendment to I.C. § 31-857 there was no other statute of limitation that applied to actions that fell under I.C. § 31-857.

I.C. § 31-857, prior to 2009, did not include a statute of limitation that acted as a complete bar to an action. Similarly, the act did not state that a statute of limitation already existing applied to actions encompassed by I.C. § 31-857. This includes the statute of limitations for bringing legal actions such as torts, breach of written contracts, matters dealing with damage to real or personal property, fraud, consumer transactions, etc. These are several specific statutes of limitation that apply to the bringing of lawsuits in those specific areas. None of the statutes of

limitation applies to a board of commissioners' order creating a district. Mr. Piercy maintains that the legislative history of the amendment to I.C. § 31-857 supports this argument.

The committee minutes and Statement of Purpose are contained in the Exhibits to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, R. Vol. 8, p. 1370V, 1370W, 1370X, and 1370Z. See Appendix B. attached to this Brief.

In the legislative history for the 2009 amendment to I.C. § 31-857, each of the minutes and the Statement of Purpose begin, "This bill *establishes* a standard seven year statute of limitations for procedural and jurisdictional challenges to the creation of governmental districts under Idaho law." (Emphasis supplied). This shows that prior to the amending language there was no existing complete bar statute of limitation of this type that applied to the creation of governmental districts in counties.

This Court has stated,

> It is the long standing rule in this state that when the legislature amends a statute it is deemed, absent an express indication to the contrary, to be indicative of *changed legislative intent.* (Citations omitted.) It is likewise the long standing rule of this jurisdiction that an amendment to an existing statute will not, absent an express legislative statement to the contrary, be held to be retroactive in application. (Citations omitted)(emphasis in original).

Nebeker v. Piper Aircraft Corp., 113 Idaho, 609, 614, 747 P.2d 18, 23(1987), rehearing denied, (adopting the Uniform Probate Code did not also amend who could bring an action for wrongful death under the Wrongful Death Act). This shows that the only statute of limitation that could potentially apply to Mr. Piercy's challenge to the 1982 Ordiance would be the limitations found in I.C. § 31-857.

Therefore, Mr. Piercy requests that this Court overturn Judge Ford's ruling that I.C. § 5-224 would apply to limit Mr. Piercy from challenging the 1982 Ordinance.

4. JUDGE FORD ERRED IN RULING THAT THE 2009 AMENDMENT TO I.C. § 31-857 APPLIED RETROACTIVELY.

The 2009 amendment to I.C. § 31-857 established an additional statute of limitations that would bar any challenge to a county created district after seven years of the date of the order. In applying the seven-year statute of limitations to this matter, Mr. Piercy maintains that the it began to run on the date the statute went into effect; in this case, July 1, 2009. I.C. § 73-101 makes all Idaho statutes prospective, unless the legislature expressly declares that the statute is to be retroactive. The words retroactive or retrospective do not appear in the amended I.C. § 31-857. There is no indication in the legislative history of H.B. 102 [the amendment] declaring that the amendment is to be retroactive. See, Idaho Session Laws Ch. 43, p. 124 attached as Appendix A to this brief. There is nothing recorded in the minutes of either of the committees which states that the amendment is to apply to cases pending, or to older districts.

Judge Ford erred when he decided that the amendment to I.C. § 31-857 applied retrospectively from the date of the order creating the district. Judge Ford stated that the legislative purpose of eliminating stale claims challenging the validity of county-created districts meant that it would make no sense to limit the applicability of the amendment to districts created after July 1, 2009 or to add another seven years to challenge districts created more than seven years prior to the effective date of the amendment. Judge Ford stated that the literal language of the statute as well as the relevant legislative committee minutes and statement of purpose for the amendment supported his interpretation. R. Vol. 8.p. 1408; Appendix B to this Brief.

However, the Statement of Purpose for the amendment 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.

Again as argued above, the bill amending the statute *establishes* a standard seven-year statute of limitations. Idaho appellate courts have previously decided cases dealing with the imposition of a new statute of limitations where none existed in the past or where an amendment to an existing statute shortened an existing statute of limitations. In *LaFon v. State,* 119 Idaho 387, 807 P.2d 66 (Ct. App.1991), rehearing denied, the Court of Appeals affirmed the district court's denial of post-conviction relief. The court reviewed the history of statute of limitations in the Uniform Post-Conviction Procedure Act,["UPCPA"], I.C. § 19-4901, *et seq.* The Court of Appeals explained that prior to 1979, there was no statute of limitations applicable to the UPCPA. In 1979, a five-year statute was applied via an amendment to I.C. § 19-4902. The court further explained that the five-year statute applied to applications for relief for convictions entered before 1979.

The Court of Appeals followed this Court's pronouncements in the case of *University of Utah Hospital v. Pence,* 104 Idaho 172, 176, 657 P.2d 469, 473 (1982) holding that the five-year period of limitations began to run on July 1, 1979, the effective date of the amendment. *Id.*; *Mellinger v. State,* 113 Idaho 31, 32, 740 P.2d 73, 74 (Ct. App. 1987). The Court of Appeals then quoted from the *University of Utah Hospital* case as follows:

> 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. As the California Supreme Court reasoned in *Holt v. Morgan, supra,* [128 Cal.App.2d 113, 274 P.2d 915 (1954)], "[t]he connection [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. *University of Utah Hospital,* 104 Idaho at 174-75, 657 P.2d at 471-472 (citations omitted).

LaFon v. State, 119 Idaho at 390, 807 P.2d at 69.

The Court of Appeals then reiterated the last sentence of the quote saying, "Legislative reduction of a statutory period of limitation may apply to an accrued cause of action as long as a reasonable amount of time is allowed within which to assert the cause. *See, University of Utah Hospital,* 104 Idaho at 175, 657 P.2d at 472." *LaFon v. State,* 119 Idaho at 390, 807 P.2d at 69. The Court of Appeals found that this application of the five-year statute of limitations to applications for post-conviction relief was prospective and not retroactive. *Id.* However, in the case of both *LaFon* and *University of Utah Hospital,* the new period of limitations began when the amendment was enacted. The above reasoning was followed and approved by this Court in *Esquivel v. State,* 128 Idaho 390, 391-92, 913 P.2d 1160, 1161-62 (1996), rehearing denied, (amendment shortening time for filing UPCPA petition to one year beginning on date the amendment was enacted).

The same reasoning as to when the new period of limitations began to run should apply in Mr. Piercy's case. Like the statutes in *LaFon* and *University of Utah Hospital,* the amendment to I.C. § 31-857 essentially reduced the period of limitations from unlimited to seven years by establishing the seven-year period in 2009. This case was pending at that time. The declaratory judgment trial and its decision were completed. The Idaho legislature took no action to make the amendment to I.C. § 31-857 retroactive. For example, the legislature could have stated in actual words that the amendment was to be applied retroactively. Or, it could have stated that the amendment was applicable to pending cases. Or, it could have declared an emergency and started the period running when the governor approved the amendment. Yet, the legislature took none of these actions.

The legislature understands how to make amendments retroactive. For example, the legislature amended I.C. § 41-1839(4) in 1996 to include a provision for attorneys fees. The legislature added subsection four, declared an emergency, and expressly stated that the amendment was retroactive applying to all cases pending at the time of its "passage and approval." 1996 Idaho Sess. Laws 1307, 1308-09; *J.R. Simplot Co. v. Western Heritage Insurance Co.,* 132 Idaho 582, 584-85, 977 P.2d 196, 198-99 (1999). No such language was added to the 2009 amendment to I.C. § 31-857.

In fact, to apply the 2009 amendment retroactively to the 1982 Ordinance would mean that Mr. Piercy would have had to have been sued and raised his defense that the Ordinance was void no later than 1989, before the collision in this case had even taken place. That would be an absurd result.

In order to follow this Court's rule that statutes of limitation provide a reasonable time within which to allow parties to assert their cause, the 2009 amendment should begin upon the date of enactment. This outcome was recognized by this Court in *Esquivel v. State,* 128 Idaho 390, 391, 913 P.2d 1160, 1161 (1996), rehearing denied, and in *Martinez v. State,* 130 Idaho 530, 534-35, 944 P.2d 127, 131-32 (Ct. App. 1997).

> The Court in Esquivel indicated that there are, nonetheless, some limits to the legislature's ability to amend a statute of limitation. A legislative reduction of a statutory period of limitation, when applied to an accrued cause of action, must allow "a reasonable amount of time ... within which to assert the cause." *Esquivel,* 128 Idaho at 392, 913 P.2d at 1162 quoting *LaFon,* 119 Idaho at 390, 807 P.2d at 69. The Court concluded that the period of one year from the effective date of the amendment to I.C. § 19-4902 provided a reasonable amount of time in which to file an application, and was not, therefore, an impermissible ex post facto law. *Esquivel,* 128 Idaho at 392, 913 P.2d at 1162.

Martinez v. State, 130 Idaho 530, 534-35, 944 P.2d 127, 131-32 (Ct. App. 1997). The limit on the legislature's ability to amend a statute of limitation must be respected, and Piercy should be allowed a reasonable time to assert his cause.

Further, the legislature showed its intent by setting the effective date for this new statute of limitation to be July 1, 2009. This Court has ruled that, in the case of an amendment to a business statute, "In setting the effective date of the new statute as July 1, 2000, the legislature demonstrated its intent that it not be given a retrospective effect. *Woodland Furniture, LLC v. Larsen,* 142 Idaho 140, 146, 124 P.3d 1016, 1022 (2003) (applying the amendment to I.C. § 48-104). Since the effective date of the 2009 amendment to I.C. § 31-857 was set for July 1, 2009, the legislature demonstrated its intent that the amendment was not retrospective.

Mr. Piercy requests that this Court overrule Judge Ford's decision that the 2009 amendment to I.C. § 31-857 apply retroactively to bar Mr. Piercy from challenging the 1982 Ordinance.

5. JUDGE FORD ERRED IN RULING THAT STATUTES OF LIMITATION APPLY TO MR. PIERCY'S AFFIRMATIVE DEFENSE CHALLENGING THE ENFORCEMENT OF THE 1982 ORDINANCE.

The case law in Idaho states that statutes of limitation do not apply to pure defenses, but are applicable only where affirmative relief is sought. *Morton v. Whitson,* 45 Idaho 28, 260 P. 426 (1927). This Court stated:

> The general rule is that the statutes of limitation are not applicable to defenses. . . . And where the defendant in an action on a note pleads total failure of consideration, and alleges a parol warranty of property for which the note was given, the plaintiff cannot avoid the defense by insisting on the statute of limitations. (Citation omitted).

Id., 45 Idaho at 33, 260 P. at 427.

Mr. Piercy answered Mr. Guzman's complaint with an affirmative defense. Mr. Piercy did not ask for affirmative relief until required to do so when the declaratory judgment action

was ordered to be filed by Judge Petrie. These facts were stated above. Appellant's Brief at p. 3-4.

Judge Ford, in his Written Order, found that if appellate review found that I.C. § 31-857 did not apply to this case, I.C. § 5-224 would apply. Judge Ford used the following logic to decide that statutes of limitations, in particular, the "catch-all" statute, I.C. § 5-224, applied to declaratory judgment actions. First, Judge Ford decided that declaratory judgment actions were civil actions. Second, he found that I.C. § 5-240 defines an action as a civil proceeding. Third, he found that I.C. § 5-201 stated that civil actions must be commenced within periods of limitation set out in that chapter of the Code. Fourth, he stated that I.C. § 5-224, the catch-all statute of limitations, subjected all actions for relief, not provided for in the chapter must be commenced within four years after the action accrued. He relied upon two cases to support his conclusion. R. Vol. 8, p. 1412-1414. However, both cases are distinguishable on their facts.

In *Freiberger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005), rehearing denied, a former employee brought a declaratory judgment action to declare a non-compete clause in an employment contract unenforceable. There was no discussion of the application of a statute of limitations to the declaratory judgment action. Instead, this Court discussed the application of I.C. § 12-120(3) (attorneys fees awarded in commercial contracts) to this action which construed a commercial employment contract. This Court stated that the "gravamen of both *Freiberger's* declaratory judgment action and J-U-B's counterclaim was the enforceability of a covenant contained in an employment agreement. This Court found that the action was clearly grounded in a commercial contract which allowed the application of I.C. § 12-120(3) to the declaratory judgment action. *Id.*, 141 Idaho at 423-24, 100 P.3d at 108-09. Thus, *Freiburger*

is distinguishable from the present case on the grounds that it did not involve the determination of whether a statute of limitations applied to the declaratory judgment action.

The second case relied upon by Judge Ford was *Smith v. State Board of Medicine,* 74 Idaho 191, 259 P.2d 1033 (1953), where plaintiff requested declaratory relief that he, a naturopath, be able to practice without a physician's and surgeon's license. The Board of Medicine and law enforcement agencies threatened prosecution of plaintiff for practicing medicine without a license. Plaintiff asked for the affirmative relief that the physician's licensing statute be declared unconstitutional, that it not apply to plaintiff, and that defendants be enjoined from enforcing the statute against plaintiff. As in *Freiburger*, there was no issue and no analysis as to the application of a statute of limitations to plaintiff's action for declaratory relief. The only statement made regarding the nature of a declaratory judgment action was that it was a civil action. That meant that plaintiff had the burden of proof to prove that he was entitled to practice without a physician's or surgeon's license. *Id.* 74 Idaho at 194, 259 P.2d at 1034. Again, this case has no reasoning regarding the application of statutes of limitation to declaratory judgment actions. Neither *Freiburger* nor *Smith* support Judge Ford's legal conclusion.

In fact, the action brought in *Smith v. State Board of Medicine,* is the classic way in which declaratory judgments are utilized; when a statute is threatened to be enforced on the litigant. Smith was allowed to challenge the constitutionality and application of the physician's and surgeon's licensing statute. No statute of limitations should have been applied to Smith at all. *See, e.g., Styne v. Stevens,* 25 Cal.4th 42, 109 Cal.Rptr.2d 14, 26 P.3d 343 (2001) (no statute of limitations applied in enforcement action). Note that Smith was always the protagonist in his case, unlike Piercy in the present case who only raised a defense that the 1982 Ordinance was

void until Judge Petrie ordered the declaratory judgment action as the procedure to decide the validity of the 1982 Ordinance.

There are Idaho cases which discuss applying statutes of limitation to plaintiffs seeking relief in certain declaratory judgment actions. *See, e.g., Hayden Lake Fire Protection Dist. v. Alcorn,* 141 Idaho 388, 403-403, 111 P.3d 73, 88 (2005), rehearing denied, (three-year statute for statutory violations applied to action seeking affirmative declaratory relief, injunctive relief, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, rescission, and attorney's fees). However, this Court has also held that the statute of limitations does not apply to the challenge of the validity of an ordinance. In *Infanger v. City of Salmon,* 137 Idaho 45, 44 P.3d 1100 (2002), the City attempted to exchange a portion of a city street for another property by ordinance without statutory authority to do so. Property owners sued alleging that the ordinance was invalid, that they had an easement to use a street, and to quiet title. The City answered alleging estoppel and the statue of limitations. This Court held that no statute of limitations applies in cases in which a city unlawfully attempts to convey a portion of a city street. *Id.* 137 Idaho at 50, 44 P.3d at 1105.

In *McCuskey v. Canyon County,* 123 Idaho 657, 851 P.2d 953 (1992), rehearing denied, (1993), a landowner brought a declaratory judgment action against Canyon County challenging the validity of an amendment to a zoning ordinance. The ordinance was amended in 1979, downzoning McCuskey's property. Seven years later in 1986, *McCuskey* applied for a building permit to build a convenience store and gas station. The request was denied, and *McCuskey* brought the declaratory judgment action against the county. No statute of limitations was applied in the proceeding or discussed in this Court's opinion. This Court did state, "A zoning ordinance enacted without complying with the state enabling statute is ineffectual. *Jerome County v.*

Holloway, 118 Idaho 681, 684, 799 P.2d 969, 972 (1990) (*citing Citizens for Better Government v. County of Valley,* 95 Idaho 320, 322, 508 P.2d 550, 552 (1973))." *McCuskey v. Canyon County,* 123 Idaho 657, 663, 851 P.2d 953, 959 (1992), rehearing denied, (1993).

The facts of lack of actual notice of the amendment to the zoning ordinance, required by state statute in *McCuskey* are similar to those in this case where Piercy did not sign a petition to create a herd district and there was no notice of the County Commissioners' intent to consider a herd district petition in 1982. Mr. Piercy should not be barred by statutes of limitation for either raising the defense of the invalidity of the 1982 Ordinance or from bringing the challenge to the Ordinance through the declaratory judgment procedure when ordered to by a district judge.

C. JUDGE FORD ERRED IN RULING THAT STATUTES OF LIMITATION THAT LIMIT A PERSON'S RIGHT TO CHALLENGE AN ILLEGAL ORDINANCE ARE CONSTITUTIONAL.

The 2009 amendment to I.C. § 31-857 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 if 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. The herd district are also taxing districts that effect Mr. Piercy's personal property.

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 challenge. 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 I.C. § 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, or any other 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 an urban impact district, or highway district, increase district fees, or other personal desires 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 could 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, a trial on the merits found that the Canyon County Commissioners violated Idaho State law and illegally enacted a herd district. Judge Ford has now endorsed that illegal action by commissioners.

It is frightening to think that a statute that essentially allows County Commissioners to ignore State Statues and to bar challenges to laws passed without due process, would then be interpreted as being constitutional. 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 States 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 nor 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 limitations as a 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 an extremely effective means for County Commissioners to ignore state open meeting laws, ignore State Statutes, and to keep the matter confidential for seven years to eliminate challenges. 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 that are 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.

Mr. Piercy therefore requests that the statute of limitation in the amended I.C. § 31-857 be declared unconstitutional. If in fact this Court finds that the I.C. § 5-224 would otherwise apply to this matter, Mr. Piercy requests that its application to challenges to ordinances be declared unconstitutional.

3. JUDGE FORD MISSTATED THE FACTS IN RULING ON MR. PIERCY'S OPPORTUNITY TO BE HEARD ON THE 1982 ORDINANCE

Judge Ford, in his Written Order states:

> 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.

R. Vol. 8, p. 1413-1414.

Judge Ford's statement that "There was actual public notice given . . .." misstates the facts. The deficiency in the notice was that *there was no notice at all published in local newspapers of the intent to adopt the herd district ordinance*. The only "notice" given was the publishing of the adoption of a vague ordinance in the Idaho Press-Tribune after the ordinance had been adopted. Judge Ford did not preside at the bench trial; he did not hear the evidence; Judge Petrie heard the evidence. There was testimony of three witnesses who searched the local newspapers in Canyon and Ada Counties for the alleged public notice that the Canyon County Commissioners were proposing to adopt a herd district. None of the witnesses found any such notice. They did find that the defective adopted ordinance was published in the Idaho Press-Tribune after it was adopted. See, generally, Tr. October 8, 2008.

Specifically, the testimony about notice was as follows. Jackie Germain, Deputy County Clerk, testified that when she was required to send documents to a newspaper, she sent them to the Idaho Press-Tribune. Tr. p.129, L.18-19; p. 130, L. 13-21; p. 131, L. 8-10. However, since she did not assume her duties after the subject ordinance was at issue, until January 1983, she could not say if that was the only newspaper in which Canyon County published notices. Tr. p. 131, L. 18-25; p. 132, L. 1.

David Lloyd reviewed issues of the Idaho Statesman published in 1982 and found no notices of the proposed adoption of a herd district in Canyon County. Tr. p. 132-139. Karyn

Wychell testified that she reviewed the 1982 issues of the Parma Review, the Idaho Press-Tribune, and the Idaho Statesman looking for the alleged notice. Tr. p. 140, L. 23-25; p. 141, L. 1-10. She found no such notice published in those three newspapers. Tr. p. 141, L. 21-25; p. 142, L. 1-25; p. 143, L. 1-13.

Paul Kosterman, a paralegal for Chasan & Walton also researched notices for notices on herd districts in the Idaho Press-Tribune. Tr. p. 216, L. 16-20. He looked at the Idaho Press-Tribune, the Parma Review, and the Canyon Herald. Tr. p. 219 L. 5-9. His research for 1982 turned up no notice of a petition for a herd district to be decided in December 1982. Tr. p. 226, L. 2-8.

Thus, the evidence showed that there was no public notice published of a petition for the adoption of a herd district in Canyon County in 1982. This is a key fact, because the commissioners alone could not create or adopt a herd district according to the statutory requirements in effect in 1982. I.C. § 25-2401 (1907). The procedure required that a petition of landowners in the area of the proposed herd district had to be presented to the county commissioners. I.C. § 25-2402 (as amended 1963). The petition had to describe the boundaries of the proposed herd district and designate what animals were to be prohibited from running at large. *Id.* A hearing on the petition was then to be set by the commissioners. Notice of the hearing was required to be given in two ways. First, it was to be posted in three conspicuous places in the proposed herd district. Second, it was to be published in a newspaper published in the county nearest to the herd district. Both notices were required to be published for two weeks prior to the hearing on the petition. I.C. § 25-2403 (1907).

At the hearing on the proposed herd district, the herd district could only be created if the commissioners were satisfied that a majority of the landowners owning more than 50% of the

land in the proposed district, who were both residents and qualified electors of Idaho, were in favor of the proposed herd district. The commissioners had to be satisfied that the herd district would also be beneficial. Only then could the commissioners order the creation of the district, and then only according to the terms of the petition. I.C. § 25-2404. The only evidence in Judge Petrie's bench trial was that the incomplete 1982 Ordinance was published in the Idaho Press-Tribune after being passed by the commissioners. Based upon the complete failure of the Canyon County Commissioners to follow the procedures required by statute, it is clear that the commissioners created the district illegally in contravention of I.C. § 25-2401 through I.C. § 25-2404. R. Vol. 6, p. 964-65.

This was the determination made by Judge Petrie in his decision. *Id.* Judge Petrie conducted the bench trial, he heard the testimony of the witnesses, and he was in the best position to determine their credibility. Judge Petrie also reviewed the depositions of several witnesses, including former Commissioner Glenn Koch, the only surviving commissioner from 1982. Judge Petrie determined that no petition proposing a herd district was ever presented to the commissioners because no petition ever existed. Therefore, the 1982 Ordinance was illegal and void. R. Vol. 6, p. 963, n. 5; p. 964-65.

Mr. Piercy asks that the misstatement of fact at R. Vol. 8, p. 1414 be corrected to state that there was no actual public notice of the Board of Commissioners' intent to consider and possibly adopt the ordinance. This fact is relevant to Mr. Piercy's constitutional and substantive arguments.

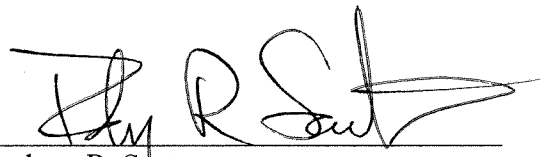
IV. CONCLUSION

Mr. Piercy has shown that Judge Ford erred in his ruling allowing Mr. Guzman and Ms. Sutton to raise the statutes of limitation found in I.C. § 5-224 and Amended I.C. § 31-857 in

order to overturn Judge Petrie's ruling that the 1982 Ordinance was illegal and void. Judge Ford also erred in finding that statutes of limitation on challenges to ordinances that effect property rights are constitutional. For these and the above stated reasons, Mr. Piercy requests that this Court reverse Judge Ford's rulings.

Respectfully submitted this 22nd day of January 2013,

SAETRUM LAW OFFICES

By 

Rodney R. Saetrum

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of January 2013, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Andy M. Chasan CHASAN & WALTON LLC 1459 Tyrell Lane P.O. Box 1069 Boise, ID 83701-1069	_____ U.S. Mail __X__ 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
Samuel B. Laugheed Canyon County Prosecuting Attorney Canyon County Courthouse 1115 Albany Caldwell, ID 83605	_____ U.S. Mail __X__ Hand Delivery _____ Overnight Mail _____ Facsimile

Rodney R. Saetrum

APPENDIX "A"

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.

APPENDIX "B"

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.

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