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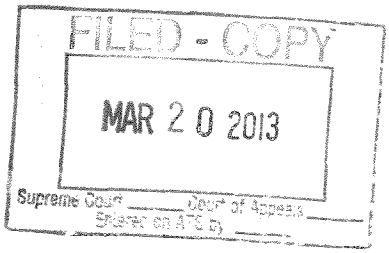
Guzman v. Piercy Respondent's Brief 2 Dckt. 39708

IN THE SUPREME COURT OF THE STATE OF IDAHO

LUIS J. GUZMAN, Plaintiff/Defendant/Respondent-Cross-Appellant, v. DALE PIERCY, individually, Defendant/Plaintiff/Respondent/ Cross-Appellant, CANYON COUNTY, Defendant-Respondent, JENNIFER SUTTON, individually, Defendant/Respondent/Cross-Appellant.	Docket No. 39708 DEFENDANT/RESPONDENT/CROSS-APPELLANT JENNIFER SUTTON'S RESPONDENT/CROSS-APPELLANT'S BRIEF



DEFENDANT/RESPONDENT/CROSS-APPELLANT JENNIFER SUTTON'S RESPONDENT/CROSS-APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, Honorable Bradly S. Ford, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

The nature of the case is a declaratory relief action filed by Piercy pursuant to Idaho Code § 10-1201, et seq., in which he challenged procedural irregularities in the creation of a herd district enacted by the Canyon County Board of Commissioners in 1982, some 23 years before the auto accident that gave rise to Guzman's lawsuit against Piercy and Sutton.

The question presented by Piercy's appeal is how long is too long to wait to challenge a herd district. Piercy takes the position that before the 2009 amendment to Idaho Code § 31-587, there was no statute of limitation to challenge a herd district, school district, or road district. The time frame for such a challenge, using his word, was "unlimited."

Judge Ford agreed that the catch-all statute of limitation, Idaho Code § 5-224, applied to Piercy's case before the Idaho Legislature amended Idaho Code § 31-587 in 2009 and gave the amendment retroactive effect. Whether this Court applies the four year statute of limitation of Idaho Code § 5-224 or the retroactive seven year statute of limitation contained in Idaho Code § 31-587 is irrelevant: under either statute Piercy's challenge to the 1982 herd district ordinance is too old.

While Piercy makes much of the procedural irregularities in the ordinance's enactment, those irregularities are not really at issue in this appeal. The whole point of a statute of limitation is to prevent parties from having to litigate matters which, because of the passage of time, are

difficult, if not impossible, to litigate because of faded memories, dead or difficult to locate witnesses, and missing or degraded documentary evidence.

Piercy never raised a word in protest to the 1982 herd district until he was sued in 2005 for this car accident. The implications of a ruling in his favor in this appeal are significant, as such a ruling would invite civil and criminal defendants to defend their cases not on the merits, but by attacking the procedures by which laws which have applied to them for decades were enacted.

B. Course of Proceedings.

Sutton generally agrees with Piercy's the course of proceedings described by Piercy, with some important qualifications. Sutton and Guzman have argued in favor of the validity of the 1982 herd district from the beginning based on the notion that Piercy's challenge to the district is too late. (*See*, e.g., R., Vol. 2, p. 283 (arguing Piercy's motion to void ordinance barred by doctrine of estoppel by laches); R., p. 210 (arguing applicability of quasi estoppel)). Sutton has argued throughout the life of the case that "[i]t is too late for Piercy, having benefited from the herd district status of Canyon County for 25 years, to now complain about alleged technical defects in the ordinance's passage because he finds himself in this unfortunate case." (R., Vol. 2, p. 287.)

Because of the unique and complicated procedural posture of the case, neither Guzman nor Sutton had the opportunity to assert defenses under the Idaho Rules of Civil Procedure until

the district court ordered Piercy to file a declaratory relief action against Canyon County. (*See* R., Vol. 4, p. 672, ¶¶ 2 and 3.) The district court specifically approved the filing of the Amended Action for Declaratory Relief attached to his order as Exhibit A. (*See* R., Vol. 4, pp. 673-677.) That complaint specifically alleged there was a "justiciable controversy" between Piercy, Canyon County, Guzman, and Sutton over the "herd districts," (*id.*, p. 677, ¶ XV.), which included both the 1982 herd district from which Piercy's bull escaped and the 1908 herd district where the accident happened. Piercy challenged the validity of both herd districts. (Id., p. 677, prayer for relief, ¶ 5.)

Given the unique procedural posture of the case, the district court gave Canyon County, Guzman and Sutton the right to answer Piercy's complaint and assert all defenses under the Idaho Rules of Civil Procedure. (*See* R., Vol. 4, p. 672, ¶ 4.)

Sutton and Guzman then pled one of the statute of limitations defenses (based on Idaho Code § 5-224) that Judge Ford ultimately ruled barred Piercy's challenge to the 1982 and 1908 herd districts. (R., Vol. 4, p. 702 (Guzman answer); R., Vol. 4, p. 718 (Sutton answer)). These answers, filed in 2008, did not assert Idaho Code § 31-587 as a statute of limitations defense since the amendment to that statute did not occur until the following year.

Even though Sutton argued strenuously for application of Idaho Code § 5-224 to Judge Petrie in her post trial briefing (R., Vol. 5, pp. 911-920), Judge Petrie never made a ruling of any kind on the defense, and left the bench shortly after issuing his decision in the declaratory relief

action. (See R., Vol. 6, pp. 959-971.) Sutton and Guzman moved Judge Ford to reconsider the statute of limitations defenses because Judge Petrie never addressed them, and Judge Ford granted the request on December 4, 2009, noting "this court finds that the statute of limitations argument has not been fully considered and decided by the court." (R., Vol. 6, p. 1147.)

Sutton and Guzman argued the statutes of limitation on reconsideration, and Judge Ford considered the arguments, including the argument based on the 2009 amendment to Idaho Code § 31-587, based on his authority under I.R.C.P. 11(a)(2)(B) to consider new facts and law in the process of reconsidering "interlocutory orders entered by the court or its predecessor." (R., Vol. 8, p. 1405.)

C. Concise Statement of Facts.

Sutton does not believe that the underlying facts - to the extent Piercy provides them - are of much relevance to the issues before this Court on appeal, as Piercy objects to application of the statutes of limitation found in Idaho Code § 31-587 and § 5-224 based solely on case law and statutory law. While Piercy primarily covers the procedural history, including the potential procedural irregularities behind enactment of the 1982 herd district, these facts do not answer the question of whether the statutes apply to bar Piercy's challenge to this two-plus decade old herd district.

It does not matter whether Piercy's challenge to the 1982 herd district ordinance was successful or not. The central point of Sutton's successful defense of that herd district is that Piercy brought the challenge too late, regardless of the merits of his challenge.

As Piercy notes, the 1982 herd district was enacted by the Canyon County Commissioners, before Sutton and Guzman were born. Sutton and Guzman were high school students when the accident happened. Sutton, who got her drivers license in September 2002, frequently drove Wamstad Road, where the accident happened. (R., Vol. 2, p. 292, ¶¶ 2 and 3.) She drove the road frequently at night. (*Id.*) Before the night of the accident she never saw any "Open Range" signs on Wamstad Road or cattle warning signs. (The yellow sign with the silhouette of a cow.) (*Id.*, ¶ 5.) She had driven extensively in other parts of Idaho and seen those signs, and understood them to mean that she needed to watch out for cattle. (*Id.*, ¶ 6.) Growing up in Parma she understood that cattle owners in her area of Canyon County had to keep their livestock fenced in. (*Id.*, ¶ 7.) The presence of Piercy's black bull on the road the night of the accident was a complete surprise to her. (*Id.*, ¶ 8.)

Conversely, Piercy had farmed and ranched in Canyon County for 30 years. (Tr., p. 186, ll. 17-19.) He had around 260 cows in 2005 when the accident occurred, and about 20 bulls. (*Id.*, p. 187, ll. 12-16.) He farmed 450 acres at the time, and ranched another 340 acres. (*Id.*, p. 187, ll. 17-20.)

Although it is ultimately irrelevant to the statute of limitations arguments that the teenager Sutton knew that the area where the accident happened was a herd district, while the much older and experienced rancher Piercy claims he did not, these facts are provided to demonstrate to the Court that Piercy's testimony that he had no idea that he had lived in a herd district for 23 years when the accident occurred was very much open to question.

II. ISSUES PRESENTED ON APPEAL

The issue on appeal is whether Piercy's challenge to the 1982 herd district is barred by Idaho Code §§ 31-587 or 5-224.

Sutton waives her cross appeal.

III. ARGUMENT

A. Standards of Review on Appeal

1. Standard of Review for Grant of Summary Judgment Based on the Statute of Limitations.

The determination of the applicable statute of limitation is a question of law over which the Court has free review. *Farber v. Idaho State Ins. Fund*, 153 Idaho 495, 497, 272 P.3d 467, 469 (2012) (citations omitted). The factual findings upon which Judge Ford based his statute of limitations rulings are subject to the substantial evidence standard. *Machado v. Ryan*, 153 Idaho 212, 217, 280 P.3d 715, 720 (2012).[1]

[1]Though, Piercy has not challenged these findings on appeal.

B. Analysis

1. The Trial Court Did Not Abuse its Discretion in Ruling that Guzman and Sutton Did Not Waive Their Statute of Limitations Defenses .

Piercy argues that Sutton waived her statute of limitations by not timely asserting them and by stipulating to waive them. Both arguments fail, and overlook that the essence of all arguments made by Sutton and Guzman from the beginning of the case are time based. Quasi-estoppel, laches, Idaho Code § 31-857, and Idaho Code § 5-224, are all based on the notion that Piercy's challenge is too late.

Piercy is of course correct that a statute of limitations can be waived if not pled. *See, e.g., Anderson v. State,* 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct. App. 1999). I.R.C.P. 8(c) requires that a statute of limitations be pled as an affirmative defense. There is no dispute, however, that both Guzman and Sutton pled the defenses when given the opportunity by the district court. Judge Petrie ordered Piercy to file a declaratory action against Canyon County and permitted Sutton and Guzman to assert defenses under the Idaho Rules of Civil Procedure. (R., Vol. 4, p. 672, ¶ 4.) Because the defenses were pled, Piercy's waiver argument fails.

With respect to Piercy's argument regarding the stipulation, the proper analysis of the issue is the trial court's authority to enter and interpret changes to its scheduling order under I.R.C.P. 16(b). While there are no cases under Rule 16(b) in the annotations, cases interpreting other provisions of Rule 16 review a trial court's rulings under an abuse of discretion standard.

See, e.g., Lloyd v. DeMott, 124 Idaho 62, 856 P.2d 99 (Ct.App. 1993) (holding that trial court did not abuse its discretion in limiting issues for trial under IRCP 16(c) and (d)(1)).[2]

The parties stipulated to a schedule in the case on April 10 and 11, 2008.[3] That stipulation, approved by Judge Petrie, set a deadline for amendments to pleadings of 120 days before trial, which was set for October 8, 2008. Accordingly, when Judge Petrie ordered Piercy to file a declaratory relief action against Canyon County on September 5, 2008 (R., Vol. 4, pp. 671-672, ¶¶ 1 and 2), it was necessary for the parties to agree that amendments to the pleadings *after* the amendment cut-off (which had long since passed) were permitted. Accordingly, in the September 4, 2008 Stipulation to Amend Pleadings and Scheduling, Sutton, Guzman and the County agreed to "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, ¶ 6), and Piercy agreed conversely that his opponents "may Answer the Amended Action for Declaratory Relief filed by Mr. Piercy as provided for in the Idaho Rules of Civil Procedure." (R., Vol., p. 663, ¶ 4.)

Judge Ford appropriately exercised his discretion in ruling that Sutton and Guzman had not waived their statute of limitations defenses by signing the stipulation. Judge Ford ruled that

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[2]The sequence of this Court's inquiry into abuse of discretion is: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with any legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

[3]Sutton will file a motion to augment the record with this scheduling order.

paragraph 4 of the stipulation was inconsistent with Piercy's position that Guzman and Sutton waived statute of limitations defenses, as it gave them both the right to answer Piercy's amended declaratory relief complaint as provided for in the Idaho Rules of Civil Procedure. (R., Vol. 8, p. 1404.) In the district court's words, "[p]aragraph 4 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." (*Id.*)

Additionally, Judge Ford noted that if the litigants had intended such a waiver, "the stipulation should have specifically stated that the respondents waive all statute of limitations defenses. (*Id.*) In other words, in the district court's view, the language Piercy relied upon was not specific enough to warrant the drastic remedy of finding that the defenses were waived.[4]

Last, Piercy's counsel in oral argument never rebutted that the undisputed purpose of the stipulation was to modify the existing scheduling orders and permit amendments to pleadings by both parties. By definition, and by its terms, the stipulation was never intended by any of the parties as a dismissal of previously asserted defenses or waiver of future defenses. Undersigned counsel provided the district court with additional information that the court considered in exercising its discretion:

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[4]Because all the arguments made by Sutton and Guzman were arguably time based – including the estoppel and laches arguments – taken to its logical extreme, Piercy could argue that they waived all of their arguments in favor of the 1982 herd district. This, of course, was never their intent.

> Clearly, a context of that stipulation was allowing them to amend, the cut-off for amendments to pleadings had already passed. And that was the whole reason for including that language in that stipulation to allow Mr. Piercy to amend so he could re-align the parties and set this up to make sense to the Supreme Court in case of us ending up there at some point in time in the future.
> I certainly never had any discussions with Mr. Peck about waiving the statute of limitations defense, that was never out there in anything we did, Your Honor. And there would have been no reason to have done that either, because we weren't in a position where we had to bargain that way.

(Tr., p. 348, ll. 9-20.)

Counsel for Guzman argued similarly, and counsel for Piercy admitted that the statute of limitations never specifically came up in discussions about the stipulation:

> Mr. Walton: Josh [Evett] is exactly right, and Ryan [Peck] will tell you, we never talked about statute of limitations in connection with that stipulation. Correct, Ryan? We never did.
>
> Mr. Peck: That term never came up.

(Tr., p. 375, ll. 11-14.)

Judge Ford acted well within his discretion in finding that Sutton and Guzman did not waive their statute of limitations defenses by signing the stipulation. There was no reason for either to waive those defenses. The purpose of the stipulation was to modify Judge Petrie's scheduling order and permit amendments that were technically untimely under that scheduling order. Furthermore, the stipulation and order expressly gave Sutton and Guzman the right to plead their defenses, which they did.

2. Guzman and Sutton Were Entitled to Defend Canyon County's Herd District Ordinance.

Piercy argues that Guzman and Sutton "have no standing" to argue that the 1982 herd district is valid. *See* Appellant's Brief, p. 17. This is an odd position to take, as Piercy, in his Amended Action for Declaratory Relief, alleged there was a "justiciable controversy" under Idaho Code §§ 10-1202 and 10-1203 between Piercy, the County, Guzman and Sutton. (R., Vol. 4, p. 681, ¶ XV.)

Piercy makes this two page argument without a single citation to case or statutory law. Usually, a party's failure to cite any authority for its position would result in the issue being waived. *Farm Bureau Mut. Ins. Co. of Idaho v. Eisenman*, 153 Idaho 549, 286 P.3d 185 (2012), citing *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (citations omitted) (holding that issues "not supported by propositions of law, authority, or argument ..." are waived "if either authority or argument is lacking, not just if both are lacking.")

Piercy must do better than simply state a conclusion. Because he has not provided this Court with authority for his argument, it is waived.

Assuming the argument is not waived, Idaho Code § 10-1202 gives Sutton the right to argue in favor of preservation of the 1982 herd district. The statute reads as follows:

> 10-1202. **PERSON INTERESTED OR AFFECTED MAY HAVE DECLARATION.** Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise,

> may have determined *any question of construction or validity arising under the* instrument, statute, *ordinance*, contract or franchise *and obtain a declaration of rights, status or other legal relations thereunder.*

Idaho Code § 10-1202 (Emphasis added.).

In the same way that the Idaho Legislature has given Piercy the legal right to challenge the 1982 herd district, it has given Sutton the legal right to argue that the 1982 herd district ordinance is "valid." Sutton's "rights" and "legal relations" are clearly at issue. If the 1982 herd district is upheld, she will be able to ask the jury to find that Piercy is liable in some amount for the injuries to Guzman. If the herd district is struck down, Piercy intends to argue that neither Guzman or Sutton can argue that he bears fault for the accident.

There are three problems with Piercy's argument that neither Sutton or Guzman have "standing" to argue in favor or the 1982 herd district. *See* Appellant's Brief, p. 17.

First, Piercy has provided this Court with no authority for his argument. His brief does not cite a case, statute, or rule of procedure providing that a litigant in Sutton's position has no "standing" to argue in favor of an ordinance. The Idaho Appellate Rules provide that "[t]he argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon." I.A.R. 35(a)(6). If an appellant does not "assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error

are too indefinite to be heard by the Court." *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (citation omitted). Piercy's "standing" argument fails these simply requirements.

Second, there is no basis to modify Idaho Code § 10-1202, which unambiguously grants "any" person whose "rights" or "legal relations" are affected by an ordinance to obtain a declaration of rights. Piercy's argument essentially is that the district court could only consider Canyon County's arguments in deciding whether the 1982 herd district is valid. By its plain language, however, Idaho Code § 10-1202 does not limit the right to obtain a declaration of rights to the governmental entity whose ordinance is in question. If a statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 505 (2011). Accordingly, this Court is constrained by Idaho Code § 10-1202, and *Verska*, to hold that Sutton has the right to argue in favor of the 1982 herd district's validity.

Third, and putting aside that she has standing by way of Idaho Code §10–1202, Sutton has standing under this Court's standing analysis. The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. *Miles v. Idaho Power Co.*, 16 Idaho 635, 641, 778 P.2d 757, 763 (1989), citing *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the

concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." This requirement of "personal stake" has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. (Citations omitted.) *Miles*, 116 Idaho at 641, 778 P.2d at 763, citing *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978).

Thus, to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. *Miles*, 116 Idaho at 641, 778 P.2d at 763 (citation omitted).

Sutton has a "personal stake" in the dispute over the validity of the 1982 herd district ordinance. If the ordinance stands she can argue that Piercy is at fault for the accident. If the ordinance is struck down, Piercy will argue that as a matter of law he has no fault and is entitled to dismissal from the case. There is no dispute that one purpose of a herd district is to protect motorists and their passengers from livestock. Piercy argues that the 1982 herd district ordinance was void, and he accordingly had no duty to keep his livestock off of area roadways. Suttons' Volkswagen was totaled and her friends were badly injured. Piercy takes the position that he bears no fault for his black bull standing in the middle of Wamstad Road on a dark night. Sutton's "stake" in this litigation could not be more concrete and "personal."

She has standing to argue in favor of the 1982 herd district ordinance.

3. Idaho Code § 5-224 is a Catch-All Statute of Limitations that Applies to Declaratory Relief Actions in the Event § 31-587 Does Not Apply.

Piercy takes the district court to task for its ruling that Idaho Code § 5-224 applies to challenges to herd districts. *See* Appellant's Brief, p. 18. Piercy claims that because Idaho Code § 31-587 is "more specific," Judge Ford's ruling regarding Idaho Code § 5-224 is error.

The argument is not fair to Judge Ford's decision, in which he explained that "[i]f it is determined upon appellate review that the statute of limitations set forth in Idaho Code § 31-587 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 Idaho Code § 5-224." (R., p. 1412.) Hence, the accusation that Judge Ford's ruling on Idaho Code § 5-224 is in error because there is a more "specific statute" is misplaced, as Judge Ford recognized that the 2009 amendment to Idaho Code § 31-587 provides the specific statute of limitations. Because Piercy argued that the 2009 amendment was invalid because it was not retroactive and was unconstitutional, Judge Ford made an alternative ruling on Idaho Code § 5-224 so that the case would not have to be remanded to him for further proceedings in the event Piercy was successful in his appeal.

To the extent Piercy's point appears to be that only the pre-2009 version of Idaho Code § 31-587 could contain a statute of limitations,[5] and that because it did not Idaho Code § 5-224 has therefore never applied to challenges to the creation of herd districts, he is incorrect. The pre-2009 version set forth a presumption of validity of creation or dissolution of various types of districts. *See* Appellant's Brief, p. 19, citing Idaho Code § 31-587 (1989 version). This version of the statute provided that the presumption "shall be a rule of evidence in all courts in the state of Idaho." (*Id.*)

There is no language in the pre-2009 version of Idaho Code § 31-587 that can be construed as a statute of limitations, nor can the statute's silence be construed as a legislative command that Idaho Code § 5-224, the catch-all statute of limitations, did not apply.

This Court has held repeatedly in the recent past that courts do not have the authority to construe unambiguous statutes. They must be applied "as written," whether a court likes the result or not. *Verska*, 151 Idaho at 893 265 P.2d at 505.[6] The pre-2009 version of Idaho Code § 31-587 does not contain a statute of limitations. Accordingly, Piercy's argument that the more

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[5]Piercy writes, "Idaho Code § 31-857, prior to 2009, did not include a statute of limitation that acted as a complete bar to an action." Appellant's Brief, p. 19.

[6]Piercy's argument that the Statement of Purpose to the 2009 amendments is somehow relevant to the issue presented is meritless. *See* Appellant's Brief, p. 20. No one disputes that these amendments created a statute of limitations in Idaho Code § 31-587. By no stretch of the imagination, however, does either that amendment or the statute's silence on a statute of limitations *before* that amendment mean that only Idaho Code § 31-587 could have contained a statute of limitations before 2009, and that because it didn't there was no statute of limitations before then.

specific language of the pre-2009 Idaho Code § 31-587 prevails over the general language of Idaho Code § 5-224 fails.

As determined by Judge Ford, if Piercy successfully argues that Idaho Code § 31-587 does not apply, he must still contend with the plain language of Idaho Code § 5-224.

Assuming that Idaho Code § 31-587 does not apply, the argument that Idaho Code § 5-224 still bars Piercy from challenging the validity of the 1982 herd district ordinance is a simple one, based on the plain meaning of the relevant statutes.

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

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

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

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

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

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

Idaho Code § 5-224.

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

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

Idaho Code § 5-240.

An action seeking declaratory judgment is authorized pursuant to Rule 57 of the Idaho Rules of Civil Procedure and Title 10, Chapter 12, Idaho Code, and constitutes "[a]n action for relief. . ." under Idaho Code § 5-224. Rule 57 of the Idaho Rules of Civil Procedure states that the Rules of Civil Procedure apply to declaratory judgment actions. A declaratory relief claim is an "action;" the Supreme Court of Idaho has recognized this in writing "[t]his is a civil action, albeit for a declaratory judgment." *Smith v. State Board of Medicine of Idaho*, 74 Idaho 191, 194, 259 P.2d 1033, 1034 (1953). Furthermore, this Court awarded attorney's fees in favor of a plaintiff in a declaratory judgment action under Idaho Code § 12-120(3), which statute allows for the recovery of attorney fees in "any civil action."[7] *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 423-424, 111 P.3d 100, 108-109 (2005).

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[7]Idaho Code § 12-120(3) states, in pertinent part:

> In any civil action to recover on ...any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs...(emphasis added.)

Based on the above, Piercy's declaratory judgment action is a "civil action" under Idaho Code § 5-201 and "an action for relief..." subject to the limitations set forth under Idaho Code § 5-224.

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

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

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

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

> It is eminently clear that statutes of limitations were intended to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard for want of seasonable prosecution. They are, to be sure, a bane to those who are neglectful or dilatory in the prosecution of their legal rights. 1 Wood, Limitation of Actions, § 4, p. 8. As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim

> against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 19 L.Ed. 257; 1 Wood, Limitation of Actions, *supra*, § 4; *Spath v. Morrow, supra* (174 Neb. 38, 115 N.W.2d 581). To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance. Cf. 34 Am.Jur., 'Limitation of Actions,' § 11, p. 20.

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

Under Idaho Code § 5-224, an action "must be commenced within four (4) years after the cause of action shall have accrued." In this case, the cause of action accrued the date the herd district ordinance went into effect in 1982.

The Idaho Supreme Court holds that the statute of limitations in a case where the validity of an ordinance is challenged begins to accrue the date of the ordinance's passage. *Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830, 831 (1911).

In *Canady* the Supreme Court held that the statute of limitations barred an action to declare an ordinance null and void filed nine years after the ordinance's enactment. *Id.* In *Canady*, the city of Coeur d'Alene enacted two ordinances in 1900, and another ordinance in

1905[8], generally for the purpose of vacating certain streets and alleys in the city, with the understanding that the Coeur d'Alene Lumber Company would establish and maintain a sawmill, planing mill and lumber yard on the vacated streets. *Id.* Thereafter, the Coeur d'Alene Lumber Company expended funds to build the lumber manufacturing establishment. *Id.* at 830. Plaintiff had notice of the enactment of the ordinances and the expenditure of money in the construction of the plant and did not object at that time. *Id.*

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

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

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

> We think, under the facts of this case, that this action is barred by the statute of limitations: and that this action should have been brought at least within five years from the date such cause of action arose. We think it sufficiently appears that appellant sat by when Ordinances Nos. 71 and 75 were passed in 1900, and more than nine years before this action was commenced, and made no complaint of any damages having been sustained to her property by reason of said ordinances and the vacation of the streets. And, again, in 1905, when Ordinance No. 115 was passed, she made no protest or objection of any kind. She knew that the Coeur d'Alene Lumber Company was expending a great deal of money in establishing its lumber plant upon said blocks and a portion of one of the streets, and made no protest of any kind whatever to the city, and made no claim for damages to her property as resulting from the passage of said ordinances. The first time she complained of damage to her property, so far as the record shows, was when she commenced this action, June 15, 1909. *Howard Co. v. Chicago & A. R. Co.*, 130 Mo. 652. 32 S. W. 651; *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109.

Id. at 835 (emphasis added).

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

The purpose of statutes of limitations is to prevent litigation of stale claims. *See Wadsworth v. Department of Transp.*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996); *Renner v.*

Edwards, 93 Idaho 836, 838, 475 P.2d 530, 532 (1969). Whether Piercy likes it or not - and in spite of his evidentiary showings - the Idaho Legislature has deemed his challenge to the 1982 herd district as stale.

There are strong policy reasons supporting statute of limitations provisions for actions attacking the validity of an ordinance based upon alleged irregularities in the ordinance's passage. At some point an ordinance has to have finality. If ordinances can be attacked at anytime based on procedural irregularities, without limitation as to time, then the door is open to anyone to attack any ordinance no matter how old and no matter how much evidence has been lost to time. There is no policy rationale supporting turning over a now 25+ year old ordinance on grounds of procedural irregularity. After the passage of so much time, these types of issues are a waste of judicial economy and resources.

4. Idaho Code § 31-857 Applies Retroactively to Prevent Challenges to Herd Districts Decades After Their Enactment.

As Judge Ford noted, the 2009 amendment to Idaho Code § 31-587 occurred *after* Judge Petrie's initial decision but before a final judgment was entered. Accordingly, Judge Ford considered the amendment and "new evidence" in the process of "reconsidering interlocutory orders entered by the court or its predecessors." (R., p. 1405.) Piercy has not challenged Judge Ford's power to consider new law and new evidence under Idaho Rule of Civil Procedure 11(a)(2)(B).

Rather, Piercy claims that the amendment only operatives prospectively from its effective date, and argues that the amendment is not retroactive. *See* Appellant's Brief, p. 21. To the extent that Piercy relies on legislative history to attempt to avoid the plain language of Idaho Code § 31-587 (*see, e.g.*, Appellant's Brief, p. 21 (noting no indication in minutes that the amendments were retroactive); pp. 21-22 (arguing that Statement of Purpose's use of word "establishes" proves amendment is prospective); and p. 23 (arguing that Legislature could have expressed retroactivity in various different ways)) he again violates the central point of *Verska, supra,* that courts cannot construe unambiguous statutes.

As Judge Ford found, the 2009 amendment to Idaho Code § 31-587 is unambiguous. It is retroactive and prevents challenging various types of districts once they are older than 7 years. (R., Vol. 8, p. 1410 (finding a "literal reading of the plain language of the statute confirms . . . [retroactive application]").

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). A statute may also be applied retroactively where intent is "clearly implied" by the language of the statute. *Kent v. Idaho Public Utilities Commission,* 93 Idaho 618, 621, 469 P.2d 745, 748 (1970).

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, 151, 140 P. 965, 968 (1914).

Since its original enactment in 1935, Idaho Code § 31-857 has included language making it applicable to orders of the board of county commissioners made prior to and after 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.

Because the original 1935 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, 43-44, 232 P.3d 813, 822 (2010) (because original enactment of statute included language making it applicable to convictions prior to the statute's enactment, Court concluded retroactive language applied to amendments.) To interpret the amendment as not applying retroactively would have the effect of nullifying the retroactive language in the pre-2009 statute, which this Court does not permit. *See Stuart*, 149 Idaho at 44, 232 P.3d at 822.

The analysis under *Stuart* is really no different than the analysis of *Verska*. If the pre-2009 version of Idaho Code § 31-587 applied to orders entered before its effective date, then so it is with respect to the 2009 amendments.

The plain language of the amended Idaho Code § 31-587 controls. It provides: "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 commissions in any county of 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." (Emphasis added.)

By its terms the new Idaho Code § 31-587 applies to districts "heretofore" or "hereafter" created. By its terms it applies to districts in existence *before* the 2009 amendment, and those created *after* the 2009 amendment, just as the 1935 version of the statute applied to districts already in existence. The statute of limitation now specified at the end of the statute plainly provides that it applies to districts created by an order either before or after the 2009 amendment.

The statute is retroactive and applies to Piercy's case.

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 only applies to districts created after 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[9].

Piercy's reliance on *University of Utah Hosp. on Behalf of Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1983), is misplaced. First, the case is distinguishable on its facts since the statute at issue in that case (Idaho Code § 31-3504) was not expressly retroactive, unlike Idaho Code § 31-857, which applies to districts "heretofore" or "hereafter" created.

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[9]This absurd result is precisely what Piercy seeks here, as he has repeatedly challenged the validity of the 1908 herd district where the accident in this case occurred.

Additionally, the *University of Utah* case involved a situation where a statute of limitation (Idaho Code § 31-3504) was *reduced* following the accrual of a medical indigency claim. In that case the statute of limitation was changed from within one year of "discharge" from a hospital to 45 days "following the admission" of a person to a hospital. *University of Utah*, 104 Idaho at 174. In the instant matter there was no reduction of the statute of limitations. Before the amendment to Idaho Code § 31-857 in 2009, the catch all statute of limitation of four years applied. *See* Idaho Code § 5-224. The 2009 amendment increased the statute of limitation of four years to seven years.

Accordingly, the concern of *University of Utah* - shrinking a statute of limitation on an accrued claim in the absence of express retroactive language - is simply not present here. The case is inapposite, unless one accepts Piercy's drastic claim that the statute of limitation for challenging herd districts before the 2009 amendment was "unlimited." *See* Appellant's Brief, p. 23.

Last, Piercy's argument that the effective date of the 2009 amendment to § 31-587 demonstrates it is not retroactive is flawed. *See* Appellant's Brief, p. 25, citing *Woodland Furniture, LLC v. Larsen,* 142 Idaho 140, 146, 124 P.3d 1016, 1022 (2003). First, the viability of *Woodland Furniture's* holding that the "effective date" of legislation is a demonstration of intent is questionable given this Court's 2011 holding in *Verska, supra,* that the plain language of the statute controls. A statute's effective date is not part of the statute itself. Accordingly, under

Verska, it is of no use in the interpretation of an unambiguous statute. Furthermore, implicit in the holding of *Woodland Furniture* is the position that a statute intended to be retroactive would have an effective date prior to when the statute actually became effective. This logical impossibility weighs in favor of affirming the central holding of *Verska* that plain statutory language controls.

Additionally, *Woodland Furniture* is inapplicable because retroactive effect is expressed in the first sentence of Idaho Code § 31-587. The 2009 amendment applies to orders "heretofore" or "hereafter" created, just as the original 1935 version of the statute applied to districts already in existence.

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.

5. Whether Piercy's Challenge to the Herd District is in the Form of a Claim or Affirmative Defense Should not Matter, as the Ultimate Issue (is the District Valid) Remains the Same.

Piercy argues that statutes of limitation do not "apply to pure defenses," and apply only where affirmative relief is sought. *See* Appellant's Brief, p. 25, citing *Morton v. Whitson,* 45 Idaho 28, 260 P. 426 (1927).

Putting aside the holding in *Morton*, Piercy overlooks that his challenge to the 1982 herd district ordinance *is* in the nature of a claim for affirmative relief. Piercy seeks a judgment that the 1982 herd district is invalid, and that accordingly the area from which his black bull escaped

reverts to open range and he has no liability, as a matter of law, for the accident. This is "affirmative relief" in every sense of the phrase. Piercy's declaratory relief action is a "civil action" as defined by I.R.C.P. 2. I.R.C.P. 8(a)(1) requires a pleading setting forth a "claim for relief," which Piercy has done.

Piercy is not a defendant with respect to the challenge to the 1982 herd district. He is the Plaintiff, as he is the one challenging the validity of the law. He has asserted claims, not defenses.

Morton appears to stand for the simple proposition that a plaintiff who sues a defendant cannot defend an affirmative defense asserted by the defendant based on the statute of limitations. Statutes of limitations apply to claims, such as Piercy's claim challenging the validity of the 1982 herd district.

The other arguments made by Piercy in III. A. 5. of his brief are unavailing.

Freiberger v. J-U-B Engineers, Inc., 141 Idaho 415, 111 P.3d 100 (2005) and *Smith v. State Board of Medicine*, 74 Idaho 191, 259 P.2d1033 (1953), were both cited by Judge Ford to support his conclusion that a declaratory action is a civil action. That being the case, Judge Ford found that Idaho Code § 5-224 applies to actions for declaratory relief. Piercy's faulting of Judge Ford for relying on these cases (*see, e.g.,* R., Vol. 8, p. 1412) is misplaced, as Judge Ford relied on them for nothing more than the simple proposition that declaratory actions are "civil actions."

Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 11 P.3d 73 (2005), cited at p. 28 of Appellant's Brief, supports Sutton's position, as it upheld application of a statute of limitations in a declaratory relief action.

Infanger v. City of Salmon, 137 Idaho 45, 44 P.3d 1100 (2002), cited at p. 28 of Appellant's brief, is inapposite, as it dealt with the unique situation of whether a statute of limitations applies to a city's unlawful conveyance of a portion of a city street. This Court has long held that no statute of limitations applies to a city's unlawful attempt to convey a portion of a city street. *Infanger*, 137 Idaho at 50, citing *Boise City v. Wilkinson*, 16 Idaho 150, 102 P. 148 (1909). This rule is based on the Court's decades old holdings in many cases that city streets are public and "held by the municipality in trust for the use of the public." *Infanger*, 137 Idaho at 49.

Infanger did not hold that "the statute of limitations does not apply to the challenge of the validity of an ordinance." Appellant's Brief, p. 28. The case does not come close to a holding that general. It is specifically limited to city streets.

Similarly, *McCuskey v. Canyon County,* 123 Idaho 657, 851 P.2d 953 (1992), does not say that statutes of limitation do not apply to challenges to herd districts, or any other type of district. No statute of limitations defense was asserted in that case. The issue was not before this Court. While it is true that this Court in *McCuskey* held that county zoning ordinances enacted without complying with state enabling statutes are "ineffectual" and "void," this Court did not

address the issue presented by this case: At what point does a county resident lose the right to challenge a herd district based on alleged procedural flaws in its enactment?

Idaho Code § 31-857 now explicitly recognizes that, *before* seven years elapses, a resident can challenge "all proceedings and jurisdictional steps preceding the making of such order . . . ." After seven years, however, "[n]o challenge . . . shall be heard or considered . . . ."

The Idaho Legislature has made a decision that, in spite of procedural irregularities in the passage of a school, road, herd, or other district, after seven years those districts are beyond challenge. Piercy has submitted no authority to this Court for the proposition that the Legislature cannot do this. The Court must consider the implications of Piercy's arguments, as he is essentially claiming that under this Court's precedents the Idaho Legislature cannot place a statute of limitations on challenges to procedural irregularities in the passage of a herd or other district. If the Idaho Legislature has required the completion of various procedural steps to enact a herd district, certainly it can set a time limit for challenges to those districts. Piercy cannot, on the one hand, demand strict compliance with the Legislature's herd district requirements but then attack the Legislature's restrictions on challenges to the creation of those districts. He must take the good with the bad.

Both Idaho Code § 31-857 and, in the alternative, Idaho Code § 5-224, set a limit on the time in which a county resident can challenge procedural irregularities in the enactment of a herd

district. *McCuskey* never addressed the applicability of a statute of limitation. It is, accordingly, not on point.

6. The 2009 Amendment to Idaho Code § 31-857 is Constitutional.

Piercy argues that retroactive application of Idaho Code § 31-857 violates his procedural due process rights, as he "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." Appellant's Brief, p. 30.

There is no merit to this novel argument. Piercy cites no authority for the position that retroactive application of a statute of limitations is a procedural due process violation. Furthermore, Piercy has no cognizable property right, and he had ample opportunity before the accident involving his bull to challenge the herd district. He did not.

a. 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, 40, 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.

b. 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 requiring due process before its deprived. He has cited no authority for that position.

It is obvious that the "right" for one's cattle to "roam free" is not a property right at all. Piercy has a property right in his cattle, and in his land where they are pastured. Piercy has no more of a property right in open range than he does to drive 30 miles per hour on a street with a speed limit now set at 20 miles per hour.

Furthermore, title 25, chapter 24, Idaho Code demonstrates there is no such constitutional right because it grants counties the right to create herd districts. *See* Idaho Code § 25-2401. The statutes 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 retroactive application of Idaho Code § 31-587 is a procedural due process violation.

c. 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, 661, 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 661, 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.

As argued above, there is no evidence or case law supporting Piercy's claim that he has a constitutionally protected property interest.

Additionally, Piercy has made no showing that the 2009 amendment to Idaho Code § 31-857 is "arbitrary, capricious, or without a rational basis." To the contrary, the basis for the amendment is plainly rational, as it prevents individuals from challenging decades old herd districts that have been in existence for decades for alleged procedural irregularities in their enactment. 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 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." *See* Statement of Purpose, Idaho Code § 31-587. Such purpose clearly bears a reasonable relationship to a permissible legislative objective.

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

7. There is No Basis for Piercy's Requested "Correction" of the Court's Findings.

Piercy argues that Judge Ford "misstated" facts in ruling on Piercy's opportunity to be heard. *See* Appellant's Brief, pp. 33-36. The issues raised in this section are nowhere to be found in Piercy's Notice of Appeal or Amended Notice of Appeal. (*See* R., pp. 1426-1436 (Notice of Appeal) and pp. 1437-1447 (Amended Notice of Appeal).

Piercy has presented this Court with no authority for his request that this Court "correct" Judge Ford's factual conclusions, none of which have any bearing on the issue of whether Piercy's challenge to the 1982 herd district is barred by the statute of limitations. Nor are Judge

Ford's conclusions "relevant" to "Mr. Piercy's constitutional and substantive arguments." *See* Appellant's Brief, p. 36. Certainly Piercy must do more than just state conclusions. He has not explained how these facts are relevant to his procedural and substantive due process claims, nor provided any authority to the Court that would permit it to correct what Piercy contends are errors in the district's court's factual conclusions.

Accordingly, this Court should reject Piercy's invitation.

V. CONCLUSION

The Idaho Legislature has answered the question of how long is too long to challenge a herd district with the answer "7 years." Before it amended Idaho Code § 31-587 in 2009, the answer to the question was "four years" under Idaho Code § 5-224. This Court should not open the Pandora's Box of permitting civil defendants to avoid civil liability by collaterally attacking the process by which laws that have applied to them for decades were passed.

DATED this 20th day of March, 2013.

ELAM & BURKE, P.A.

By: _____

Joshua S. Evett, of the firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March, 2013, 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
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