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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

EDWARD WATTERS, DEAN)
GUNDERSON, STEVEN FARNWORTH,)
MATTHEW ALEXANDER NEWIRTH,)
individuals, and OCCUPY BOISE, an Idaho)
unincorporated nonprofit association,)

Plaintiffs,)

vs.)

C.L. (BUTCH) OTTER, in his official)
capacity as the Governor of the State of)
Idaho, TERESA LUNA, in her official)
capacity of the Director of the Idaho)
Department of Administration, and COL. G.)
JERRY RUSSELL, in his official capacity as)
the Director of the Idaho State Police,)

Defendants.)

Case No. 1:12-cv-00076-BLW
**DEFENDANTS' MOTION TO
MODIFY OR CLARIFY
PRELIMINARY INJUNCTION
(DKT. 17) PURSUANT TO FED. R.
CIV. P. 54(b)**

Pursuant to Fed. R. Civ. P. 54(b), Defendants hereby move this Court to modify or clarify its preliminary injunction order in this case (Dkt. 17), issued February 26, 2012, to provide as follows:

(1) The Defendants shall have unobstructed access to the Capitol Annex and its grounds for repair and for such time as the State shall determine necessary to complete that repair. Plaintiffs shall clear all personal property from the grounds within 48 hours of the Court's order. Any property left after that time may be removed and stored and/or disposed of by the State.

(2) Following repair, Defendants shall be entitled to implement the maintenance schedule identified in Exhibit B to the Declaration of Ric Johnston. During mowing, watering, and other maintenance activities, personal property must be moved and persons must move so as not to interfere with these activities. If maintenance activities are prevented due to weather or other circumstances, the schedule may be adjusted accordingly.

If the Court denies the State's motion, the State requests that the Court order Plaintiffs to post a bond in the amount of \$10,000 to cover the estimated costs of damage that has occurred and may occur if Defendants are unable to repair and maintain the grounds.

Defendants request expedited briefing and consideration of this motion and waive oral argument. Defendants stand ready for argument on an expedited schedule if the Court so desires.

DATED this 30th day of March 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Carl J. Withroe
CARL J. WITHROE
Deputy Attorney General

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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capacity as the Governor of the State of)
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JERRY RUSSELL, in his official capacity as)
the Director of the Idaho State Police,)

Defendants.)

Case No. 1:12-cv-00076-BLW
**MEMORANDUM IN SUPPORT
OF DEFENDANTS’ MOTION TO
MODIFY OR CLARIFY
PRELIMINARY INJUNCTION
(DKT. 17) PURSUANT TO FED. R.
CIV. P. 54(b)**

Pursuant to Fed. R. Civ. P. 54(b), which authorizes revision of any order that precedes a final judgment, Defendants hereby move the Court to modify or clarify its February 26, 2012, Order. Specifically, Defendants request that the Court modify or clarify its injunction to (1) permit the State of Idaho unobstructed access to the Capitol Annex to repair and maintain the grounds and to limit the types of structures that may be placed upon the ground, (2) permit the State to fence and close portions of the grounds at the Capitol Annex for a construction project, and (3) require that Plaintiffs post a bond to cover the cost of repairs that will be necessary if the State is prevented from conducting the needed maintenance, repair, and construction activities.

BACKGROUND

The State of Idaho owns the property known as the Capitol Annex, located at 514 W. Jefferson Street in Boise. Declaration of Ric Johnston, ¶ 4 & Ex. A. The Department of Administration manages the real property there, along with the other grounds within the capitol mall area. *Id.*, ¶ 3.

In November 2011, Plaintiffs established an “encampment” at the grounds of the Capitol Annex consisting of tents and structures and other personal property. First Am. Verified Compl. (Dkt. 8), p. 2. While the encampment has taken various forms since its establishment in November, it remains to this day. Declaration of April Rice, ¶ 7. In addition to the “tent city,” Plaintiffs have placed wood stoves, a sink (which drains into the public sewer system), and other items on the property; they store trash, food, waste, ashes, and personal effects there, as well. *Id.*, ¶ 8. It is plain that all these items facilitate a long term, and as Plaintiffs put it, “indefinite,” presence on the site. First Am. Verified Compl., p. 8. What Plaintiffs have referred to as their “indefinite vigil” is more like an all-out occupation of State-owned ground. In effect, they have seized control of the ground in the name of the First Amendment. *See Webster’s New World Dictionary and*

Thesaurus (2d ed. 2002) (defining “occupy” as to “take possession of by settlement or seizure”).

The effect of Plaintiffs’ occupation is twofold. First, Plaintiffs’ encampment, in its current form, prevents the State from adequately maintaining the property. Johnston Decl. ¶ 11. It has caused significant damage to the grounds and Plaintiffs’ refusal to temporarily relocate has effectively obstructed the State’s efforts to repair and maintain the grounds. *Id.*, ¶¶ 13, 14. (A full assessment of the damage cannot be done until Plaintiffs’ encampment is removed. *Id.*, ¶ 13.) Examples of the damage to the grounds are identified in photographs attached as Exhibit A to the Declaration of April Rice, Director of Security for the Department of Administration. The Division of Public works estimates that between 10,000 and 25,000 square feet of grass at the Capitol Annex will need to be re-sodded or re-seeded (or both). Johnston Decl., ¶ 13. This will cost anywhere between \$2,500 and \$15,000. *Id.* Tents and other structures on the property. *Id.*, ¶ 11. The Department of Administration anticipates needing approximately two weeks to assess the damage and develop and execute a rehabilitation plan for the Annex. *Id.*, ¶ 15. The time needed for the grounds at the Annex to be free of stored personal property following repair will depend upon the nature and extent of repair. *Id.*

Second, once the grounds at the Capitol Annex have been rehabilitated, the State will need to perform seasonal maintenance there, as it does with the other properties within the capitol mall. Maintenance generally includes aeration, fertilizing, mowing and watering the grass, as well as various as-needed maintenance and repair. *Id.*, Ex. B. Each property within the capitol mall is mowed one day a week, with Monday, Tuesday, and Wednesday set aside for mowing, and Thursday set aside for trimming and other maintenance. Johnston Decl., ¶ 6 & Ex. B. (The Annex is mowed on Wednesdays. *Id.*, ¶ 6.) Mowing occurs between 6:00 a.m. and 3:00 p.m. *Id.*, Ex. B. For a variety of obvious reasons, property must be generally free of persons and property, at least

temporarily, when an area is being mowed. *Id.*, ¶ 7. If weather prevents mowing at the Capitol Annex or other properties, the mowing schedule is moved back by the number of days that mowing is interrupted. *Id.*, ¶ 6.

Each property within the capitol mall has a moisture-sensing watering system, which waters automatically as needed between 6:00 p.m. and 6:00 a.m. *Id.*, ¶ 9. (The grounds at the Capitol building are set to be watered between 7:00 p.m. and 7:30 a.m. *Id.*) During this time, grass and flower beds and other areas that need watering must be generally clear of property to allow the water to reach the growing material. *Id.*

In addition to repair needed at the Capitol Annex, the Division of Public Works within the Department intends to solicit bids for Division of Public Works Project No. 12-006, at the Annex in mid-April. *Id.*, ¶ 16. The project is slated to begin approximately May 1, 2012. *Id.* For the duration of the project, the Department anticipates needing to fence and close a portion of the grounds as generally depicted in Exhibit C to the Declaration of Ric Johnston. The specifics will not be known until just before the project begins and may change throughout the project. *Id.*

The State requested Plaintiffs to temporarily remove their encampment from the grounds so that the repair and maintenance could occur. Plaintiffs requested a maintenance schedule for the Capitol Annex, and the State obliged. Second Withroe Decl. Ex. A. The State also requested Plaintiffs' agreement to relocate their encampment to allow the area depicted in Exhibit A to the maintenance schedule provided to Plaintiffs' counsel to be fenced and closed for the construction project. *Id.*

Plaintiffs' counsel responded in a letter dated March 16, 2012. He did not address whether his clients would comply with the needs related to the construction project. *Id.*, Ex. B. As for the repair and maintenance, he asserted that his clients had an apparently unqualified right to maintain their encampment on the grounds. *Id.* He offered to discuss with his clients their willingness to move their encampment to the Capitol grounds. *Id.*

Of course the grounds there, and within the capitol mall generally, need similar maintenance. *Id.* Plaintiffs’ counsel explained that he would view any attempts to clear the ground for maintenance and repair as being in contempt of the Court’s order. *Id.*

In a subsequent letter, dated March 22, Plaintiffs’ counsel did not agree to temporarily relocate the encampment, but explained that he wanted copies of “the as-built plans for the irrigation systems installed at the site, along with the Staging Plan (the actual Contract Document Sheet located in the Bid Set), as well as the schedule of Values and Construction Schedule for the pending construction project,” which the Plaintiffs said they would review. *Id.*, Ex. C. Without assurances from Plaintiffs that they will voluntarily relocate their encampment, the Defendants request modification or clarification of the injunction to permit the State to fence and close a portion of the Capitol Annex grounds for the construction project.

LEGAL STANDARD

Courts issuing preliminary injunctions have the authority to modify them. *See United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (noting a district court has the authority to modify a decree according to “changed conditions”). Federal Rule of Civil Procedure 54(b) provides that a district court can modify an interlocutory order “at any time” prior to entry of final judgment, and the Ninth Circuit has long recognized that under Rule 54 “a district judge always has the power to modify or to overturn an interlocutory order or decision while it remains interlocutory.” *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) (quoting *Tanner v. Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)).

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ARGUMENT

A. The Court Should Modify or Clarify Its Injunction to Permit the State's Repair, Maintenance, and Construction Activities Because These Activities Do Not Offend the Plaintiffs' First Amendment Rights

1. Modification or clarification of the injunction is appropriate because the issues and facts presented here were not before the Court at the time of the hearing on the preliminary injunction

Plaintiffs' First Amended Verified Complaint concerns only Idaho Code §§ 67-1613 and 67-1613A. These statutes prohibit "camping" on grounds within the capitol mall and provide for the disposition of abandoned property related to camping. The Court has thus far declined to preliminarily enjoin the ban on camping under section 67-1613; however, the Court ruled that under that statute, the State did not have the authority to clear the tent city established on the Capitol Annex. Memo Decision & Order (Dkt. 17), p. 15.

The issue of the State's ability to access the Capitol Annex for repair, maintenance, and construction was not before the Court at the time of the preliminary injunction hearing. The State's authority to manage the grounds at the Annex derives from its ownership of the property and exists independent of and separate from the limitation established in section 67-1613. Plaintiffs' refusal to accommodate the need for repair and the maintenance schedule puts the Defendants in a difficult position: The State has the right, indeed, the obligation, to repair and maintain the Capitol Annex property for all Idahoans. Plaintiffs' occupation of the grounds effectively excludes the State from its own property. Yet, if the State clears the ground to repair and maintain the property, Plaintiffs have made clear they will view the State's maintenance activities as contempt. Similarly, Plaintiffs' demands that they be provided all the construction plans as an implied condition of their cooperation with the construction project is unreasonable and creates uncertainty that without this Court's intervention may delay the project.

Given these facts, and given the injunction, the State needs and requests this Court's assistance in clarifying the State's ability to maintain the property. For the reasons that follow, the State's requests are entirely consistent with what the First Amendment requires.

2. The State's need for unobstructed access to the grounds at the Capitol Annex for repair, maintenance, and the construction project are permissible content-neutral time, manner, and place limitations on speech and assembly

To perform the needed repair the State needs the grounds to be clear, temporarily. Once that repair has been done, the State will need to perform the seasonally required maintenance described above. Plaintiffs view this as an infringement on their First Amendment speech and assembly rights. Limitations on speech are of course subject to reasonable time, manner, and place regulations. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Generally, limitations on speech are evaluated to determine (1) whether the conduct at issue is protected by the First Amendment; (2) the forum to which the restrictions apply; (3) whether the restrictions are content-neutral or content-based, and (4) whether the regulations satisfy the applicable standard. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

Protected activity and forum. Plaintiffs' activity and the forum where it occurs may be dealt with quickly. Defendants will assume, without conceding, that the forum in question here is a traditional public forum, even though the Capitol Annex is no longer a county courthouse or a legislative hall, and is in fact scheduled to be remodeled to house a law school and library.

Defendants will assume, too, that the Plaintiffs' presence on the Capitol Annex conveys a message and the placement of tents or signs to convey a message may be entitled to some protection by the First Amendment. Nevertheless, expression, whether verbal or written or symbolized by conduct, is subject to reasonable time, place, or

manner limitations that are narrowly tailored to serve a substantial governmental interest and that leave open ample alternative avenues of communication. *Clark*, 468 U.S. at 293. Defendants assume—again, without conceding—that the placement of a tent or structure upon ground is not purely expressive activity, but rather, conduct that contains an expressive component. *See United States v. O’Brien*, 391 U.S. 367, 376 (1968). The Supreme Court has observed that “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

Under *O’Brien* the test for limitations on expressive conduct is: (1) whether the State has the power to repair and maintain and undertake construction projects on the grounds, (2) whether the need for unobstructed access to facilitate these activities furthers an important or substantial governmental interest, (3) whether that interest is unrelated to the suppression of speech, and, finally, (4) whether the incidental restriction on alleged First Amendment Freedoms is no greater than essential to further that interest. *O’Brien*, 391 U.S. at 377. Certainly there can be no question that the State has the power to maintain and undertake construction projects on its own property.

The remaining three *O’Brien* factors are similar to the general time, place, and manner standard identified in *Clark*, and the difference between the two, the Court said in *Clark* was “little, if any” *Clark*, 468 U.S. at 298. The *O’Brien* factors will therefore be discussed within the time, place, and manner elements below.

Content neutrality. The State’s planned repair, maintenance, and construction activities do not target speech. Rather, the need for *all* personal property be removed temporarily to facilitate the State’s repair, maintenance, and construction activities is related solely to the State’s need to manage the property and allow a construction project to proceed. The temporary limitations apply without regard to speaker or message: They apply the same to people who would host a pancake breakfast, gather to celebrate Pi Day,

or to assemble and erect a tent city as a protest or demonstration. These limitations are therefore content neutral because they do not “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.” *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 & n.8 (11th Cir. 2005); *see also Hill v. Colorado*, 530 U.S. 703, 719 (2000).

Narrowly tailored to serve a substantial governmental interest. Because any limitation on speech here is content-neutral, it “need not be the least restrictive or least intrusive means of [serving the State’s interests]. Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (internal quotations and citations omitted). It is well established that ensuring adequate maintenance and operation of public grounds is a substantial government interest. *CCNV*, 468 U.S. at 296. “The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.” *Adderly v. State of Florida*, 385 U.S. 39, 48 (1967); *see also id.*, at 49 (“The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose”).

It is plain that the interest in maintaining, repairing and preserving the grounds at the capitol mall are unrelated to the suppression of speech. *See O’Brien*, 391 U.S. at 377. There is evidence of damage that, in the judgment of the Department of Administration, needs attention. This need for repair exists without regard to any message anyone occupying the grounds wishes to convey. Rather, this need derives from a truism of property ownership: it needs to be maintained and when necessary, repaired. The same holds for the construction project. The project has nothing to do with any speech or assembly.

If Plaintiffs claim that the need for repair or manner in which the Department has determined the property must be maintained are unnecessary or are arbitrarily concocted for purposes of chilling speech, the Court should reject such a claim. The maintenance schedule is essentially the same now as it has been for years. Johnston Decl., ¶ 6. The Plaintiffs are not the Chief Groundskeeper for the State of Idaho. Nor is the State obligated to negotiate with the Plaintiffs exactly what portions of the grounds will be fenced and closed during the construction project. The Department of Administration is tasked with making the judgments about the need for repair and maintenance and construction, and these judgments are not subject to second-guessing so long as they otherwise satisfy the First Amendment. As the Supreme Court put it in *Clark*,

we do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [Department of Administration] as the manager of [State grounds] or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Id. at 299.

Any limitation on speech here is sufficiently narrow. The only limitation on a person's or group's presence on the property is that during repair, maintenance, and construction activities, people and property need to move, temporarily, to allow repair, maintenance, and construction to occur and people and property need only to move from the place where repair, maintenance, and construction is occurring. The limitations are entirely legitimate.

Ample alternative avenues of communication. The time and place needed for unobstructed access to facilitate repair and maintenance and construction is relatively insubstantial. Once that repair has concluded, folks may return. The maintenance schedule that will be implemented following the repair only limits times and places when people and property may be on the grounds. During the construction project, a portion of

the grounds will be fenced and closed, but the remainder of the Capitol Annex will remain open, subject to the limitations created by the maintenance schedule. These temporary limitations leave ample time for First Amendment activity on the grounds. Similarly, the limitations on the type of structures that can be placed on the grounds to avoid damage to the grounds also leaves open plenty of other ways to convey a message.

* * *

The First Amendment's guarantees are of course essential to the vitality of the Republic. But the First Amendment does not allow one group of people to exercise their rights to the exclusion of the government's legitimate interest in basic maintenance and other activities attending property ownership. The State has put forth a legitimate plan for maintenance and construction, but the Plaintiffs' unwillingness to cooperate with the State has compromised that plan. Therefore, it is appropriate for the Court to modify or clarify its injunction to permit the maintenance, repair, and construction activities identified herein.

B. If the Court Prevents the State From Removing Property to Repair and Maintain the Grounds, or if the Court Prevents the State From Fencing and Closing a Portion of the Capitol Annex for Construction, the Court Should Require Plaintiffs to Post a Bond to Cover the Substantial Costs Associated With the Damage to the Grounds or Delay of the Project

Federal Rule Civil Procedure 65(c) provides that a court “may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” This is a matter left to the trial court's discretion. *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009). The declaration of Ric Johnston establishes that the grounds at the Capitol Annex, as of now, will need between \$2,500 and \$15,000 of restorative work caused by the long-term placement of structures there. Should the Court decline to allow the State to maintain the property as requested by this

motion, it is appropriate to require Plaintiffs to post a bond in the amount of \$10,000 to cover the costs of repair if Defendants are wrongfully enjoined from maintaining the grounds. Additionally, timing of the construction project is critical. If the Court prevents the State from closing a portion of the Capitol Annex for the construction project, the Plaintiffs should be required to post a bond to cover the costs associated with the State's inability to undertake the project.

CONCLUSION

Defendants request that this Court modify or clarify its injunction in this matter to provide as follows:

(1) The Defendants shall have unobstructed access to the Capitol Annex and its grounds for repair and for such time as the State shall determine necessary to complete that repair. Plaintiffs shall clear all personal property from the grounds within 48 hours of the Court's order. Any property left after that time may be removed and stored and/or disposed of by the State.

(2) Following repair, Defendants shall be entitled to implement the maintenance schedule identified in Exhibit B to the Declaration of Ric Johnston. During mowing, watering, and other maintenance activities, personal property must be moved and persons must move so as not to interfere with these activities. If maintenance activities are prevented due to weather or other circumstances, the schedule may be adjusted accordingly.

If the Court denies the State's motion, the State requests that the Court order Plaintiffs to post a bond in the amount of \$10,000 to cover the estimated costs of damage that has occurred and may occur if Defendants are unable to repair maintain the grounds.

DATED this 30th day of March 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Carl J. Withroe
CARL J. WITHROE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

Bryan K. Walker
Walkeresq.bk@gmail.com

Thomas C. Perry
tom.perry@gov.idaho.gov

 /s/ Carl J. Withroe
CARL J. WITHROE
Deputy Attorney General

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the Director of the Idaho State Police,)
)
Defendants.)

Case No. 1:12-cv-00076-BLW
DECLARATION OF APRIL RICE

I, APRIL RICE, declare as follows:

1. I am the Director of Security for the Idaho Department of Administration.
2. I have held this position since November 2008.
3. As part of my duties as Director of Security, I monitor activities on state-owned land managed by the Department of Administration. This includes lands within the capitol mall area in Boise.
4. I am aware that a group identifying itself as “Occupy Boise” established an encampment at the grounds of the Capitol Annex at 514 W. Jefferson Street in Boise in November 2011.
5. As part of my duties as Director of Security, I have monitored the activities at the Capitol Annex since November 2011.
6. In monitoring the activities at the Capitol Annex, I have visited the Annex multiple times. I have spoken with people participating in the protest and taken pictures.
7. I have made several visits to the Annex. I do this solely as part of my duties to monitor security at capitol mall properties. Between November 2011 and today’s date, the encampment has taken various forms. Tents and structures have moved or been removed. As of today, there is a large canvas tent on the west side of the Annex property, as well as several other tents throughout the property.
8. At various times between November 2011 and today’s date, I have observed the presence of two wood stoves, a sink (which drains into the public sewer system), fuel, cooking equipment, and other personal property like sleeping bags on the property. I have also observed stored trash, waste, food, ashes, and personal effects there.

EXHIBIT A

DECLARATION OF APRIL RICE



Capitol Annex Visit March 21, 2012
Photograph 1



Capitol Annex Visit March 21, 2012
Photograph 2



Capitol Annex Visit March 21, 2012
Photograph 3

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the Director of the Idaho State Police,)
)
Defendants.)

Case No. 1:12-cv-00076-BLW
**DECLARATION OF RIC
JOHNSTON**

I, RIC JOHNSTON, declare as follows:

1. I am the Facilities Services Manager within the Division of Public Works, a part of the Idaho Department of Administration. I have been with the Department for 12 years, and I have held this title for seven years.

2. I have 12 years of experience in managing facilities.

3. The Department of Administration manages the capitol mall in Boise on behalf of the State of Idaho.

4. Part of my duties as Facilities Services Manager includes overseeing management of the grounds within the capitol mall area in Boise. The Capitol Annex, also known as the old Ada County Courthouse, is within the capitol mall. The State of Idaho owns the Capitol Annex. Attached hereto as Exhibit A is a true and correct copy of the deed to the property showing the State of Idaho as the grantee.

5. My staff for managing the capitol mall grounds consists of one landscape superintendent, two senior landscape technicians, and three temporary workers. The landscape superintendent has held that position for over 27 years.

6. There are approximately 19.4 acres of grounds within the capitol mall. This includes about 8.7 acres of lawn and flower beds, 5.7 acres of parking lots, and 5 acres of sidewalks. Between mid-March and November each year, each property is mowed typically once a week. We cannot mow all the grounds on the same day, so that schedule is spread throughout the week. We mow the Capitol Annex on Wednesdays. If it rains or there are other weather events that prevent mowing on a particular day, the schedule for the whole capitol mall gets moved back by the number of days that weather interrupts mowing. The number of hours to mow at each property—which is an approximation—is summarized on the Capitol Mall Maintenance Schedule attached to my declaration as Exhibit B. While each year is a bit unique, this schedule is

substantially similar to prior years' schedules. The mowing schedule, however, has remained unchanged for five years.

7. For mowing, we use commercial 36-inch ride-behind, engine-propelled mowers used for large pieces of ground. Before mowing an area, the grounds are visually inspected for debris, as foreign objects can create significant safety hazards and risk damage to the mowers. In addition, we use 20-inch commercial walk-behind mowers and string trimmers on those parts of the capitol mall grounds not suitable for the larger mowers.

8. The grassy areas in the capitol mall are watered by an Acclima-brand moisture sensor system. Very generally speaking, this system senses the amount of water in the soil and automatically waters based on the soil moisture content. This system saves the State of Idaho money; the entire system paid for itself in terms of water savings within one year. Because it uses less water, it reduces demands on Idaho's water resources.

9. Watering is done most efficiently in the night or early morning hours. With the exception of the Capitol building grounds, we set up the watering system so that the remaining properties are watered between the hours of 6 p.m. to 6 a.m. The Capitol grounds are scheduled to be watered between 7:00 p.m. and 7:30 a.m. We have determined this is the best time block for watering and allows all zones to perform a complete cycle. Areas of grass covered directly by tarps or tents will not receive adequate water. Additionally, the sprinkler heads are of the "pop-up" variety, so sprinkler heads that can't pop up due to obstructions are subject to damage and may flood the immediate areas.

10. There are other maintenance needs on the capitol mall, as well. We need to fertilize several times between March and November. We typically aerate the grounds in the spring. We also have to repair sprinkler heads from time to time. Other management needs occur from time to time.

11. Throughout the mowing season we typically assess the grounds within the capitol mall to determine any special needs a piece of ground may have. I am familiar with the "Occupy Boise" site located at the Capitol Annex. I understand that it was generally established in November 2011 and has remained in some form since. The presence of the encampment has prevented my staff from maintaining the property. In assessing the grounds within the capitol mall this year, my crew and I discovered significant damage to the grass there due to the long-term placement of structures on the grass, and from continued heavy foot traffic.

12. The Capitol Annex consists of about 25,000 square feet of grass and has several large, old trees.

13. My division regularly assesses the condition of the grounds within the capitol mall. My complete assessment of the Capitol Annex is hampered by the presence of tents and other structures on the grounds that cover a substantial percentage of the total square footage. From what I was able to observe, the damage between November 2011 and now means that we may need to re-seed or re-sod (or a combination of the two) approximately 10,000 to 25,000 square feet of grass. The entire area within the sidewalks will need rehabilitation of some sort. This could cost anywhere between \$2,500 to \$15,000 for materials and labor costs. So far, due to the encampment, we have not been able to repair the grounds.

14. The current situation at the Capitol Annex prevents my staff from maintaining the property.

15. To assess condition and need for repair at the Capitol Annex, I anticipate needing about two weeks. The time needed to implement the repair depends on the nature and extent of the repair we need to conduct.

16. The Department of Administration intends to commence the second phase of the Annex renovation project, Division of Public Works Project No. 12-006 this spring. It intends to solicit bids for the project by April 15, 2012, and hopes to start

EXHIBIT A

DECLARATION OF RIC JOHNSTON

COPY

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO

RECORDED - REQUEST OF

2 pgs
FEE ϕ DEPUTY *MP*

2000 JA -5 PM 3: 54

100001205

DEED

ALLIANCE TITLE

THIS INDENTURE is made effective the 5th day of January, 2000 by the Idaho State Building Authority, acting by and through its board of commissioners ("Grantor") to the State of Idaho ("Grantee").

WITNESSETH:

FOR VALUE RECEIVED, the Grantor does hereby bargain, sell and convey to the Grantee and its successors and assigns that certain real property situated in the County of Ada, State of Idaho (the "Property") and more particularly described as:

All lots in their entirety in Block 65 of BOISE CITY ORIGINAL TOWNSITE, according to the Official Plat thereof, filed in Book 1 of Plats at Page(s) 1, Records of Ada County, Idaho.

AND

A vacated alley in its entirety located in Block 65 of BOISE CITY ORIGINAL TOWNSITE, according to the Official Plat thereof, filed in Book 1 of Plats at Page(s) 1, records of Ada County, Idaho, more particularly described as follows:

An alley lying Northerly of Lots 1-6 and Southerly of Lots 7-12 between North 5th Street and North 6th Street, Block 65 of BOISE CITY ORIGINAL TOWNSITE.

together with all tenements, hereditaments and appurtenances thereto belonging, subject to all easements, restrictions, agreements, encumbrances and other matters of record or appearing on the Property.

Grantor warrants to the Grantee that the Grantor has not heretofore created any lien, charge or encumbrance against the Property which is not shown herein, and Grantor covenants that it will defend the Property to the extent of the warranties made herein against all lawful claims by, through and under the Grantor.

The Current address of the Grantee is: Statehouse, Boise, Idaho 83720.

EXHIBIT B

DECLARATION OF RIC JOHNSTON

CAPITOL MALL MAINTENANCE SCHEDULE

Beginning approximately March 15, 2012, ending approximately November 1, 2012:

Mowing:

(1) Schedule. One day per week for each property, beginning on March 21; 6:00 a.m. to 3:00 p.m. If weather prevents mowing at a property on its scheduled day, the entire schedule is moved back by the number of days that mowing cannot occur.

(a) Monday: The Capitol Building, Steunenberg Park (at the intersection of Capitol and Bannock Streets), Borah Building (304 N. 8th St.), Joe R. Williams Building (700 W. State St.), Len B. Jordan Building (650 W. State St.).

(b) Tuesday: Washington Street Parking Structure (between 5th and 6th Streets), Pete T. Cenususa Building (450 W. State St.), Library (325 W. State St.), Secretary of State (450 N. 4th St.), Division of Public Works, Blind Commission, Alexander House (502 W. State St.).

(c) Wednesday: Supreme Court Building (451 W. State St.) and Capitol Annex (514 W. Jefferson St.).

(d) Thursday and Friday: Trimming, edging, weeding, adjusting sprinklers, planting as necessary, and maintaining walkways.

(2) Requirements. Grounds must be clear of debris and property and persons for safety and maintenance reasons. People may be asked to move and move their property when mowers and trimmers need to mow or trim or maintain a particular area.

Watering:

(1) Schedule. Watering is on an Acclima-brand moisture sensor system, which automatically waters when sensors determine watering is necessary. This occurs as often as daily, during evening and nighttime hours, usually between 6 p.m. and 6 a.m., but may occur during daytime hours. Watering at the Capitol grounds occurs between 7:00 p.m. and 7:30 a.m.

(2) Requirements. Grounds must be clear of debris and property to allow sprinkler heads to “pop” up from ground level and to allow water to reach necessary areas. Sprinkler heads that do not pop up due to obstruction by personal property may cause flooding in the area and damage to property.

Other regular maintenance: Aeration, fertilization, sprinkler repairs and adjustments; these occur on an as-needed basis and cannot be specifically scheduled.

Other known management needs within the capitol mall:

(1) Construction project. The Department of Administration intends to commence the second phase of the Annex renovation project at the Capitol Annex (Division of Public Works Project No. 12-006) by approximately April 15, 2012, with an anticipated construction commencement date of May 1, 2012. This will require the grounds to be cleared and the area fenced off as depicted in Exhibit A hereto.

(2) Grass and grounds restoration. It is estimated that approximately 10,000 to 25,000 square feet of sod at the Capitol Annex will need to be either re-sodded or re-seeded to repair damage to the sod that has occurred since November 2011. This will require the grounds to be cleared to allow access to the grounds for re-sodding or re-seeding activities. The time to assess and rehabilitate the grounds is approximately two weeks. The time necessary for the grounds at the Annex to be free of stored personal property following repair depends on the nature and extent of the repair. The Department of Administration anticipates commencing this project as soon as possible.

Other management needs. From time to time, other management needs of the property may arise that necessitate temporary removal or relocation of personal property to allow management activities associated with the property.

EXHIBIT C

DECLARATION OF RIC JOHNSTON

SEWER (NEW CONNECTION)

TRANSPORMER (RELOCATED FROM PARKING LOT)

W STATE ST

CONSTRUCTION FENCE

A detailed site plan of the Capitol Annex building. The plan shows the building's footprint with various rooms and corridors. Key features include:

- SEWER:** A line representing a sewer line runs along the perimeter of the building, with a specific connection point labeled 'SEWER'.
- TRANSPORMER:** A transformer is located near the center of the building, labeled 'TRANSPORMER'.
- STAIRS:** A set of stairs is located on the right side of the building, labeled 'STAIRS'.
- REPAIRS:** Areas marked for repairs are indicated by dashed lines and labeled 'REPAIRS'.
- SEWER VAULTS:** Sewer vaults are located near the bottom right corner, labeled 'SEWER VAULTS'.

The plan is bounded by 'N 6TH' to the north and 'N 5TH' to the south. The building is situated between 'W JEFFERSON ST' and 'W STATE ST'.

N 6TH

N 5TH

W JEFFERSON ST

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief of Civil Litigation

MICHAEL S. GILMORE, ISB #1625
CARL J. WITHROE, ISB #7051
Deputy Attorneys General
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Boise, ID 83720-0010
Telephone: (208) 334-2400
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Office of the Governor
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Boise, ID 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454
tom.perry@gov.idaho.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

EDWARD WATTERS, DEAN)
GUNDERSON, STEVEN FARNWORTH,)
MATTHEW ALEXANDER NEWIRTH,)
individuals, and OCCUPY BOISE, an Idaho)
unincorporated nonprofit association,)

Plaintiffs,)

vs.)

C.L. (BUTCH) OTTER, in his official)
capacity as the Governor of the State of)
Idaho, TERESA LUNA, in her official)
capacity of the Director of the Idaho)
Department of Administration, and COL. G.)
JERRY RUSSELL, in his official capacity as)
the Director of the Idaho State Police,)

Defendants.)

Case No. 1:12-cv-00076-BLW

**SECOND DECLARATION OF
CARL J. WITHROE**

I, CARL J. WITHROE, declare as follows:

1. I am one of the attorneys of record in this case.
2. Attached hereto as Exhibit A is a true and correct copy of correspondence dated March 14, 2012, with attachments, that I authored and hand-delivered to counsel for Plaintiffs.
3. Attached hereto as Exhibit B is a true and correct copy of correspondence I received from counsel for Plaintiffs on March 16, 2012.
4. Attached hereto as Exhibit C is a true and correct copy of correspondence I received from counsel for Plaintiffs on March 21, 2012.
5. Pursuant to 28 U.S.C. § 1747 I declare under penalty of perjury that the foregoing is true and correct.

Further I sayeth naught.

DATED this 30th day of March 2012.

/s/ Carl J. Withroe

CARL J. WITHROE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

Bryan K. Walker
Walkeresq.bk@gmail.com

Thomas C. Perry
tom.perry@gov.idaho.gov

/s/ Carl J. Withroe

CARL J. WITHROE
Deputy Attorney General

EXHIBIT A

SECOND DECLARATION OF CARL J. WITHROE



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 14, 2012

Bryan K. Walker, Esq.
Obsidian Law, PLLC
2712 W. Jefferson
Boise, ID 83702

Re: Watters, et al. v. Otter, et al.; 12-cv-0076-BLW

Dear Bryan:

At the meeting with you, Mr. Bray, Mr. Gunderson, Director Luna, Steven Olsen, and me on March 2, you identified several items at the Occupy Boise site on the Capitol Annex grounds that you believed did not constitute "camping" within the meaning of Idaho Code § 67-1613. Among them:

- six tents or similar structures, used for various purposes (a library, meeting, information, a "free store," and supplies and equipment);
- several "static displays" (which we understand to be tents or similar structures that do not store personal belongings and are not used for any other purpose);
- wood stoves;
- cabinets; and
- a sink (which drains into the public sewer system)

We also understand that couches have been placed at the grounds.

We do not share your view that the above items are not indicia of "camping." We understand that the court has allowed the static displays. However, the remaining items all enable a long-term presence at the site (which your clients have referred to as an "encampment") and in our view, are indicia of "camping." These items are stored personal belongings, they are temporary structures used for storing personal belongings, and they are items used for cooking and for making a fire. *See* Idaho Code § 67-1613. These items, when placed and left at the site, demonstrate use of the grounds as temporary or permanent place of dwelling, lodging, or living accommodation. Pursuant

Bryan Walker, Esq.
March 14, 2012
Page - 2

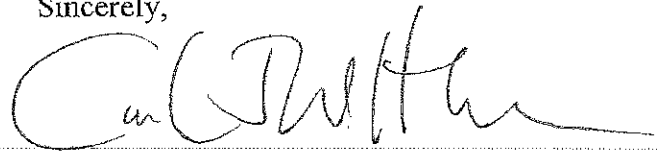
to the court's order and Idaho Code § 67-1613, we expect that the indicia of camping as we have described be removed.

The state of Idaho has an additional concern with the personal property on the site. That property effectively prevents the state from managing, maintaining, and repairing the property. In less than two weeks, the state will need access to the grounds at the Capitol Mall—the Annex included—and will need it clear of all personal property in order to fertilize, water, mow and maintain the grounds in accordance with the attached maintenance schedule.

In addition to these basic maintenance needs, an assessment of the grounds at the Capitol Annex revealed substantial damage to the grounds due to the encampment there. The state will need to undertake substantial repair efforts in order to restore the property. Moreover, the groundspeople tell us that items like tents or similar structures that cover portions of grass damage the grass if they are left there for any prolonged period of time. While we are happy to discuss with your clients what sorts of structures may be placed on the grounds and for how long, indefinite placement of structures on the grass is not workable due solely to the damage they cause.

The plaintiffs' speech and assembly rights are subject to reasonable time, place and manner restrictions that allow the groundskeepers to mow, water, fertilize, and otherwise maintain, inspect and, if necessary, repair the underlying state property. The grounds must be cleared to allow for the scheduled maintenance and repair, and any placement of personal property must not interfere with scheduled or other necessary maintenance. Please confirm to me by Friday at noon that your clients will abide by this schedule.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl J. Withroe". The signature is written in a cursive style with a large initial "C" and a long horizontal flourish at the end.

CARL J. WITHROE
Deputy Attorney General

CJW:cjf
Attachment

CAPITOL ANNEX MAINTENANCE SCHEDULE

Note: This is the proposed schedule as of March 14, 2012. It was prepared at the request of Brian Walker, attorney for Plaintiffs in *Watters v. Otter*. All management schedules are based on and substantially similar to prior years' needs; however, the Department of Administration reserves its right to modify this schedule as needs arise.

Beginning approximately March 15, 2012, ending approximately November 1, 2012:

Mowing:

(1) Schedule. One day per week each Wednesday, beginning on March 21; 6:00 a.m. to 3:00 p.m.

(2) Requirements. Grounds must be clear of debris and property and persons for safety and maintenance reasons. People may be asked to move and move their property when mowers and trimmers need to mow or trim or maintain a particular area.

Watering:

(1) Schedule. Watering is on an Acclima® moisture sensor system, which automatically waters when sensors determine watering is necessary. This occurs as often as daily, during evening and nighttime hours, usually between 6 p.m. and 6 a.m., but may occur during daytime hours.

(2) Requirements. Grounds must be clear of debris and property to allow sprinkler heads to "pop" up from ground level and to allow water to reach necessary areas. Sprinkler heads that do not pop up due to obstruction by personal property may cause flooding in the area and damage to property.

Other regular maintenance: Aeration, fertilization, sprinkler repairs and adjustments; these occur on an as-needed basis and cannot be specifically scheduled.

Other known management needs:

(1) Construction project. The Department of Administration intends to commence the second phase of the Annex renovation project (Division of Public Works Project No. 12-006) by approximately April 15, 2012, with an anticipated construction commencement date of May 1, 2012. This will require the grounds to be cleared and the area fenced off as depicted in Exhibit A hereto.

(2) Grass and grounds restoration. It is estimated that approximately 10,000 to 25,000 square feet of sod will need to be either re-sodded or re-seeded

to repair damage to the sod that has occurred since November 2011. This will require the grounds to be cleared to allow access to the grounds for re-sodding or re-seeding activities. The Department of Administration anticipates commencing this project as soon as possible.

(3) Long-term placement of structures on grass areas. Items like stands, tarps, tents or other structures that are located directly on or that directly cover grass prevent proper exposure to water, air, and sunlight and therefore damage grass within a few hours. Small personal items, like coolers, strollers, bags, picnic baskets, recreational equipment, signs, or structures, such as canopy tents or tables or other items that do not prevent exposure to water, air, or sunlight for a significant period of time, do not pose this risk.

Other management needs. From time to time, other management needs of the property may arise that necessitate temporary removal or relocation of personal property to allow management activities associated with the property.

SEWER (NEW CONNECTION)

TRANSFORMER (RELOCATED FROM PARKING LOT)

W STATE ST

CONSTRUCTION FENCE

The diagram is a site plan of the Capitol Annex building. It shows the building's footprint with various rooms and corridors. Key features include:

- Streets:** N 6th and N 5th streets are shown at the top, and W Jefferson St and W State St are shown on the right side.
- Sewer System:** A dashed line indicates the sewer line, with a square symbol representing a 'TRANSFORMER'. A label 'SEWER' points to the line. A note says 'TRANSFORMER (RELOCATED FROM PARKING LOT)'. A legend indicates 'SEWER (NEW CONNECTION)'.
- Other Features:** A circular area is labeled 'DEBRIS REMOVAL'. A hatched area is labeled 'CONSTRUCTION FENCE'. A label 'STAG/UB' points to a specific area. A note 'REVER VAILTS' is also present.
- Building Labels:** The main building is labeled 'CAPITOL ANNEX'.

W JEFFERSON ST

EXHIBIT A

EXHIBIT B

SECOND DECLARATION OF CARL J. WITHROE

OBSIDIAN LAW, PLLC

BRYAN K. WALKER, ESQ.
2712 WEST JEFFERSON
BOISE, IDAHO 83702
TEL. (208) 275-0090
FAX (208) 275-0095
E-MAIL: walkerseq.bk@gmail.com

March 16, 2012

*Via E-Mail: steven.olsen@ag.idaho.gov
Carl.withroe@ag.idaho.gov*

Steven Olsen
Carl Withroe
Office of the Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

Re: *Watters v. Otter, 12-cv-76*

Dear Steve and Carl:

After reviewing your letter dated March 14, 2012, I understand the State's position to be that it can do with an unpublished, unpromulgated "maintenance schedule" what the court has already said it could not do with a statute enacted by the Governor and both houses of the Legislature. Not only does the court's February 26, 2012, injunction expressly contemplate a "long-term presence" at the protest site ("the defendants . . . are prohibited from enforcing I.C. §§ 67-1613-1613A to remove tents . . . or to prevent Occupy Boise from staffing the tent city around the clock"), but it also clearly prevents your clients from taking any action on its demand that the "grounds must be cleared." Camping and cooking have ceased at the site. I am not aware that anyone has been cited for violations of I.C. § 67-1613, but if you are, please let me know.

I do understand that your office takes the view, among others, that because people sometimes take books on camping trips, the *Occupy Boise* political library at the protest site is an indicum of camping and may be seized. That view, and the demands included in your March 14, 2012, letter contort the plain language of Judge Winmill's decision and order, and they appear calculated to chill protestors' speech by creating uncertainty about enforcement. We will consider any action that removes and interferes with the symbolic tent city, as now adjusted in compliance with the injunction, to be a contempt. We will move the court for another injunction if interference appears imminent, or for contempt if it occurs. If your clients pursue their latest plan to clear the grounds, they will do it at their own risk.

OBSIDIAN LAW, PLLC

I can, however, discuss with *Occupy Boise* the possibility of moving the protest across the street, onto the grounds of the Capitol, to allow for maintenance at the old Ada County courthouse site. If you let me know by the end of today about that option, I can discuss it with *Occupy Boise* when it next meets in General Assembly, this Saturday.

Very truly yours,

OBSIDIAN LAW, PLLC

A handwritten signature in cursive script that reads "Bryan K. Walker". The signature is written in black ink and is positioned above the printed name.

BRYAN K. WALKER

EXHIBIT C

SECOND DECLARATION OF CARL J. WITHROE

OBSIDIAN LAW, PLLC

BRYAN K. WALKER, ESQ.
2712 WEST JEFFERSON
BOISE, IDAHO 83702
TEL. (208) 275-0090
FAX (208) 275-0095
E-MAIL: walkerresq.bk@gmail.com

March 22, 2012

Via E-Mail: Carl.withroe@ag.idaho.gov

Steven Olsen
Carl Withroe
Office of the Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

Re: *Watters v. Otter, 12-cv-76*

Dear Carl:

I think you have misunderstood my March 16, 2012, letter. I have yours dated March 20, 2012, but you should not understand my letter to mean that my clients will not accommodate the State's maintenance needs.

Your letter of March 14, 2012, does not appear to be a "request for access," as you characterize it in your latest letter. Instead, it provided less than 24 hours' notice of a maintenance schedule slated to begin as early as March 15, 2012, and required that the "grounds must be cleared." It did not ask for my clients' cooperation, but rather for my "confirmation," within less than two days, that my clients "will abide" by your letter's demands.

Moreover, your assessment of what you consider to be "indicia of camping" is unduly restrictive, inflexible, and does not, in our opinion, comport with the spirit of the court's injunction. First, it borders on an absurd distortion of terms to insist that a political Library and Free Store represent indicia of camping, especially when – to our knowledge – not one person has been found to be camping, nor cited for such. Further, when your March 14 letter opines that such items "enable a long-term presence at the site," that questionable conclusion simply fails to recognize that Judge Winmill specifically contemplated a "long-term encampment," or as Occupy Boise has termed it, an "indefinite vigil." (Occupy Boise has never claimed that it had established a "permanent encampment," and your characterization of the demonstration as such is inaccurate.) The State's position on these points admits of no "spirit of cooperation," which was not sought simply to permit maintenance of the grounds, but also to preserve Occupy Boise's demonstration.

OBSIDIAN LAW, PLLC

Nonetheless, as I explained in my March 16, 2012, response, my clients *are* willing to explore relocating the protest to accommodate the State's maintenance needs. Because location and exposure to target audiences is crucial to their political speech, the protest will need to remain in clear sight of the Capitol and the lobbyists, representatives, and elected officials who frequent it. It is not strictly necessary, given the present camping ban, to locate the demonstration on a grassy area. Please also confer with Department of Administration employees who have worked with *Occupy Boise* on maintenance issues; I trust they will confirm what they have previously confirmed in emails: that *Occupy Boise* said it would maintain its area, and that it has.

Also, although I may have discussed this with you before, my organizational client, *Occupy Boise*, operates by a consensus process and meets only twice each week in General Assembly to make binding decisions (although it does not always obtain quorum). To facilitate our cooperation, I hope you will keep this in mind when making requests in the future for relatively immediate responses. In this case, it will not be until this Saturday, March 24, 2012, that *Occupy Boise* will meet again to consider your requests.

In the meantime, I think there is a way forward that should not require judicial intervention. If you could provide me with a copy of the as-built plans for the irrigation systems installed at the site, along with the Staging Plan (the actual Contract Document Sheet located in the Bid Set), as well as the Schedule of Values and Construction Schedule for the pending construction project, my clients and I can review those materials during this week and at the March 24, 2012, *Occupy Boise* meeting and work to accommodate the State's requests. Obviously, the sooner we can begin reviewing these materials, the sooner we can respond to continue our discussions.

Very truly yours,

OBSIDIAN LAW, PLLC



BRYAN K. WALKER