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**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

EDWARD WATTERS *et al.*,

CASE NO. 1:12-cv-00076-BLW

Plaintiffs,

vs.

C.L. (BUTCH) OTTER, in his official capacity
as the Governor of the State of Idaho, *et al.*,

**RESPONSE TO DEFENDANTS’
MOTION TO MODIFY OR CLARIFY
PRELIMINARY INJUNCTION FILED
ON MARCH 30, 2012**

Defendants.

The plaintiffs submit the following response to the DEFENDANTS’ MOTION TO MODIFY OR CLARIFY PRELIMINARY INJUNCTION (Dkt. 24), and show this Court:

I. BACKGROUND

After notifying the defendants (“State”) in advance,¹ the plaintiffs began a tent city assembly and protest on November 5, 2011, on a public plaza in direct view of the Idaho Statehouse, the Idaho Supreme Court building, and nearby government office buildings and executive agency headquarters. Since, the plaintiffs have continued their ‘round-the-clock

¹ First Am. Compl. ¶ 24 at 8 (Dkt. 8) [hereinafter “FAC”].

political protest, always promptly addressing the rare maintenance or safety issue that the State brought to their attention.²

On February 21, 2012, defendant Otter signed a bill into law that made “camp[ing] on or in state-owned or leased property”³ an infraction subject to a \$100 penalty under state law. I.C. § 18-111. From its inception, however, the bill had been targeted not at camping, but at the plaintiffs’ protest.⁴ Thus, when defendant Otter signed the bill, he included a signing statement informing the Speaker of the Idaho House of Representatives—whose office looks out directly upon the *Occupy Boise* protest—that he was going to tell *Occupy Boise* that it must “vacate” by 5:00 p.m. the following Monday.⁵

Before that following Monday, however, the plaintiffs moved this Court for a preliminary injunction to keep the State from banishing their protest and assembly. The State argued in response, among other things, that it needed access to the site to conduct grounds maintenance.⁶ This Court granted the plaintiffs’ motion in part, noting that the new law simply “does not authorize” removal of the tents that make up the *Occupy Boise* assembly and protest.⁷ The State now asks this Court to modify its injunction, raising grounds maintenance arguments for the second time.

² FAC ¶¶ 26–31 at 8–9 (Dkt. 8).

³ Decl. Walker ex. A at ll. 31–32 (Dkt. 2-4).

⁴ See, e.g., FAC ¶ 35 at 10 (Dkt. 8).

⁵ Decl. Withroe ex. A (Dkt. 9-1).

⁶ Mem. in Opp. to Pls.’ Renewed Emergency Mot. for TRO 7, 8, 16 (Dkt. 9). [^oral arg]

⁷ Mem. Decision and Order 11 (Dkt. 17).

II. STANDARD

The defendants (“State”) move to modify an interlocutory order under F.R.C.P. 54(b). Although that rule mentions that certain orders can be “revised,” a court’s opinions “are not intended as mere first drafts, subject to revision and reconsideration at a litigant’s pleasure.” *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill.1988).

Accordingly, reconsideration of a court’s prior ruling is appropriate only “if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law.” *Intermountain Fair Hous. Council v. CVE Falls Park, LLC*, No. 2:10-cv-00346-BLW, 2011 U.S. Dist. LEXIS 135143 at *3 (D. Idaho Nov. 22, 2011). Unless the State’s arguments fall within one of these three categories, its motion must be denied. *Id.*

Modification of a preliminary injunction is even more limited. The State must also “establish a change in circumstances that would make the original preliminary injunction inequitable.” *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 742 (D. Idaho 1996).

III. ARGUMENT

There is no change in circumstances. This Court did not err. There has been no intervening change in controlling law. And there is no newly discovered evidence, either, unless the State formulated its maintenance or construction plans subsequent to the February 24, 2012 hearing before this Court. Rather, things are just as they were when this Court entered the injunction: the State’s unceasing efforts to squelch disfavored political protest still continue.

It should be noted at the outset that while the Defendants have devoted substantial briefing to the State’s “need to access” the Capitol Annex for construction purposes, they have not sought that relief in their Motion to Modify or Clarify Preliminary Injunction.

The maintenance schedule, as the State concedes, is substantially the same as it has been for years.⁸ It is not “newly discovered.” *Intermountain Fair Hous. Council*, 2011 U.S. Dist. LEXIS 135143 at *3. The schedule begins in mid-March every year.⁹ The parties were before this Court for hearing just 21 days before that, on February 24, 2012. The State pointed out the State’s grounds maintenance interests during that hearing,¹⁰ and in its briefing.¹¹ Grounds maintenance is even mentioned right in the anti-*Occupy* law itself,¹² and this Court discussed grounds maintenance in its decision.¹³ That is, the State’s argument that “[t]he 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” is false.¹⁴ It is manifestly unreasonable and incredible that the State would claim that it was unaware of its own construction schedule, unless the schedule was concocted after the February 24, 2012, TRO hearing. Thus, the State could have and should have brought up its latest scheme to evict *Occupy Boise* when this Court last took that up.¹⁵ See *Intermountain Fair Hous. Council*, 2011 U.S. Dist. LEXIS 135143 at *3. The State does not argue that this Court erred, or that it made a

⁸ Decl. Ric Johnston ¶ 6 (Dkt. 24-4).

⁹ Decl. Ric Johnston ¶ 6 (Dkt. 24-4).

¹⁰ Mr. Withroe addressed grounds maintenance as one of the State’s compelling interests during an inquiry from the Court beginning at about 4:00 p.m.

¹¹ Mem. in Opp. to Pls.’ Renewed Emergency Mot. for TRO 7, 8, 16 (Dkt. 9).

¹² Decl. Walker ex. A at ll.17–19 (Dkt. 2-4).

¹³ Mem. Decision and Order 7, 10 (Dkt. 17).

¹⁴ Mem. in Supp. Of Defs.’ Mot. to Modify or Clarify Prelim. Inj. 6 (Dkt. 24-1).

¹⁵ And it will have another chance to do this just weeks from now. Dkt. 21.

manifestly unjust decision, or that governing law has changed since the February 26, 2012, injunction. Its motion must be denied.

Disturbingly, its motion also reveals that the State of Idaho has a fundamental misunderstanding of the purpose of traditional public forums like the old Ada County courthouse plaza. Throughout its brief, the State talks about the grounds around the Statehouse as if they're the defendants' own personal, private lawns.¹⁶ They are the opposite: the defendants hold those grounds *in trust* for the plaintiffs and all of the public, specifically so that the public has a place for “assembly, communicating thoughts between citizens, and discussing public questions.” *Grossman v. City of Portland*, 33 F.3d 1200, 1204–1205 (9th Cir. 1994) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). In other words, the public's space isn't just for looking at in America—you can sit on the furniture here. *See* U.S. CONST. amend. I. This is especially crucial in these times, “when the extremely rich have an enormous variety of privately-owned media through which to reach the public, and political careers can be launched by the mere fact that the putative candidate has a fortune to spend on advertising.” *Grossman*, 33 F.3d at 1205 n.8. The right to hold demonstrations in parks—“a free forum for those who cannot afford advertisements, television infomercials, and billboards”—must accordingly “be jealously protected.” *Id.*, 33 F.3d at 1205 & n.8.

Equally disturbing, after over six months of demonstrations, and nearly six months of encampment at the Capitol Annex, the State continues, apparently, to be entirely flummoxed by the nature of Occupy Boise's demonstrations, including the encampment. The State asserts that

¹⁶ *E.g.*, Dkt. 24-1 at 6 (plaintiffs' protest “effectively excludes the State from *its own* property” (emphasis added)). It is also apparently “unreasonable” for the public to ask to see its government's construction plans. *Id.*

Occupy Boise has “seized control of the ground in the name of the First Amendment,”¹⁷ when in actuality, Occupy Boise’s continued presence is directed generally toward the substantive grievance of undue and corrupting corporate and financial influence over the formulation of public policy. The First Amendment acknowledges the rights of Occupy Boise to assemble, to engage in political speech and to redress grievances against the government, but it is not itself the point of Occupy Boise’s presence. Whether the State’s deafness to Occupy Boise’s message is intentional or simply myopic, the fact that it cannot distinguish between these points provides the best evidence that the need for the assembly and protest continues undiminished.

The State’s motion would have this Court join its conspiracy to kill function with form.¹⁸ Although it asks this Court to kick the people out of the one sort of place that has always been protected for public protest and assembly so that the State can “maintain” it, the State never says what it is “maintaining” it for. As trustee for the people,¹⁹ however, if there is any reason the State must maintain those grounds, it is so that the plaintiffs’ demonstration and others like it have a place to be. *See id.*

In any event, the plaintiffs have offered to move their tent city and protest onto non-grassy areas, rendering moot the State’s argument that *Occupy Boise* is preventing it from

¹⁷ Mem. in Supp. Of Defs.’ Mot. to Modify or Clarify Prelim. Inj. 2 (Dkt. 24-1).

¹⁸ As Thomas Jefferson put it, when General Gage declared it treason for the people of Massachusetts “to assemble themselves to consider of their Grievances”: the government sometimes does “no[t] regard the constitutional Rights of his Majesty’s Subjects, whenever they interfere with the Plan [it] has formed” Thomas Jefferson, “Instructions in the Virginia Convention to the Delegates at Congress, Aug. 1774,” in 5 THE FOUNDERS’ CONSTITUTION 199 (1987).

¹⁹ In Idaho, “[a]ll political power is inherent in the people.” IDAHO CONST. art. I, § 2.

maintaining the grounds.²⁰ Occupy Boise has offered two alternative relocations, along with an offer to discuss other alternatives.²¹ The State's response has been consistent: it has completely ignored those offers, while continuing with its demands that Occupy Boise comply with its statutes and rules.²²

Much of the State's demands of late has involved the construction project, for which sealed proposals will be opened on or after May 3, 2012.²³ Why the State would fail to address this construction concern before or at the TRO hearing on February 24th is curious in itself, but raises the question as to whether such had, in fact, been scheduled at that time. The very nature of the work (demolition), the timing of the Advertisement for Bids (in late Spring), the fact that the State purchased its own fencing in connection with the project, and the fact that there is a long gap between the demolition of climate control facilities and the projected reconstruction of such facilities, all beg the inquiry: Was this construction advanced or initiated due to the presence of Occupy Boise?²⁴ Pending discovery responses, this reasonable suspicion must await further developments.

Finally, the injunction bond that the State seeks, like the modification it requests, is also inappropriate. It is the State's obligation to "present[] evidence that a bond is needed." *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003). "An improperly enjoined party may not demand damages on the bond simply because the injunction

²⁰ 2d Decl. Walker, exs. C, E, J (Dkt. 26-3, 26-5, 26-10).

²¹ 2d Decl. Walker, ex. J (Dkt. 26-10).

²² 2d Decl. Walker, exs. D, I (Dkt. 26-4, 26-9).

²³ 2d Decl. Walker, ex. I (Dkt. 26-9).

²⁴ 2d Decl. Gunderson.

was improperly granted. He must demonstrate injury as a consequence of the injunction.” *Matek v. Murat*, 862 F.2d 720, 733 (9th Cir. 1988). The State only suggests that “the damage between November 2011 and now” is related to grounds maintenance the State regularly provides.²⁵ The State was not enjoined until February 26, 2012, and its anti-*Occupy* law did not even exist until February 21, 2012. Even if this Court were to later determine that the State should not have been enjoined from enforcing I.C. § 67-1613, that statute does not authorize the State to remove tents.²⁶ The only loss to the State would be any penalties for violations of I.C. § 67-1613 that it was unable to collect because of the injunction. But the State has presented no evidence that any of the plaintiffs would have violated I.C. § 67-1613 if an injunction had not issued. The penalty for violation is only \$100, anyway. I.C. § 18-111.

The State’s request for bond is just another of the State’s efforts to evict the protest, as it hopes that this Court will set a bond that none of the plaintiffs could afford to post. “[A]ny possible damages, if incurred, would be incurred in the course of the continuing duty of defendants to maintain law, order and public convenience . . . concomitantly with the reasonable exercise by plaintiffs and others of their constitutional right of peaceful, orderly free speech, assembly, and petition.” *Hurwitt v. Oakland*, 247 F. Supp. 995, 1006 (N.D. Cal. 1965). Therefore, no bond is proper. *Id.*

IV. CONCLUSION

WHEREFORE, for all the reasons explained above, the plaintiffs respectfully ask this Court to DENY the defendants’ motion (Dkt. 24).

²⁵ Decl. Johnston ¶ 13 (Dkt. 24-4) (emphasis added).

²⁶ Mem. Decision and Order 11 (Dkt. 17) (“[I]t is not clear what legal basis the State is relying on to remove the tents. The statute does not authorize such action.”).

DATED this 23rd day of April, 2012, at Boise, Idaho.

/s/ Bryan K. Walker

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of April, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Carl J. Withroe carl.withroe@ag.idaho.gov
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Attorneys for Defendants

DATED this 23rd day of April, 2012.

/s/ Bryan K. Walker

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**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

EDWARD WATTERS, et al,

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vs.

C.L. (BUTCH) OTTER, et al,

Defendants.

CASE NO. 1:12-cv-00076-REB

**SECOND DECLARATION OF
DEAN GUNDERSON**

DECLARATION OF DEAN GUNDERSON

I, Dean Gunderson, declare as follows:

1. I reside at Boise, Idaho. I am an adult, and I am a plaintiff in the cause captioned above. I have been involved with Occupy Boise since September 2011. I have completed substantial coursework in the professional Architecture and Environmental Design programs at

the University of Minnesota (1984-1988), and the Fine Arts program at Boise State University (2000-2004). I am presently self-employed as a community and regional planner, and provide services in conceptual design, site development and land use. My past employment and professional experience includes serving as the Principal Planner for Land Use and Transportation for Ada County Development Services (“ACDS”) (2006-2008); Senior Planner and Design Review for ACDS (2004-2006); and as Architectural Project Manager (1996-1999) and Facilities Planner (1999-2004) for Boise State University.

2. On or about April 17, 2012, I reviewed the publicly available Bid Documents for the pending construction project at the Capitol Annex (old Ada County Courthouse), and discussed the scope of the work with the Elizabeth Hill (Idaho Division of Public Works Project Manager in charge). Based on my review, I feel several aspects of the project raise concerns.

3. First is the project timing. The \$1.2M project is essentially a demolition project, wherein most of the interior partitions within the Capitol Annex will be removed – along with sundry mechanical systems (including ductwork), roof-top mechanical units, and plumbing fixtures. This work is commencing without any subsequent funding, plans, or projected timeline for the subsequent improvements – essentially leaving the building in a semi-disused state with minimal means to maintain interior climate control for what may be several years. Ordinarily, demolition work is a prefatory phase of an actual construction project – it typically would immediately precede the tenant improvements necessary to fully utilize the building.

4. Unfortunately, the State has no means to utilize the building after this demolition project. It is my understanding that a significant goal of renovation of the Capitol Annex is to

preserve the 1930's era WPA plaster murals decorating the interior of the premises. However, by proceeding with demolition, and in the absence of any designs and allocated funds for the reconstruction of climate control infrastructure within the premises, those murals will be subjected to essentially uncontrolled temperature and humidity fluctuations which are highly likely to degrade those murals.

4. The second concerning aspect is the peculiar action of the State when it purchased its own construction fencing to cordon off the building and a large portion of the site – almost a month before the awarded demolition contractor could take possession and commence work. The State opted to purchase the construction fencing from the contractor carrying out the work on the recently completed mechanical tunnel project (built over the winter months), and is directing that contractor to re-configure this fencing (used by the tunnel's contractor to secure his own scope of work) to cordon off this larger segment of the site. The State even purchased additional sections of fencing from the tunnel contractor to ensure that it had enough fencing to encircle the entire building, a portion of the building's parking lot, and large swaths of the surrounding site. It's important to note that the demolition project's bid schedule (as stated in the Bid Advertisement) shows the Bid Submittal & Bid Opening is set for May 3 – yet the State has indicated that it plans on erecting its re-configured construction fence on April 17th. Even after the sealed bids are open, the subsequent notifications and contractor negotiations will still need to occur. If this project were to follow a standard project curve, the contractor would erect his own construction fencing (prior to his commencement of work) sometime in the third week of May.


5. Based on my direct experience in issuing bids for public works projects for the State of Idaho (during my tenure as a Architectural Project Manager and Facilities Planner at Boise State University), the very best time to issue a bid for any public project is in the period from December to February. This ensures the very best bid prices from contractors who are seeking to secure their first set of construction projects for the up-coming construction season. The only reason to bid a project in May of *any* year is to encumber public funds that may be lost due to budget rescissions, to respond to the unique needs of a grant award, or when the construction must be done to meet an extraordinary scheduling milestone. It is not known whether the funds for this demolition project are subject to loss (or re-capture by the State for other purposes), but there is no subsequent construction project driving the need to commence with the demolition project in the summer of 2012, and the current demolition project bidding and construction schedule virtually guarantees that the public will pay a higher cost for this demolition work. Bidding this project at this time of the year rises to fiscal malfeasance, and begs the question, “What is the rush?”

6. I have worked in Project Management for over 20 years in both the private and public sectors (including, as previously stated, a number of years as a project manager for an agency of the State of Idaho), and based upon my review of documents, my observations and history of the State’s responses to the Occupy Boise demonstrations, it appears that the State’s only purpose in actually purchasing its own construction fencing, erecting the fence over a month in advance of its actual need is to “clear” the site, and to commence a public works

project out of the normal annual bidding cycle is too clear the block of an unwanted presence -- namely the Occupy Boise vigil.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 23rd day of April, 2012.



DEAN GUNDERSON

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on the 23rd day of April, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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Attorneys for Defendants

DATED this 23rd day of April, 2012.

/s/ Bryan K. Walker