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17 Environmental Alliance, Inc.

12 BEFORE THE DEPARTMENT OF WATER RESOURCES
13 OF THE STATE OF IDAHO

14)
15 IN THE MATTER OF APPLICATION FOR) MOTION FOR AUTHORIZATION TO
16 PERMIT NO. 96-9253 IN THE NAME OF) CONDUCT DISCOVERY
17 KOOTENAI LAND AND TRUST LLC)
18) AND
19)
20) MOTION FOR CONTINUANCE

21 COMES NOW Arthur B. Macomber and Scott W. Reed, Counsel for Kootenai
22 Environmental Alliance, Inc. (KEA, Inc.), Protestant, pursuant to IDAPA 37.01.01.260(1)
23 and in accordance with IDAPA 37.01.01.521, motioning the Presiding Officer for
24 authorization to conduct discovery and, pursuant to IDAPA 37.01.01.561, for continuance
25 of this proceeding.

26 **STATEMENT OF FACTS**

27 On July 29, 2005, Applicant Kootenai Land and Trust, L.L.C., filed a municipal
28 water right application to divert the water resources of Idaho and apply them to a beneficial
use. The Idaho Department of Water Resources (IDWR) assigned that application Permit
Number 96-9253. On October 3, 2005, Protestant KEA, Inc. filed a formal Protest, which

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1 included acknowledgement that more information gathering and discovery would be
2 necessary. (KEA, Inc., *Protest*, p. 1 (2005).)

3 On August 7, 2007, a Pre-Hearing Conference was held between the parties, but it
4 failed to resolve the issues. At that conference, Protestant requested discovery, but
5 IDWR's *Notice of Hearing After Conference* dated October 30, 2007 did not include any
6 time period for discovery. Lacking authorization from IDWR, Protestant has not
7 conducted discovery.

8 Counsel Macomber and Reed entered into a retention agreement with Protestant
9 earlier this week. Counsel has reviewed Protestant's original 2005 Protest. A hearing is
10 currently scheduled for December 19, 2007 for the Presiding Officer to hear and decide on
11 Applicant's request.

12 ARGUMENT

13 Lacking discovery, Protestant's efforts will unduly and unreasonably suffer. In
14 IDWR's *Notice of Hearing After Conference* dated October 30, 2007, the Issues section
15 assigns Protestant a shared burden of proof related to the local public interest. The "local
16 public interest" is defined at Idaho Code section 42-202B(3) as "the interests that the
17 people in the area directly affected by a proposed water use have in the effects of such use
18 on the public water resource." The Idaho Legislature enacted the wording above in 2003.
19 The Legislature clarified its purpose by stating, in part, "[t]he 'local public interest' should
20 be construed to ensure [that] the greatest possible benefit from the public waters is
21 achieved . . ." (H.B. 284, *Statement of Purpose* (2003).)

22 Factors to be included in IDWR's assessment of the local public interest are "all
23 locally important factors affecting the public water resources, including but not limited to
24 fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation,
25 navigation, water quality and the effect of such use on the availability of water for
26 alternative uses of water that might be made within a reasonable time." (*Id.*) Protestant
27 needs time for discovery in order to adequately bring the Presiding Officer relevant
28 information in support of its case.

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use,

1 Further, because Applicant's permit requests diversion for a beneficial municipal
2 speculation about users' potential quantities of water use is to be avoided, especially here
3 where the prospective homes are not yet constructed. Potential uses are dependent on
4 applicant's home designs, landscaping, and other factors. Discovery must be allowed so
5 that information related to these factors can be determined. Protestant needs time to
6 discover water quantity uses similar to Applicant's proposed municipal use.

7 Finally, Applicant desires to divert groundwaters from the Rathdrum Aquifer. These
8 groundwaters are hydraulically connected to thousands of potentially concurrent diverters.
9 While IDWR has discretion to limit the scope of issues when assessing a permit
10 application, and Protestant does not dispute IDWR's responsibility in this regard, discovery
11 is required to allow Protestant to adequately gather information from both Applicant and
12 other sources to address Applicant's diversion request from this particular aquifer, which
13 serves hundreds of thousands of people.

14 CONCLUSION

15 Protestant KEA, Inc. respectfully requests the Presiding Officer provide relief in the
16 form of adequate time for discovery in these proceedings, and, given the short time period
17 available for discovery prior to the December 19 Hearing, Protestant requests continuance
18 of the Hearing date to a time following such discovery period.

19 DATED this 9th day of November, 2007



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21 Arthur B. Macomber, Attorney at Law
22 Counsel for Protestant KEA, Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November 2007, I served a true and correct copy of the within and foregoing document upon the parties named below by depositing a copy of the same in the United States mail, postage pre-paid, at the post office in Coeur d'Alene, Idaho.

Kootenai Land & Trust L.L.C.
Attn: Daniel T. Simms
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Applicant

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