

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

LAIE WATER COMPANY, INC.)

DOCKET NO. 2006-0502

For Approval of a Rate Increase)
Pursuant to Hawaii Revised)
Statutes § 269-16; and Revised)
Rate Schedules.)

ORDER NO. 23446

Filed May 18, 2007

At 12 o'clock P. M.

Karen Higashi
Chief Clerk of the Commission

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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
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STATE OF HAWAII

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KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Karen Higashi

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ORDER

By this Order, the commission: (1) denies the Motion to Intervene or to Participate filed by Dr. James M. Anthony on March 16, 2007 ("Dr. Anthony's Motion to Intervene"); (2) denies the Motion to Intervene or to Participate filed by Dawn K. Wasson on March 19, 2007 ("Ms. Wasson's Motion to Intervene"); (3) grants the Motion to File Response to Memorandum in Opposition to Motion to Intervene or to Participate filed by Dawn K. Wasson on April 17, 2007 ("Ms. Wasson's Motion to File Response"); and (4) dismisses the Motion to Admit Counsel Pro Hac Vice filed on April 12, 2007 by Rovianne Leigh, as amended by the Amended Motion to Admit Counsel Pro Hac Vice filed by Rovianne Leigh on April 16, 2007 (jointly, "Pro Hac Vice Motion").

I.

Background

LAIE WATER COMPANY, INC. ("LWC") is a public utility that provides water utility services, including the gathering,

storage, transmission, distribution, and other provision of water, within its authorized service area in Laie, on the island of Oahu, Hawaii.¹

On December 29, 2006, LWC filed an application, requesting approval of a rate increase and revised rate schedules and rules.² Specifically, LWC requests commission approval of a general rate increase of approximately \$1,522,089, which amounts to an approximate 198.0% increase over pro forma revenues at present rates, and is based on an estimated total revenue requirement of \$2,290,723 for the 2007 calendar test year. LWC also seeks to implement: an additional intermediary rate block for residential customers; a new rate structure with four rate blocks for commercial customers; an increase in fixed monthly and usage charges for both residential and commercial customers; and an Automatic Power Cost Adjustment Clause, which will allow LWC to increase or decrease its water service rates based on any corresponding increase or decrease in LWC's cost for electricity.

On March 8, 2007, the commission held a public hearing on the Application at Laie Elementary School. Dr. Anthony and

¹LWC was granted a certificate of public convenience and necessity in Decision and Order No. 15642, filed on June 12, 1997, as amended by Order No. 15478, filed on August 11, 1997, in Docket No. 7830.

²LWC's Application, Exhibits LWC 1 - LWC 10, LWC T-100 - LWC T-200, Verification, and Certificate of Service, filed on December 29, 2006 ("Application"). Copies of the Application were served on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to this proceeding pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and HAR § 6-61-62. LWC and the Consumer Advocate are collectively referred to herein as "the Parties."

Ms. Wasson were among those who testified at the hearing. Dr. Anthony, Ms. Wasson, and several other "kuleana landowners" associated with Ms. Wasson submitted written materials at the public hearing.

By letter dated March 12, 2007, the commission informed Dr. Anthony, Ms. Wasson, and the individuals associated with Ms. Wasson who submitted written materials at the hearing that it was construing their written submissions as written testimony only, and that if they intended to move to intervene or participate in this proceeding, they were required to file a motion to intervene or participate, in accordance with the commission's rules of practice and procedure, by March 19, 2007.

On March 16, 2007, Dr. Anthony timely filed his Motion to Intervene, which requested a hearing.

On March 19, 2007, Ms. Wasson timely filed her Motion to Intervene, which also requested a hearing.³

On March 23, 2007, LWC filed Memoranda in Opposition to Dr. Anthony's Motion to Intervene and to Ms. Wasson's Motion to Intervene.

On March 30, 2007, the commission issued a Notice of Hearing, informing the Parties, Dr. Anthony, and Ms. Wasson that it scheduled a hearing on the motions to intervene on April 18, 2007.

On April 12, 2007, Rovianne Leigh filed a Motion to Admit Counsel Pro Hac Vice, which was amended on April 16, 2007,

³As discussed further below, Ms. Wasson claimed to be filing her motion on behalf of thirty other kuleana landowners and ratepayers who were listed in Appendix 1, attached to her motion.

requesting that Harold S. Shepherd be admitted pro hac vice "for the affected kuleana land owner ratepayers of the Native Hawaiian [sic] Laie Community and Dawn Wassen [sic] in this proceeding."⁴

By letter dated April 17, 2007, the commission informed Ms. Leigh and Mr. Shepherd that, based on the commission's rules of practice and procedure in HAR §§ 6-61-41(c) and 6-61-21(e), the commission would not hear the Pro Hac Vice Motion at the hearing scheduled for the motions to intervene on April 18, 2007, nor would it rule on the Pro Hac Vice Motion until the deadline for the Parties to file objections to the Pro Hac Vice Motion had passed.

On April 17, 2007, Ms. Wasson filed the Motion to File Response, requesting permission to file a response to LWC's Memorandum in Opposition to her Motion to Intervene. Ms. Wasson attached her response to her Motion to File Response.

On April 18, 2007, the commission held a hearing on the motions to intervene. At the hearing, LWC objected to Dr. Anthony's Motion to Intervene and to Ms. Wasson's Motion to Intervene;⁵ the Consumer Advocate took no position on the motions.⁶ At the hearing, the commission also informed the Parties, Ms. Wasson, and Dr. Anthony that it would not rule on

⁴Amended Motion to Admit Counsel Pro Hac Vice, filed on April 16, 2007, by Rovianne Leigh, at 1.

⁵LWC also objected to the commission hearing the Pro Hac Vice Motion at the hearing because it had not yet been officially served with the motion, and had not been allowed sufficient time under the commission's rules to respond to the motion.

⁶The Consumer Advocate did not file written responses to any of the motions decided herein.

the Motion to File Response until the deadline for filing written objections to the motion had passed.⁷

On April 23, 2007, LWC filed a Memorandum in Response to the Pro Hac Vice Motion, stating that it did not object to the motion; provided that the commission requires Mr. Shepherd to strictly adhere to the terms of the Stipulated Procedural Order entered in this docket, pay the annual disciplinary board fee to the Hawaii State Bar Association, and provide additional clarification as to which person or entity, in particular, Mr. Shepherd intends to represent pro hac vice. In addition, LWC argued that, if Mr. Shepherd's proposed clients are not allowed to intervene or participate in this proceeding, then the Pro Hac Vice Motion should be denied as moot.

II.

Discussion

HAR § 6-61-55 sets forth the requirements for intervention in commission proceedings. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.
- (b) The motion shall make reference to:

⁷No oppositions were filed in response to the Motion to File Response.

- (1) The nature of the applicant's statutory or other right to participate in the hearing;
- (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;
- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b). HAR § 6-61-55(d) further states that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented."⁸

⁸See In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975) (intervention "is not a matter of right but a matter resting within the sound discretion of the commission").

A.

Dr. Anthony's Motion to Intervene

Dr. Anthony lives on and owns property located in Ka'a'awa, Hawaii.⁹ Dr. Anthony states that he and his four children of Hawaiian descent have statutory rights under the public trust doctrine, which was upheld by the Hawaii Supreme Court's decision in the "Waihole case."¹⁰ As the relief requested in this proceeding, Dr. Anthony states that he seeks, "first of all, that the watershed from which Applicant Laie Water Company, takes millions of gallons of water a year without paying anything for it is protected."¹¹ In this regard, Dr. Anthony asserts:

The continued availability of water, its management, the protection of the aquifer from which such water is taken and the preservation and protection of the immediate and adjacent watersheds (ahupua'a), all have consequential impacts on property values as well as the intergenerational equity in which this and future generations have a stake. For these rights to be protected the movant has an obligation to take proactive steps to protect both his immediate property rights and the longer term property values arising out of necessary steps that must be taken now to protect the watershed from which vast quantities of water are being taken by both public and private purveyors of water. Protecting watersheds is by law (the 1987 Water Code)¹² part of the necessary expense of engaging in the business of being either a

⁹See Dr. Anthony's Motion to Intervene at 2.

¹⁰See In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (Haw. 2000).

¹¹Dr. Anthony's Motion to Intervene at 8.

¹²Dr. Anthony cites to the State Water Code, HRS Chapter 174C. See id. at 2 n.2.

public or private purveyor of water for public consumption.¹³

Dr. Anthony therefore believes that LWC's cost calculations for its proposed rates are "greatly understated" because the calculations exclude costs for watershed protection, and that by understating water costs, LWC "acts contrary to the mandate of both the Public Trust Doctrine and the 1987 Water Code."¹⁴

In response, LWC argues, in sum, the following:

- (1) Dr. Anthony lacks standing. There is no dispute that Dr. Anthony is neither an existing customer or ratepayer nor a prospective customer or ratepayer of LWC. Moreover, Dr. Anthony is neither a resident of Laie, nor is his property connected to LWC's existing water distribution system. Any rate changes proposed by LWC in this proceeding would have no impact on Dr. Anthony's water rates or on his property in Ka'a'awa.¹⁵
- (2) Dr. Anthony's allegations and representations regarding the public trust doctrine, watershed protection, intergenerational equity, and the 1987 Water Code are either irrelevant, lack credibility, or would unduly broaden the issues in this proceeding. Although these allegations pertaining to water resources and water protection may be useful for other types of proceedings (i.e., before the State of Hawaii Commission on Water Resources Management ("CWRM")), these types of issues and subjects are clearly irrelevant to the ratemaking issues presented in this proceeding, and would unduly broaden and delay the proceeding.

¹³Id. at 2 (*italics in original*).

¹⁴Id. at 3.

¹⁵See LWC's Memorandum in Opposition to Dr. Anthony's Motion to Intervene, filed on March 23, 2007, at 4-6.

Dr. Anthony's representations lack credibility because he failed to attach any affidavit supporting his motion in accordance with HAR § 6-61-41(b).¹⁶

- (3) The CWRM has exclusive jurisdiction over matters concerning the protection, control, and regulation of the use of Hawaii's water resources. The commission should not allow Dr. Anthony to utilize this rate case proceeding as a means to re-litigate matters that have already been addressed in other proceedings or new issues that should be properly raised and addressed before other forums such as the CWRM.¹⁷

Upon review of the entire record, the commission finds that, as a resident of Ka'a'awa who is not an existing or prospective customer of LWC, Dr. Anthony lacks standing to intervene or participate in this proceeding. As argued by LWC, the commission's approval of any rate changes in this proceeding will not have an impact on Dr. Anthony's water rates or on his property in Ka'a'awa.

Moreover, the commission finds that the issues that Dr. Anthony seeks to raise in this proceeding relating to the public trust doctrine, watershed protection, management of water resources, intergenerational equity, and the State Water Code are beyond the scope of this ratemaking proceeding, and if addressed, would unduly broaden the issues and delay this proceeding.¹⁸

¹⁶See id. at 6-10.

¹⁷See id. at 10-11.

¹⁸HRS § 269-16(d) states, in relevant part, that the commission "shall make every effort to complete its deliberations and issue its decision as expeditiously as possible[.]" Moreover, HAR § 6-61-1 provides, in relevant part, that the commission's rules of practice and procedure "shall be liberally

In fact, the commission finds that it is without jurisdiction to determine the matters Dr. Anthony seeks to address herein since, pursuant to the State Water Code, HRS § 174C-7(a), the CWRM is granted exclusive jurisdiction and final authority to decide such matters. As explained by the Hawaii Supreme Court in Ko'olau Agricultural Co., Ltd. v. Commission on Water Resource Management, 83 Hawai'i 484, 927 P.2d 1367 (Haw. 1996):

The State Water Code was enacted in 1987 pursuant to constitutional mandate. 1987 Haw. Sess. L. Act 45, at 74. Article XI, section 7 of the Hawai'i Constitution (1978) provides in pertinent part that:

The State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality, and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

The Code established the Commission on Water Resource Management and bestowed upon it "exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as specifically provided in this chapter." HRS § 174C-7(a) (1993).

Id. at 489-90, 927 P.2d at 1372-73 (emphasis added).

construed to secure the just, speedy, and inexpensive determination of every proceeding."

Accordingly, for all of the foregoing reasons, Dr. Anthony's Motion to Intervene is denied.¹⁹

B.

Ms. Wasson's Motion to Intervene

Ms. Wasson's Motion to Intervene is substantively almost identical to Dr. Anthony's Motion to Intervene. Ms. Wasson also alleges that she has statutory rights to water under the public trust doctrine upheld in the Hawaii Supreme Court's Waiahole decision. Moreover, for the same reasons discussed in Dr. Anthony's Motion to Intervene, Ms. Wasson "seeks, first of all, that the watershed from which Applicant La'ie Water Company, takes millions of gallons of water a year without paying anything for it is protected."²⁰

Unlike Dr. Anthony, however, Ms. Wasson represents that she resides in Laie, on property that "is located within the geographical confines of the moku of Ko'olauloa, the same moku in which Applicant La'ie Water Company is located and from which it draws groundwater."²¹ She also states: "As a kuleana owner, movant has riparian, appurtenant and correlative rights to

¹⁹In addition, to the extent Dr. Anthony's oral testimony at the public hearing held on March 8, 2007, is construed as an oral motion seeking intervention, participation, or any other relief in these proceedings, the commission denies those motions, as well, as improperly made under the commission's administrative rules of practice and procedure (see commission's letter dated March 12, 2007 to distribution list of individuals who provided written submissions at the hearing) and on the same grounds discussed above.

²⁰Ms. Wasson's Motion to Intervene at 4.

²¹Id. at 1.

water."²² In this regard, Ms. Wasson represents that she filed her Motion to Intervene on behalf of all the kuleana landowners and ratepayers who are listed in Appendix 1, attached to her motion.²³

In response, LWC argues, as it did in connection with Dr. Anthony's Motion to Intervene, that issues relating to the public trust doctrine, watershed protection, intergenerational equity, and the 1987 Water Code, are irrelevant, lack credibility, would unduly broaden the issues in this proceeding if addressed, and fall under the exclusive purview of the CWRM.²⁴ In addition, LWC argues:

- (1) Ms. Wasson lacks standing. Although LWC acknowledges that Ms. Wasson is an existing customer and ratepayer, Ms. Wasson currently pays a flat rate fee to LWC established through a separate formula agreed to in the settlement of a civil lawsuit in 1982.²⁵ LWC's Application does not propose to modify or affect Ms. Wasson's flat rate fee or the stipulated formula set forth in the 1982 settlement agreement. As such, Ms. Wasson's Motion to Intervene should be denied because Ms. Wasson does not have a sufficient direct interest in the present ratemaking matters before the commission

²²Id. at 3.

²³See id. at 6. Appendix 1 lists thirty individuals (besides Ms. Wasson), who Ms. Wasson claims to represent.

²⁴See LWC's Memorandum in Opposition to Ms. Wasson's Motion to Intervene, filed on March 23, 2007, at 8-13.

²⁵Exhibit C to LWC's Memorandum in Opposition to Ms. Wasson's Motion to Intervene details the 1982 settlement agreement and the history of Ms. Wasson's flat rate fee with LWC.

in this docket under HRS Chapter 269 to warrant her intervention.²⁶

- (2) Ms. Wasson's interest as an LWC customer/ratepayer (financially or otherwise) will be adequately represented by the Consumer Advocate, who is statutorily responsible, pursuant to HRS § 269-51, to "represent, protect, and advance the interest of all consumers, including small businesses, of utility services."²⁷
- (3) Ms. Wasson failed to provide any factual support or verification (e.g., an affidavit) that the individuals listed in Appendix 1 to her Motion to Intervene are kuleana landowners, customers, and ratepayers and that Ms. Wasson has their authorization to represent their interests as a group or class. Therefore, the commission should treat Ms. Wasson solely as an individual customer/ratepayer rather than an authorized representative of a number of ratepayers within a particular class.²⁸

In Ms. Wasson's response to LWC's Memorandum in Opposition,²⁹ Ms. Wasson claims, among other things, that her fixed rate with LWC fluctuates when her household uses more than 13,000 gpm, such that a rate increase decided in this proceeding will affect her rate. Ms. Wasson also attaches to her response, declarations from three individuals from Appendix 1, attached to her Motion to Intervene, wherein the individuals each attest that

²⁶See LWC's Memorandum in Opposition to Ms. Wasson's Motion to Intervene, filed on March 23, 2007, at 4-6.

²⁷See id. at 6-8.

²⁸See id. at 13-14.

²⁹As addressed below, the commission grants Ms. Wasson's Motion to File Response, and therefore considers her response to LWC's Memorandum in Opposition to her Motion to Intervene herein.

they, and the other individuals listed in Appendix 1, authorized Ms. Wasson as their representative in this matter.³⁰

Upon review, the commission finds, as it did above with respect to Dr. Anthony's Motion to Intervene, that the issues Ms. Wasson seeks to address in this proceeding relating to the public trust doctrine, watershed protection, intergenerational equity, and the 1987 Water Code, are beyond the scope of this ratemaking proceeding, instead fall under the exclusive purview of the CWRM, and if addressed, would unduly broaden the issues and delay this proceeding. The commission therefore adopts its findings and conclusions above relating to Dr. Anthony's Motion to Intervene.

In addition, the commission finds that Ms. Wasson lacks a sufficient interest to intervene or participate in this proceeding in that she admittedly is charged a flat fee by LWC,³¹ and LWC has not proposed to increase or modify that flat fee in this proceeding.³² Moreover, the commission finds that there is insufficient evidence in the record indicating that the

³⁰See Declarations of Miulan Nihipali, Happy A. Taualii, and David Kamauoha III, attached to Ms. Wasson's Motion to File Response, at ¶ 3.

³¹See Declaration of Dawn K. Wasson, attached to the Motion to File Response, at ¶ 7 ("[LWC] currently provides potable water service to me at a flat rate fee which was established through the settlement of a civil lawsuit in the 1982 (Settlement Agreement).")

³²Although Ms. Wasson argues that her flat rate does fluctuate, presumably to analogize her fee situation to the general rate increases proposed in this docket, the commission finds that Ms. Wasson's fee fluctuates based on her water usage according to a stipulated formula in the 1982 settlement agreement with LWC, and that LWC has not proposed to modify that fee arrangement in this docket.

individuals listed in Appendix 1, attached to Ms. Wasson's Motion to Intervene, are kuleana landowners, customers, and ratepayers of LWC, and that Ms. Wasson is duly authorized to represent them.³³ HAR § 6-61-12 prohibits non-attorneys from appearing before the commission in a contested case proceeding in a representative capacity.³⁴ Accordingly, the commission construes Ms. Wasson's Motion to Intervene only as a filing on her individual behalf, and for all of the reasons discussed above, concludes that it should be denied.³⁵

C.

Ms. Wasson's Motion to File Response

Ms. Wasson's Motion to File Response requests leave to file a response to LWC's Memorandum in Opposition to her Motion to Intervene. The commission's rules of practice and

³³The commission notes that only three out of the thirty individuals listed in Appendix 1 actually filed declarations in support of Ms. Wasson's Motion to Intervene. In any event, even if the commission were to find that Ms. Wasson is duly authorized to represent the individuals listed in Appendix 1, the commission would deny intervention and participation to these individuals for the same reasons discussed above with respect to Ms. Wasson and Mr. Anthony (i.e., their interests are beyond the scope of this proceeding, and instead, under the exclusive jurisdiction of the CWRM; and their participation would unduly broaden the issues and delay this proceeding).

³⁴See also Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Haw. 372, 377, 590 P.2d 570, 573 (1979) (holding that natural persons are not permitted to act as attorneys and represent other natural persons in their causes).

³⁵On the same basis discussed above, see supra n.19, the commission further concludes that, to the extent Ms. Wasson's oral testimony at the public hearing is construed as an oral motion seeking intervention, participation, or any other relief in these proceedings, the commission denies those motions.

procedure, however, do not allow for the filing of a response or reply memorandum following the filing of an objection to a motion.³⁶

As no objections were filed in response to Ms. Wasson's motion, and as the substance of Ms. Wasson's response was addressed by Ms. Wasson during the hearing on her Motion to Intervene, the commission will, in this instance, grant Ms. Wasson's Motion to File Response.

D.

Pro Hac Vice Motion

As set forth above, the Pro Hac Vice Motion requested that Harold S. Shepherd be admitted pro hac vice "for the affected kuleana landowner ratepayers of the Native Hawaiian [sic] Laie Community and Dawn Wassen [sic] in this proceeding."³⁷ Having denied Ms. Wasson's Motion to Intervene in its entirety, the commission dismisses the Pro Hac Vice Motion as moot.

III.

Orders

THE COMMISSION ORDERS:

1. Dr. Anthony's Motion to Intervene is denied.
2. Ms. Wasson's Motion to Intervene is denied.
3. Ms. Wasson's Motion to File Response is granted.

³⁶See HAR § 6-61-41.

³⁷Amended Motion to Admit Counsel Pro Hac Vice, filed on April 16, 2007, by Rovianne Leigh, at 1.

4. The Pro Hac Vice Motion is dismissed as moot.

DONE at Honolulu, Hawaii MAY 18 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Kauiulani Kidani Shinsato
Kaiulani Kidani Shinsato
Commission Counsel

2006-0502.eh

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the foregoing Order No. 23446 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI
EXECUTIVE DIRECTOR
DIVISION OF CONSUMER ADVOCACY
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. Box 541
Honolulu, HI 96809

MICHAEL H. LAU, ESQ.
KENT D. MORIHARA, ESQ.
KRIS N. NAKAGAWA, ESQ.
RHONDA L. CHING, ESQ.
MORIHARA LAU & FONG LLP
Davies Pacific Center
841 Bishop Street, Suite 400
Honolulu, HI 96813

Counsel for Laie Water Company, Inc.

R. ERIC BEAVER, PRESIDENT
JACE L. MCQUIVEY, ESQ.
LAIE WATER COMPANY, INC.
55-510 Kamehameha Highway
Laie, HI 96762

DAWN K. WASSON
P.O. Box 512
Laie, HI 96762

DR. JAMES M. ANTHONY
P.O. Box 629
Ka'a'awa, HI 96730

ROVIANNE LEIGH, ESQ.
ALEXANDER, BERKEY, WILLIAMS AND WEATHERS, LLP
2030 Addison Street, Suite 410
Berkeley, CA 94704

Certificate of Service
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HAROLD S. SHEPHERD, ESQ.
CENTER FOR WATER ADVOCACY
90 W. Center Street
P.O. Box 331
Moab, UT 84532

Karen Higashi

Karen Higashi

DATED: MAY 18 2007