*****NOT FOR PUBLICATION*****

No. 26559

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

WAIMANA ENTERPRISES, INC. and
ALBERT S.N. HEE, Appellants-Appellants

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I; DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawai'i corporation, Appellees-Appellees

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 04-1-003K)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Acoba, JJ., Circuit Judge Chan in Place of Nakayama, J., Recused, and Circuit Judge Del Rosario in Place of Duffy, J., Recused)

We hold that (1) this appeal has been rendered moot by the occurrence of subsequent events insofar as the requirements for justiciability on appeal are no longer met, and (2) the "capable of repetition yet evading review" exception to the mootness doctrine discussed by this court in Okada Trucking Co. v. Bd. of Water Supply, 99 Hawai'i 191, 196-97, 53 P.3d 799, 804-05 (2002), is not applicable to the instant case inasmuch as (a) the question presented is not of a public nature, (b) a determination is unlikely to provide future guidance to public officials, and (c) it has not been shown that the instant case is likely to recur.

Appellants-Appellants Waimana Enterprises, Inc. (Waimana) and Albert Hee (Hee) [collectively, Appellants] appeal from the final judgment of the circuit court of the third circuit[1] (the court) affirming the grant of a revocable water permit by Appellee-Appellee Board of Land and Natural Resources (BLNR) to Appellee-Appellee Hawaii Electric Light Company, Inc. (HELCO) [collectively, Appellees] for the use of groundwater extracted from the Keauhou aquifer at its Keāhole station site. For the following reasons, this appeal is dismissed as moot.

I.

The parties have been involved in extensive and varied litigation for more than a decade regarding HELCO's Keāhole power plant and HELCO's Conservation District Use Application (CDUA) HA-487A.[2] On August 26, 1992, HELCO submitted its CDUA to double the capacity of its existing facilities at Keāhole. HELCO's request required the BLNR to process the application within 180 days, in this case, by February 22, 1993. HELCO made several requests to extend the processing deadline so that it could satisfy all the Environmental Impact Statement (EIS) requirements. The deadline was ultimately extended to May 18,

[1] The Honorable Ronald Ibarra presided.

[2] For related cases, see Hawaii Elec. Light Co., v. Dept. of Land & Natural Res., 102 Hawai'i 257, 75 P.3d 160 (2003); SC No. 22921 (dismissed for lack of appellate jurisdiction); SC No. 26519 (pending); SC No. 25446 (dismissed); Keahole Def. Coalition v. Bd. of Land and Natural Res., No. 26305, slip op. (May 18, 2006); Hawaii Elec. Light Co. v. Keahole Def. Coalition, SC No. 25153 (dismissed); Civ. No. 94-123K (1994 Remand Order finding that Waimana lacked standing).

1994. HELCO's EIS was submitted on December 9, 1993, and accepted on January 7, 1994.

In 1994, the Department of Hawaiian Home Lands (DHHL) acquired a 153-acre tract of land next to HELCO's Keāhole power plant. According to the testimony of Darrell Yagodich, Planning Officer for the DHHL, the tract is "envisioned for a commitment to residential development." (Emphasis added.) As an adjacent landowner, the DHHL has a property interest in land that could be adversely affected by the BLNR's actions regarding HELCO's Keāhole plant.[3]

In 1994, Waimana was granted an exclusive license to provide telecommunications services to the DHHL's property throughout the State, including the parcel adjacent to the power plant. Waimana describes itself as a "native Hawaiian corporation" which claims that its business "inherently concern[s] the welfare and betterment of native Hawaiians."[4] As an independent power producer, Waimana is also an economic competitor of HELCO's. Waimana claims that it has a property

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[3] Under Hawai'i Administrative Rules § 10-2-19 (1998), the commissioners of the Department of Hawaiian Home Lands (DHHL) are required to "act exclusively in the interest of [the] beneficiaries" of the Hawaiian Homelands Commission Act (1920), as well as to "hold and protect the trust properties" for beneficiaries. (Emphasis added.)

[4] Appellees contend that the Articles of Incorporation of Appellant-Appellant Waimana Enterprises, Inc. (Waimana) do not support the assertion that Waimana is a business concerned with the "welfare and benefit of native Hawaiians." The Articles of Incorporation do not mention native Hawaiians. The primary purposes for which the business was created include "[t]o engage in the generation of electricity through Hydroelectric Development and other forms of alternate energy development" and to engage in economic transactions in order to facilitate such generation.

interest in the DHHL tract by virtue of its contract with the DHHL and as a beneficiary of the public trust. Hee is the President and Chief Executive Officer of Waimana.

Also, Hee is on the DHHL's wait list for an award of agricultural land on the Island of Hawai'i. Based on that fact, Appellants claim that Hee has a protected property interest in the adjacent tract because he acquired a property interest in the DHHL tract, he is a native Hawaiian who practices customary rights in the area, and he is a beneficiary of the public trust.

On February 11, 1994, BLNR appointed a Hearings Officer and ordered that the contested case hearing commence on March 16, 1994. BLNR allowed Waimana to take part in the contested case hearing, but Hee did not participate in these proceedings as an individual.[5] After the appointed Hearings Officer fell ill, the contested case hearing was postponed indefinitely. On May 13, 1994, five days before the extended deadline, BLNR voted on whether to deny the application without prejudice and whether to grant the application. There were only two votes in favor of denying the application without prejudice and no votes in favor of granting the application. Hawai'i Revised Statutes (HRS) § 171-5 (Supp. 2005) provides that four votes are required to constitute a valid act by the BLNR. See also Hawaii Electric

[5] The court later found that Waimana's admission as a party to the contested case hearing was not the equivalent of a determination that Waimana had a property interest protected under the state or federal constitutions. Therefore, the court concluded that Waimana did not have standing to bring an action for judicial review of the BLNR's action under Hawai'i Revised Statutes (HRS) § 91-14 (1993).

Light Co. v. Dep't of Land & Natural Res., 102 Hawai'i 257, 261, 75 P.3d 160, 164 (2003).

On May 17, 1994, pursuant to HRS § 91-14 (1993),[6] Waimana filed a Notice of Appeal in response to BLNR's vote, which had terminated the pending contested case hearing regarding HELCO's CDUA. In its Order Remanding HELCO's CDUA back to BLNR (1994 Order), the court found that

> as an entity neither physically located near the site of HELCO's proposed expansion nor whose purpose is to protect environmental or Hawaiian interests, Waimana's interest in contesting the CDUA appears to be purely economic. . . . Waimana does not have a due process right to a contested case hearing because its economic interest does not constitute "property" within the meaning of the due process clauses of the federal and state constitutions. . . . Not having a right to a contested case hearing by statute, rule, or by the constitution, Waimana lacks standing to file this Appeal pursuant to HRS section 91-14(a).

(Emphases added.) This finding was never challenged by Waimana or any other party.

HELCO had a long-term plan to obtain a water lease in order to replace potable water with brackish water for industrial purposes. The process was delayed by litigation regarding CDUA HA-487A. All litigation regarding CDUA HA-487A was terminated in

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[6] HRS § 91-14(a) (1993) states as follows:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

November 2003, when the parties reached a settlement agreement.[7] Waimana was not a party to the settlement. HELCO, DHHL, DLNR and BLNR were all parties to the settlement agreement. The settlement agreement contained a provision that HELCO would transfer 90% of its potable water allocation to DHHL if it could obtain the necessary permits to withdraw brackish water from the Keahou aquifer. If HELCO could not obtain the necessary permits within one year, it was required to pay $150,000 to DHHL in lieu of the water transfer.

HELCO continued to pursue the long-term water lease, but under the provisions of HRS § 171-58 (1993), the process can take more than a year. On an unknown date, HELCO applied to BLNR for a revocable water use permit and the matter was duly placed on the agenda for the regular board meeting scheduled for December 12, 2003. HELCO estimated that it would use 200,000 to 250,000 gallons of water per day. The Keauhou aquifer has a sustainable yield of 38 million gallons per day.[8] The water that HELCO sought to use for industrial purposes could not be used for domestic or agricultural purposes without first undergoing desalinization.[9]

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[7] The settlement agreement was entered into after Judge Ibarra ordered the parties in Civ. No. 97-00017K into mediation. Waimana was not a party to Civ. No. 97-00017K.

[8] The amount HELCO estimated it would use daily is two-thirds of one percent of the total daily sustainable yield, or 0.66%.

[9] The water in the aquifer has a salinity level from 3022 to 5440 mg/L. The guidelines of the Environmental Protection Agency for drinking water is 250 mg/L. Grass and crops cannot grow at levels exceeding 500-1,000

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On December 9, 2003, Appellants wrote to BLNR requesting to be notified of all proceedings regarding CDUA HA-487A. On December 10, 2003, Peter Young, BLNR's chairperson, notified Appellants of HELCO's request for the revocable water permit. On December 11, 2003, Appellants filed a petition for a contested case hearing pursuant to HRS § 91-14.[10] On December 12, 2003, the matter was heard by the BLNR. Appellants and HELCO testified at the hearing and DHHL submitted a letter in support of granting the permit. DHHL's letter stated, "DHHL . . . supports HELCO's request for a ground water permit to the extent that this action will enable HELCO to fulfill its commitment to DHHL as provided for under the terms of the [2003] settlement agreement."[11] Appellants argued that the permit should not be granted because the request did not address the impact to the watershed management plan and the EIS done in 1994 was based upon a power plant planned by HELCO, but which is not similar to HELCO's existing plant.

On December 12, 2003, Appellants' request for a contested case hearing was denied and HELCO's revocable water use permit was granted by a unanimous vote of the BLNR. On

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[9](...continued)
mg/L.

[10] See supra note 6.

[11] As noted above, in the 2003 settlement agreement HELCO agreed to transfer ninety percent of its existing 100,000 gallons per day potable water allocation to DHHL. The transfer was conditioned upon HELCO obtaining permits to use brackish water for its industrial purposes.

January 27, 2004, DLNR and HELCO executed Revocable Permit No. S-7374, which was made retroactive to January 1, 2004.[12] The permit allowed HELCO to use groundwater from the Keahole aquifer, "pumped to the surface via the HELCO Keahole Well No. 4461-02." Condition 14 of the permit stated that "[t]his permit shall cease and be void if the [BLNR] issues a lease pursuant to Section 171-58, [HRS], for the Water Resource." (Emphasis added.)

On January 12, 2004, Appellants filed a Motion for Stay of Decision regarding the BLNR's decision of December 12, 2003. HELCO filed a Motion to Dismiss Appeal on January 21, 2004, which was joined by BLNR and DLNR on January 22, 2004. On March 29, 2004, the court denied Appellants' motion for Stay of Decision. On that same day, the court issued Findings of Fact, Conclusions of Law, and an Order Dismissing Appeal pursuant to HELCO's motion.

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[12] S.Ct. No. 27159, Hui Kakoʻo Aina Hoʻopulapula v. Bd. of Land & Natural Res., (Hui Kakoʻo), is a related case in which Waimana and Hee are also appellants and HELCO, BLNR, and DLNR are appellees. In that case, the appellants are contesting the sale of the long term lease to HELCO. We take judicial notice of the Record on Appeal for this case.

> The most frequent use of judicial notice of ascertainable facts is in noticing the content of court records. This court has validated the practice of taking judicial notice of a court's own records in an interrelated proceeding where the parties are the same.
>
> Under Hawai'i Rules of Evidence (HRE) Rule 201(d), a court is mandated to take judicial notice if requested by a party and supplied with the necessary information.

State v. Akana, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985) (citations omitted). Appellees requested that this court take judicial notice of the Record on Appeal in Hui Kakoʻo and supplied the "necessary information" in their Supplemental Brief, filed July 14, 2005.

The court ruled that Waimana had failed to demonstrate that it had standing to appeal the BLNR's December 12, 2003 decision. The court noted that it had previously concluded that Waimana lacked standing to appeal issues related to HELCO's Keāhole power plant because Waimana's economic interest did not constitute "property" under the due process clauses of the federal and state constitutions and that its conclusion was res judicata. The court further ruled that although Waimana had previously been allowed by the BLNR to participate in a contested case hearing regarding the Keāhole power plant, that did not confer standing to contest the December 12, 2003 decision. The court ruled that Hee did not have an interest in the revocable permit different than members of the general public, and as a privy to Waimana, Hee also lacked standing to appeal. Having determined that Appellants lacked standing, the court concluded that it lacked appellate jurisdiction to consider the appeal. Final judgment was entered on April 7, 2004. On May 4, 2004, Appellants filed their Notice of Appeal.

On March 12, 2004, the BLNR unanimously approved the sale of a sixty-five-year lease for water use at the Keāhole power station by public auction. On July 1, 2004, the BLNR held the auction, pursuant to public notice.[13] HELCO prevailed at the

[13] The Record on Appeal for S.Ct. No. 27159, vol. 7, 2353-2373 contains the Findings of Fact, Conclusions of Law, and Order Affirming the BLNR's March 12, 2004 Decision, filed November 3, 2004, in Civ. No. 04-1-0051K. We take judicial notice of the Record filed in this related proceeding. See supra note 12. Appellees requested that this court take

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auction, and a sixty-five-year lease between BLNR and HELCO was executed on July 19, 2004.

On July 31, 2004, the BLNR cancelled the revocable water use permit. On August 1, 2004, HELCO acquired a long-term lease from the BLNR to use water from the Keauhou aquifer at the Keāhole station. On July 5, 2005, this court requested supplemental briefing, and the parties submitted briefs on the issue of mootness.

II.

On appeal, Appellants argue that (1) "the [court] erred in recognizing BLNR's jurisdiction to grant HELCO's request for a revocable permit" insofar as related actions were pending in the circuit and appellate courts, (2) "the [court] erred in affirming that HELCO's application for a revocable water permit did not give rise to a contested case," because (a) "under the public trust doctrine, a contested case hearing is required," (b) "reservations of water constitute a public trust purpose," (c) "higher scrutiny was required of the [court]," (d) "DHHL's endorsement also triggers a contested case hearing," and (e) "the disposition of the [S]tate's scarce water resources is not simply a matter of 'internal custodial management," (3) "Appellants have standing with regard to this proceeding," inasmuch as

[13](...continued)
judicial notice of the Record on Appeal in Hui Kako'o and supplied the "necessary information" in their Supplemental Brief, filed July 14, 2005.

(a) "standing is reviewable de novo," and (b) res judicata is inapplicable in the instant appeal," (4) "the [court] erred in denying Appellant Hee standing," because (a) Hee's constitutional rights were denied, and (b) "Hee was not afforded equal protection under the law," and (5) "the [court's] reliance on the 1994 remand order was error."

In conjunction with these arguments, Appellants contend that allowing HELCO to withdraw water from the Keauhou aquifer will jeopardize the efforts of the DHHL to develop the land adjacent to the power plant because there will not be sufficient water for domestic and agricultural use. According to Appellants, this would adversely affect the interests in that land held by Waimana (under its contract with the DHHL to provide telecommunications services) and Hee (inasmuch as he is on the wait list for a grant of agricultural land from the DHHL). Appellants maintain that by supporting the application for a revocable water use permit, the DHHL breached its duty to native Hawaiians to ensure that there is sufficient water available so that it can develop its properties and award land to eligible Hawaiians. Appellants do not make a specific claim for relief. Presumably, Appellants request that this court vacate the court's April 7, 2004 final judgment and remand the instant case to the BLNR for a contested case hearing.

Answering briefs were submitted by HELCO and jointly by the BLNR and the DLNR. In response, HELCO contends that (1)

"Appellants lack standing to bring this appeal, and it must be dismissed for lack of appellate jurisdiction," (2) "Appellants' arguments to avoid the application of res judicata are unpersuasive," (3) "Appellants' other arguments to trigger standing must be rejected," (4) "the BLNR had jurisdiction to consider HELCO's request for a revocable permit, and the December 12, 2003 meeting was not a continuation of the contested case hearing on HELCO's first request for extension of time to construct the [Keāhole power plant] project," (5) "the BLNR properly denied the [Appellants'] request for a contested case hearing," (6) "Appellants' argument that Hawai'i water law and the public trust doctrine 'requires' a contested case hearing under the circumstances of this case is misplaced," and (7) "the BLNR fulfilled its public trust obligations."

The BLNR and the DLNR jointly assert that (1) "the [court] lacked jurisdiction over [Appellants'] appeal" inasmuch as (a) Appellants were not entitled to a contested case hearing, (b) Appellants did not participate in a contested case, (c) "[Appellants] are not a 'person aggrieved,'" as required for judicial review of an agency decision under HRS § 91-14, and (d) a "judicial remedy is moot" insofar as "the BLNR issued a long-term lease to HELCO to use water from the Keauhou aquifer at the Keahole station, thereby cancelling the revocable permit, which is the subject of this case," and (2) "the BLNR had jurisdiction to approve HELCO's revocable permit." Appellants

did not submit a reply brief.

III.

As stated previously, the parties were required to submit supplemental briefs regarding the mootness of this appeal. Appellants maintain that this appeal is not moot because the information that the BLNR relied on to grant HELCO the sixty-five year lease was primarily the same information it relied upon in granting the revocable water permit. Therefore, Appellants assert, "the issues raised in this appeal are germane to whether the water lease eventually awarded to [HELCO] was proper" and "without this appeal, arguably, [Appellants] would not be able to preserve certain legal issues relating to the award of the water lease, which legal issues first arose during the permit process."

In response, HELCO contends that (1) "[t]he issuance of the long-term lease to HELCO renders this appeal moot," inasmuch as (a) the revocable permit contained a clause which states that it will be voided if a lease to use the water is issued, (b) the remedy of reversing the BLNR's grant of the revocable permit can no longer be effectuated since the permit is now void, and (c) there is no actual controversy left in the instant case because "[d]etermining the necessity of a contested case hearing and Appellants' standing, both of which are based on the issuance of the revocable permit, would be of no consequence," and (2) "[t]he 'capable of repetition yet evading review' exception

is inapplicable," because (a) "[t]his case does not involve any exceptional circumstances of broad public concern that would warrant appellate review," and (b) revocable permits and leases are considered on a case-by-case basis so it is not probable that future revocable permits will be voided by the issuance of leases.

In response, the BLNR and DLNR jointly contend that (1) "[t]his appeal is moot because a subsequent lease has made the subject of this appeal, the revocable permit, void," insofar as (a) the terms of the revocable permit render it void if a lease is issued by the BLNR, (b) the lease was subject to disapproval by the legislature pursuant to HRS § 171-58(c) (1993)[14] and was not disapproved during the 2005 Regular Session of the Legislature which concluded on May 5, 2005 and (c) "[Appellants'] claims arising from the revocable permit no longer have an adverse interest or effective remedy."

IV.

"Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do

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[14] HRS § 171-58(c) (1993) provides in relevant part:

> Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law; provided that any disposition by lease shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposition[.]

(Emphasis added.)

so." Wong v. Bd. of Regents, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980) (citing Territory v. Aldridge, 35 Haw. 565, 567-68 (1940)). Jurisdiction is a question of law that is reviewed de novo under the right/wrong standard. Amantiad v. Odum, 90 Hawai'i 152, 158, 977 P.2d 160, 166 (1999).

V.

This appeal concerns the approval of a revocable water use permit awarded by the BLNR to HELCO. In view of the fact that the revocable water permit has been cancelled, the appeal has become moot.[15] As previously mentioned, on July 31, 2004, BLNR canceled the revocable water use permit. On August 1, 2004, after this appeal was commenced, HELCO acquired a long-term lease from the BLNR to use water from the Keauhou aquifer at the Keāhole station.

HELCO, the BLNR and the DLNR contend that this appeal has been rendered moot by the subsequent actions of BLNR. As stated previously, Appellants did not file a reply brief. Thus, Appellants did not originally respond to Appellees' contention that the appeal has become moot. However, as illustrated supra, Appellants did address the mootness issue pursuant to this court's order requesting supplemental briefing.

[15] In light of our disposition we need not address Appellants' arguments regarding BLNR's jurisdiction to grant the revocable permit, whether the permit application gave rise to a contested case hearing, and whether Appellants have standing to contest the revocable permit.

VI.

Regarding the mootness doctrine and the requirements for justiciability on appeal, this court has explained that:

> The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal - adverse interest and effective remedy - have been compromised.

Wong, 62 Haw. at 394, 616 P.2d at 203-04 (emphasis added). Further, "[t]he duty and the inclination of courts, it is clear, are to decide actual controversies only and not 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Anderson v. W.G. Rawley Co., 27 Haw. 150, 152 (1923) (quoting Murphy v. McKay, 26 Haw. 171, 173 (1921)) (emphasis added).

In this case, the second requirement for justiciability on appeal, an effective remedy, is not met.[16] Cancellation of the revocable water use permit and the granting of the long-term lease for water use have "so affected the relations between the parties" that there is no longer an effective remedy for Appellants' alleged injuries. Wong, 62 Haw. at 394, 616 P.2d at

[16] As the test for justiciability requires that both requirements be met, and the second requirement has not been met, we need not address whether the first requirement, adverse interest, has been met.

204. Appellants contend that they were denied due process under the law because the BLNR did not hold a contested case hearing before approving HELCO's application for a revocable water use permit. Even if this court did reverse the court's determination that Appellants lacked standing to appeal the BLNR's decision, there would be no remedy for this alleged lack of due process. No determination by this court could possibly affect the matter at issue because the revocable water use permit is no longer in effect. Since the BLNR has subsequently cancelled the revocable water use permit and granted HELCO a long-term lease to use the water from the Keauhou aquifer, there is no reason to undergo further proceedings regarding the revocable water use permit. Accordingly, in the instant case, the second requirement for justiciability on appeal is not met and this appeal has become moot.

However, this court has recognized an exception to the general rule that moot cases will not be decided and has elucidated standards for such circumstances:

> There is a well settled exception to the rule that appellate courts will not consider moot questions. When the question involved affects the public interest, and it is likely in the nature of things that similar questions arising in the future would likewise become moot before a needed authoritative determination by an appellate court can be made, the exception is invoked. Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.

Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (internal quotation marks and citation omitted) (emphases added).

This exception was further explained in Okada Trucking, in which this court stated:

> Nevertheless, we have repeatedly recognized an exception to the mootness doctrine in cases involving questions that affect the public interest and are capable of repetition yet evading review. . . . The phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

99 Hawai'i at 196-97, 53 P.3d at 804-05 (emphasis added) (internal quotation marks and citations omitted).

This case does not fall under the exception to the mootness doctrine because it does not fulfill the criteria necessary to demonstrate public interest and Appellants have not argued that it does. First, the question is arguably a private, as opposed to a public one, in nature. Although Appellants assert that they are protecting the rights of Native Hawaiians and the public in general that are afforded under the public trust doctrine, the question on appeal is whether Appellants have standing to appeal an agency action taken by the BLNR concerning HELCO's revocable water use permit. This is seemingly a private question, inasmuch as the determination of Appellants' standing would not determine the standing of any future party to appeal the BLNR's decisions.

Second, it is not necessary in this case that this court make a decision regarding Appellants' standing for the guidance of future public officers. Because standing is based on factual circumstances particular to every controversy, the

determination of Appellants' standing in this case would likely provide only limited guidance to public officials in the future. Finally, it is not probable that this question will recur in the future. Revocable permits are considered by the BLNR on a case-by-case basis and it has not been established that it is probable that the circumstances of the instant case will recur.

As stated supra, Appellants argue that this appeal is not moot because the issues raised in this appeal are germane to the appeal in S.Ct. No. 27159, Hui Kakoʻo Aina Hoʻopulapula v. Bd. of Land & Natural Res.,[17] which challenges the propriety of granting HELCO the long-term lease. Appellants contend that if this appeal is dismissed for mootness, they will not be able to preserve certain legal arguments, which first arose when the revocable water permit was granted, for the appeal in Hui Kakoʻo because "[t]he information relie[d] upon by Appellees [sic] BLNR in awarding a [sixty-five]-year water lease consisted primarily of information before Appellees [sic] BLNR at the time of Appellee HELCO's request for issuance of a revocable water permit." Appellants' argument is not persuasive. In dismissing this appeal as moot, this court is not making a determination of whether the long-term lease is void or not.

VII.

The cancellation of the revocable water use permit and the granting of a long-term lease allowing HELCO to draw water

[17] Waimana and Hee are also appellants in S.Ct. No. 27159. Hui Kakoʻo Aina Hoʻopulapula is not a party to this case.

from the Keauhou aquifer for industrial uses at the Keāhole station have rendered this appeal moot. For the foregoing reasons, this appeal is dismissed as moot.

DATED: Honolulu, Hawai'i, May 25, 2006.

On the briefs:

Michele-Lynn E. Luke (Richards & Luke) for appellants-appellants.

Sonia Faust and Julie H. China, Deputy Attorneys General, for appellees-appellees Board of Land & Natural Resources and Department of Land & Natural Resources.

Warren Price III and Robert A. Marks (Price Okamoto Himeno & Lum) and John T. Komeiji and Brian A. Kang (Watanabe Ing Kawashima & Komeiji) for appellee-appellee Hawaii Electric Light Company, Inc.