* * * **FOR PUBLICATION** * * *
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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HUI KAKO'O AINA HO'OPULAPULA, a domestic non-profit corporation; 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; HAWAI'I ELECTRIC LIGHT COMPANY, INC., a Hawai'i corporation, Appellees-Appellees.

NO. 27159



APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 04-1-00051K)

SEPTEMBER 21, 2006

MOON, C.J., LEVINSON, J., AND CIRCUIT JUDGE CHAN, IN PLACE OF DUFFY, J., RECUSED; ACOBA, J., CONCURRING AND DISSENTING SEPARATELY, WITH WHOM CIRCUIT JUDGE DEL ROSARIO, IN PLACE OF NAKAYAMA, J., RECUSED, JOINS

OPINION OF THE COURT BY MOON, C.J.

In this secondary appeal, appellants-appellants Waimana Enterprises, Inc. (Waimana), Albert S.N. Hee, and Hui Kako'o Aina Ho'opulapula (Hui Kako'o) [hereinafter, collectively, Appellants] appeal from the Circuit Court of the Third Circuit's February 4, 2005 final judgment[1] entered in favor of appellees-appellees

[1] The Honorable Ronald Ibarra presided over the underlying proceedings.

Hawaiian Electric Light Company, Inc. (HELCO), Department of Land and Natural Resources (DLNR), and Board of Land and Natural Resources (BLNR) [hereinafter, collectively, Appellees] and the circuit court's April 1, 2005 orders denying the Appellants' post-judgment motions for relief. Essentially, the circuit court dismissed Waimana's and Hee's appeal for lack of jurisdiction, concluding that Waimana and Hee [hereinafter, collectively, Waimana Parties] were collaterally estopped from litigating whether they have standing in the instant matter. As to Hui Kako'o, the circuit court ruled, inter alia, that Hui Kako'o lacked standing in the instant matter and that it failed to follow specific procedures promulgated by the DLNR in requesting a contested case hearing, thereby precluding judicial review pursuant to Hawai'i Revised Statutes (HRS) § 91-14(a) (1993), quoted infra.

On appeal, the Appellants claim, inter alia, that the circuit court erred in concluding that it lacked jurisdiction to review their appeal. For the reasons discussed below, we conclude that the Appellants' contentions lack merit inasmuch as a contested case hearing did not occur in the instant case, thereby precluding judicial review pursuant to HRS § 91-14(a). Accordingly, we affirm the circuit court's February 4, 2005 final judgment and April 1, 2005 orders denying the Appellants' post-judgment motions for relief.

## I. BACKGROUND

The parties to the instant appeal, except for Hui Kako'o, have been involved in extensive litigation for more than a decade regarding HELCO's plans to expand the Keahole Generating Plant, an electric generating station, on the island of Hawai'i, resulting in several dispositions by this court. See, e.g., Hawaiian Elec. Light Co. v. Dep't of Land & Natural Res., 102 Hawai'i 257, 75 P.3d 160 (2003) [hereinafter, HELCO]; Keahole Def. Coalition, Inc. v. Bd. of Land & Natural Res., 110 Hawai'i 419, 134 P.3d 585 (2006) [hereinafter, Waimana I]; Waimana Enters., Inc. v. Bd. of Land & Natural Res., No. 26519 (Haw. May 25, 2006) (mem.); Waimana Enters., Inc. v. Bd. of Land & Natural Res., No. 26559 (Haw. May 25, 2006) (mem.). As discussed more fully infra, the instant case concerns HELCO's request to the BLNR for a long-term water lease at the Keahole Generating Plant.

### A. Factual Background

On February 24, 2004, HELCO sent a letter to the DLNR, requesting the issuance of "a long-term lease of water [from the Keauhou aquifer] for the use of brackish water for its industrial use and fire suppression needs at its Keahole Generating Plant site" on the island of Hawai'i. HELCO requested the sale of a long-term water lease at a public auction pursuant to HRS

§ 171-58(c) (1993).[2] By letter dated March 8, 2004, the DLNR informed HELCO that the BLNR would consider HELCO's request at the BLNR's public meeting on March 12, 2004, which was subsequently placed on the agenda as "Item D-16."

At the March 12, 2004 meeting, a BLNR staff member recommended that the BLNR "authorize the sale of a water lease by public auction." At that point, counsel for Waimana Parties, Deborah Jackson, came forward to provide testimony to the BLNR. According to the minutes of that meeting, Jackson informed the BLNR that,

> in December 2002[,[3]] her colleague, Michelle Luke[,] requested a contested case hearing on behalf of her clients[, i.e., Waimana Parties]. At that meeting[, i.e., a December 12, 2003 BLNR meeting,] the [BLNR] decided to grant [a revocable permit for water use to HELCO for the Keahole Generating Plant]. Ms. Jackson contends the [BLNR] issued HELCO a revocable permit based on a 1994 Environmental

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[2] HRS § 171-58(c) provides:

> 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; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and environmental impact statement approvals, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.

[3] It appears that the reference to "December 2002" should be "December 2003."

> Impact Statement (EIS). She went on to inform the [BLNR that,] subsequent to their December 12, 2003 meeting[,] the [Land Use Commission (LUC)] ordered HELCO to prepare a new EIS. Because the new EIS has yet to be prepared, Ms. Jackson feels the [BLNR] should not render a decision on this matter today, instead[,] the [BLNR] should wait until the new EIS is prepared.

Consequently, Jackson requested the BLNR to defer "decision making at this time until the [new] EIS is completed." Jackson then informed the BLNR that, if "they are inclined to make a decision today[,] they should reject" HELCO's request for a long-term water lease. Finally, Jackson stated that, if the BLNR accepted HELCO's request, she will "ask for a contested case hearing."

Dickie Nelson, the vice-president of Hui Kako'o,[4] next testified on behalf of Hui Kako'o against HELCO's request for a long-term water lease. The meeting minutes reveal Nelson stated that

> there are 482 acres of land in Keahole of which 153 acres abut HELCO[']s] power plant. He feels these lands should be made available to Native Hawaiians on [the Department of Hawaiian Home Land's (DHHL)] waitlist. He noted his organization[, i.e., Hui Kako'o], has serious concerns regarding the potential impacts that this water lease may have on their members[']] rights to lease these lands. He feels there have not been adequate studies done on the impacts of the water [lease]. Mr. Nelson noted [that] Micah Kane[, the executive officer of DHHL,] spoke in support of this item on behalf of the DHHL and those individuals who already have homestead leases. In contrast[, Nelson] represents those individuals on the DHHL waitlist.

Nelson also requested the BLNR to "defer this matter until more information can be provided," stating further that, if a decision

[4] Hui Kako'o "is an organization that represents the beneficiaries and native Hawaiians on the Hawaiian Home Lands wait list." FOF No. 19.

is made today, he would request a contested case hearing to receive more information.

Immediately thereafter, the BLNR convened in an "Executive Session" with deputy attorney general Yvonne Izu to discuss the Appellants' oral requests for a contested case hearing as well as the impact of the EIS. After less than ten minutes, the BLNR reconvened and stated that "a contested case hearing is not available." HELCO's request for a long-term water lease was thereafter unanimously approved by the BLNR.

B. Procedural History

On April 12, 2004, the Appellants jointly filed a notice of appeal with the circuit court pursuant to HRS § 91-14(a)[5] and Hawai'i Rules of Civil Procedure Rule 72 (2005).[6] The

[5] HRS § 91-14, entitled "Judicial review of contested cases," provides in relevant part:

> (a) 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.

(Emphasis added.)

[6] HRCP Rule 72 provides in relevant part:

> (a) How taken. Where a right of redetermination or review in a circuit court is allowed by statute, any person adversely affected by the decision, order or action of a governmental official or body other than a court, may appeal from such decision, order or action by filing a notice of
>
> (continued...)

notice of appeal indicated that the Appellants were appealing from the BLNR's "action" taken at its March 12, 2004 meeting with respect to the authorization of the sale of the long-term water lease by public auction.

On July 13, 2004, Waimana Parties filed a "Motion for Stay of Decision Dated March 12, 2004." Essentially, Waimana Parties requested the circuit court to enter an order staying the issuance of the long-term water lease to HELCO pending resolution of the instant appeal.[7] On July 19, 2004, Hui Kako'o similarly filed a "Motion for Stay of Decision Dated March 12, 2004," requesting the same relief as Waimana Parties. Waimana Parties subsequently joined in Hui Kakoo's motion on July 23, 2004, and Hui Kako'o joined in Waimana Parties' motion on August 4, 2004. A hearing on the motions for stay was held on August 11, 2004. At the conclusion of the hearing, the circuit court orally denied the motions.[8]

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[6](...continued)
> appeal in the circuit court having jurisdiction of the matter. As used in this rule, the term "appellant" means any person or persons filing a notice of appeal, and "appellee" means every governmental body or official (other than a court) whose decision, order or action is appealed from, and every other party to the proceedings.

(Emphasis in original.)

[7] Earlier, on July 1, 2004, a public auction was held for the sale of the long-term water lease, and HELCO purchased the lease.

[8] On August 30, 2004, the circuit court entered its written order denying the motions for stay.

In the meantime, Hui Kako'o filed its opening brief with the circuit court on August 9, 2004. Hui Kako'o contended, inter alia, that the BLNR (1) erred in denying its oral request for a contested case hearing and (2) failed to comply with HRS § 171-58(c), see supra note 2, before authorizing the sale of the long-term water lease. On the same day, Waimana Parties filed their opening brief with the circuit court, raising, in essence, the same contentions as Hui Kako'o.

On August 26, 2004, HELCO filed a motion to dismiss Waimana Parties' appeal, in which the BLNR and the DLNR joined on September 3, 2004. HELCO asserted that, inasmuch as the circuit court had already ruled in the "1994 Remand Order"[9] that Waimana

[9] In a November 9, 1994 remand order, the circuit court entered the following relevant conclusions relating to Waimana's lack of standing to challenge HELCO's conservation district use application (CDUA) with the BLNR that sought to modernize and expand the Keahole Generating Plant [hereinafter, the 1994 Remand Order]:

> (5) Although Waimana argues it is a native Hawaiian-controlled entity whose economic interests, environmental interests and interests in ceded lands are at stake and that, therefore, it has constitutionally protected property interests, the [circuit] court concludes otherwise; 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, an interest which the DLNR recognized in recommending Waimana's intervention in the CDUA process:
>
> > [Waimana] is an energy company. It has conducted studies and obtained a lease for development of a generator station at an alternative site, Kawaihae, that may be superior to the Keahole site. Expansion of the Keahole generating station may suppress development of [Waimana's] project.
>
> (6) 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;
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> . . . .

(continued...)

lacked standing to challenge issues relating to the expansion of the Keahole Generating Plant, it follows that Waimana and Waimana's privy, Hee,[10] are precluded from litigating the issue whether they have standing in the instant matter. Thus, HELCO maintained that the circuit court lacked appellate jurisdiction to consider Waimana Parties' present appeal.

On September 10, 2004, Hui Kako'o filed a memorandum in opposition to HELCO's motion to dismiss Waimana Parties' appeal. Hui Kako'o asserted that HELCO "misconstrue[d] the dispositive legal issue in this administrative appeal[,] which is whether the [BLNR] properly complied with the statutory provisions of [HRS] § 171-58(c) prior to the approval of the [long-term] water lease to HELCO." Moreover, Hui Kako'o argued that "standing should not be a barrier to the right of appeal." (Capital letters altered.)

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[9](...continued)
(8) 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 §] 91-14(a)[, see supra note 5].

Waimana I, 110 Hawai'i at 422-23, 134 P.3d at 588-89 (ellipses and emphases omitted). Waimana did not appeal the 1994 Remand Order, which was incorporated in a final judgment entered by the circuit court; thus, it did not challenge the circuit court's determination that it lacked standing. Id. at 423, 134 P.3d at 589.

[10] Hee "is the president, incorporator[,] and majority shareholder of Waimana[.]"

On September 13, 2004, Waimana Parties filed their memorandum in opposition to HELCO's motion to dismiss their appeal. Waimana Parties contended that, "[w]here a party is dismissed from an action, based upon a determination that the party lacks standing, res judicata unequivocally does not apply."

A hearing was held on HELCO's motion to dismiss Waimana Parties' appeal on September 20, 2004. At the conclusion of the hearing, the circuit court instructed the parties to submit proposed findings and conclusions on their respective positions regarding standing as well as the merits of the appeal.

Also on September 20, 2004, the BLNR and the DLNR jointly filed their answering brief to Waimana Parties' opening brief. The BLNR and the DLNR contended that the circuit court lacked jurisdiction because Waimana Parties did not meet the requirements of HRS § 91-14. Specifically, the BLNR and the DLNR argued that Waimana Parties have not been "specially, personally and adversely affected by special injury or damage to his [or her] personal or property rights" and that they "did not participate in a contested case nor [were they] entitled to a contested case." On the same day, the BLNR and the DLNR jointly filed their answering brief to Hui Kakoo's opening brief. The BLNR and the DLNR asserted that the circuit court lacked jurisdiction because Hui Kakoʻo, like the Waimana Parties, did not meet the requirements of HRS § 91-14. Specifically, the BLNR and the DLNR argued that Hui Kakoʻo was not "personally

aggrieved" by the BLNR's decision authorizing the issuance of the long-term water lease and that Hui Kako'o did not participate in a contested case nor was it entitled to one. The BLNR and the DLNR also contended that, notwithstanding the lack of jurisdiction, the BLNR fully complied with the requirements of HRS § 171-58(c).

HELCO also filed its answering brief to Hui Kakoo's opening brief on September 20, 2004. HELCO contended, inter alia, that Hui Kako'o lacked standing to bring the instant appeal. Moreover, HELCO asserted that the BLNR's decision authorizing the issuance of the long-term water lease on March 12, 2004 did not arise from a contested case hearing. Specifically, HELCO alleged that it was undisputed that "the BLNR's March 12, 2004 public meeting was not a contested case hearing[] and that Hui Kako'o did not comply with Hawai'i Administrative Rule[s] (HAR) § 13-1-29[11] by submitting a timely

[11] HAR § 13-1-29 provides in relevant part:

> (a) A hearing on a contested matter may be requested by the board on its own motion or upon the written petition of any government agency or any interested person who then properly qualifies to be admitted as a party. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing or the board meeting, whichever is applicable. The time for making an oral or written request and submitting a written petition may be waived by the board.

(continued...)

written petition to the BLNR for a contested case hearing." Consequently, HELCO maintained that the circuit court lacked appellate jurisdiction to entertain Hui Kakoo's appeal.

On the same day, HELCO filed its answering brief to Waimana Parties' opening brief. HELCO alleged, inter alia, that Waimana Parties "lack standing to challenge issues relating to the Keahole [Generating Plant]." HELCO basically reiterated the arguments it had made in support of its motion to dismiss Waimana Parties' appeal, to wit, that, inasmuch as the circuit court had earlier ruled in the 1994 Remand Order that Waimana lacked standing to challenge issues relating to the expansion of the Keahole Generating Plant, it follows that Waimana and Waimana's privy, Hee, are precluded from litigating whether they have standing in the instant matter. HELCO also contended, as it did in its answering brief to Waimana Parties' opening brief, that the BLNR's decision authorizing the issuance of the long-term water lease on March 12, 2004 did not arise from a contested case hearing. Specifically, HELCO argued that the BLNR's March 12, 2004 meeting was not a contested case hearing and that Waimana Parties did not comply with HAR § 13-1-29 by submitting a timely written petition to the BLNR for a contested case hearing. Thus, HELCO contended that Waimana Parties' "procedural default [wa]s fatal to their appeal."

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[11](...continued)
(Emphasis added.)

On October 11, 2004, the circuit court heard oral argument on the Appellants' appeal, at which time the parties essentially reiterated the arguments made in their briefings to the circuit court. At the conclusion of the hearing, the circuit court stated that it would take the matter "under submission."

On October 28, 2004, the circuit court entered its order granting HELCO's motion to dismiss Waimana Parties' appeal and the BLNR's and the DLNR's joinder therein. On November 3, 2004, the circuit court entered its findings of fact (FOFs), conclusions of law (COLs), and order affirming the BLNR's March 12, 2004 decision. The circuit court entered the following relevant FOFs:

> 17. On March 12, 2004, the BLNR held a duly-noticed meeting to consider HELCO's request for approval of an auction for the lease for brackish water from the Keauhou aquifer.
>
> 18. [The Appellants] appeared at the meeting and requested a contested case hearing.
>
> 19. Hui Kako'o is an organization that represents the beneficiaries and native Hawaiians on the Hawaiian Home Lands wait list.
>
> 20. Hui Kako'o failed to present any testimony or other evidence to the BLNR during the March 12, 2004 meeting that they (and[,] in Hui Kakoo's case, its members) actually used the area surrounding the Keahole generating station for native Hawaiian traditional and customary practices.
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> 21. Hui Kako'o failed to present any evidence in this appeal to prove that its members actually used the area surrounding the Keahole generating station for native Hawaiian traditional and customary practices.
>
> 22. Hui Kako'o did not present any testimony or other evidence to the BLNR demonstrating any harm to the environment from HELCO's use of the brackish water from the Keauhou aquifer.
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> 23. The BLNR denied the [Appellants'] requests for a contested case hearing and unanimously approved HELCO's request as submitted.
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> 24. Hui Kako'o failed to subsequently file (or mail and postmark) a written petition with the BLNR for a contested case hearing as required by [HAR] § 13-1-29.

> 25. Pursuant to public notice, the public auction for the [long-term water] lease was held on July 1, 2004. HELCO was the prevailing bidder and the lease was executed with HELCO on July 19, 2004.

(Emphasis added.) The circuit court also entered the following relevant COLs:

> 2. [HRS] § 91-14(a) sets forth the following jurisdictional requirements for an agency appeal: (1) the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing that was "required by law" and "determined the rights, duties, and privileges of specific parties"; (2) the agency action must represent a "final decision and order" or a "preliminary ruling" that such deferral of review would deprive the claimant of adequate relief; (3) the claimant must have followed the applicable agency rules and have been involved "in" a contested case hearing; and (4) the claimant's legal interest must have been injured -- i.e., the claimant must have standing to appeal. Pub[.] Access Shoreline Hawai'i v. Hawai'i County Planning [Comm'n], 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) ("PASH II").
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> . . . .
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> 5. Hui Kako'o has failed to demonstrate that it has standing to appeal the BLNR's March 12, 2004 decision.
>
> 6. Hui Kako'o has failed in its burden to demonstrate that it has standing to appeal the BLNR's March 12, 2004 decision.
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> . . . .
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> 12. A person or entity asserting standing must prove standing at the beginning of the case. Sierra Club v. Hawai'i Tourism Auth[.], ex rel. B[d.] of Dir[s.], 100 Hawai'i 242, 257, 59 P.3d 877, 892 (2002). Hui Kako'o (and [Waimana Parties]) failed to prove standing at the beginning of the case.
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> 13. Hui Kako'o failed to produce evidence to show that it or its members have any "personal" interest as native Hawaiians who traditionally and customarily exercised practices for subsidence, cultural, or religious purposes.
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> 14. . . . . Hui Kako'o failed to assert before the BLNR, or thereafter, to adduce evidence that its members had actually exercised traditional and customary native Hawaiian practices that could be affected by the lease of the brackish water.
>
> 15. Hui Kakoo's arguments to [the circuit] court for the first time on appeal and unsupported by evidence[] that its members "may" exercise such practices is insufficient as a matter of law to confer standing.
>
> 16. Even assuming that Hui Kako'o has standing to bring this appeal, the BLNR's March 12, 2004 [decision] must still be affirmed.
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> 17. Hui Kakoo's appeal of the BLNR's March 12, 2004 approval of the sale of the lease at public auction does not arise from a "contested case" hearing pursuant to the jurisdictional requirements of HRS § 91-14(a), and

> accordingly, this [c]ourt lacks appellate jurisdiction to hear their appeal.
>
> 18. The BLNR's March 12, 2004 public meeting was not a contested case hearing.
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> 19. There is no evidence in the record that [Hui Kako'o] complied with HAR § 13-1-29 by submitting a written petition to the BLNR for a contested case hearing from the BLNR's decision to permit the auction of the water lease made on March 12, 2004. Appellants seeking judicial review under HRS § 91-14 must follow agency rules relating to contested case proceedings promulgated under HRS [c]hapter 91.
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> 20. The BLNR was also not required "by law" to conduct a contested case hearing where, as here, the BLNR's action involved the custodial management of public property. See Sharma v. State of Hawai'i Dep['t.] of Land [&] Natural Res[.], 66 Haw. 632, 673 P.2d 1030 (1983) (noting that internal management of an agency necessarily includes the custodial management of public property entrusted to the agency, and holding that a contested case hearing was not "required by law" for BLNR decisions relating to such management)[.]
>
> 21. HELCO's lease request was granted pursuant to HRS § 171-58. That statute does not require or suggest that a contested case hearing is required before the BLNR may exercise its custodial function to grant water rights by lease at public auction. [Hui Kako'o] has failed to demonstrate any statutory basis for a contested case hearing.
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> 22. The [circuit c]ourt further finds that the Appellants were not constitutionally entitled to a contested case hearing. . . .
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> . . . .
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> 36. HELCO satisfied its burden to prove that its request to the BLNR for an auction for a [long-term water lease] from the Keauhou aquifer was consistent with the public trust doctrine.
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> . . . .
>
> 56. . . . [T]he BLNR fully complied with HRS § 171-58(c)[.]

(Emphases added.)

On November 5, 2004, Waimana Parties filed a motion for clarification of the circuit court's order granting HELCO's motion to dismiss Waimana Parties' appeal. Waimana Parties requested the circuit court to disclose:

> (1) [T]he factual and legal basis upon which th[e circuit c]ourt apparently determined that [Waimana] lacked standing to bring this administrative appeal;
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> (2) [T]he factual and legal basis upon which th[e circuit c]ourt apparently determined that [Hee] lacked standing to bring this administrative appeal; and

> (3) [T]he identification of any factual findings or legal conclusions derived from outside the submissions on HELCO's motion and the argument at [the] hearing on September 20, 2004[] th[e circuit c]ourt considered and relied upon in granting HELCO's Motion to Dismiss[.]

(Numbering altered.) Waimana Parties alternatively requested the circuit court to enter findings and conclusions with respect to its order granting HELCO's motion to dismiss. On November 30, 2004, the circuit court entered its order denying Waimana Parties' motion for clarification, stating that:

> HRCP Rule 52(a) [(2005)[12]] does not require the court to issue [FOFs] and [COLs] with respect to motions to dismiss for lack of jurisdiction because appellants lack standing as a matter of law; and findings and conclusions are not necessary in relation to [Waimana Parties], as the record in this agency appeal clearly sets forth the basis for the court's order. The court issued [FOFs] and [COLs] relating to [Hui Kakoo's] appeal on November 3, 2004.

On February 4, 2005, the circuit court entered final judgment in favor of the Appellees and against the Appellants.

On February 23, 2005, Hui Kakoʻo filed a motion for relief from the circuit court's FOFs, COLs, and order affirming the BLNR's March 12, 2004 decision pursuant to HRCP Rule 60(b)(6)(2005),[13] which Waimana Parties joined on March 9, 2005. Hui Kakoʻo stated that:

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[12] HRCP Rule 52(a) provides in relevant part that "[FOFs] and [COLs] are unnecessary on decisions of motions under Rules 12 [(motions pleading certain defenses)] or 56 [(motions for summary judgment)] or any other motion except as provided in subdivisions (b) and (c) of this rule." Subdivisions (b) and (c) are not relevant to the instant case.

[13] HRCP Rule 60(b) provides in relevant part that, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (6) any other reason justifying relief from the operation of the judgment."

> In less than three months after the [circuit] court issued its order in the instant appeal, the BLNR granted a [contested case hearing] to challenge the proposed issuance of a water lease under [HRS] § 171-58. On January 28, 2005, the BLNR, in consultation with the Office of the Attorney General, authorized a hearing officer to conduct a [contested case hearing] pursuant to oral requests challenging the proposed sale of a 65 year lease at [a] public auction of water rights for use of the "Blue Hole" Diversion and Portions of a Water Transmission System to Kaua'i Island Utilities Cooperative (KIUC). Clearly, the BLNR's inconsistent positions have resulted in the denial of Hui Kakoo's due process rights to a full and fair opportunity to be heard and to ensure that its constitutional rights are protected.

On the same day, Waimana Parties filed their motion for relief from the February 4, 2005 final judgment pursuant to HRCP Rule 60, primarily raising the same contentions as Hui Kako'o.

On March 4, 2005, HELCO filed its memorandum in opposition to Waimana Parties' motion for relief. HELCO contended, inter alia, that "[t]he reasons cited by [Waimana Parties] for relief from the final judgment do not relate to the dismissal of their appeal for lack of standing, and they cannot be 'conferred' standing based upon a subsequent proceeding before the BLNR in an unrelated matter[, i.e., the KIUC matter]." (Capital letters altered.) Moreover, HELCO pointed out that, although a contested case hearing had been requested in the KIUC matter, the BLNR had not yet ordered one. On the same day, HELCO filed its memorandum in opposition to Hui Kakoo's motion for relief, essentially asserting the same arguments it had advanced against Waimana Parties.

Also on March 4, 2005, the BLNR and the DLNR jointly filed their memorandum in opposition to Hui Kakoo's motion for

relief. The BLNR and the DLNR contended that Hui Kakoo's failure to submit a subsequent written petition for a contested case hearing pursuant to HAR § 13-1-29 was an independent basis upon which the circuit court could, and did, affirm the BLNR's March 12, 2004 decision. The BLNR and the DLNR also maintained that the KIUC matter was irrelevant to the instant case inasmuch as "[t]here is no basis for [Hui Kako'o] to contend or [the circuit c]ourt to conclude that [the] KIUC [matter] is the same as this case." On the same day, the BLNR and the DLNR jointly filed their memorandum in opposition to Waimana Parties' motion for relief. Again, the BLNR and the DLNR contended, inter alia, that the KIUC matter was irrelevant to the instant case.

The circuit court held a hearing on the Appellants' motions for relief on March 14, 2005. At the conclusion of the hearing, the circuit court orally denied the Appellants' motions for relief. On April 1, 2005, the circuit court entered two separate written orders denying Hui Kakoo's and Waimana Parties' motions for relief.

Prior to the circuit court's entry of the April 1, 2005 orders, Hui Kako'o filed its notice of appeal on March 3, 2005, and Waimana Parties filed their notice of appeal on the same day. The foregoing set of appeals was assigned appeal No. 27159. On April 29, 2005, Hui Kako'o filed a second notice of appeal, and Waimana Parties filed their second notice of appeal on the same day. The second set of appeals was assigned appeal No. 27276.

Both sets of appeals were consolidated under appeal No. 27159 by this court on July 14, 2005.

## II. STANDARDS OF REVIEW

### A. Subject Matter Jurisdiction

"The existence of subject matter jurisdiction is a question of law that is reviewable de novo under the right/wrong standard." Aames Funding Corp. v. Mores, 107 Hawai'i 95, 98, 110 P.3d 1042, 1045 (2005) (internal quotation marks, brackets, and citations omitted). "If a court lacks jurisdiction over the subject matter of a proceeding, any judgment rendered in that proceeding is invalid. Therefore, such a question is valid at any stage of the case, and though a [circuit] court is found to have lacked jurisdiction, we have jurisdiction here on appeal, not of the merits, but for the purpose of correcting an error in jurisdiction." Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 133, 870 P.2d 1272, 1277 (1994) (internal quotation marks, original brackets, and citation omitted).

### B. Findings of Fact

This court reviews the circuit court's FOFs under the clearly erroneous standard. Ueoka v. Szymanski, 107 Hawai'i 386, 393, 114 P.3d 892, 899 (2005) (citations omitted).

> A[n] [FOF] is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed. A[n] [FOF] is also clearly erroneous when the record lacks substantial evidence to support the finding. We have defined substantial evidence as credible

> evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004) (quoting Beneficial Hawai'i, Inc. v. Kida, 96 Hawai'i 289, 305, 30 P.3d 895, 911 (2001)).

C. Conclusions of Law

This court reviews the circuit court's COLs de novo. Id. at 51, 85 P.3d at 158 (citation omitted). "A COL is not binding upon an appellate court and is freely reviewable for its correctness." Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 453, 99 P.3d 96, 104 (2004) (citations and internal quotations marks omitted). Moreover, "a COL that is supported by the [circuit] court's FOFs and that reflects an application of the correct rule of law will not be overturned." Id. (citation omitted, internal quotation marks, and original brackets omitted).

## III. DISCUSSION

As this court has previously stated:

> Preliminarily, we reiterate the well-settled principle that appellate courts have an independent obligation to insure they have jurisdiction to hear and determine each case. Kernan v. Tanaka, 75 Haw. 1, 15, 856 P.2d 1207, 1215 (1993); State v. Moniz, 69 Haw. 370, 372, 742 P.2d 373, 375 (1987); Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986). This duty arises from the equally "well-settled rule that the legislature may define and limit the right of appeal because the remedy of appeal is not a common law right and it exists only by authority of statutory or constitutional provisions[.]" In re Attorney's Fees of Mohr, 97 Hawai'i 1, 4, 32 P.3d 647, 650 (2001) (citations omitted). In light of the legislature's prerogative of fixing the limits of appellate jurisdiction, an appealing party's "compliance with the methods and procedures prescribed by statute is obligatory." Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995) (emphasis added).

In re Doe, 102 Hawai'i 246, 249, 74 P.3d 998, 1001 (2003) (brackets in original). Consequently, we first address the Appellees' contention that the Appellants' failure to comply with the specific procedures promulgated by the DNLR, namely, HAR § 13-1-29, in requesting a contested case hearing precludes judicial review pursuant to HRS § 91-14(a).

"HRS § 91-14(a) provides the means by which judicial review of administrative contested cases can be obtained. Among its prerequisites, the section requires that a contested case must have occurred before appellate jurisdiction may be exercised." Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994) (citation omitted). In addition, "[a]ppellants seeking judicial review under HRS § 91-14 must also follow agency rules 'relating to contested case proceedings . . . properly promulgated under HRS [c]hapter 91[.]'" Id. at 67-68, 881 P.2d at 1213-14 (quoting Simpson v. Dep't of Land & Natural Res., 8 Haw. App. 16, 24, 791 P.2d 1267, 1273 (1990) (third set of brackets and ellipsis in original), overruled on other grounds by, Kaniakapupu v. Land Use Comm'n, 111 Hawai'i 124, 139 P.3d 712 (2006)); PASH, 79 Hawai'i at 433, 903 P.2d at 1254.

In Simpson, the Intermediate Court of Appeals (ICA) held that a public hearing required by law is not a contested case where (1) the agency has properly promulgated specific procedures for a contested case hearing and (2) a party has

failed to follow such procedures. Id. at 24-25, 791 P.2d at 1273. In that case, the petitioner had applied for a mooring permit from the DLNR and participated in a public hearing required by law. Id. at 18, 791 P.2d at 1270. The petitioner, however, did not request a contested case hearing pursuant to the DLNR's agency rules regarding contested case proceedings, specifically, HAR § 13-1-29, see supra note 11. Id. at 19, 791 P.2d at 1271. After the BLNR denied the petitioner's application for a mooring permit, the petitioner filed a notice of appeal to the circuit court. Id. The circuit court dismissed the appeal on the ground that it lacked subject matter jurisdiction inasmuch as there was no final decision from a contested case. Id. at 19-20, 791 P.2d at 1271.

On appeal, the ICA agreed with the circuit court that the petitioner's appeal was not from a contested case. Id. at 18, 791 P.2d at 1270. Specifically, the ICA concluded that, inasmuch as the petitioner failed to request a contested case hearing as required by HAR § 13-1-29, there was no contested case from which the petitioner could appeal, pursuant to HRS § 91-14(a). Id. at 24, 791 P.2d at 1273. The ICA went on to state:

> The basic purpose of [s]ubchapter 5 of the [DLNR's "Rules of Practice and Procedure"[14]] is to provide the [BLNR] an opportunity to establish an adequate formal record for judicial review of its decision and order. Since [the petitioner] did not request a contested case hearing, the record of the proceedings before the Board is sparse and inadequate for judicial review. Transcripts of witnesses' testimony at the public hearing, exhibits, if any, presented at the hearing, and the Board's findings of fact and conclusions of law are lacking. In fact, it is difficult to determine from the record who, other than [the petitioner], testified at the . . . public hearing. The Board's decision and order seem to be based entirely on a staff planner's summary of the proceedings and recommendations. Thus, we hold that the public hearing before the Board was not a "contested case hearing" in accordance with the DLNR's Rules. **To hold otherwise would vitiate the right of agencies to make and enforce such rules.**

Id. at 24-25, 791 P.2d at 1273 (bold emphasis added).[15]

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[14] Title 13, chapter 1 of the HAR is entitled "Rules of Practice and Procedure" (Rules). In turn, subchapter 5, entitled "Contested Case Proceedings," is contained in title 13, chapter 1 of the HAR. HAR § 13-1-29 is contained in Title 13, chapter 1, subchapter 5. The ICA noted that the "DLNR had adopted the Rules establishing formal procedures for contested case proceedings. The Rules, which were properly promulgated under HRS [c]hapter 91, are part of the public record." Id. at 24, 791 P.2d at 1273 (emphasis added).

[15] We note that, four years after Simpson was decided by the ICA, this court in Pele Defense Fund criticized Simpson's decision to reverse and remand the case to the circuit court in light of the DLNR's and the BLNR's failure to inform the petitioner "of his right to request a 'contested case hearing' and the time within which such request must be made." Simpson, 8 Haw. App. at 26, 791 P.2d at 1274. In Pele Defense Fund, this court stated that,

> [a]lthough the ICA found that the circuit court lacked jurisdiction because [the petitioner] did not participate in a contested case, it nonetheless reversed the dismissal of [the petitioner's] claim and remanded with direction to remand the matter to the DLNR for a contested case hearing. Lacking jurisdiction, the circuit court could do nothing but dismiss the appeal. **Requiring a remand to the DLNR with instructions to provide a contested case hearing directly contradicts the proper finding of a lack of jurisdiction in Simpson.** Jurisdiction is the base requirement for any court considering and resolving an appeal or original action. Appellate courts, upon determining that they lack jurisdiction -- or that any other courts previously considering the case lacked jurisdiction -- shall not require anything other than a dismissal of the appeal or action. Without jurisdiction, a court is not in a position to consider the case further.

77 Hawai'i at 69 n.10, 881 P.2d at 1215 n.10 (citation and internal quotation (continued...)

Likewise, in this case, HAR § 13-1-29 is the applicable agency rule delineating the specific procedures for requesting a contested case hearing. As previously stated, HAR § 13-1-29 provides in relevant part:

> (a) A hearing on a contested matter may be requested by the board on its own motion or upon the written petition of any government agency or any interested person who then properly qualifies to be admitted as a party. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is required). **In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing or the board meeting, whichever is applicable.** The time for making an oral or written request and submitting a written petition may be waived by the board.

(Bold and underscored emphases added.) The parties agree that the Appellants made oral requests for a contested case hearing prior to the close of the March 12, 2004 meeting before the BLNR. However, as the Appellees point out and the Appellants do not dispute, the Appellants failed to subsequently submit a written petition to the BLNR, requesting a contested case hearing. Indeed, the circuit court's unchallenged FOF No. 24 indicates that "Hui Kako'o failed to subsequently file (or mail and postmark) a written petition with the BLNR for a contested case

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[15](...continued)
marks omitted) (bold and underscored emphases added); see Bush, 76 Hawai'i at 136, 870 P.2d at 1280 (holding that judicial review by the circuit court of the agency's denial of the appellants' request for a contested case hearing as well as review of the merits of the agency's decision "is unattainable due to a lack of subject matter jurisdiction"). In fact, this court recently overruled Simpson "to the extent that it required a remand to the DLNR with instructions to provide a contested case hearing when it lacked jurisdiction to do so." Kaniakapupu, 111 Hawai'i at 136, 139 P.3d at 724.

hearing as required by [HAR] § 13-1-29." As such, FOF No. 24 is binding on this court. See In re Lock Revocable Living Trust, 109 Hawai'i 146, 154, 123 P.3d 1241, 1249 (2005) (FOFs not challenged on appeal are binding on the appellate court); Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002) (same). Although the circuit court did not enter any findings relating to Waimana Parties' failure to subsequently file (or mail and postmark) a written petition with the BLNR for a contested case hearing as required by [HAR] § 13-1-29, Waimana Parties do not point to any evidence in the record that they followed their oral request for a contested case hearing with a subsequent written petition "not later than ten days after the close of the [March 12, 2004] board meeting[.]" Accordingly, inasmuch as the DLNR had properly promulgated specific procedures for a contested case hearing, see supra note 14, and the Appellants failed to follow the requisite procedures, there was no contested case from which the Appellants could appeal, pursuant to HRS § 91-14(a).

Nonetheless, the Appellants contend on appeal that their non-compliance with the DLNR's specific procedures for a contested case hearing should be excused because such compliance would have been "futile." Although this court has recognized that, "[w]henever exhaustion of administrative remedies will be futile[,] it is not required[,]" Poe v. Hawai'i Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) (internal

quotation marks, original brackets, and citations omitted), it cannot be said that submitting a written petition requesting a contested case hearing after the BLNR's oral rejection of the Appellants' earlier oral requests would have been a futile act. Cf. Poe, 97 Hawai'i at 531, 40 P.3d at 933 (holding that a "public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes every step available to the employee in the grievance process and a request to the employee's exclusive bargaining representative to proceed to the last grievance step, which only the representative can undertake, would be futile") (emphases added); Winslow v. State, 2 Haw. App. 50, 56, 625 P.2d 1046, 1051 (1981) (holding that the "appellant could not be required to exhaust contractual remedies in an action against the union where no such remedies actually exist") (emphasis added). Here, it appears, based upon a review of the events that occurred at the March 12, 2004 meeting, that the BLNR's consideration of the Appellants' oral requests were somewhat perfunctory. At that meeting, the Appellants orally requested contested case hearings. The BLNR then convened in an "Executive Session" with deputy attorney general Yvonne Izu to discuss the oral requests. The minutes of the March 12, 2004 meeting reveal that the Executive Session lasted no more than ten minutes. The minutes also indicate that the BLNR had several remaining items on its agenda to address during the March 12, 2004 meeting. Consequently, given the

number of other items on the meeting's agenda that required the BLNR's attention, coupled with the seemingly cursory consideration of the Appellants' oral requests for a contested case hearing, it cannot be said that the BLNR had ample time to fully consider the merits of the Appellants' oral requests.

Moreover, HAR § 13-1-29(a) appears to recognize that a denial of a timely oral or written request will be reconsidered by the BLNR upon the filing of a written petition that complies with the requirements set forth in subsection (b) of HAR § 13-1-29.[16] As previously stated, HAR § 13-1-29(a) requires that "[a]n oral or written request for a contested case hearing must be made by the close of the . . . board meeting at which the matter is scheduled for disposition" and that, "[i]n either situation, [i.e., orally or in writing,] the person . . . requesting the contested case hearing must file . . . a written petition with the board not later than ten days after the close of the . . . board meeting." HAR § 13-1-29, however, is silent

[16] HAR § 13-1-29(b) provides that the subsequent written petition requesting a contested case hearing contain "concise statements" of:

> (1) The legal authority under which the proceeding, hearing or action is to be held or made;
> (2) The petitioner's interest that ma[y] be affected;
> (3) The disagreement, denial, or grievance which is being contested by the petitioner;
> (4) The basic facts and issues raised; and
> (5) The relief to which the party or petitioner seeks or deems itself entitled.

with respect to the conditions under which a written petition is required, i.e., upon either the grant or denial of an oral request or only upon the denial of an oral request. Based on a plain reading of HAR § 13-1-29, a written petition is required even if the oral request is granted. However, requiring a petitioner to file a written petition after relief has already been granted is nonsensical.[17] Thus, given the substantive requirements for a written petition, it is apparent that HAR § 13-1-29 anticipates exactly what occurred in this case -- an oral request and insufficient time to deliberate, resulting in a perfunctory ruling. The filing of a subsequent substantive written petition would not only allow the petitioner another opportunity to convince the BLNR of his or her position, but would allow the BLNR to more carefully and deliberately reconsider its ruling and reverse itself, if appropriate. In that regard, the BLNR's oral rejection of an oral or written request for a contested case hearing presented by the close of a board meeting cannot be said to be absolute or final. To conclude otherwise would effectively void the latter portion of HAR § 13-1-29(1), which mandates the filing of "a written

[17] In fact, HAR § 13-1-29 appears to anticipate such a scenario by providing the BLNR with authority to waive the time requirement for making an oral or written request and submitting a written petition. HAR § 13-1-29(a) ("The time for making an oral or written request and submitting a written petition may be waived by the board.").

petition with the board not later than ten days after the close of the public hearing or the board meeting." In other words, if the BLNR's oral rejection of a petitioner's oral or written request made by the close of a public hearing or a board meeting is deemed conclusive, then HAR § 13-1-29's requirement that the oral or written request be followed by a written petition would be superfluous or of no significance. Consequently, any interpretation that the BLNR's oral rejection is absolute or final in the context of HAR § 13-1-29 would ignore the "cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Coon v. City & County of Honolulu, 98 Hawai'i 233, 259, 47 P.3d 348, 374 (2002) (internal quotation marks and citations omitted); see Medeiros v. Hawai'i Dep't of Labor & Indus. Relations, 108 Hawai'i 258, 265, 118 P.3d 1201, 1208 (2005) (stating that "[t]he general principles of construction which apply to statutes also apply to administrative rules" (citation omitted)).

Finally, as previously stated, because it cannot be said that the BLNR had ample time to fully consider the merits of the Appellants' oral requests, it follows that the Appellants

should be afforded another opportunity to provide more information to the BLNR. However, HAR § 13-1-29 already provides the Appellants a second opportunity to submit additional information in order to convince the BLNR of their position. Had the Appellants presented a subsequent written petition as permitted by HAR § 13-1-29, they could have taken advantage of the opportunity to state, inter alia, their "interest that ma[y] be affected[,]" HAR § 13-1-29(b)(2), i.e., their basis for standing. Consequently, "the source of the alleged 'futility' [was] not the administrative process but, rather, the part[ies] who [were] seeking relief[, i.e., the Appellants]." In re Doe Children, 105 Hawai'i 38, 60, 93 P.3d 1145, 1167 (2004) (holding that the complainant could not avail herself of the "futility exception" because she could have requested an impartial due process hearing but chose not to do so). Accordingly, we hold that the Appellants failed to comply with the specific procedures promulgated by the DNLR, specifically, HAR § 13-1-29, in requesting a contested case hearing and that such failure precludes judicial review pursuant to HRS § 91-14(a).[18]

[18] In light of this court's holding, this court need not address the remainder of the Appellants' contentions.

## IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's February 4, 2005 final judgment and April 1, 2005 orders denying Appellants' post-judgment motions for relief.

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