CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
WITH WHOM DEL ROSARIO, J., JOINS

In this case, the majority decides as to the appeal of Appellant-Appellant Hui Kakoʻo Aina Hoʻopulapula (Hui Kakoʻo) that "no" does not mean no, even in the face of an administrative rule that clearly does not provide for "reconsideration" of a denial. The effect of this approach is unjust, inasmuch as, based on the plain language of Hawai'i Administrative Rule (HAR) § 13-1-29,[1] Hui Kakoʻo could not have had adequate notice that to preserve its right to judicial review under Hawai'i Revised Statutes (HRS) § 91-14(a) (1993)[2] of the Hawai'i Administrative Procedure Act

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[1] Hawai'i Administrative Rule (HAR) § 13-1-29, entitled "Request for hearing," states:

> (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.
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> (b) A petition requesting a contested case hearing shall contain concise statements of:
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> (1) The legal authority under which the proceeding, hearing or action is to be held or made;
> (2) The petitioner's interest that may 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.

(Emphasis added.)

[2] Hawai'i Revised Statutes (HRS) § 91-14, entitled "Judicial review of contested cases," provides in relevant part:

(continued...)

(HAPA), it was required to file a written petition for a contested case hearing, even after being denied that hearing and that its failure to do so now voids its appeal. I would hold, rather, that Hui Kakoʻo was not provided an adequate opportunity to establish its standing as allowed under the Hawaiʻi Constitution, article XII section 7, before Appellees-Appellees Board of Land and Natural Resources (BLNR) and Department of Land and Natural Resources (DLNR) and that the case should be remanded to BLNR to allow for such an opportunity.

For similar reasons, I would hold that Appellants-Appellants Waimana Enterprises, Inc. (Waimana) and Albert S.N. Hee (Hee), Waimana's president, should not be subject to HAR § 13-1-29 as the majority otherwise holds. However, because the standing of Waimana and Hee was previously decided and not appealed, they are barred by the doctrine of collateral estoppel from contesting the grant by BLNR and DLNR of a long-term lease

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[2](...continued)

> (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.)

to use brackish water[3] drawn from the Keauhou aquifer to Appellee-Appellee Hawaii Electric Light Company, Inc. (HELCO) for use in HELCO's Keahole power plant (the Keahole plant or Keahole generating station). See Keahole Def. Coalition v. Bd. of Land & Natural Res., 110 Hawai'i 419, 134 P.3d 585 (2006) [hereinafter Waimana I];[4] Waimana Enters., Inc. v. Bd. of Land & Natural Res., No. 26519 (May 25, 2006) (mem.) [hereinafter Waimana II];[5] and Waimana Enters., Inc. v. Bd. of Land & Natural Res., No. 26559

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[3] Brackish groundwater is described as water with "less salt than seawater but undrinkable." Webster's Third New International Dictionary 265 (1961).

[4] Keahole Def. Coalition v. Bd. of Land & Natural Res., 110 Hawai'i 419, 423-24, 134 P.3d 585, 589-90 (2006) [hereinafter Waimana I], concerned BLNR's March 25, 2002 grant of HELCO's first extension of time to complete construction under conservation district use permit (CDUP) HA-487A. In Waimana I, it was held that

> Waimana Enterprises, Inc. (Waimana) lacked standing to challenge the decision of [the] Board of Land and Natural Resources (BLNR) regarding a time extension that it granted to . . . Hawaii Electric Light Company, Inc. (HELCO) to complete construction of HELCO's Keahole power station inasmuch as Waimana was barred by collateral estoppel and does not have a sufficient property interest to have suffered a due process violation under the Fourteenth Amendment to the United States Constitution or article I, section 5 of the Hawai'i Constitution[.]

The concurring opinion in Waimana I, authored by Substitute Justice Dexter D. Del Rosario, addressed Waimana's arguments to the effect that a November 4, 2003 settlement agreement therein was contrary to law and, hence, unenforceable; that the governmental agencies involved in the case "breached their public duty and the public trust by agreeing to the settlement"; that this court would be abdicating its appellate responsibility if it did not conclude that the third circuit court had improperly vacated its prior ruling in that case that reversed a decision of the BLNR denying HELCO an extension of time to complete construction on its power plant; and that it was denied due process and equal protection. Id. at 435-41, 134 P.3d at 601-07.

[5] Waimana Enters., Inc. v. Bd. of Land & Natural Res., No. 26519 (May 25, 2006) (mem.) [hereinafter Waimana II] related to BLNR's October 10, 2003 grant of a second extension to HELCO.

(May 25, 2006) (mem.) [hereinafter Waimana III].[6] Accordingly, I would affirm in part the February 4, 2005 final judgment and the April 1, 2005 order denying the motion for relief from the order filed November 3, 2004, of the circuit court for the third circuit (the court),[7] as related to Waimana and Hee. However, I would vacate the court's February 4, 2005 final judgment and April 1, 2005 order denying the motion for relief from order filed November 3, 2004, as related to Hui Kako'o. In my view, the instant case should be remanded to the court with instructions to remand to the BLNR to conduct a hearing as to Hui Kako'o's standing.

I.

Waimana, Hee, BLNR, and DLNR have been involved in extensive litigation for more than a decade regarding construction of the Keahole plant, HELCO's Conservation District

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[6] Pursuant to the November 4, 2003 settlement agreement, HELCO agreed to transfer 90% of its existing rights to potable water to the DHHL for use in its residential developments. Potable water is water that is "suitable, safe, or prepared for drinking." Webster's Third New International Dictionary at 1774. In order to transfer these rights, HELCO sought a long-term lease for use of brackish groundwater in the aquifer beneath the Keahole plant.

Waimana Enters., Inc. v. Bd. of Land & Natural Res., No. 26559 (May 25, 2006) (mem.) [hereinafter Waimana III] concerned BLNR's December 12, 2003 grant of a revocable permit to use the brackish groundwater. As stated in Waimana III, HELCO was in the process of pursuing a long-term lease, but due to the length of the process, HELCO applied for the revocable permit until the lease was obtained. Waimana III, memo op. at 3. Prior to this court's disposition in Waimana III, the lease was granted and the revocable permit was cancelled. Id. at 4. It was determined in Waimana III that the appeal regarding the revocable permit did not fall under the mootness exception of cases capable of repetition yet evading review. Id. at 6-8. Hence, the appeal in Waimana III was dismissed as moot. Id. at 8. The present appeal, No. 27159, is specifically concerned with the challenge by Waimana, Hee, and Hui Kako'o to the BLNR's grant of the sixty-five-year lease to HELCO to use the brackish groundwater referred to in Waimana III.

[7] The Honorable Ronald Ibarra presided.

Use Application (CDUA) HA-487A. A November 4, 2003 settlement agreement was eventually reached between the Keahole Defense Coalition, citizens Mahi Cooper and Peggy Ratliff, HELCO, the Department of Health, BLNR, DLNR, and the Department of Hawaiian Home Lands (DHHL) concerning the power plant.[8] Hui Kako'o[9] was not a party to this prior litigation.

In the instant case, HELCO's request for the long-term lease to use brackish groundwater from the Keauhou aquifer was discussed at the BLNR's March 12, 2004 meeting. Dickie Nelson (Nelson), the vice-president of Hui Kako'o, spoke against the sale of the lease. He told BLNR that there are 482 acres of land in Keahole, 153 acres of which abut HELCO's power plant. Nelson expressed his feeling that those lands should be made available for native Hawaiians on the DHHL wait list.

He explained that his organization had "serious concerns" about the impact the issuance of a long-term water lease may have on the rights of Hui Kako'o's members to lease land in Keahole and that adequate studies have not been done to determine such impact. Nelson related that although DHHL supported the water lease, it represented persons who already had leases to land in Keahole, whereas Hui Kako'o represented persons

[8] For related cases, see Hawai'i Elec. Light Co. v. Dep't of Land & Natural Res., 102 Hawai'i 257, 75 P.3d 160 (2003); Keahole Def. Coalition v. Hawaii Elec. Light Co., No. 22921 (dismissed for lack of appellate jurisdiction Jan. 20, 2000); Hawaii Elec. Light Co. v. Keahole Def. Coalition, No. 25153 (dismissed Apr. 12, 2004); Keahole Def. Coalition v. Hawaii Elec. Light Co., No. 25446 (dismissed Jan. 13, 2004).

[9] Hui Kako'o Aina Ho'opulapula (Hui Kako'o) is a purported domestic non-profit corporation that, according to it, "represents the beneficiaries and native Hawaiians on the Hawaiian Home Lands wait list."

on the "wait list." Finally, he asked BLNR to defer rendering a decision, but if a decision was to be made that day, he would request a contested case hearing.

BLNR then moved into "Executive Session" to discuss the requests for a contested case hearing and the environmental impact statement (EIS) with deputy attorney general Yvonne Izu (Izu). Izu informed BLNR that contested case hearings on dispositions "were not allowed." BLNR apparently relied on this court's holding in Sharma v. Dep't of Land & Natural Res., 66 Haw. 632, 673 P.2d 1030 (1983), to deny the requests made by Waimana, Hee, and Hui Kako'o for a contested case hearing. Although not specifically discussed in the minutes of the March 12, 2004 meeting, the parties agree that Sharma was the basis for the BLNR's decision. Accordingly, the requests for a contested case hearing were denied. HELCO's request for the sale of a long-term water lease was then unanimously approved.

II.

On November 3, 2004, the court entered its "Findings of Fact, Conclusions of Law, and Order Affirming the [BLNR's] March 12, 2004 Decision." The relevant findings of fact (findings) were as follows:

> 4. As part of the settlement of the litigation, HELCO agreed to transfer 90 percent of its existing incremental entitlement to 100,000 gallons per day ("gpd") of drinking water to the [DHHL] in order to facilitate DHHL's residential development projects in Kona.
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> . . . .
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> 6. Under the Settlement Agreement, the transfer of drinking water to DHHL is conditioned upon HELCO securing an adequate supply of brackish water to meet its cooling, fire suppression and other industrial requirements at the Keahole generating station.

> 7. Without the alternative supply of brackish water, HELCO cannot transfer the drinking water to DHHL because HELCO will need to apply its available drinking water to industrial requirements in order to operate the Keahole generating station.
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> 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 Kako'o'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.
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> 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 [Waimana and Hee's] and Hui Kako'o's 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.

(Emphases added.) The court did not enter a finding concerning HAR § 13-1-29 with respect to Waimana and Hee similar to finding no. 24 regarding Hui Kako'o. The court entered the following relevant conclusions of law (conclusions):

> 5. Hui Kako'o has failed to demonstrate that it has standing to appeal the BLNR's March 12, 2004 decision.
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> 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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> 11. While it has been recognized that native Hawaiians may have a special interest in proceedings affecting their rights traditionally and customarily practiced for subsistence, cultural, and religious purposes, see [Pub. Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995) (PASH II)], this interest must also be personal -- i.e. "clearly distinguishable from that of the general public," and the association's members must demonstrate that they actually engage in the aforementioned activities. See [Pub. Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 79 Hawai'i 246, 254, 900 P.2d 1313, 1321 (1993) (PASH I)], and Ka Pa'akai O Ka'aina v. Land Use Comm'n, 94 Hawai'i 31, 34, 7 P.3d 1068, 1071 (2000). Hui Kako'o has failed to make such a showing.
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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. [Bd.] of Directors, 100 Hawai'i 242, 257, 59 P.3d 877, 892 (2002). Hui Kako'o (and [Waimana and Hee]) failed to prove standing at the beginning

of the case.

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 subsistence, cultural, or religious purposes.

14. Unlike the detailed evidence of traditional and customary practices presented in [PASH I] and [Ka Pa'akai O Ka'aina], 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 Kako'o's arguments to this [c]ourt for the first time on appeal and unsupported by evidence, that its members "may" exercise such practices [are] insufficient as a matter of law to confer standing.

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17. Hui Kako'o'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) [of the HAPA], and accordingly, this [c]ourt lacks appellate jurisdiction to hear their [sic] appeal. See In re: [Int'l Bhd.]of Painters [&] Allied Trades, 104 Hawai'i 275, 281, 88 P.3d 647, 653 (2005) . . . (holding that in order to be entitled to judicial review pursuant to HRS [c]hapter 91, a party "must have participated in a 'contested case' hearing" (quoting Alejado v. City & County of Honolulu, 89 Hawai'i 221, 226, 971 P.2d 310, 315 (App. 1998) (construing HRS § 91-14(a))).

18. The BLNR's March 12, 2004 public meeting was not a contested case hearing.

19. There is no evidence in the record that the Appellant[10] 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 Chapter 91. [Pele Def. Fund v.] Puna Geothermal Venture, 77 Hawai'i [64,] 67-68, 881 P.2d [1210,] 1213-14 [(1994)]; Simpson v. DLNR, 8 Haw. App. 16, 23, 791 P.2d 1267, 1273 (1990).

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] (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); HRS § 171-13 [(1993)] (providing that the BLNR may "[d]ispose of public land in fee simple, by lease, lease with option to purchase, license or permit"); HRS § 171-1 [(1993)] ("'Land' includes all interests therein and natural resources including water, minerals, and all such things connected with land, unless otherwise expressly provided.") (Emphases added.)

21. HELCO's lease request was granted pursuant to HRS

[10] Although the court refers to "the Appellant," based on finding of fact (finding) 24, it is assumed it was referring to Hui Kako'o.

§ 171-58 [(1993)]. 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. Appellant has failed to demonstrate any statutory basis for a contested case hearing. See HRS § 171-58 (c)-(g); Bush v. Hawaiian Homes [Comm'n], 76 Hawai'i 128, 870 P.2d 1272 (1994) (holding that if the statute governing the activity in question does not mandate a hearing prior to the administrative agency's decision-making, the actions of the agency do not amount to a "final decision or order in a contested case" from which an appeal is possible).

22. The [c]ourt further finds that the Appellants were not constitutionally entitled to a contested case hearing. Claims for a due process right to a hearing [require] an analysis of: 1) whether the particular interest which the claimant seeks to protect by a hearing is "property" within the meaning of the due process clauses of the state and federal constitutions; and 2) if the interest is "property," what specific procedures are required to protect it. Aquiar v. Hawai'i Housing [Auth.], 55 Haw. 478, 495, 522 P.2d 1255, 1266 (1974).

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27. The [c]ourt concludes that the actual procedures used by the BLNR in this matter for the approval of a lease through an auction comported with due process, because, among other things, the approval involved a matter of internal, custodial management. See Sharma.

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29. There is no evidence of any procedural impropriety during the public meeting or during the decision-making process. Accordingly, the [c]ourt finds that due process was satisfied under the circumstance of this case. . . .

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31. Appellants' argument that Hawaii water law and the public trust doctrine - in and of themselves - [require] a contested case hearing under the circumstances of this case, is also without legal support.

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35. The information before the BLNR at the March 12, 2004 hearing was sufficient for it to discharge its responsibilities pursuant to the public trust doctrine.

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37. The BLNR's approval of HELCO's request to auction a lease to waters from the Keauhou aquifer was consistent with the public trust doctrine in that doing so protected drinking water resources as provided by the Settlement Agreement. The protection of drinking water resources is an important public trust purpose. [In re Waiola O Molokai, Inc.,] 103 Hawai'i [401,] 429, 83 P.3d [664,] 692 [(2004)].

. . . .

39. The BLNR, in exercising its custodial management authority over state property permitted under Sharma, was not acting in its regulatory or adjudicatory capacity to "regulate" the use of the water in this instance. Rather, the BLNR, as the trustee of the water, as it is with public lands, acted in its proprietary, custodial function to approve the lease of the water rights within its own jurisdiction.

40. Unlike Waiahole I and Waiola, where the [Commission on Water Resources Management] was required to adjudicate competing uses for limited ground water resources

within designated ground water management areas under its jurisdiction, the BLNR properly exercised its proprietary custodial management in considering HELCO's request and granting the auction of a lease for the brackish water at issue.

41. The [c]ourt finds that HELCO's request to use two-thirds of one percent of the sustainable yield of brackish water from the Keauhou aquifer for industrial purposes in order to effectuate its agreement to transfer 90 percent of its existing incremental entitlement of drinking water to DHHL is in the public interest and consistent with BLNR's public trust responsibilities.

42. The [c]ourt further finds that the record supports the fact that the BLNR properly balanced and considered the public interest factors, and met its obligations under the public trust doctrine.

43. Appellant further argues that the water lease at issue in this case is non-consumptive and that HRS § 171-58(c) therefore requires that, prior to approving a water lease, the BLNR hold a public hearing, approve a conservation district use permit and [EIS], and obtain approval from the governor and a concurrent resolution from the legislature. The [c]ourt disagrees.

44. Appellant fails to raise the "non-consumptive" argument before the BLNR and [has] thus waived the argument on appeal.

45. Even assuming this [c]ourt considers the argument, the [c]ourt finds that the water lease at issue is consumptive as a matter of fact and law.

46. The fundamental starting point in statutory construction is to look to the language of the statute itself, inasmuch as "a presumption exists that the words in a statute express the intent of the legislature." Morgan v. Planning Dep't, County of Hawai'i, 104 Hawai'i [173,] 185, 86 P.3d [982,] 994 (2004) (citation omitted). In looking to the language of the statute, "courts are bound, if rational and practicable, to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant . . . ." Director, Dep't of Labor & Indus. Relations v. Kiewit Pac. Co., 104 Hawai'i 22, 27-28, 84 P.3d 530, 535-36 (2004) (citation omitted).

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48. The plain language of HRS § 171-58(c) defines non-consumptive use as water "returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of the water or biota in the stream or other body of water[.]" ([E]mphasis added.)

49. Based on the plain language of HRS § 171-58(c), the water lease issued by BLNR in this case is for consumptive use as a matter of law, given that, in the processing of water for use at the Keahole generating station, approximately forty (40) percent of the water will be lost, and the water that is lost will not be reinjected into the Keauhou aquifer or any other body of water.

50. Even assuming the water lease is construed as non-consumptive, the BLNR's actions complied with HRS § 171-58(c), inasmuch as the plain language of HRS § 171-58(c) does not require prior approval from the governor and legislature for non-consumptive water leases.

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52. The plain language of HRS § 171-58(c) provides the

> state with discretion to lease its water rights, inasmuch as disposition of water rights "may" be made by lease. If the State exercises this discretion, HRS § 171-58(c) mandates that such lease be subject to legislative disapproval, inasmuch as the next sentence provides that disposition "shall" be subject to legislative disapproval.
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> 55. The [c]ourt notes that the foregoing is also consistent with the BLNR's and DLNR's interpretation of HRS § 171-58(c), and their interpretation of the statute is entitled to deference by this [c]ourt. Kiewit Pac. Co., 104 Hawai'i at 29, 84 P.3d at 537.
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> 56. Inasmuch as the BLNR was not required to select the alternative method of obtaining prior government approval, the BLNR fully complied with HRS § 171-58(c) and permissibly chose to issue the subject water lease via subsequent legislative disapproval and not prior governor and legislative approval.

(Emphases added.)

III.

On appeal, Hui Kako'o argues that (1) "this court has appellate jurisdiction to determine whether a contested case hearing should have been held," (2) it "has standing to appeal the decision of the [BLNR]," (3) "the [BLNR] has an affirmative trust obligation to determine the impact of its actions on water resources and native Hawaiian rights," (4) "the [BLNR] violated Hui Kako'o's constitutional due process rights by denying [it] an opportunity to be heard in a contested case hearing," inasmuch as (a) "a contested case hearing is required by law to determine the rights, duties or privileges of specific parties," (b) "the [BLNR] acted in an adjudicatory capacity when it approved the issuance of the water lease and determined that it would not impact Hui Kako'o's native Hawaiian rights," and (c) "the State has granted contested case hearings in other cases," (5) "[Sharma] is distinguishable from the case at bar and should not be used as the basis for a sweeping ruling that any and all

determinations made prior to the actual dispositions by the State do not require contested case hearings,"[11] (6) "the State failed to comply with the procedural safeguards explicitly outlined in HRS § 171-58(c) to insure that the [BLNR] properly determines that it is appropriate to issue a water lease," insofar as (a) "HRS § 171-58(c) sets forth the requirements for water leases issued by the [BLNR]," (b) "the subject water lease is for non-consumptive purposes," and (c) "the [BLNR] failed to properly assess the potential impacts associated with issuing the subject water lease as contemplated by the provisions of HRS § 171-58(c)," and (7) "the [court] erred in denying Hui Kakoʻo's motion for relief from order filed November 3, 2004." In conjunction with its arguments, Hui Kakoʻo asserts that the court erred in finding no. 20 and conclusion nos. 5, 6, 13, 15, 17, 20, 21, 22, 31, 39, 49, 50, and 56.

In its reply brief, Hui Kakoʻo maintains that (1) "[it] acted reasonably to preserve its rights and the State's reliance on Sharma was misplaced," (2) "the State cannot avoid its trust obligations simply because there was a settlement agreement or

[11] In support of its contention that Sharma v. Dep't of Land & Natural Res., 66 Haw. 632, 673 P.2d 1030 (1983), is distinguishable from the instant case, Hui Kakoʻo contends that (1) the "very narrow" holding of Sharma is only that the BLNR is not required to conduct a contested case hearing for the termination of a lease pursuant to HRS § 171-39 (1993) where the terms of the lease explicitly provide for cancellation upon breach of its terms, (2) the case Sharma relies upon, United States v. Blumenthal, 315 F.2d 351 (3d Cir. 1963), involved a month-to-month lease, unlike the present case, inasmuch as Hui Kakoʻo is claiming that the lease may impact native Hawaiian rights, recognized as a constitutionally protected property interest, (3) when the State issues a water lease, it is not acting like a private lessor and is bound by its duties under statutory and constitutional laws, and (4) Sharma deals with the leasing of "public lands," which should not include the leasing of water rights subject to special constitutional trust obligations.

because the proper paperwork had not been filled out," (3) the BLNR improperly treated the lease as a "ministerial act" and summarily denied Hui Kako'o's request for a contested case hearing without questioning Nelson as to native Hawaiian rights at issue, (4) "the [BLNR] had an affirmative duty to identify and protect customary native Hawaiian rights," (5) "[it] has standing to challenge the decision of the [BLNR] because its request for a contested case hearing was summarily denied and it had no opportunity to substantiate its claims," (6) "in order to establish appellate jurisdiction, the contested case hearing below does not have to comply with Chapter 91, HRS," and (7) "this court has jurisdiction to determine if a contested case hearing should have been held, even if no contested case hearing was held below."

IV.

For a contested case hearing to be "required by law" pursuant to HRS 91-14(a), and Hui Kako'o thus to be entitled to one, the hearing must be required by agency rule, statute, or the constitution. PASH II, 79 Hawai'i at 431, 903 P.2d at 1252. As previously noted, at the March 12, 2004 meeting, Nelson asked the BLNR to defer a decision on the long-term lease so that he could provide more information. He further stated that if the BLNR made a decision that day, he would request a contested case hearing to provide more information.

Clearly, Nelson was attempting to secure an opportunity for Hui Kako'o to provide information regarding the effect the

long-term lease would have on its members' purported rights to the land surrounding HELCO's power plant. Hui Kako'o also made this contention before the court in its "Motion for Stay of Decision Dated March 12, 2004." Therein, Hui Kako'o asserted that the BLNR should not have relied on Sharma to deny Hui Kako'o a contested case hearing. In conclusion no. 20 related above, the court relied on Sharma in deciding that a contested case hearing was not required in the instant case.[12]

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[12] Sharma involved the lease of a tract of land on Maui to the plaintiff by the State through DLNR and BLNR action. 66 Haw. at 634, 673 P.2d at 1032. The lease was to run for a term of twenty-nine years beginning on May 11, 1973. Id. Pursuant to the terms of the lease, the plaintiff was required to pay rent, maintain a comprehensive public liability insurance policy, and post a performance bond. Id. The plaintiff failed to post the bond, but the BLNR overlooked this failure until 1975, when the plaintiff requested approval to subdivide the land and sublease a portion of it. Id.

The BLNR denied his request, but its review revealed that the plaintiff still had not posted the bond and, in the meantime, had allowed the insurance policy to lapse. Id. The plaintiff was advised by letter to cure these defects, but failed to do so. Id. at 634-35, 673 P.2d at 1032. The DLNR then informed the plaintiff that a recommendation to terminate his lease would be presented to the BLNR at its next meeting. Id. at 635, 673 P.2d at 1032. This suggestion was adopted by the BLNR at its November 7, 1975 meeting. Id. The BLNR authorized a termination of the lease unless the plaintiff complied with its terms within sixty days. Id.

The plaintiff was also notified that he had further breached the lease by failing to make his most recent rental payment. Id. Plaintiff did not cure any of his defaults within the sixty-day period and on February 13, 1976 the BLNR voted to cancel his lease. Id. On February 17, 1976, the plaintiff paid his delinquent rent and requested that the BLNR reconsider the cancellation of the lease. Id. at 635, 673 P.2d at 1032-33. However, due to the continuing non-compliance with the other terms of the lease, the BLNR rejected his request and the State resold the lease at public auction. Id. at 635, 673 P.2d at 1033.

The plaintiff appealed to the circuit court of the first circuit arguing that he had been denied due process because the BLNR failed to follow HAPA and provide him notice of the contemplated action and a contested case hearing prior to the cancellation. Id. at 636, 673 P.2d at 1033. The court granted the State's motion for summary judgment and the plaintiff appealed. Id.

This court determined that HAPA does not apply to all agency actions and that the cancellation of a lease did not require notice or a contested case hearing. Id. It was explained that an agency must comply with the requirements of HAPA when it is acting in its rule-making or adjudicative capacity, but that agencies also deal with issues related to their "internal management." Id. at 637, 673 P.2d at 1033-34. This court observed that what constitutes "internal management" had not been clearly defined, but that the legislative history of HAPA suggested that "custodial management" of public

(continued...)

V.

Unlike the majority, I would conclude that finding no. 24 and conclusion no. 19, relating to Hui Kako'o's failure to

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[12](...continued)
property is primarily a matter of "internal management." Id. at 638, 673 P.2d at 1030. The prior case of Holdman v. Olim, 59 Haw. 346, 355-56, 581 P.2d 1164, 1170 (1978), was then referred to, in which this court stated that "[w]e think that the internal management of an agency necessarily includes the custodial management of public property entrusted to the agency. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Sharma, 66 Haw. at 638, 673 P.2d at 1034 (internal quotation marks and citations omitted).

The provision governing the lease of public land, HRS § 171-20 (1993), was determined not to require a contested case hearing prior to the termination of a lease. Id. at 639-40, 673 P.2d at 1035. It was noted that HRS § 171-20 expressly empowers the BLNR to terminate a lease without legal process upon a breach of its terms inasmuch as the BLNR is functioning as any other landlord. Id. at 640, 673 P.2d at 1035. This court addressed the plaintiff's claim that he was denied due process by noting that he had had "ample opportunity to demonstrate" his position:

> [Plaintiff] nevertheless argues he was denied due process by the summary termination of his tenancy. We do not find the argument persuasive, for the lease provision with reference . . . [thereto] . . . [was] valid and binding upon . . . [him] in the same manner as though the lessor had been a private person. And he was afforded ample opportunity to demonstrate to the trial court that he was not actually in default or that the State had breached the agreement. No due process violation appears in the record.

Id. at 641, 673 P.2d at 1036 (emphasis added). The circuit court's grant of summary judgment was therefore affirmed. Id. at 642, 673 P.2d at 1036.

In the instant case, similar to Sharma, the provision allowing the BLNR to issue the long-term lease does not require a hearing prior to agency action. The only mention of a "public hearing" found in HRS § 171-58(c) relates to non-consumptive uses of water. As stated previously, in finding no. 11 and conclusion nos. 43, 44, 45, 48, 49, 50, and 52, the court determined that HELCO's use of the water from the Keauhou aquifer was consumptive. Hui Kako'o only challenges conclusion nos. 49 and 50. Conclusion no. 49, however, is supported by uncontested, and hence binding, finding no. 11, which explains why the lease is for a consumptive use of water. See Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) (explaining that generally "[u]nchallenged findings are binding on appeal"). Accordingly, I am not persuaded that conclusion no. 49 is wrong. Conclusion no. 50 posits a hypothetical based on the lease being construed as one for non-consumptive water use. As this is not the case, Hui Kako'o's challenge to conclusion no. 50 need not be addressed. Hui Kako'o has not effectively challenged either conclusion no. 49 or 50 and, therefore, has not refuted the court's determination that HELCO's use of the water was consumptive. Accordingly, as Hui Kako'o has not refuted this determination and the plain language of HRS § 171-58(c) does not require a contested case hearing for leases for consumptive water use, Hui Kako'o was not entitled to a contested case hearing under HRS § 171-58(c).

file a written petition with BLNR for a contested case hearing as required by HAR § 13-1-29, do not preclude a determination that Hui Kako'o is entitled to a contested case hearing if it can establish standing. In this regard, as Hui Kako'o asserts, "even if the [BLNR] or the DLNR staff had advised Hui Kako'o of the [requirement of] filling out of a written request, this would have been futile, based upon the [BLNR's] interpretation of Sharma. The law does not require the doing of a futile act."

I believe that Hui Kako'o is correct.

At the March 12, 2004 meeting, BLNR conclusively determined that a contested case hearing was not required in the instant case. Any effort by Hui Kako'o to file a written request for a contested case hearing, after BLNR's oral rejection of its request, would have been futile. The law does not require Hui Kako'o to undertake a futile act. See e.g. Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 537-38, 40 P.3d 930, 939-40 (2002) (noting that where the Hawai'i Government Employees Association (HGEA), the exclusive bargaining representative of the complainant, did not respond to or participate in meetings concerning complainant's individual grievance, but separately engaged in negotiations regarding the general subject matter of the grievance with the public employer, it is futile for complainant to request that the HGEA proceed to the last grievance step, which only the HGEA could undertake, before

filing a prohibited practice complaint against employer).[13] Accordingly, a contested case hearing is not foreclosed by

[13] Other cases have held the same. See Poe v. Hawaii Labor Relations Bd., 105 Hawai'i 97, 102, 94 P.3d 652, 657 (2004) (holding that an employee who is prevented from exhausting his or her contractual remedies as a result of the union's breach of duty of fair representation as a bargaining agent may bring an action himself against an employer for breach of a collective bargaining agreement, but noting that in this case the employee did not establish that he was deprived of his contractual remedies insofar as he did not request that the union advance his claims to Step 4 arbitration); In re Doe Children, 105 Hawai'i 38, 59, 93 P.3d 1145, 1166 (2004) (recognizing that Hawai'i has a "futility exception," although it was inapplicable because the administrative process could have provided complainant appropriate relief for grade placement of disabled children if he had requested an impartial due process hearing; however, complainant did not pursue such an avenue, thus the source of the "'futility' [was] not the administrative process but, rather, the party who was seeking relief"); Hokama v. Univ. of Hawai'i, 92 Hawai'i 268, 273, 990 P.2d 1150, 1155 (1999) (recognizing that although "[a]n aggrieved party need not exhaust administrative remedies where no effective remedies exist," in this case it was "unclear from the language of the agreement whether the damages sought by [complainant] are available under the [University of Hawai'i] grievance procedure."); Waugh v. Univ. of Hawai'i 63 Haw. 117, 129, 621 P.2d 957, 967 (1980) (noting that the appellant was not required to follow University administrative procedures because there were no established internal procedures for handling claims such as his and the ad hoc procedures created were not binding on the University and the Board of Regents); Baldeviso v. Thompson, 54 Haw. 125, 132, 504 P.2d 1217, 1222 (1972) (concluding that because the reasonableness of the 30-day time limit in the welfare application process must be evaluated according to the amount of resources allocated to accomplish the task, as well as other surrounding circumstances, the claims of the appellants are of a nature that does not require exhaustion of administrative remedies); Winslow v. State, 2 Haw. App. 50, 56, 625 P.2d 1046, 1051 (1981) (opining that in the enactment of the contract's grievance procedures, it was not contemplated that the employee would utilize the procedures in a grievance against the union itself, and no provisions were incorporated into the contract to address the event; thus, the appellant could not be required to exhaust contractual remedies in an action against the union where no such remedies actually existed). I note that although the majority maintains that several of the preceding cases are distinguishable, it fails to provide any discussion or argument to support this contention. Further, the majority appears to agree with the analysis of Winslow and Poe, 97 Hawai'i at 537-38, 40 P.3d at 939-40, made herein, inasmuch as it has incorporated our supporting cases into its discussion.

Hui Kako'o cites to State v. Grace, 107 Hawai'i 133, 140 n.7, 111 P.3d 28, 35 n.7 (2005). In a footnote in Grace, the Intermediate Court of Appeals (ICA) recognized that a hearsay declarant would not be considered unavailable for confrontation clause purposes unless the prosecution had made a "good faith" effort to obtain his or her presence at trial. Id. However, it was concluded that if there was no possibility of obtaining the hearsay declarant's presence at trial, for instance because of his or her death, "good faith" required nothing of the prosecution. Id. Although Grace contains the general proposition that the law does not require a party to perform a futile act, the cases provided supra are more on point with the instant case.

finding no. 24 and conclusion no. 19.[14]

VI.

A.

The majority maintains that Hui Kako'o should have filed a written petition for a contested case hearing, despite the BLNR's previous denial of its oral request, and that Hui Kako'o's failure to do so is fatal to this court's review under HRS § 91-14(a). Majority opinion at 24-25. As noted above, Nelson asked BLNR to defer rendering a decision on HELCO's request for the lease, but if the decision was to be made that day, he would request a contested case hearing to provide "more information" to BLNR. Rather than deferring its decision, BLNR moved into "Executive Session" to consult with Izu. After resuming the meeting, the minutes show that BLNR denied Hui Kako'o's request, stating that "[Izu] clarified that contested case hearings on dispositions were not allowed. Hence a contested case hearing is not available." (Emphasis added.) By its denial, BLNR indicated, in effect, that it would reject any

[14] Based on this holding, Hui Kako'o's challenges to conclusion no.17, which states that the instant appeal does not arise from a contested case hearing, conclusion no. 31, rejecting Hui Kako'o's argument that Hawai'i water law and the public trust doctrine require a contested case hearing, and conclusion no. 39, related to BLNR acting in a custodial function in approving the lease, need not be discussed. Also, Hui Kako'o's challenges to conclusion nos. 20 and 22, stating that a contested case hearing was not required "by law" or by due process need not be addressed, inasmuch as Hui Kako'o's entitlement to a contested case hearing would be determined after the hearing on its standing had taken place. Additionally, based on this holding, Hui Kako'o's argument in (4)(c) that "the State has granted contested case hearings in other cases" or HELCO's assertion in (2)(f) that Hui Kako'o was not entitled to a contested case hearing simply because contested case hearings may have been held in other unrelated matters, need not be reached. I also need not discuss further Hui Kako'o's argument in (7) that "the [court] erred in denying Hui Kako'o's motion for relief from order filed November 3, 2004."

such request because it believed, as it argues on appeal, that contested case hearings are not "required on dispositions [of water leases]." In other words, BLNR's response signified that a contested case hearing would not be granted to any party, under any circumstances. This rejection was without condition and was, therefore, absolute.

In its assertion that "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," majority opinion at 28, the majority ignores Izu's representations to BLNR. As discussed, she apparently informed BLNR that contested case hearings were not available. This left no possibility of a change in BLNR's decision and cannot reasonably be viewed as anything less than final.

B.

Nor did the BLNR give leave to file a written petition for a contested case hearing following the oral disallowance. Such leave is not contemplated under HAR § 13-1-29. The plain language of HAR § 13-1-29, see supra note 1, does not state that a party should file a written petition for a contested case hearing after a rejection of its oral request by the BLNR, as the majority would have it. The information required to be included in a written petition, id., e.g. "the legal authority under which the proceeding, hearing or action is to be held or made," "the petitioner's interest that may be affected," "the disagreement, denial, or grievance which is being contested by the petitioner,"

"the basic facts and issues raised," and "the relief to which the party or petitioner seeks or deems itself entitled," HAR § 13-1-29, consists of matters necessary to determine whether a contested case hearing should be held. Such information would be irrelevant once BLNR rendered its decision on the request.

With all due respect, to require, then, that a written petition was necessary after the rejection by BLNR is a construction of the rule that would render the rule "absurd" under our standards and, thus, is to be avoided by this court. See Leslie v. Bd. of Appeals, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) (stating that "[d]eparture from the literal construction of a statute is justified only if such a construction yields an absurd and unjust result obviously inconsistent with the purposes and policies of the statute (internal quotation marks and citations omitted)); Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 454, 99 P.3d 96, 105 (2004) (declaring that "[t]he general principles of construction which apply to statutes also apply to administrative rules"); State v. Cornelio, 84 Hawai'i 476, 484, 935 P.2d 1021, 1029 (1997) (noting that "the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality" (internal quotation marks and citation omitted)).

C.

The majority notes that HAR § 13-1-29(a) does not specify under what circumstances a party is required to file a

written petition requesting a contested case hearing, but asserts that "requiring a petitioner to file a written petition after relief has already been granted is nonsensical[,]" majority opinion at 28 (emphasis in original), and notes that "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[,]" id. at 28 n.17. It would be equally "nonsensical," id. at 28, however, to require a petitioner to file a written petition after an oral request for a contested case hearing has been denied, as the majority proposes. The provision allowing BLNR to waive the time requirement for filing the written petition would be equally irrelevant after an oral request for a contested case hearing had been denied inasmuch as the petition would not serve its purpose.

The simple fact is that HAR § 13-1-29 is silent as to the procedure to follow in the event that BLNR rejects a request for a contested case hearing before a written petition is filed. The only reasonable and logical reading of HAR § 13-1-29 is that a request is an event separable from the written petition for a contested case hearing. As mentioned before, the rule enumerates matters to be included in a written petition germane to determining whether a contested case hearing should be held.

The written petition plainly would be unavailing once the BLNR issued its decision on the oral request. It would be fruitless, then, to submit a contested case petition. As explained supra, parties need not exhaust administrative remedies

when to do so would serve no purpose. It is only when such a decision has not yet been made that a written petition, and the information contained therein, would be useful to the BLNR and aid it in deciding the question. Accordingly, as discussed previously and contrary to the majority's assertion, this court is not bound on appeal by finding no. 24, related to Hui Kako'o's failure to file the written petition, inasmuch as, as a matter of law, doing so would have been futile.[15] See cases cited supra.

Because a written petition would only be useful to BLNR

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[15] In support of the proposition that Hui Kako'o is precluded from seeking judicial review, the majority relies on Simpson v. Dep't of Land & Natural Res., 8 Haw. App. 16, 791 P.2d 1267 (1990), recently overruled in Aha Hui Malama O Kaniakapupu v. Land Use Comm'n, 111 Hawai'i 124, 139 P.3d 712 (2006), to the extent that it remanded that case with instructions to hold a contested case hearing. Majority opinion at 21-23. Simpson, however, is inapposite. In that case, the futility of a written petition was not addressed, or relevant, as a previous oral request had not been denied. Simpson, a pro se party appeared at a public hearing held by the BLNR on his application for a commercial boat mooring permit. 8 Haw. App. at 18, 791 P.2d at 1270.

At a subsequent meeting, the BLNR denied Simpson's application. Id. at 19, 791 P.2d at 1270. Simpson filed a notice of appeal in the second circuit court. Id. at 19, 791 P.2d at 1271. DLNR's motion to dismiss was granted and Simpson appealed. Id. The ICA determined that Simpson had not properly requested a contested case hearing, thus providing an inadequate record for judicial review. Id. at 24, 791 P.2d at 1273.

The ICA recognized that, at the time of the hearing he attended, Simpson, as a pro se applicant, was unaware of the requirements of HAR § 13-1-29 and concluded that BLNR should have informed him of his right to request a contested case hearing. Id. at 26, 791 P.2d at 1274. The case was then remanded so that in the interest of fairness, a contested case hearing could be held. Id. The majority states that this court criticized the ICA's decision to remand the case in a footnote in Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 69 n.10, 881 P.2d 1210, 1215 n.10 (1994). Majority opinion at 23-24 n.15.

However, like Simpson, Pele Defense Fund and Aha Hui are inapposite. The filing of a written petition requesting a contested case hearing was not at issue in Pele Defense Fund and, therefore, the futility of doing so after the denial of an oral request was not at issue. That case focused on entitlement to a contested case hearing based on constitutional due process. 77 Hawai'i at 68-72, 881 P.2d at 1214-18. Likewise, Aha Hui concerned whether a hearing constituted a contested case hearing subject to judicial review. 111 Hawai'i at --, 139 P.3d at 713. That case did not involve a request for a contested case hearing. Aha Hui, therefore, did not consider the denial of an oral request for a contested case hearing nor did it discuss the futility of a subsequent written petition. Accordingly, Pele Defense Fund and Aha Hui are wholly irrelevant to the determination of whether the instant case should be remanded for a hearing on Hui Kako'o's standing.

when a decision has not been made on an oral request for a contested case hearing, the majority is incorrect in its assertion that "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." Majority opinion at 29. This language is not rendered "superfluous" inasmuch as such language logically would apply when a decision has not yet been made by the agency. Therefore, such an interpretation would not ignore "the cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute," Coon v. City & County of Honolulu, 98 Hawai'i 233, 259, 47 P.3d 348, 374 (2000), as the majority maintains. Majority opinion at 29. Manifestly, it would not be "rational and practicable," Coon, 98 Hawai'i at 259, 47 P.3d at 374, to require a party to file a written petition for a contested case hearing after its oral request had already been denied. Rather, it would make the request process meaningless and render the rule irrational and impractical. With all due respect, it is the majority, then, that ignores the cardinal rule of statutory construction that this court should avoid construing a statute in a way that would lead to an absurd result. See discussion supra.

D.

The majority posits that "it cannot be said that the BLNR had ample time to fully consider the merits of [the oral requests of Hui Kakoʻo, Waimana, and Hee]," majority opinion at 27, and rests its application of HAR § 13-1-29 on the assertion that the rule "anticipates exactly what occurred in this case -- an oral request and insufficient time to deliberate, resulting in a perfunctory ruling[,]" id. at 28. Nothing could be further from the facts.

The majority's assertions are wholly speculative and without any support in the record. It should be noted that the minutes of the March 12, 2004 meeting do not reflect that BLNR needed more time to consider Hui Kakoʻo's oral request or that it had insufficient time to discuss or to deliberate on the request. There is also nothing in the record to suggest that the BLNR's denial of Hui Kakoʻo's request for a contested case hearing was "perfunctory" or "cursory," as the majority suggests. Id. at 26-27. To the contrary, BLNR clearly considered Hui Kakoʻo's request important enough to move into Executive Session to consult with Izu.

Rather, it would appear more logical and in consonance with the facts and with BLNR's position on appeal to conclude that inasmuch as Izu apparently had advised BLNR that such contested case hearings were not allowed, BLNR would not require much time to determine that it would deny Hui Kakoʻo's request for one. On the other hand, the majority's argument that the

BLNR did not have time to adequately consider Hui Kako'o's request for a contested case hearing actually supports the conclusion herein that a hearing should be held in which Hui Kako'o could provide BLNR "more information" regarding standing. Indeed the majority states, "Appellants should be afforded another opportunity to provide more information to the BLNR." Majority opinion at 29-30 (emphasis added). However, the majority inexplicably denies Hui Kako'o this "second opportunity," id. at 30, because according to the majority, Hui Kako'o could have "presented a subsequent written petition[,]" id. By this strained reasoning the majority lays its perceived defect of the "perfunctory" and "cursory" "ruling" it attributes to the BLNR at the feet of Hui Kako'o.

E.

Additionally, the majority construes HAR § 13-1-29(a) as indicating that BLNR will "reconsider" a previous denial of an oral request for a contested case hearing upon the filing of a written petition and that after this reconsideration BLNR could have reversed itself and granted Hui Kako'o's request. Majority opinion at 27-28. However, HAR § 13-1-29 does not refer at all to reconsideration of a decision rejecting a request for a contested case hearing. Thus, the suggestion that HAR § 13-1-29 would give Hui Kako'o another chance to provide BLNR more information and the majority's reliance on In re Doe Children, 105 Hawai'i 38, 60, 93 P.3d 1145, 1167 (2004), majority opinion

at 30, plainly is at odds with the language of the rule.[16] Further, it is again speculation to suggest that the BLNR might have reversed itself and granted Hui Kako'o's request for a contested case hearing had it filed a written petition, as the majority proposes. Id. As mentioned before, BLNR's determination was based on advice from Izu and, apparently, a legal interpretation of cases. This evidences that Hui Kako'o, as did all the other parties, took BLNR at its word and understood its decision as final, and thus appealable.

VII.

Having determined that Hui Kako should not be deprived of its right to appeal for failure to comply with HAR § 13-1-29, Sharma does not presage the appropriate result in this case. In Sharma, this court specifically stated that the plaintiff was "afforded ample opportunity" to show that he was not in default of the terms of his lease. Sharma, 66 Haw. at 641, 673 P.2d at 1036. The procedure followed here was not comparable.

[16] The majority relies on In re Doe Children, which held that a surrogate parent could not avail herself of the "futility exception" to obtain judicial review of a family court order placing her surrogate child in the eighth grade in school, rather than the ninth grade. 105 Hawai'i at 60, 93 P.3d at 1167. In that case the parent could have requested an administrative due process hearing to review the order, but did not do so. Id. However, it was noted that, had the surrogate parent requested an administrative hearing on the surrogate child's behalf, the administrative process was specifically designed to afford the surrogate child an effective remedy regarding the family court order. Id.

In the instant case, the written petition would not have provided an effective remedy insofar as BLNR's decision at the March 12, 2004 meeting rendered it a futile exercise. Hui Kako'o would not be afforded a similar opportunity to avail itself of an administrative process inasmuch as its request for a contested case hearing had already been rejected.

Hui Kako'o asserts that "[i]t was only by chance that Hui Kako'o's president, Blossom Feiteira[,] became aware of the matter and asked [Nelson], a member of Hui Kako'o and resident of Kona, to attend the meeting," and that "[e]ven though the hearing was held on Oahu, Hui Kako'o appeared at the hearing pro se through [Nelson]." Further, Hui Kako'o specifically states that "at the March 12, 2004 meeting, Hui Kako'o did not have time to fully review and comprehend what impacts could result from the issuance of the lease." As stated previously, Nelson requested that the matter be deferred by BLNR in order for Hui Kako'o to provide "more information." He also asked that a contested case hearing be held.

Article XII, section 7 of the Hawai'i Constitution, entitled "Traditional and Customary Rights," requires the protection of traditional native Hawaiian practices, stating that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." (Emphasis added.) In furtherance of this constitutional mandate, in PASH I it was determined that "all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities

for preserving them. At least that much is required by article XII, § 7." 79 Hawai'i at 253-54, 900 P.2d at 1320-21 (emphasis added).

As Hui Kako'o argues, the minutes of the March 12, 2004 meeting are devoid of any effort by BLNR to determine whether or not the members of Hui Kako'o took part in such practices. According to the minutes, immediately after Nelson spoke, BLNR conducted a ten minute "Executive Session" with Izu and then determined that a contested case hearing was not available based on her advice. I believe, like the PASH I court, that article XII, section 7 requires more. In my view, under these circumstances, BLNR should have made an inquiry regarding practices protected by article XII, section 7.

In the interest of fairness, Hui Kako'o should be given an opportunity to establish its standing to challenge the long-term lease. See PASH II, 79 Hawai'i at 443, 903 P.2d at 1263 (stating that "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7" (emphasis in original)). This court has held that standing to challenge government action can be based on the exercise of native Hawaiian rights. See Ka Pa'akai O Ka'ina, 94 Hawai'i at 42, 7 P.3d at 1079 (stating that "[w]ith regard to native Hawaiian standing, this court has stressed that the rights of native Hawaiians are a matter of great public concern in Hawai'i" and recognizing that "[o]ur fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public

interest, and that the judicially imposed standing barriers should be lowered when the needs of justice would be best served by allowing a plaintiff to bring claims before the court" (internal quotation marks and citations omitted)).

Therefore, BLNR was required to conduct a hearing in order to provide Hui Kako'o the opportunity to present any evidence it may have that its members actually use the area surrounding HELCO's power plant for native Hawaiian traditional and customary practices. If Hui Kako'o can make a showing that "some of its members are 'specifically, personally and adversely affected by the [BLNR's] action," PASH I, 79 Hawai'i at 253 n.11, 900 P.2d at 1320 n.11, it will be deemed "an aggrieved person with standing," id. A contested case hearing would then be "required by law" pursuant to HRS 91-14(a), in light of the mandates of article XII, section 7, and PASH II.

Finding nos. 20, 21, and 22 and conclusion nos. 5, 6, 11, 13, 14, and 15 relate to Hui Kako'o's failure to produce testimony or evidence that its members personally used the area surrounding the Keahole plant for the exercise of native Hawaiian rights, and that it, therefore, had failed to establish standing. However, as stated previously, Hui Kako'o requested more time to present information on whether or not its members exercised native Hawaiian rights in the area surrounding the Keahole plant. Further, pursuant to article XII, section 7 and PASH I, BLNR had a duty to inquire and determine "if native Hawaiian gathering rights have been customarily and traditionally practiced on the

land in question and explore the possibilities for preserving them." Id. at 253-54, 900 P.2d at 1320-21. The BLNR failed to do so. Accordingly, I believe the BLNR's and the court's ruling denying Hui Kako'o standing at this point is wrong on independent state constitutional grounds.

VIII.

As indicated previously, the issue of whether Waimana and Hee complied with the mandates of HAR § 13-1-29 is immaterial. The court did not find that HAR § 13-1-29 applied to Waimana and Hee as the majority does. However, as will be elucidated infra, I believe Waimana and Hee are collaterally estopped from contesting issues related to BLNR's grant of CDUA HA-487A.

On appeal, Waimana and Hee maintain that (1) "the [court] had jurisdiction to address the administrative appeal," insofar as (a) Waimana and Hee appeared at BLNR's December 12, 2003 and March 12, 2004 meetings and requested a contested case hearing, and (b) BLNR concluded that Waimana and Hee were not entitled to a contested case hearing, (2) "the [court's] dismissal of [Waimana and Hee's] administrative appeal, based upon lack of standing to challenge the proposed agency action by BLNR, was error," inasmuch as (a) BLNR failed to reach the issue of standing, and (b) HELCO incorrectly asserts that Waimana and Hee lack standing based on res judicata, because (i) "where a party is dismissed from an action, based upon a determination that the party lacks standing, res judicata does not apply,"

(ii) "other courts have held that res judicata has been and should be suspended where public policy and fairness concerns essentially trump preclusive effect," (iii) when the public trust is concerned, "full adjudication on the merits is warranted," (iv) "the issuance of a water lease to HELCO by BLNR was never fully and finally adjudicated in a prior proceeding," (v) "the [court] erred where as a matter of judicial notice it sua sponte determined that [Waimana and Hee] lacked standing to contest BLNR's issuance of a water lease to HELCO," and (vi) "judicial notice of the 1994 remand order was inappropriate," (3) "a contested case hearing was clearly mandated as a matter of law and public policy," because (a) "under the public trust doctrine, a contested case hearing is required," (b) "Hawaiian constitutional law mandates that a contested case be held in this matter," (c) the court improperly relied on Sharma, (d) "BLNR failed to comply with HRS § 171-58," and (e) BLNR has an "unavoidable conflict of interest in this case" between enforcing state law and honoring the terms of the settlement agreement it entered into with HELCO, and (4) the court improperly denied Waimana and Hee's HRCP Rule 60 motion. In conjunction with their arguments on appeal, Waimana and Hee maintain that the court erred in conclusion nos. 12, 18, 19, 20, 21, 27, 29, 31, 35, 37, 40, 41, 42, 43, 44, 45, 46, 49, 50, 52 and 55. In their reply brief, Waimana and Hee contend that (1) "where property rights are impacted by agency action, the proceeding is by definition a contested case hearing for purposes of [HRS] Chapter 91,"

(2) "BLNR has conceded [the] right to a contested case hearing in water rights cases," and (3) "standing and res judicata issues raised by HELCO are red-herrings."

IX.

We concluded in Waimana I that Waimana lacked standing to challenge the first extension granted to HELCO to complete construction of its power plant under CDUA HA-487A. 110 Hawai'i at 428-29, 134 P.3d at 594-95. It was held that Waimana was barred by collateral estoppel due to a previous denial of its standing to challenge issues related to BLNR's grant of CDUA HA-487A, that had gone uncontested. Id. at 428, 134 P.3d at 594.

In litigation occurring in 1994, the court had issued a remand order, remanding the CDUA to BLNR to hold a contested case hearing. Id. The order indicated that, with respect to Waimana, "Waimana [did] not have a due process right to a contested case hearing because its economic interest [did] not constitute 'property' within the meaning of the due process clauses" and that by "[n]ot having a right to a contested case hearing by statute, rule or by the constitution, Waimana lack[ed] standing to file [the appeal] pursuant to HRS Section 91-14(a)[.]" Id. Waimana never challenged these conclusions. Id.

Thus, we held that Waimana "was collaterally estopped from relitigating the issue of its standing to challenge decisions regarding CDUA HA-487A." Id. at 428-29, 134 P.3d at 594-95. In Waimana I, it was also determined that Waimana had failed to establish a sufficient property interest to have

suffered a due process violation under the Fourteenth Amendment to the United States Constitution or article I, section 5 of the Hawai'i Constitution. Id. at 431-35, 134 P.3d at 597-601. Therefore, Waimana was precluded from contesting HELCO's first request for extension of time in Waimana I. Id. at 435, 134 P.3d at 601.

Similarly, in Waimana II, we concluded that Waimana was collaterally estopped from challenging the grant of a second time extension to HELCO to construct the Keahole plant. Waimana II, memo op. at 8-9. We said that "inasmuch as Waimana could not contest HELCO's first request for extension of time under CDUA HA-487A because it was collaterally estopped" as indicated in Waimana I, "the doctrine of collateral estoppel, which is again based on the resolution in the 1994 remand order litigation, operates to bar Waimana's challenge to HELCO's second request for extension of time as well." Id. at 8, 9.

In the instant case, it likewise follows that Waimana is barred from challenging HELCO's long-term lease because Waimana lacked standing to challenge CDUA HA-487A. CDUP HA-487A was the permit allowing the construction of the power plant resulting from approval of CDUA HA-487A. The parties negotiated the November 4, 2003 settlement agreement to resolve the dispute regarding the first time extension under CDUP HA-487A.[17] Waimana

[17] Waimana was not a party to the settlement agreement. Waimana I, 110 Hawai'i at 424, 134 P.3d at 590. Although Waimana was not one of the original parties ordered into mediation, HELCO's counsel contacted Waimana's counsel to determine Waimana's position regarding the settlement negotiations.

(continued...)

I, 110 Hawai'i at 424, 134 P.3d at 590. As part of the settlement agreement with respect to CDUA HA-487A, see supra, the court found in uncontested finding no. 4 that HELCO had agreed to transfer ninety percent of its "drinking water" allocation to DHHL.

Uncontested finding no. 6 states that the transfer of the drinking water was conditioned upon HELCO securing an adequate supply of brackish water to meet its industrial needs. Finding no. 7, which again is uncontested, states that, without access to the brackish water, HELCO could not transfer the drinking water to DHHL because it would need it to operate the Keahole plant. The lease, therefore, arises directly from the settlement agreement with respect to CDUP HA-487A. In Waimana I, this court concluded that Waimana "was collaterally estopped from relitigating the issue of its standing to challenge decisions regarding CDUA HA-487A." 110 Hawai'i at 428-29, 134 P.3d at 594-95. As indicated, the lease is inextricably linked to CDUA HA-487A. Accordingly, Waimana is collaterally estopped from challenging the issuance of the lease to HELCO.

As stated in Waimana II, the doctrine of collateral estoppel would also operate against Hee, who, although not a party in Waimana I, is in privity with Waimana as its

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[17](...continued)
Id. In a conversation with HELCO's counsel, Hee indicated that he considered the settlement efforts a "waste of time." Id. HELCO's counsel informed Waimana by letter that it would keep its "perspective in mind" throughout the negotiations. Id. Waimana did not respond. Id.

president.[18] Waimana II, memo op. at 9. In Waimana II, it was also concluded that Hee had failed to establish (1) that because he was on the DHHL "wait list" for an award of agricultural land adjacent to HELCO's power plant, he had a constitutionally protected property interest in such land, inasmuch as the adjacent land was intended for development as a residential area, id. at 10-11; (2) that he had a constitutionally protected property interest in adjacent land "as a beneficiary of State-ceded lands upon which HELCO's peaking station at Keahole is located"; and (3) that he had a constitutionally protected property interest as a beneficiary of the "public trust" arising from his status as a native Hawaiian, id. at 11-12.

As to specific sub-arguments in item (2)(b)(i), Waimana and Hee appear to argue that a determination of standing is not a judgment "on the merits." Waimana I, 110 Hawai'i at 428, 134 P.3d at 594. However, in Waimana I, it was determined that because Waimana had an opportunity to fully litigate the issue of

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[18] In concluding that Hee was in privity with Waimana, in Waimana II, we relied on Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999) (stating that "[i]ssue preclusion, or collateral estoppel, on the other hand, applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action" (some emphases added and some omitted)); Marine Midland Bank v. Slyman, 995 F.2d 362, 365 (2d Cir. 1993) (finding that parties who were officers, directors, and sole shareholders of a corporation were in privity with it); In re Teltronics Servs., Inc., 762 F.2d 185, 190 (2d Cir. 1985) (holding that the founder, president, chairman of the board, and substantial shareholder of a corporation was in privity with the corporation); Drier v. Tarpon Oil Co., 522 F.2d 199, 200 (5th Cir. 1975) (opining that the president of a corporation, who was also a major stockholder, was in privity with the corporation); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384-85 (N.D. 1992) (concluding that privity existed between a closely held corporation and its president for purposes of res judicata and collateral estoppel where the president was the sole shareholder).

its standing, there was a judgment "on the merits" for purposes of collateral estoppel. Id. at 429-30, 134 P.3d at 595-96. As to items (2)(b)(ii) and (iii), other than saying that their arguments regarding public policy, fairness, and the public trust "should" lead to full adjudication that includes them, Waimana and Hee fail to provide a basis as to why this "should" occur.

It may be observed that, in Waimana I, the concurring opinion noted that the court, as well as the governmental agencies involved, had adequately considered the interests of the public trust. Id. at 438, 134 P.3d at 604 (Del Rosario, J., concurring). In item (2)(b)(iv), Waimana and Hee assert that because the issuance of a lease to HELCO has never been fully and finally adjudicated, res judicata should not act to bar their challenge to the lease. Whether the issuance of the lease has been adjudicated, however, is not relevant to Waimana and Hee's standing to challenge it. Waimana and Hee's argument in item (2)(b)(v) that the court erred in "sua sponte" determining a lack of standing is wrong as a matter of law.

In Waimana I, it was clearly recognized that a court may address the question of a plaintiff's standing sua sponte inasmuch as it implicates the court's jurisdiction. Id. at 428 n.18, 134 P.3d at 594 n.18. As to their argument in item (2)(b)(vi) that the court inappropriately took judicial notice of the 1994 remand order, other than their conclusory statement, Waimana and Hee offer no argument as to why the court's action was inappropriate. This argument, therefore, does not need to be

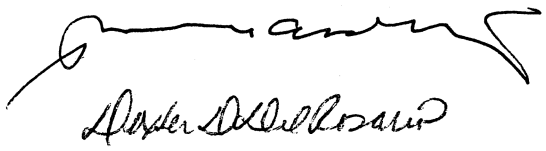
addressed further. Based on the foregoing, the court was correct in determining that Waimana and Hee lacked standing to challenge the BLNR's decision to grant the long-term lease. Therefore, we should conclude the same.

Also, I must disagree with Waimana and Hee's argument (1) that the court had jurisdiction over their administrative appeal inasmuch as, as previously stated, standing relates to a court's jurisdiction and Waimana and Hee lacked standing. Waimana and Hee also fail to support their argument (1)(a) that their appearance at BLNR's December 12, 2003 and March 12, 2004 public hearings establishes that they have standing to challenge the lease; and as to (1)(b), do not provide any legal, constitutional, or factual support for their "equitable estoppel" argument.

Further, Waimana and Hee's argument (2)(a) that BLNR failed to reach the issue of their standing would not be relevant. Because they lack standing, we need not decide Waimana and Hee's arguments (3)(a), (b), (c), (d), and (e), and (4) inasmuch as a party lacking standing would not be entitled to a contested case hearing under any of the theories posited, would not be able to challenge BLNR's actions related to the settlement agreement, and would not be entitled to relief under HRCP Rule 60(b).

Finally, Waimana and Hee assert in their reply brief that the issue of standing is a "red-herring" because it is irrelevant to the issue of whether BLNR improperly denied their

request for a contested case hearing. However, a party without standing to contest a given issue would not be entitled to a contested case hearing. Hence, the arguments raised by Waimana and Hee to the effect that they should not be collaterally estopped from challenging the lease because of a lack of standing are unpersuasive.

X.

For the foregoing reasons, I would affirm the court's February 2, 2005 final judgment and April 1, 2005 Order Denying the Motion for Relief from Order filed November 3, 2004 in part as related to Waimana and Hee. I would vacate the court's February 2, 2005 final judgment and April 1, 2005 Order Denying the Motion for Relief from Order filed November 3, 2004 as related to Hui Kakoʻo and remand this case to the court with instructions to remand to the BLNR with instructions to conduct a hearing as to Hui Kakoʻo's standing.