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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

SIERRA CLUB,)	CIVIL NO. 19-1-0019-01 JPC
)	(Environmental Court)
Plaintiff,)	
)	
vs.)	
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, DEPARTMENT OF LAND)	
AND NATURAL RESOURCES,)	
SUZANNE CASE in her official)	
capacity as Chairperson of the)	
Board of Land and Natural)	
Resources, ALEXANDER AND)	
BALDWIN, INC., and EAST MAUI)	
IRRIGATION, LLC,)	
)	
Defendants.)	

DEPOSITION OF SUZANNE CASE

Taken on behalf of Plaintiff at 1001 Bishop Street, Suite
798, Honolulu, Hawaii on Thursday, March 14, 2019 commencing
at 1:07 p.m. pursuant to notice.

Reported by:
Priscilla Gonzaga, CSR #127
State of Hawaii

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APPEARANCES:

For Plaintiff:

DAVID KIMO FRANKEL, ESQ.
1638-A Mikahala Way
Honolulu, Hawaii 96816

For Defendants BLNR, DLNR and Case Defendants:

AMANDA WESTON, ESQ.
Deputy Attorney General
Department of the Attorney General
465 South King Street, 3rd Floor
Honolulu, Hawaii 96813

For Defendants Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC:

DAVID SCHULMEISTER, ESQ.
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

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EXAMINATION BY:

PAGE

MR. FRANKEL

4

EXHIBITS FOR IDENTIFICATION:

NONE

1 (Reporter's disclosure is available.)

2 SUZANNE CASE,

3 called as a witness, having been first duly sworn,

4 was examined and testified as follows:

5 EXAMINATION

6 BY MR. FRANKEL:

7 Q Can you state your name for the record.

8 A Suzanne Case.

9 Q Do you understand that for each question,
10 you must provide a spoken answer for the court
11 reporter to record. You can't just nod or shake your
12 head.

13 A Yes.

14 Q And can you wait for me to finish my
15 question before answering?

16 A Yes.

17 Q If my question is not clear, will you ask me
18 to explain myself?

19 A Yes.

20 Q Do you understand that although your
21 attorney may object to a question, you must still
22 answer the question unless your attorney instructs
23 you not to because it would violate the
24 attorney-client privilege?

25 A Yes.

1 Q Have you taken any medication that would
2 affect your ability to answer fully and truthfully
3 this morning?

4 A No. Afternoon.

5 Q Oh, yeah, thank you.

6 Are you suffering from any medical condition
7 that could affect your ability to answer fully and
8 truthfully this afternoon?

9 A No.

10 Q Do you understand your testimony is being
11 made under oath?

12 A Yes.

13 Q Do you understand that your -- the questions
14 you give today can be used in court particularly if
15 you answer differently in court than you do today?

16 A Yes.

17 Q Do you understand that you may request a
18 review of the completed transcript of this
19 deposition?

20 A Yes.

21 Q Would you like to review the transcript and
22 offer corrections?

23 A Yes.

24 Q Okay. What did you do to prepare for
25 today's deposition?

1 A I reviewed some documents and spoke with my
2 attorney.

3 Q What documents did you review?

4 A I briefly reviewed your complaint, the
5 November 2018 board submittal and the June 2018 CWRM
6 decision.

7 Q Great.

8 A Commission on Water Resource Management
9 decision.

10 Q You're the chair of the Board of Land and
11 Natural Resources or BLNR?

12 A Yes.

13 Q And you're the director of the Department of
14 Land and Natural Resources or DLNR?

15 A There's technically -- it's technically the
16 chair of DLNR.

17 Q Okay. Okay. And you've served these -- in
18 these roles since April 2015?

19 A Correct.

20 Q Is the Commission on Water Resource
21 Management or CWRM overseen by BLNR or is it
22 independent of BLNR?

23 A It's independent.

24 Q Okay. We'll talk a little bit about
25 invasive species. What's the problem caused by

1 invasive species?

2 MR. SCHULMEISTER: Objection, lack of
3 foundation.

4 THE WITNESS: I think that's a vague
5 question.

6 Q (By Mr. Frankel) You formerly worked for the
7 Nature Conservancy and you've worked at the
8 Department of Land and Natural Resources and Board of
9 Land and Natural Resources for the last four years.
10 Do you recognize that invasive species in Hawaii
11 cause problems?

12 A Invasive species as defined are habitat
13 specific and non-native invasive species can displace
14 native species.

15 Q So what are -- beyond the displacement, what
16 other problems are created by invasive species in
17 Hawaii?

18 A I mean generally it's displacement of
19 habitat, destruction of habitat.

20 Q Okay. Are invasive species a problem in
21 East Maui forests?

22 A I think that's a vague question.

23 Q What part of the question is vague?

24 A It depends on where you are and what species
25 you're talking about.

1 Q So are there any parts -- portions of East
2 Maui where invasive species are not a problem?

3 MR. SCHULMEISTER: Object, lack of
4 foundation as to what you mean by problem.

5 THE WITNESS: There are areas in East Maui
6 that have few to none, yes.

7 Q (By Mr. Frankel) Okay. And where are those
8 areas that are few to none?

9 A I can't identify them specifically today.

10 Q Okay. So you understand the questions I'll
11 be asking today pertain to BLNR's decision to
12 continue to hold over the revocable permits for lands
13 in East Maui, A&B and EMI?

14 A Yes.

15 Q Does BLNR know the extent to which invasive
16 species are growing on state lands covered by the
17 four revocable permits?

18 A Again, that's a vague question.

19 Q What part of the question's vague?

20 A Invasive species is site specific.

21 Q Okay. So I'm talking about a specific site,
22 the area covered by the four revocable permits. Does
23 BLNR know the extent to which there are invasive
24 species growing on those state lands?

25 A BLNR is generally aware that invasive

1 species are a problem in certain areas of East Maui.

2 Q What areas?

3 A Again, that's site specific.

4 Q So I'm asking you specifically.

5 A So I can't answer that specifically. I
6 would refer you to specific -- as specific maps as
7 you can find from the Division of Forestry and
8 Wildlife.

9 Q So you don't know if there's -- do you know
10 or not know whether invasive species are growing in
11 the areas covered by the four revocable permits?

12 A I don't know specifically.

13 Q Okay. Do you know what invasive species are
14 a problem in East Maui?

15 A I know some.

16 Q What are they?

17 A Miconia is a problem. Ginger is a problem.
18 Pigs are a problem.

19 Q Anything else come to mind, any other
20 species in East Maui?

21 A Not at the moment.

22 Q Do you know if Miconia, Ginger and pigs --
23 and/or pigs are a problem in the area covered by the
24 four revocable permits?

25 A I don't know specifically.

1 Q Okay. Do you know if there are more
2 invasive species within the revocable permit area in
3 East Maui today than there were in the year 2000?

4 A No, I don't know.

5 Q Has BLNR ever asked Alexander & Baldwin
6 and/or EMI to inventory or evaluate the extent to
7 which invasive species are spreading in the revocable
8 permit area?

9 A I don't know.

10 Q Has it done so while you've been chair of
11 the Board of Land and Natural Resources?

12 A I don't know.

13 Q You don't know if the board has asked?

14 A I don't know.

15 Q The board -- I'm not talking about the
16 department. I'm talking about the board.

17 A The board has -- meets twice a month and has
18 done so for my entire time. I don't know the extent
19 of any questions off the top of my head. I refer you
20 to the minutes of the board meetings.

21 Q In the context of the decision making for
22 the revocable permits, has the board ever asked
23 Alexander & Baldwin and EMI to inventory or evaluate
24 the extent to which invasive species are spreading in
25 the revocable permit area?

1 A I don't recall.

2 Q Has BLNR ever required a condition of its
3 revocable permits or total authorizations that
4 Alexander & Baldwin or EMI do any work to manage the
5 spread of invasive species on public land?

6 A I don't recall.

7 Q Would it be a good idea?

8 A I don't have an opinion on that. That would
9 be a board -- you're asking if it's a board decision.

10 Q I'm asking you for your opinion as chair,
11 whether it would be a good idea to require that
12 Alexander & Baldwin or EMI manage the spread of
13 invasive species on public land?

14 A I don't have an opinion right now about
15 that.

16 Q What kind of information would you need to
17 form an opinion?

18 A It would depend on what the action was that
19 was before the board for that kind of decision.

20 Q Well, okay, let me repeat my question. The
21 context, as my question indicated, was in the context
22 of the revocable permits, a holdover authorization.
23 So . . .

24 A I can't speak to a general question about
25 what a board should consider.

1 Q I'm asking what you should consider, you.
2 I'm asking you, your opinion as to whether it would
3 be a good idea to require that the holder of a permit
4 allowing the use of 33,000 acres of public land as a
5 condition manage the spread of invasive species?

6 A I don't have an opinion on that right now.

7 Q Okay. Now, you know the context. What
8 factors would help create -- allow you to form an
9 opinion? What information would you need? I've
10 given you the context.

11 A I would consider what activities are
12 supposed to be going on and how invasive species
13 might be introduced or spread by those activities.

14 Q Let's assume that the activities of
15 Alexander & Baldwin, East Maui Irrigation have
16 nothing to do with the spread in and of itself but
17 the invasive species spread through the nature of how
18 invasive species spread. Disbursal, reproduction, et
19 cetera. Nevertheless, because they're being allowed
20 to use 33,000 acres of public land, would it be a
21 good idea to condition that use on managing the
22 spread of these invasive species?

23 A I would direct users to the East Maui
24 Watershed Management plan.

25 Q Uh-hum. And does the East Maui Watershed

1 Management plan include any of these 33,000 acres,
2 the scope of it?

3 A Yes.

4 Q How far down in elevation does the East Maui
5 Watershed plan go?

6 A I can't answer that right now.

7 Q Because you don't know?

8 A I don't have that information right now.

9 Q Okay. So if that watershed plan called for
10 the removal of invasive species on a portion of the
11 land that's covered by the RP, the revocable permits,
12 would it be a good idea if the board were to require
13 that Alexander & Baldwin and East Maui Irrigation
14 help manage the spread of invasive species in that
15 area?

16 A I don't have an opinion on that at this
17 time.

18 Q And what factors would help you to formulate
19 an opinion?

20 A Support for watershed management is
21 considered in the statutory requirements for leases.

22 Q Correct.

23 A So.

24 Q Do you don't think it's appropriate to do in
25 the context of an RP?

1 A I don't have an opinion about that.

2 Q Okay. Do you think allowing Alexander &
3 Baldwin and East Maui Irrigation to use 33,000 acres
4 of public land without any condition regarding
5 managing invasive species is consistent with the
6 principle of malama aina?

7 A I'm going to say that's a vague question
8 because I don't know what malama aina means.

9 Q You've testified under oath previously that
10 you do know what it means. Do you recall that?

11 A No, I don't recall that.

12 Q In the Pohakuloa -- in your deposition of
13 the Pohakuloa --

14 A There is no legal definition of malama aina.

15 Q Do you understand that you've previously
16 testified that you know what it means? Do you recall
17 that?

18 A I don't recall. I don't recall what I said.

19 Q Okay. So now, you don't know what it means?

20 A I don't -- there is no legal definition of
21 malama aina.

22 Q Do you know what the Hawaiian term means?

23 A Yes, I know what the Hawaiian term means.

24 Q What does it mean?

25 A It means to care for the land.

1 Q So do you think allowing Alexander & Baldwin
2 and EMI to use 33,000 acres of public land without
3 any condition requiring management of invasive
4 species is consistent with the principle of malama
5 aina as you've just articulated it?

6 A I do not have an opinion about what that
7 means because the term malama aina is extremely
8 vague.

9 Q Okay. Does DLNR have any plans to manage
10 alien plants or animals in the 33,000 acres of state
11 lands that are subject -- that are the subject of the
12 revocable permits?

13 A DLNR is a participant in the East Maui
14 Watershed Management plan.

15 Q Could the state do more to manage these
16 lands and improve native ecosystems if more revenue
17 were available?

18 MS. WESTON: Objection, vague.

19 THE WITNESS: If more revenue were available
20 for any particular project, DLNR could always do more
21 in any particular project.

22 Q (By Mr. Frankel) Would it help BLNR and
23 DLNR if EMI and Alexander & Baldwin did more work in
24 the East Maui Watershed to manage invasive species?

25 A It depends on what their plans were to do

1 that.

2 Q Let's talk about garbage. Do you know how
3 much trash, including discarded pipes, remain
4 littering the revocable permit parcels?

5 A I think that is a vague question.

6 Q Which part of the question is vague?

7 A Trash is a subjective term.

8 Q How about do you know how much manmade
9 material that is no longer used remains littering the
10 revocable permit parcels?

11 A No.

12 Q Okay. What efforts did BLNR and DLNR
13 undertake to discover how much of that material is on
14 the revocable permit parcels?

15 A BLNR's decisions require permittee to clean
16 up the trash.

17 Q And how much effort did BLNR and DLNR
18 undertake to discover how much of that material is on
19 the parcels?

20 A The determination is of what that constitute
21 is a site by site question. And the question of
22 whether it's trash or not is a matter for the
23 permittee to answer.

24 Q So the permittee decides whether there's
25 trash, not DLNR?

1 A The permittee decides whether it's useable
2 material or not.

3 Q Okay. But my question again is the efforts
4 that BLNR and DLNR engaged in. So my question is not
5 what A&B did or EMI did. My question is what did
6 BLNR and DLNR do to discover whether there is
7 discarded material on the revocable permit parcels?

8 A I don't recall.

9 Q Okay. Do you know if anyone from the land
10 division went on-site to look?

11 A Don't know.

12 Q How about anyone from the Division of
13 Aquatic Resources?

14 A I don't know.

15 Q How about anyone at the Commission on Water
16 Resource Management?

17 A I don't know.

18 Q Have you --

19 A Certainly the Commission on Water Resource
20 Management staff have been to most of these sites.

21 Q Right. But my question is regarding whether
22 they have looked to see how much discarded material
23 is on the land. As you know -- well, is it your
24 understanding that -- well, let me -- sorry, one step
25 at a time.

1 So has anyone at the Commission on Water
2 Resource Management gone out to look to discover how
3 much of that discarded material is on the revocable
4 permit parcels?

5 A I don't know.

6 MS. WESTON: Objection, vague and ambiguous
7 as to time.

8 Q (By Mr. Frankel) Have you ever asked the
9 managers or staff at the Land Division to conduct an
10 inspection to see if there's discarded material on
11 site?

12 A No.

13 Q Have you ever asked anyone from the Division
14 of Aquatic Resources to inspect to find out whether
15 there's discarded material on -- in this area?

16 A No.

17 Q How about anyone at the Commission of Water
18 Resource Management?

19 A No.

20 Q Do you know if -- have you asked anyone on
21 the staff that you supervise to investigate to see
22 whether there is trash, discarded material on the
23 revocable permit parcels?

24 A I'm aware that some people say, such as
25 yourself say, that there's trash but whether there's

1 trash or not is a subjective matter.

2 Q Okay. But that's not my question. My
3 question is have you asked anyone on your staff to
4 investigate?

5 A No.

6 Q What efforts did BLNR and DLNR --

7 A But I will add, again, that the decision
8 requires -- if there is trash, requires it to be
9 cleaned up.

10 Q Sure. What efforts did BLNR and DLNR take
11 to verify whether A&B has complied with BLNR's
12 requirement that A&B and EMI clean up trash in the
13 revocable permit areas?

14 A Could you repeat the question?

15 Q Sure. What efforts did BLNR and DLNR take
16 to verify whether A&B and EMI have complied with
17 BLNR's requirement that they clean up trash in the
18 revocable permit areas?

19 A I don't know.

20 Q Was any inspection done to check?

21 A I don't know.

22 Q Can the diversion of water from East Maui
23 streams adversely affect native aquatic species?

24 MS. WESTON: Objection, vague and ambiguous.

25 THE WITNESS: It depends.

1 Q (By Mr. Frankel) Sure. What does it depend
2 on?

3 A Depends on what species you're talking
4 about. It depends on what the stream flow is. It
5 depends on what the amount of the diversion is.

6 Q So those are all important -- all important
7 information to know to conclude whether the diversion
8 can adversely affect native species?

9 A Uh-hum, yes.

10 Q Can the diversion of water from East Maui
11 streams adversely affect native stream habitat?

12 MS. WESTON: Objection, vague and ambiguous.

13 THE WITNESS: It depends.

14 Q (By Mr. Frankel) Same factors?

15 A Yes.

16 Q Okay. Can the diversion of water from East
17 Maui streams adversely affect ecosystem health?

18 MS. WESTON: Same objection.

19 THE WITNESS: It depends what ecosystem
20 you're talking about.

21 Q (By Mr. Frankel) The ecosystem of the
22 stream.

23 A So same answer.

24 Q Okay. Can diversion of water from East Maui
25 streams adversely affect recreational uses?

1 A It depends.

2 MS. WESTON: Same objection.

3 Q (By Mr. Frankel) Can -- same factors or
4 different factors?

5 A Depends on what the proposed use is or what
6 the requested use is, what is required in terms of
7 water volume.

8 Q Great. Okay.

9 Can the diversion of water from East Maui
10 streams adversely affect natural beauty?

11 A It depends.

12 Q So sometimes it can, sometimes it wouldn't?

13 A Natural beauty is a very subjective term.

14 Q Uh-hum. So but can the diversion adversely
15 affect natural beauty?

16 A It depends on what somebody's perception is
17 and what amount of water is diverted compared to what
18 amount of water is needed to preserve that factor.

19 Q So when you answer these questions it
20 depends, would you agree that it can, in some
21 circumstance and it may not in other circumstances?

22 A Yes.

23 Q Okay. Can the diversion of water from East
24 Maui streams adversely affect cultural uses?

25 MS. WESTON: Objection, vague and ambiguous.

1 THE WITNESS: It depends.

2 Q (By Mr. Frankel) Okay. So sometimes it can
3 and sometimes certain circumstances, it wouldn't have
4 an effect?

5 A Depends on what you are identifying as a
6 cultural use and what water it -- water it depends on
7 and what water is diverted.

8 Q So sometimes it may have a adverse effect
9 and sometimes it may not?

10 A Yes.

11 Q Okay. Could an increase in the amount of
12 water being diverted out of East Maui streams that
13 has been occurring for the past three years adversely
14 affect native aquatic species, native stream habitat,
15 ecosystem health, recreational values, natural beauty
16 and cultural uses?

17 MS. WESTON: Objection, vague and ambiguous,
18 cumulative.

19 MR. SCHULMEISTER: Compound.

20 MS. WESTON: Compound.

21 THE WITNESS: It depends.

22 Q (By Mr. Frankel) So it could or it might not
23 depending on the circumstances?

24 A Yes.

25 Q Okay. Would you agree that adequate stream

1 flow from upstream adult habitat to the stream mouth
2 is critical for amphidromous animals?

3 MS. WESTON: Objection, vague and ambiguous.

4 MR. SCHULMEISTER: Objection, vague and
5 ambiguous.

6 THE WITNESS: It depends.

7 Q (By Mr. Frankel) Okay. What are the impacts
8 from taking more than half of the water stream?

9 A It depends.

10 Q Can you ever imagine taking -- describe to
11 me a circumstance where you could take more than half
12 of the water from the stream and it would not have an
13 adverse impact?

14 A Certain streams do not naturally flow
15 continuously from mauka to makai. Therefore,
16 diverting water from a stream would not interrupt
17 mauka to makai flow because there isn't any.

18 Q Has Alexander & Baldwin and the Water
19 Commission ever concluded that a stream couldn't
20 reach the ocean and yet when water was restored, the
21 stream actually did reach the ocean? You aware of
22 that?

23 A I'm aware that there are some streams that
24 are losing -- have losing reaches.

25 Q That's not my question.

1 A By natural flow, they have losing reaches.
2 So there are areas that are -- where the stream is
3 not flowing on the surface.

4 Q Do you recall any stream in which Alexander
5 & Baldwin and/or the Water Commission opined a
6 stream, even if restored from diversions, would not
7 reach the ocean and yet when water was restored, it
8 has reached the ocean?

9 A I don't recall.

10 Q Okay. Other than for a losing stream, can
11 you -- what other circumstances could taking more
12 than half the water from a stream not have a
13 significant impact?

14 MR. SCHULMEISTER: Let me just object to --
15 when you say take more than half, I think is
16 ambiguous. You mean more than half 100 percent of
17 the time, every moment?

18 MR. FRANKEL: At any moment.

19 MR. SCHULMEISTER: That's -- so I think it's
20 ambiguous.

21 THE WITNESS: Streams are extremely
22 variable. So at any particular moment, the answer
23 will be -- will be different.

24 Q (By Mr. Frankel) So it's important to know
25 about the characteristics of a stream because streams

1 are different?

2 A Yes.

3 Q Okay. Can stream diversion decrease the
4 size of the freshwater plume and therefore, make it
5 harder for recruiting animals to detect the
6 freshwater from their offshore larval development
7 areas?

8 MS. WESTON: Objection, vague and ambiguous.

9 THE WITNESS: It depends.

10 Q (By Mr. Frankel) So sometimes it could and
11 sometimes it wouldn't?

12 A It depends.

13 Q Sometimes it would and sometimes it
14 wouldn't?

15 MS. WESTON: Asked and answered.

16 Q (By Mr. Frankel) Correct?

17 A It depends.

18 Q Okay. When you say it depends, that means
19 in some circumstances, it would have --

20 A I don't think in all circumstances it would
21 have -- it would make an effect. It depends on what
22 kind of stream you're talking about, what kind of
23 flows you're talking about, what kind of habitat
24 you're talking about.

25 Q Okay.

1 A So no, not in all circumstances is it true
2 that there could be.

3 Q But in some circumstance --

4 A It depends on what stream you're talking
5 about.

6 Q Okay. Can stream diversion lead to the
7 creation of a stream mouth berm?

8 MS. WESTON: Objection, vague and ambiguous.

9 THE WITNESS: I don't know. Depends on
10 where it is.

11 Q (By Mr. Frankel) Okay. Would increased
12 stream flow decrease the amount of time that stream
13 remains closed by a berm and therefore, blocked to
14 recruitment?

15 MS. WESTON: Same objection.

16 THE WITNESS: It depends on where it is.

17 Q (By Mr. Frankel) Okay. Can diversion
18 structures be a physical barrier, create dry sections
19 that prohibit movement by aquatic species or entrain
20 animals as they attempt to pass over the diversion
21 structure?

22 MS. WESTON: Objection, vague and ambiguous,
23 compound.

24 THE WITNESS: Theoretically, yes.

25 Q (By Mr. Frankel) Do you know if that's ever

1 happened in East Maui?

2 A I'm going to say I don't know the answer to
3 that. I haven't been around for the whole life of
4 East Maui.

5 Q Are you aware of diversion structures
6 currently existing in East Maui that serve as a
7 physical barrier?

8 A I'm aware that the Water Commission decision
9 ordered what essentially is assurance that there is
10 in most cases a wooded pathway. So whether there is
11 or isn't full diversion at any particular point,
12 depends on the diversion itself and the amount of
13 flow.

14 Q Okay. I'm not -- that's not the question
15 I'm asking you. I'm not asking you about the Water
16 Commission's decision. I'm asking you what's going
17 on in the ground on East Maui within the RP area. My
18 question is are there any diversion structures there
19 that serve as a physical barrier to native aquatic
20 species?

21 MR. SCHULMEISTER: Objection, vague and
22 ambiguous, lack of foundation. What do you mean by
23 physical barrier?

24 MS. WESTON: And join.

25 THE WITNESS: Again, it depends. It's

1 stream by stream.

2 Q (By Mr. Frankel) No, no. Okay. So are
3 there any? It's yes or no. Are there any structures
4 that prevent aquatic species from migrating on the
5 streams in East Maui? Are there any in existence
6 now?

7 MR. SCHULMEISTER: Let me just object again.
8 I'd just ask if you would consider clarifying your
9 question. 'Cause when you say any streams in which
10 diversions operate as a barrier, a barrier, 100
11 percent barrier, every day, a few days of the year?
12 I mean to me it's vague.

13 MS. WESTON: Join.

14 THE WITNESS: I agree with his question.

15 Q (By Mr. Frankel) You mean the objection?

16 A Well, his --

17 MR. SCHULMEISTER: Suggested clarification.

18 Q (By Mr. Frankel) I'm just asking if there
19 are any, do you know, that serve as a physical
20 barrier?

21 MR. SCHULMEISTER: Same objection.

22 MS. WESTON: Join.

23 THE WITNESS: There are streams that have
24 diversions that can serve as a physical barrier. It
25 depends on what the stream flow is, what the

1 structure of it is.

2 Q (By Mr. Frankel) Okay. Are there structures
3 there now that create dry sections or prohibit
4 movement of aquatic species in East Maui?

5 A I don't recall the exact status of each one.

6 Q So there may be but you don't know?

7 A There may be but I don't recall the exact
8 status of each one.

9 Q Are there any diversion structures that
10 entrain animals as they attempt to pass over the
11 diversion structures?

12 MS. WESTON: Objection, vague and ambiguous.

13 THE WITNESS: I don't know.

14 Q (By Mr. Frankel) Would you agree that the
15 typical stream diversion structures in East Maui
16 divert 100 percent of the water at low to moderate
17 flows?

18 A I don't know.

19 Q Okay. Would you agree that when streams are
20 completely diverted, 100 percent of the downstream
21 moving individuals would be entrained by the
22 diversion?

23 MS. WESTON: Objection, vague and ambiguous.

24 THE WITNESS: Could you repeat that
25 question?

1 Q (By Mr. Frankel) Sure. Would you agree that
2 when streams are completely diverted, 100 percent of
3 downstream moving individuals would be entrained by
4 the diversion?

5 MS. WESTON: Same objection.

6 THE WITNESS: Again, it depends on whether
7 it's a losing stream or a gaining stream.

8 Q (By Mr. Frankel) If it's a gaining stream.

9 A If there's 100 percent natural flow mauka to
10 makai, then your question is whether a diversion
11 could entrain?

12 Q No. My question is when streams are
13 completely diverted, 100 percent of the downstream
14 moving individuals would be entrained by the
15 diversion?

16 MR. SCHULMEISTER: You say completely
17 diverted. You mean like every day of the year?

18 MR. FRANKEL: At a particular moment.

19 MR. SCHULMEISTER: A moment in time? Okay.

20 I . . .

21 THE WITNESS: I don't know how to answer
22 that.

23 Q (By Mr. Frankel) Do you not know? Is that
24 your answer, you don't know?

25 A I don't know.

1 Q Okay. Are some native aquatic species in
2 East Maui dependent on freshets for their existence?

3 MS. WESTON: Objection, vague and ambiguous.

4 THE WITNESS: I don't know.

5 Q (By Mr. Frankel) Really?

6 MS. WESTON: Asked and answered.

7 Q (By Mr. Frankel) You've never heard anyone
8 from your division of aquatic resources explain how
9 certain native species are dependent on that storm
10 water for the life cycle of the aquatic species? You
11 haven't heard that?

12 A My focus has been on what is adequate stream
13 flow for species.

14 Q Okay. And so if the species is dependent on
15 freshets, they need that freshet. But are you not
16 aware that some native species are dependent on
17 freshets?

18 MS. WESTON: Objection --

19 THE WITNESS: I don't know what you mean by
20 dependent on.

21 Q (By Mr. Frankel) The ability of the species
22 to successfully reproduce and survive.

23 A I don't know the specific ecology of all the
24 stream species so I can't answer that.

25 Q Are you aware of any that need that?

1 A I can't answer that.

2 Q Have you sat through testimony where
3 anyone's talked about that?

4 A I can't recall.

5 Q Okay. For those streams that were not or
6 are not fully restored by the June 2018 CWRM
7 decision, what provision ensure that freshets will
8 flow below the stream diversion?

9 MR. SCHULMEISTER: I'm going to object.
10 Assumes facts not in evidence which is that
11 provisions are needed for storm water to be prevented
12 from reaching the ocean naturally.

13 THE WITNESS: The CWRM decision establishes
14 interim instream flow standards. Freshets are above
15 and beyond those.

16 Q (By Mr. Frankel) So are any provisions
17 provided for in -- anywhere to ensure the freshets
18 flow below the stream diversions?

19 A Freshets are highly variable in quantity.
20 So depending on the amount of rain and the duration
21 and force of the rain, it can be high volume freshets
22 or low volume freshets. So there are certainly
23 instances where not all water is diverted from
24 freshets.

25 Q Well, if the Water Commission order only

1 requires a minimum base flow and allows A&B and EMI
2 to divert everything over and above that, it is
3 difficult for the freshets to be surging through the
4 stream?

5 A No. It depends on what the stream volume is
6 and the capacity of the diversion. There's
7 definitely situations where there will be freshets
8 that are above and beyond the capacity of the
9 diversion.

10 Q And are there times when that would not be
11 the case?

12 A Depends on the level of the freshet.

13 Q Okay. Do you know how much water A&B and
14 EMI diverted from East Maui streams in 2016, '17 and
15 '18?

16 A No. I don't have specific information on
17 that. We have collective information on diversions,
18 but no.

19 Q Okay. CWRM calculated in that June 2018
20 reference, calculated that A&B took 20 million
21 gallons a day. Does that sound familiar?

22 MR. SCHULMEISTER: You mean in a particular
23 time?

24 MR. FRANKEL: I'm talking about the
25 conclusion -- the finding of fact by the commission.

1 MR. SCHULMEISTER: I mean your earlier
2 question you reference 2016, '17 and '18. Are you
3 still going on that assumption?

4 MR. FRANKEL: No. I'm asking whether she --

5 Q (By Mr. Frankel) Whether you recall the
6 Water Commission finding regarding that. Or is that
7 something that you do not recall?

8 A I don't recall the specific finding.

9 Q Okay.

10 A But I refer you to the decision which is
11 close to 300 pages long and was full of details.

12 MR. SCHULMEISTER: And speaks for itself.

13 Q (By Mr. Frankel) BLNR's decision allows
14 Alexander & Baldwin -- let me rephrase that. The
15 Board of Land and Natural Resources' November 2018
16 decision allows A&B and EMI to divert more than 25
17 million gallons a day, doesn't it?

18 A The Board of Land and Natural Resources
19 decision allows A&B to divert water subject to the
20 interim instream flow standard required by the
21 commission.

22 Q And that is so it could divert more than 25
23 million gallons a day?

24 A It depends on what the stream flow is.

25 Q Okay. And if there's the minimum stream

1 flow within the streams in East Maui, Alexander &
2 Baldwin can take more than 25 million gallons a day?

3 A Alexander & Baldwin is limited by the
4 interim instream flow standard.

5 Q And in terms of the total volume it can
6 take, it can take more than 25 million gallons a day?

7 A It depends on what the stream flow is.

8 Q And if the stream flow is sufficient, it can
9 take more than 25 million gallons a day, correct?

10 A If the stream flow is sufficient, yes.

11 Q Do you know what kind of harm diversion
12 structures can cause to native species?

13 MS. WESTON: Objection, vague and ambiguous.

14 THE WITNESS: Yes.

15 Q (By Mr. Frankel) What?

16 A It can block migratory abilities.

17 Q Up and downstream?

18 A Yeah.

19 Q Has DLNR monitored the ten streams ordered
20 to be restored by CWRM to determine if native stream
21 life can effectively migrate and reproduce with the
22 dam structures in place -- or strike that, diversion
23 structures in place?

24 A I don't know of specific monitoring since
25 the decision.

1 MS. WESTON: Since November 2018.

2 Q (By Mr. Frankel) How about since June 2018?

3 A I don't know of specific monitoring.

4 Q Have you instructed your staff to do any
5 monitoring?

6 A I have instructed staff to seek funding for
7 monitoring.

8 Q So absent funding, there's no monitoring
9 going on?

10 A I don't know what other monitoring Division
11 of Aquatic Resources has done. I cannot say that
12 they are not doing any monitoring.

13 Q When was the last time you talked to Aquatic
14 Resource -- Division of Aquatic Resources about the
15 streams in East Maui?

16 A Within the last month.

17 Q But you didn't ask them to monitor to see
18 what stream life is like at that time?

19 A We are talking about how to monitor the
20 streams.

21 Q You're talking about how to do it but you're
22 not actually doing it?

23 A We don't have the mechanism yet to do it.

24 Q What kind of mechanism do you need?

25 A We don't have a funding mechanism yet to do

1 it.

2 Q How many staff members does the Division of
3 Aquatic Resources have on Maui?

4 A I don't know.

5 Q Does it have any?

6 A Yes.

7 Q Can you name me who's there from the Aquatic
8 Resources?

9 A Russell Sparks, Skippy Hau.

10 Q Is that it?

11 A I don't -- no, there are others. I don't
12 know -- recall their names.

13 Q And why is it that they can't do any
14 monitoring now?

15 A Because they don't have funding to do it.

16 Q What kind of funding do they need?

17 A You need funding to be able to travel and to
18 get up -- probably you need some helicopter time to
19 get up in the upper reaches. You need staff time.
20 They're all committed.

21 Q Well --

22 A They have -- they have priorities to do.
23 And this is a new task and we will need to develop
24 capacity to do it.

25 Q What's more important on Maui for the

1 Division of Aquatic Resources in terms of priorities?

2 MS. WESTON: Objection, vague and ambiguous.

3 THE WITNESS: They have certainly their list
4 of priorities.

5 Q (By Mr. Frankel) I'm asking what those are?

6 A Well, they're doing a lot of reef work.

7 Q That's -- Russell does that really, right?

8 A Well, he does a lot of work on Maui.

9 Q Skippy Hau does more work with the streams
10 and Russell Sparks --

11 A Skippy does a lot of other work as well.

12 Q Okay. Would the information gathered from
13 monitoring the ten streams that were ordered restored
14 to determine if native stream life can effectively
15 migrate and reproduce, would that information be
16 useful?

17 A Yes. The CWRM decision contemplates that
18 because there are a variety of stream flows
19 contemplates learning from that.

20 Q Is there a mechanism by which BLNR could
21 require Alexander & Baldwin and EMI to provide that
22 money to Division of Aquatic Resources so that could
23 occur?

24 A There's none in place right now.

25 Q That's not my question. My question is

1 could that -- could that occur?

2 A I don't know. I'd have to look at the
3 statutes and regulations.

4 Q And so if it was legal to, would it be a
5 good idea?

6 A I don't know.

7 Q Well, you've explained how you have a lack
8 of resources --

9 A It is a good idea to do it. The mechanism
10 for doing it, I don't have -- we don't have an answer
11 yet.

12 Q Did you guys discuss that possibility prior
13 to or at your November 2018 meeting on the revocable
14 permits?

15 A The -- did who?

16 Q The Board of Land and Natural Resources.

17 A The Board of Land and Natural Resources
18 didn't discuss it before the November meeting.

19 Q Or at the November meeting?

20 A I don't recall. You have to look at the
21 minutes.

22 Q Other than seeking funding, does DLNR have
23 plans to regularly monitor those restored streams to
24 determine if native stream life can effectively
25 migrate and reproduce with the diversion structures

1 in place or further modifications need to be made?

2 A We don't have specific plans because we
3 don't have funding.

4 Q Are you seeking funding from the legislature
5 this session on this?

6 A We -- we're looking for opportunities. We
7 don't have a specific line item in it for it but we
8 were looking for opportunities.

9 Q Has the Board of Land and Natural Resources
10 required that A&B and/or EMI install gauges or meters
11 to measure how much water is being taken from each
12 stream?

13 A Board of Land and Natural Resources'
14 decision incorporates the Commission on Water
15 Resources' decision which contemplates gauging at
16 certain places on certain streams.

17 Q How about -- okay. It contemplates gauging.
18 Who is to install the gauges?

19 A I don't recall. It's primarily CWRM is the
20 lead on that.

21 Q So my question is has the board required
22 that A&B and EMI install gauges or meters to measure
23 how much water is being taken from each stream from
24 which they're taking water?

25 A Again, I would refer you to the CWRM

1 decision and the board decision.

2 Q I'm not asking you to refer me to anybody.
3 I'm asking you whether the board has required A&B and
4 EMI to install gauges or meters?

5 MS. WESTON: Objection, vague and ambiguous.

6 THE WITNESS: I don't recall.

7 Q (By Mr. Frankel) Okay. Has BLNR required
8 A&B and EMI to measure how much water is being taken
9 from each stream?

10 MS. WESTON: Objection, vague and ambiguous.

11 THE WITNESS: The BLNR decision incorporates
12 the CWRM decision which establishes instream flow
13 standards measurable at certain places.

14 Q (By Mr. Frankel) For some of the streams in
15 East Maui, not from all the streams, correct?

16 A It -- the decision is a stream by stream
17 decision.

18 Q And that decision doesn't require A&B or EMI
19 to measure anything, does it?

20 A The CWRM decision doesn't have anything to
21 do with allocation of water.

22 Q That's not my question. Well, so then if it
23 has nothing to do with allocation, I'm asking --

24 A The CWRM decision does not have to do with
25 EMI. The CWRM decision has to do with what are the

1 instream flow standards.

2 Q Great. So now I'm asking you has BLNR ever
3 required A&B and/or EMI to measure how much water is
4 being taken from each stream?

5 MR. SCHULMEISTER: Just so we're clear,
6 you're talking about recently, right, the last few
7 years?

8 MR. FRANKEL: Sure.

9 MR. SCHULMEISTER: You know about the
10 history of that?

11 THE WITNESS: I don't recall.

12 Q (By Mr. Frankel) In the last few years, you
13 don't recall?

14 A No.

15 Q Have you ever asked that?

16 A No.

17 Q Do you think it would be a good idea?

18 A What -- what is required is measurement to
19 ensure that the instream flow standards are met.

20 Q So -- I don't know how long we've been going
21 through questions but I asked you about impacts from
22 stream diversions and, you know, what the impacts can
23 be and from diverting water from streams. And you
24 said it depends on the species. It depends on the
25 stream flow and how much is diverted. So if we want

1 to know what the impact is to a particular stream,
2 you've already said that knowing how much water is in
3 the stream and how much is being taken out are
4 necessary information --

5 A No. I said what's necessary to know is how
6 much is in the stream to meet the interim instream
7 flow standards which use the best available science
8 on a stream by stream analysis to determine what is a
9 priority to protect in each stream and therefore,
10 what was the required amount to remain in the stream
11 to protect those uses.

12 Q What factors would one need to know in order
13 to know whether diversion of water from a particular
14 stream adversely affects native aquatic species?

15 A The diversion of water isn't the question.
16 The question is what is the amount of water that
17 needs to stay in the stream?

18 Q But that's not -- I'm asking the questions.
19 My question is what factors would one need to know to
20 know whether diversion is having an adverse impact to
21 native aquatic species? Answer my question.

22 MS. WESTON: Vague and ambiguous and
23 argumentative.

24 MR. SCHULMEISTER: I object to that question
25 as being vague and ambiguous particularly in the

1 context because you're not stating your question on
2 whether she's supposed to assume instream flow
3 standards are being complied with or not. Answer
4 could be different, you know, depending on whether
5 the instream flow standards are being complied with.
6 So incomplete.

7 THE WITNESS: The basic answer is more water
8 being diverted than is allowed to be diverted under
9 the instream flow standard.

10 Q (By Mr. Frankel) What's that answer -- how
11 is that an answer to the -- what question are you
12 answering?

13 A If you would like to repeat the question.

14 Q Okay. What factors would you need to know
15 to know whether the diversion of water, taking water
16 from a stream, would have an adverse impact on native
17 species?

18 MS. WESTON: Same objections.

19 MR. SCHULMEISTER: Irrespective of whether
20 the instream flow standards are being complied with?

21 THE WITNESS: The instream flow standards
22 are designed very carefully in a very careful
23 decision analyzed stream by stream to protect
24 instream values. So the instream flow standards that
25 were set are the ruler by which you measure whether

1 there's impact. So if there's more water being
2 diverted than meets the instream flow standard, then
3 it's a violation of the instream flow standard. The
4 amount of water diverted is not the question. The
5 amount of water left in the stream is the question.

6 Q (By Mr. Frankel) So it's your position that
7 there is no harm to a stream as long as the instream
8 flow standards are met?

9 A The question is not whether there's no harm
10 to the stream. The question --

11 Q That's my question. That is my question.
12 Please answer my question. That is I'm asking you
13 about the harm to a stream. So --

14 A You're asking about an absolute yes or no in
15 a field that has a range of answers depending on what
16 values -- what values are important to protect and
17 how much water they need to protect. And there's no
18 yes or no answer to that. There's a range that is
19 carefully evaluated with the instream flow standard.

20 Q So is it your position that so long as the
21 instream flow standard is met, there is no harm to
22 the stream?

23 A I think the question of harm to the stream
24 is a very vague question. The question is what
25 harm -- harm what? Are you harming a recreational

1 use? Are you harming an instream habitat use? Are
2 you harming a downstream cultural use? So those were
3 very, very carefully analyzed in the CWRM decision on
4 a stream by stream basis to understand what are the
5 important values for the stream and how much water is
6 important to leave in the stream to protect those
7 values. So if the instream flow standard is met,
8 then as a matter of that decision -- as a matter of
9 that decision, the amount -- the -- what's important
10 to ensure is that those instream flow standards are
11 met.

12 Q Okay. I understand your position. My
13 question is then for those streams that are set at
14 20 percent of base flow, is it your position that the
15 diversion of water from those streams as long as the
16 instream flow standards is met, has no adverse impact
17 on native aquatic species?

18 A It's my position that the potential impact
19 on instream uses was carefully analyzed in the CWRM
20 decision.

21 Q I don't really care if it's analyzed. I'm
22 asking what the impact is?

23 A Well --

24 MR. SCHULMEISTER: Well, that question is
25 vague and ambiguous. Impact of what? You referring

1 to prior questions --

2 THE WITNESS: It is a stream by stream, use
3 by use, value by value assessment which was extremely
4 carefully analyzed in the CWRM decision. If you
5 wanted to say does any diversion affect anything, you
6 can make a projection as to that. The question is
7 how has that been assessed in the CWRM decision?

8 Q (By Mr. Frankel) Has BLNR required A&B and
9 EMI to measure how much water is being taken from
10 each stream?

11 MR. SCHULMEISTER: Objection, asked and
12 answered.

13 MS. WESTON: Join.

14 THE WITNESS: I don't know.

15 Q (By Mr. Frankel) Has BLNR required that A&B
16 and EMI measure how much water remains in the stream
17 after each diversion?

18 MS. WESTON: Objection, vague and ambiguous.

19 THE WITNESS: The BLNR decision requires EMI
20 to comply with the CWRM decision.

21 Q (By Mr. Frankel) And so if the CWRM decision
22 says nothing about requiring A&B and EMI to measure
23 how much water remains in the stream after each
24 diversion, there is no such requirement?

25 A There is a requirement to comply with the

1 instream flow standards.

2 Q But there's no such requirement to measure
3 how much water --

4 A If you say so.

5 Q I'm asking you, is there such a requirement?
6 Has the BLNR imposed such a requirement?

7 A CWRM is -- CWRM decision establishes the
8 measurements to -- necessary at certain points in
9 most of the streams to establish -- the instream flow
10 standard is set at a particular point on each stream
11 because it varies depending on where you are in the
12 stream. If it's a losing stream, it's a gaining
13 stream. So the CWRM decision is based on
14 measurement.

15 Q But the CWRM decision does not require A&B
16 to do those measurements, correct?

17 A That's correct.

18 Q BLNR could require A&B to do those
19 measurements, correct?

20 A If you say so.

21 Q Well, could it?

22 A Well --

23 MR. SCHULMEISTER: I'll object. Calls for a
24 legal conclusion.

25 THE WITNESS: It's a matter for the board to

1 determine.

2 Q (By Mr. Frankel) Okay. And in your opinion,
3 why have you not suggested that as a condition to the
4 revocable permit?

5 A Because my -- because our decision is to
6 incorporate the instream flow standard requirements
7 of the CWRM decision.

8 Q Does the -- how's the budget for CWRM, the
9 CWRM staff?

10 A I don't know.

11 Q Aren't you in charge of the --

12 A I don't have the specific numbers with me.

13 Q Is it adequate?

14 A That's always a judgment call. We always
15 need more resources.

16 Q So wouldn't you have more resources if you
17 required A&B to pay for the measurement of water?

18 A If A&B gave us more money, we would have
19 more money.

20 Q And wouldn't you have more resources
21 available if you had A&B pay for these -- if A&B
22 actually do the measurements?

23 A I don't know if we want A&B to do the
24 measurements as opposed to having the CWRM staff
25 monitor them.

1 Q Has BLNR or DLNR sought information
2 regarding which diversions cause the greatest threat
3 of entrainment of native aquatic species?

4 MS. WESTON: Objection, vague and ambiguous.

5 THE WITNESS: It was analyzed on a stream by
6 stream basis in the CWRM decision which was
7 incorporated by -- incorporated into the BLNR
8 decision.

9 Q (By Mr. Frankel) You believe the CWRM
10 decision actually looked at which diversion
11 structures have the -- caused the greatest threat of
12 entrainment?

13 A The CWRM decision looked at the diversion
14 structures on a stream by stream basis.

15 Q All the diversion structures?

16 A CWRM decision looked at the diversion
17 structures that were on the streams.

18 Q Okay.

19 A The CWRM decision looked for ensuring a
20 wetted pathway in nearly all the streams. And so in
21 order to do that, you have to look at the structures
22 themselves to understand how to ensure a wetted
23 pathway, yes.

24 Q But the wetted pathway has nothing to do
25 with entrainment, does it?

1 A It has to do with whether there's a pathway
2 for species to migrate up and down.

3 Q But it doesn't answer whether they're
4 entrained by the diversion structure. Having a
5 wetted pathway is a separate issue than entrainment,
6 isn't it?

7 A But in the process, you look at the
8 diversion structures themselves.

9 Q And does -- but did you look at entrainment?

10 A I don't recall.

11 Q Okay. Of the more than two dozen streams in
12 East Maui that were not ordered by CWRM to be fully
13 restored, has BLNR, DLNR required the alteration of
14 diversion structures that impede the migration of
15 native aquatic species?

16 MS. WESTON: Objection, vague and ambiguous.

17 THE WITNESS: I don't know.

18 Q (By Mr. Frankel) Prior to the November 2018
19 decision of A&B's proposal to hold over the RP for
20 another year, did BLNR specifically vote to exempt it
21 from having to prepare an EA?

22 A I don't recall.

23 Q Okay. Does BLNR or DLNR know how much water
24 was taken daily from each stream upon which there's a
25 diversion?

1 MS. WESTON: Objection, vague and ambiguous.

2 THE WITNESS: That's a very vague question.

3 Q (By Mr. Frankel) Which part of the question
4 is vague?

5 A Well, no one knows precisely how much is
6 being diverted at any one time and what the volume of
7 the water in the stream is so.

8 Q Okay.

9 A That's an impossibility.

10 Q Okay, you don't know. How about on average?
11 Does BLNR, DLNR know how much water was taken on
12 average from each stream upon which there's a
13 diversion?

14 MS. WESTON: Objection, vague and ambiguous.

15 MR. SCHULMEISTER: You say on average. You
16 mean average per hour, per day, per second, per
17 month, per year --

18 MR. FRANKEL: You know what, it doesn't
19 matter.

20 Q (By Mr. Frankel) Do you know average of
21 any -- any of those? Fine, that's great. Do you
22 know on average per second, per day, per hour, per
23 month, per year for each -- for any of the streams?

24 A I don't recall.

25 Q Does BLNR, DLNR know how much water was

1 taken at the maximum from each stream upon which
2 there's a diversion?

3 MS. WESTON: Objection, vague and ambiguous.

4 THE WITNESS: I don't know.

5 Q (By Mr. Frankel) How about at a minimum, how
6 much was taken?

7 MS. WESTON: Same objection.

8 THE WITNESS: There are interim instream
9 flow standards in place and so that's the gauge, not
10 the amount of diversion.

11 Q (By Mr. Frankel) So that may not matter to
12 you but it may matter to others. So that's not -- so
13 my question is not what's important to you. My
14 question is about the amount that's taken. And you
15 don't know that?

16 A I can't say.

17 Q Okay. Has BLNR or DLNR ever asked how much
18 water is taken from each stream upon which there's a
19 diversion?

20 A I mean I have a general sense that we have
21 general ideas on how much water is diverted. But on
22 a stream by stream basis, no.

23 Q Okay. Is that information completely
24 irrelevant to deciding whether to allow diversions to
25 continue or to increase?

1 A The question is whether diversions comply
2 with the interim instream flow standards.

3 Q And so that's the only thing that matters as
4 far as you're concerned in making the decision of the
5 revocable permits?

6 A It's a primary -- primary consideration is
7 to ensure the interim instream flow standards were
8 met.

9 Q How much water does A&B -- or I should --
10 how much water are A&B and EMI proposing to take out
11 of East Maui in 2019?

12 A I don't know.

13 Q Is that information completely irrelevant in
14 deciding whether to allow diversions to continue or
15 increase?

16 A What is relevant is whether the interim
17 instream flow standards are met.

18 Q That's the only relevant issue?

19 A It's the primary issue.

20 Q What other issues are important?

21 A Ensuring there's no waste of water.

22 Q Okay. Anything else?

23 A Those are the primary ones.

24 Q Okay. Did BLNR or DLNR ever ask how much
25 water A&B and EMI are proposing to take out of East

1 Maui in 2019?

2 A I don't recall.

3 MS. WESTON: David, we've been going for
4 over an hour. Is it all right if we take a short
5 break?

6 MR. FRANKEL: Yep. Off the record.

7 (Recessed at 2:10 p.m.)

8 (Reconvened at 2:13 p.m.)

9 MR. FRANKEL: We should be able to get out
10 of here in an hour I hope.

11 Q (By Mr. Frankel) So when the board voted in
12 November, the board lacked accurate information as to
13 how much water flows in each stream and how much
14 water A&B and EMI proposed to remove from each
15 stream, correct?

16 MS. WESTON: Objection, vague and ambiguous.

17 THE WITNESS: The CWRM decision did a
18 careful analysis stream by stream which the board
19 incorporated into its decision.

20 Q (By Mr. Frankel) Right. But I'm not asking
21 about the CWRM decision. I'm asking about the
22 information as to how much water flows in each
23 stream --

24 A There's a lot of information in the CWRM
25 decision about flows.

1 Q Okay. So did BLNR have information as to
2 how much water flows in each stream when it made its
3 decision?

4 MS. WESTON: Objection, vague and ambiguous.

5 MR. SCHULMEISTER: Do you mean beyond what
6 the Water Commission considered? I'll object.
7 It's -- given the answer and the question, I think
8 your question's ambiguous.

9 THE WITNESS: I refer you to the CWRM
10 decision which analyzes carefully on a stream by
11 stream basis.

12 Q (By Mr. Frankel) Do you know if A&B and EMI
13 are diverting water from some streams and dumping the
14 water into other streams?

15 A I don't recall. I believe there are some
16 streams that are transport streams so that the water
17 is moved to a different section.

18 Q What impact do you think that could have?

19 A On what?

20 Q On anything.

21 MS. WESTON: Vague and ambiguous.

22 THE WITNESS: I think that the values in
23 each stream which were analyzed in the CWRM decision
24 establish what the stream flow should be in each
25 stream. If water is moved that is beyond the minimum

1 stream flow, then if the stream flow is met, standard
2 is met, then the requirement to protect the values in
3 the stream as determined by CWRM are met.

4 Q (By Mr. Frankel) Did the Water Commission
5 decision in setting instream flow standards consider
6 economic benefits of having water be transported to
7 Central Maui?

8 A I would refer you to the CWRM decision for
9 that.

10 MS. WESTON: I'm sorry, can you repeat that?

11 MR. FRANKEL: I don't think I could.

12 MS. WESTON: I'm sorry. Oh, could the court
13 reporter read it?

14 THE WITNESS: I think you asked if the
15 CWRM --

16 MR. FRANKEL: Wait, wait, wait.

17 (Record read.)

18 THE WITNESS: CWRM decision considered
19 offstream uses.

20 Q (By Mr. Frankel) So did the Water Commission
21 set some inflow -- sorry, instream flow standards at
22 a lower amount than maybe it would have otherwise in
23 order to accommodate the offstream uses?

24 A I don't know what it would have otherwise
25 means.

1 Q If not for the offstream uses, would the
2 Water Commission have set the instream flow standards
3 for some streams at a higher level?

4 A If not for diversions, would there be any
5 diversion from the stream.

6 Q You're saying it's an absurd question?

7 A Yes.

8 Q So for those streams with a 20 percent base
9 flow . . . were aquatic values sacrificed at all?

10 MR. SCHULMEISTER: I'm going to object, lack
11 of foundation and vague as to which streams you're
12 talking about.

13 MS. WESTON: Join.

14 MR. SCHULMEISTER: You seem to be referring
15 to something specific but you're not being specific.

16 THE WITNESS: I agree with his objection. I
17 don't know what you're asking about.

18 Q (By Mr. Frankel) Prior to or at its November
19 9th, 2018 decision making on the holdover of the
20 revocable permits, did BLNR know which diversion
21 structures caused the greatest threat of entrainment
22 of native aquatic species?

23 A I don't know.

24 Q I have some questions about Hanahoi Stream.
25 Did CWRM order the full restoration of Hanahoi

1 Stream?

2 A I don't recall specifically. You'd have to
3 look at the CWRM decision.

4 Q Do you know if it's been fully restored?

5 A I don't know the details.

6 Q Did you ask Alexander & Baldwin prior to the
7 November 2018 decision whether Hanahoi Stream had
8 been restored?

9 A There were discussions about the
10 requirements in -- to remove stream diversions in the
11 CWRM decision and the status of them and what the
12 status of those rulings were.

13 Q There were questions to your staff or to
14 Alexander & Baldwin?

15 A It was part of the requirement of the CWRM
16 decision is to remove diversions, is to modify
17 diversions to ensure that the stream flow standards
18 and wetted pathway requirements could be met.

19 Q Did BLNR require that the diversion of water
20 from Hanahoi Stream end within a specific time frame?

21 A I don't recall. The requirement of the CWRM
22 decision is that certain structures be modified. And
23 some of those take time to go through the permitting
24 to do.

25 Q Did BLNR require that those -- the

1 alteration of the diversion structures on Hanahoi
2 Stream occur within a specific time frame?

3 A The BLNR decision requires EMI to comply
4 with the CWRM decision.

5 Q Do you know efforts have been made to
6 restore Hanahoi Stream?

7 A I am aware that the process is under way to
8 do the modifications required by the CWRM decision.

9 Q How long is that going to take?

10 A It depends on what the permitting
11 requirements take.

12 Q Assuming all those permits have already been
13 obtained, how long should Alexander & Baldwin have
14 and EMI?

15 A I don't know that they have all been
16 obtained.

17 Q Which ones have not?

18 A I can't answer that specifically.

19 Q Okay. Let me ask --

20 A I'm aware that some of the streams require
21 permitting and that is to remove or alter structures
22 and that is still in process.

23 Q Okay. Let's talk about Honopou Stream.
24 CWRM has ordered the full restoration of Honopou
25 Stream, right?

1 A My answer will be the same for each of the
2 streams you're talking about. I don't have the
3 specific information for each stream.

4 Q Let me ask you about the 12 streams that
5 were not part of the 2018 CWRM order that are within
6 the RP area.

7 MR. SCHULMEISTER: Let me just object to --
8 one time you said two dozen. Now you're saying 12.
9 I mean I'm just going to object that it's facts not
10 in evidence, lack of foundation as to the numbers.

11 Q (By Mr. Frankel) So do you know how much
12 water Alexander & Baldwin and EMI can divert this
13 year from the 12 streams that were not part of the
14 2018 --

15 A I'm aware that there are interim instream
16 flow standards in place from 1988 that apply to those
17 streams.

18 Q And what's the quantifiable standard that
19 were set on July 5th, 1988? Do you know?

20 A I don't have that information.

21 Q Would it surprise you that there is no
22 quantifiable standard?

23 A It's a status quo standard.

24 Q And what does that mean?

25 A It means that the diversions that were in

1 place can continue.

2 Q Okay. So do you know how much water that
3 would be for those 12 streams?

4 MR. SCHULMEISTER: Objection, lack of
5 foundation as to the 12 streams --

6 THE WITNESS: I don't have that information.

7 Q (By Mr. Frankel) Does the BLNR order allow
8 them to divert more water from these 12 streams than
9 was diverted last year?

10 A The BLNR order requires the interim instream
11 flow standards to be met.

12 Q So more can be diverted so long as the
13 interim instream flow standards are met?

14 A It depends.

15 Q For those streams that were not part of the
16 CWRM order in 2018, is there any provision that would
17 require that the existing stream diversions be
18 altered to prevent them from impeding the migration
19 of native aquatic species downstream or upstream?

20 A I don't know.

21 Q How much coordination is there between the
22 Division of Aquatic Resources and the staff at the
23 Commission on Water Resource Management?

24 A There's communication and discussion.

25 Q How would you describe their working

1 relationship?

2 A Fine.

3 Q Do they coordinate site visits and
4 inspections of streams in East Maui?

5 A I don't know. That's a very general
6 question.

7 Q Do you know if they go together on site
8 visits and inspections of streams within the four --
9 the area covered by the four revocable permits?

10 A I don't know.

11 Q Do you think it would be a good idea if they
12 went together?

13 A I don't know.

14 Q You have no idea if they've ever had a joint
15 visit to those streams?

16 A I don't know.

17 Q How often do you meet with the deputy at
18 CWRM together with the head of the Division of
19 Aquatic Resources to ensure that site visits and
20 inspections are happening and coordinated?

21 A There are no current plans to do site
22 inspections on the streams 'cause we don't have any
23 funding.

24 Q But you have staff.

25 A We have staff. They don't have availability

1 to do more work than they currently have.

2 Q Do you understand -- do you know that Skippy
3 Hau inspects those streams on East Maui?

4 A I'm aware that he does inspections for his
5 own purposes, not necessarily for the purposes of
6 enforcing the -- of monitoring the instream flow
7 standards. We are trying to get resources to do that
8 in the future.

9 Q In the meantime, you don't think it would be
10 a good idea to -- for you to meet with the CWRM
11 deputy and the head of the Division of Aquatic
12 Resources to try to coordinate some activities to
13 save on travel, to work together cooperatively?

14 A We have met.

15 Q Okay. Have you talked about coordinating
16 joint visits and inspections?

17 A We have talked about wanting to have
18 monitoring by the Division of Aquatic Resources for
19 East Maui as part of the implementation of the
20 instream flow standards. Yes, we have met about
21 that.

22 Q But no such inspections have occurred or
23 planned?

24 A Not as a formal part of the implementation
25 of the instream flow standards. Division of Aquatic

1 Resource does stream monitoring for its own purposes.

2 Q Before the November 2018 meeting, the board,
3 was there a coordinated visit coordinated between the
4 Land Division, CWRM and the Division of Aquatic
5 Resources of East Maui streams or the RP area?

6 A I don't know --

7 MR. SCHULMEISTER: You mean ever, ever or
8 just immediately before the November --

9 Q (By Mr. Frankel) I'll say in 2018.

10 A I don't know.

11 Q I want you to assume for a minute that the
12 revocable permits are invalidated and no leases given
13 to A&B and EMI. What would need to happen physically
14 to shut off flows in the Wailoa Ditch which serves
15 Maui County's water treatment facility?

16 A I don't know.

17 MR. SCHULMEISTER: Let me object to the
18 question as A, it's calling for speculation and
19 improper hypothetical and lacks foundation --

20 MS. WESTON: Join.

21 MR. SCHULMEISTER: -- in terms of all the
22 circumstances that would be advocating --

23 Q (By Mr. Frankel) Do you even know if it's
24 possible to shut off the majority of the flow for the
25 Wailoa Ditch?

1 A I don't know.

2 Q When were the revocable permits that EMI and
3 A&B are operating under first issued?

4 A I don't know.

5 Q You have no idea?

6 A I don't know.

7 Q Okay. Did it precede your term?

8 A I assume so.

9 Q Well, have you issued an RP to A&B and EMI,
10 a new RP since you've been chair of the board?

11 A I believe they've been holdover permits.

12 Q So holdover of RP that was issued prior to
13 your tenure?

14 A Uh-hum.

15 MS. WESTON: Yes?

16 THE WITNESS: Yes. Thank you.

17 Q (By Mr. Frankel) Has -- as far as you know,
18 has BLNR issued any other revocable permits to
19 Alexander & Baldwin and EMI since the year 2000?

20 A I don't know.

21 Q Okay. So now --

22 MR. SCHULMEISTER: When you say -- just so
23 I'm clear, when you say any other revocable permits,
24 for anything?

25 MR. FRANKEL: Well, thank you. In East

1 Maui.

2 MR. SCHULMEISTER: For water or for
3 anything?

4 MR. FRANKEL: For anything in East Maui.

5 MR. SCHULMEISTER: Anything in East Maui?

6 MR. FRANKEL: Which she doesn't know.

7 Q (By Mr. Frankel) So now, the revocable
8 permits that A&B and EMI are operating under, are
9 they the same ones that Judge Nishimura invalidated
10 in 2016?

11 MS. WESTON: If you don't know, just say you
12 don't know.

13 THE WITNESS: I don't know. I don't have
14 that specific information. I'd have to look at the
15 record to confirm.

16 Q (By Mr. Frankel) Okay. Well, you know
17 that -- do you recall that Judge Nishimura
18 invalidated the RPs?

19 A I'd have to go back and look at the decision
20 to confirm.

21 Q So you don't know if she invalidated
22 anything?

23 A I'd have to go back and look at the decision
24 to confirm.

25 Q Do you recall Judge Nishimura issuing a

1 decision in 2016 before -- no, after you became chair
2 of the board, right?

3 A I was chair of the board in 2016.

4 Q So --

5 A I did not review that decision before coming
6 here today.

7 Q Okay. But you recall she issued a decision
8 which -- do you recall she issued a decision?

9 A I don't recall the decision.

10 Q Itself?

11 A Itself.

12 Q Okay.

13 A Obviously, I could have looked at the record
14 if I had needed to to prepare for this.

15 Q I understand.

16 Do you know the basis upon which the Board
17 of Land and Natural Resources allowed Alexander and
18 Baldwin to continue to divert water after her
19 decision?

20 A I'm sorry, I don't recall what the sequence
21 was.

22 Q Okay. Is it your understanding that
23 Alexander & Baldwin and EMI are fully complying with
24 CWRM's 2018 order?

25 A I have no reason to think that they are not.

1 Q But do you -- do you know that they are?

2 A The revocable permit was issued in November,
3 confirmed in November. This is three months later.
4 So whether they are or aren't would be a bit of
5 speculation.

6 Q Okay. So you don't know now. So how about
7 back in November when you folks made your decision,
8 were A&B and EMI fully complying with CWRM's 2018
9 order?

10 A CWRM order was incorporated into the
11 November 2018 decision.

12 Q That's not my question. My question is were
13 they complying with that order?

14 A I don't know if they were complying but I
15 don't know that there was a legal requirement for
16 them to comply with it.

17 Q Okay. You don't think --

18 A There was an instream flow standard. That
19 decision was incorporated into the November 2018
20 decision.

21 Q Is it your position that if A&B did
22 something that violated the instream flow standard,
23 it's irrelevant because the instream flow standard
24 has no -- doesn't impose any requirement on A&B?

25 MS. WESTON: Objection, vague and ambiguous.

1 THE WITNESS: I believe --

2 MS. WESTON: Speculation.

3 THE WITNESS: -- that the instream flow
4 standard decision is taking -- takes a little while
5 to implement because -- and they did immediately
6 restore stream flows to a number of streams. And
7 there were some others that took longer because they
8 have to go through permitting.

9 Q (By Mr. Frankel) So in November, as far as
10 you're concerned, were they fully complying with
11 CWRM's 2018 order?

12 A We have no information that they were not.

13 Q Okay. So none of the information that
14 Sierra Club provided to you affected that analysis?

15 A I don't know what Sierra Club information
16 you're referring to.

17 Q Okay. Is it your opinion that Alexander &
18 Baldwin and EMI have been fully and completely honest
19 with you?

20 A I have no reason to think they have not.

21 Q Is it your opinion that Alexander & Baldwin
22 and EMI have been operating in good faith?

23 A I have no reason to think they have not.

24 Q Is it your opinion that the Sierra Club has
25 been fully and completely honest with you?

1 A I have no information on that.

2 Q Is it your opinion that the Sierra Club has
3 been operating in good faith?

4 A I have no reason to know one way or the
5 other.

6 Q But you have good reason to believe that A&B
7 is operating in good faith?

8 A We have a permitting relationship with A&B.
9 We have a litigation relationship with Sierra Club.
10 It's a different relationship.

11 Q All right. Did you know that as part of the
12 sales agreement, if A&B fails to obtain at least 30
13 million gallons a day from East Maui, it has to pay
14 Mahi Pono \$62 million?

15 A I have no information on that.

16 MR. FRANKEL: That's it.

17 THE WITNESS: Okay.

18 MR. SCHULMEISTER: Well, congratulations.

19 MR. FRANKEL: We're done.

20 THE WITNESS: Pretty good. Hour and a half.

21 MR. FRANKEL: Okay. We can be off the
22 record.

23 (Concluded at 2:36 p.m.)

24 --oo0oo--

25

WITNESS' CERTIFICATE

I, SUZANNE CASE, certify that I have read the foregoing typewritten pages 1 to 71, inclusive, and corrections, if any, were noted by me, and the same is now a true and correct transcript of my testimony.

Dated: This ___ day of _____, 2019.

SUZANNE CASE

Signed before me
this _____ day of _____, 2019.

Sierra Club vs. BLNR, et al.
Civil No. 19-1-0019-01 JPC
Deposition of Suzanne Case
taken March 14, 2019

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1
2 STATE OF HAWAII)
3 CITY AND COUNTY OF HONOLULU) SS:

4
5 I, PRISCILLA GONZAGA, Certified Shorthand Reporter, do hereby certify:

6 That on March 14, 2019, appeared before me
7 SUZANNE CASE, the witness whose deposition is
8 contained herein; that prior to being examined she
9 was by me duly sworn:

10 That the deposition was taken down by me in
11 machine shorthand and was thereafter reduced to
12 typewriting; that the foregoing represents, to the
13 best of my ability, a true and correct transcript of
14 the proceedings had in the foregoing matter.

15 That pursuant to Rule 30(e) of the Hawaii
16 Rules of Civil Procedure, a request for an
17 opportunity to review and make changes to this
18 transcript:

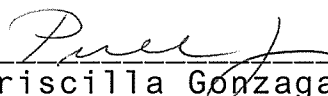
19 x Was made by the deponent or a party (and/or
20 their attorney) prior to the completion of
21 the deposition.

22 Was not made by the deponent or a party
23 and/or their attorney) prior to the
24 completion of the deposition.

25 Was waived.

I further certify that I am not an attorney
for any of the parties hereto, nor in any way
concerned with the cause.

Dated: This 3 day of April 2019, in
Honolulu, Hawaii.


Priscilla Gonzaga, CSR # 127

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DATED: APR 5 2019 SIGNED:  C.S.R. 179