

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 SAMUEL GON, III

Taken on behalf of the Plaintiff SIERRA CLUB, at 1132
Bishop Street, Conference Room 611, Honolulu, Hawaii
96813, commencing at 8:30 a.m., on Wednesday, March 11,
2020 pursuant to Notice.

BEFORE: MYRLA R. ROMERO, CSR No. 397

Notary Public, State of Hawaii

1 APPEARANCES:
 2 For Plaintiff SIERRA CLUB:
 3 DAVID KIMO FRANKEL, ESQ.
 4 1638-A Mikahala Way
 5 Honolulu, Hawaii 96816

6 For Defendant BOARD OF LAND AND NATURAL RESOURCES,
 7 DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE
 8 in her official capacity as Chairperson of the Board of
 9 Land and Natural Resources:
 10 AMANDA WESTON, ESQ.
 11 Deputy Attorney General
 12 Department of the Attorney General
 13 465 South King Street, Third Floor
 14 Honolulu, Hawaii 96813

15 For Defendant ALEXANDER AND BALDWIN, INC. and EAST
 16 MAUI IRRIGATION, LLC:
 17 MICHI MOMOSE, ESQ.
 18 Cades Schutte LLLP
 19 1000 Bishop Street, Suite 1200
 20 Honolulu, Hawaii 96813
 21
 22
 23
 24
 25

1 (Disclosure presented to all counsel.)
 2 SAMUEL GON III,
 3 called as a witness by and on behalf of the Plaintiff
 4 SIERRA CLUB, having been first duly sworn to tell the
 5 truth, the whole truth and nothing but the truth, was
 6 examined and testified as follows:
 7 EXAMINATION
 8 BY MR. FRANKEL:
 9 Q Can you state your name for the record.
 10 A Yes, I'm Sam Gon, III. And I would --
 11 yeah.
 12 Q If my question is not clear, will you ask
 13 me to explain myself?
 14 A Sure.
 15 Q Do you understand that your testimony is
 16 being made under oath?
 17 A Yes.
 18 Q You understand that the answers you give
 19 today can be used in court particularly if you answer
 20 differently in court than you do today?
 21 A All right.
 22 Q Do you understand that you may request a
 23 review of the completed transcript of this
 24 deposition?
 25 A Yes.

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1 Q And would you like to review the
 2 transcript?
 3 A Oh, sure, why not.
 4 MS. WESTON: Yes.
 5 BY MR. FRANKEL:
 6 Q There's a good chance that you'll be called
 7 as a witness for trial. And in that case, we would
 8 subpoena you and I want to know whether you would
 9 authorize the deputy attorney general to accept
 10 service of the subpoena for you. And if you want to
 11 consult with her before answering the question,
 12 that's fine.
 13 A I think that would be a good idea since I'm
 14 very inexperienced in this kind of thing.
 15 Q Okay. What did you do to prepare for
 16 today's deposition?
 17 A I reviewed portions of testimony for the
 18 Land Board meetings dealing with these things, I took
 19 a quick look at the East Maui watershed management
 20 plan, I reviewed very briefly the Hawaii stream
 21 assessment and the status of streams in Hawaii. In
 22 general, I took a look at materials that were related
 23 to the recent board decision.
 24 Q When you say the Hawaii stream assessment,
 25 what are you referring to specifically?

1 A Oh, that was an assessment of all of the
2 trees and their biota and their environmental
3 conditions conducted in the '90s.
4 Q Okay. What years have you served on the
5 BLNR?
6 A You know, it always confuses me because I
7 started on the BLNR in 2016, I believe, and then ran
8 the full allowed terms and so stepped off in 2014, I
9 believe. But it confuses me because they said well,
10 you didn't fill a full term the first year; so we're
11 extending it. So I wasn't sure. And then they told
12 me I could come back on a year but I asked them to
13 give me two so I came back on in 2016, I believe, and
14 I've been serving.
15 Q Since then?
16 A Yes.
17 Q You majored in zoology at UH, right?
18 A Yes.
19 Q Tell me about your master's degree.
20 A My master's degree was in zoology from the
21 University of California at Davis.
22 Q In what?
23 A That one was a master's by examination on
24 the way to my Ph.D.
25 Q Okay. What was your Ph.D. in?

1 A My Ph.D. was in the study of behavioral
2 ecology.
3 Q And what was your thesis topic?
4 A My thesis -- my dissertation topic was the
5 behavioral ecology of the Hawaiian Happy Face Spider
6 in forested environments of Maui and Hawaii.
7 Q Okay. What's your current position at the
8 Nature Conservancy?
9 A I am the Nature Conservancy's senior
10 scientist and cultural advisor.
11 Q Have you done any field work or scientific
12 investigation in east Maui?
13 A In east Maui?
14 Q Yes.
15 A Numerous, yes.
16 Q Tell me about them.
17 A Okay. I have done surveys of all of the
18 natural area reserves on east and west Maui. So that
19 includes Hanavi'i. I participated in the baseline
20 survey for Waikamoi Preserve. That was conducted
21 also in the '90s, I believe. And what else have I
22 done there? I've done numerous studies in Haleakala
23 Natural Park including Kipahulu Valley.
24 Q Have you done any field work or scientific
25 investigation in what I'm going to call the revocable

1 permit area, the area covered by the four revocable
2 permits that are issued in this lawsuit?
3 A Actually, I've done surveys in the mauka
4 portions of those drainages in conjunction with
5 preparation for the east Maui watershed management
6 plan.
7 Q Okay. So when you say mauka, are you
8 saying mauka of the revocable permit area or are you
9 saying mauka within the revocable permitted area?
10 A I'm saying above 4,000 feet elevation.
11 Q But you don't know if that's within the
12 revocable permit area or not?
13 A Well, you know, I'm presuming that the
14 drainages or areas that would lead down to those
15 drainages might be relevant.
16 Q All right. In any of your site
17 investigation or field work, have you seen the east
18 Maui irrigation ditch system?
19 A I believe I had a chance to visit the ditch
20 system on the -- sorry, the far end as it abuts
21 Haleakala Ranch near Ukulele Camp. There were, at
22 the time I was first there, a series of very old
23 flumes dating back to the sugar cane days. And then
24 more recently, I had a chance to also walk on the
25 improved flume system that was on that end.

1 Q Do you think that's further east of
2 Makapipi?
3 A Oh, I'm sure it is. It's probably near the
4 terminus of the ditch system.
5 Q Okay.
6 A At least on the mauka side.
7 Q Okay. Any other portions of the diversion
8 system that you have seen?
9 A You know, I recall being with Lawrence
10 Olivera back in the day. That would have been maybe
11 in the mid '80s when we went up Kuhiwa drainage. And
12 in that -- at that time, I was with Bob Hopty who was
13 the district forester. And as a side trip, we walked
14 along the ditch, but I'm not quite sure exactly where
15 that portion that we examined was.
16 Q Okay. So you don't have any distinct
17 memories of seeing any of the diversion structures
18 and their influence on streams?
19 A I have seen along that portion of the ditch
20 where waters were being diverted out of the mauka
21 stream flow and into the ditch itself.
22 Q And what stream would that be?
23 A I don't recall.
24 Q Okay. Okay. All right. And what was --
25 when you of your memory of what you saw, what kind of

1 impact did you observe?
 2 A Well, in most ditch systems in Hawaii, the
 3 stream waters are taken sometimes entirely from the
 4 upper courses and enter into the ditch system.
 5 Q Is that what you saw at that site?
 6 A I believe I saw one of two of those, yes.
 7 Q Okay. Now, you're filling BLNR's position
 8 for a board member with demonstrated expertise in
 9 native Hawaiian traditional customary practices,
 10 right?
 11 A That was my initial assignment. But with
 12 the bringing on of Kaiwi Yoon and also with the
 13 leaving of Keoni Downing, I'm apparently Oahu
 14 representative now.
 15 Q Oh, they've changed it?
 16 A They never made a public announcement of
 17 that, but I remember in one meeting because Keoni
 18 wasn't present and it was an Oahu item, I said in
 19 lieu of the Oahu representative, I will move to, you
 20 know, something and Suzanne said, what do you mean?
 21 You are the Oahu representative, okay. So by that I
 22 took that maybe I am the Oahu representative. But it
 23 could have been a glib statement on her part as well.
 24 Q But clearly at one point you were the one
 25 with the demonstrated expertise in Native Hawaiian

1 tradition and customary practices?
 2 A In 2006 I was brought on on the invitation
 3 of the Office of Hawaiian Affairs who has sent a
 4 letter to the governor saying that they wished me to
 5 serve on the land board for that purpose.
 6 Q So there are at least three criteria in the
 7 law, and I want you to tell me what experiences you
 8 have that fulfill those requirements or past tense
 9 filled them. I'll start with the third one.
 10 Substantial experience as a native Hawaiian
 11 traditional and customary practitioner.
 12 A So I was trained in Hawaiian chant and
 13 ceremony by Kumu John Kealoha Maikanana Lake and
 14 underwent 'Uniki as a kahuna.
 15 Q Can you spell that?
 16 A Glottal U long N-I-K-I. And was asked by
 17 him before he passed to continue teaching his chant
 18 classes for his halau. And so, you know, as a kahuna
 19 kakalaleo, I have been involved in ceremonies of
 20 various sorts, you know, blessings of land and
 21 openings of things and inaugurations of governors and
 22 the like. So yeah.
 23 Q The second --
 24 A We continue that practice. We are the
 25 halau and residents of the Bishop Museum currently.

1 Q All right. And also they ask whether your
 2 work history demonstrates inappropriate level of
 3 knowledge in native Hawaiian traditional and
 4 customary practices and tell me about that.
 5 A So I've often -- I have been long
 6 fascinated with traditional practice and I look to
 7 those sources that have been available both living
 8 and past people who were alive when I had the chance
 9 to interact with them as well as the many written
 10 sources of information on traditions in Hawaii both
 11 in English and in Hawaiian.
 12 Q And your job title currently says you're a
 13 cultural --
 14 A Cultural advisor for the Nature
 15 Conservancy, yes. When I underwent my 'uniki and the
 16 conservancy recognized that I was a practitioner,
 17 they asked me to serve in that capacity for the
 18 organization.
 19 Q And you speak Hawaiian?
 20 A Hai (speaking Hawaiian.)
 21 Q It's fair to say you speak Hawaiian
 22 fluently.
 23 A I enjoy it. And, in fact, a colleague of
 24 mine who worked her dissertation using entirely
 25 Hawaiian language sources out of the newspapers

1 created this group on Facebook that takes old chants
 2 and newspaper articles, we double blind translate
 3 them and then we put them back out with
 4 interpretations of their meaning and the historical
 5 context of the times in which they were written.
 6 It's a great deal of fun.
 7 Q And you satisfy the language requirement at
 8 UH through speaking Hawaiian?
 9 A Well, I took -- I took Hawaiian at the
 10 University of Hawaii a number of years, but it was
 11 with Kuku Lake's teaching that he conducted in
 12 Hawaiian primarily that those skills were worked
 13 further up and now engaging in conversations in
 14 Hawaiian with various folks that speak. It's fun.
 15 Q Okay.
 16 A Right now this being -- are we still in the
 17 month of Olelo Hawaii or was that February? It might
 18 be March. So I decided that that from now and
 19 further, all of my Facebook posts will be primarily
 20 in Hawaiian and then with English translations for
 21 folks who don't understand.
 22 Q All right. What does the word "ola" O-L-A
 23 mean in Hawaiian?
 24 A It means many things. It can mean life, it
 25 can mean healing. Those are the primary forms, yes.

1 Q What then would the word o'opu ola mean?
 2 A O'opu ola?
 3 Q And I'm going to spell it for the court
 4 reporter.
 5 A Okay. For the court reporter.
 6 Q O'-O-P-U-O-L-A.
 7 A So o'opu ola can be a living o'obo which is
 8 a gobi, a gobi fish. There are several different
 9 species that qualify for that name. Ola can also be
 10 to heal and o'opu were often used in healing
 11 practice. One o'opu in particular, the o'opu
 12 he'okole or the o'opu alamo'o was used in that extent
 13 being a physical manifestation of the mo'o or the
 14 streams.
 15 Q Given your understanding of the Hawaiian
 16 language and practices, why would Hawaiians have
 17 given an east Maui stream that name o'opu ola?
 18 A Well, because perhaps the o'opu that was
 19 utilized in ceremony could be gotten there. Names of
 20 streams and names of places are fascinating because
 21 they're usually tied to a story, a historical event,
 22 a name of a person that was associated with that
 23 name. And so you can suggest that o'opu ola means
 24 that there were living o'opu in that stream. You can
 25 say that o'opu that were used for healing at one time

1 might have been collected from that stream. You
 2 could say that there was a person named o'opu ola who
 3 was prominent in that ahupua'a and that associated
 4 with that stream. But without knowing the story
 5 that's associated with it, I wouldn't have a clear
 6 idea. So I would have to pursue that name and its
 7 sources.
 8 Q Okay. Did you know that in the board's
 9 decision making in 2018 and '19, the board authorized
 10 A&B to take all of the base flow of O'opu Ola stream
 11 so much that below the diversion there's no running
 12 water?
 13 A That is often the case with diversions in
 14 Hawaii. When water is taken from a stream, there can
 15 be complete succession of flow below the stream
 16 diversion.
 17 Q Okay. And are o'opu and opai important
 18 culturally and ecologically?
 19 A Certainly o'opu and opai are important what
 20 constituents of stream communities and so their
 21 presence indicates a stream that flows continuously
 22 at least and I won't say perennially but at least
 23 continuously during the year.
 24 Q So are they important culturally?
 25 A They can be.

1 Q How about ecologically?
 2 A Ecologically they are part of the ecosystem
 3 of the stream. And so there are streams that have
 4 o'opu and opai in them and there are streams that do
 5 not. Some streams naturally lack opai and o'opu
 6 depending on their flow regimes. And on the nature
 7 of the obstructions natural or otherwise that might
 8 occur there.
 9 For example, many of the steams in Napali
 10 that fall at the end as waterfalls going into the sea
 11 have very little opportunity. Leave very little
 12 opportunity for the young of opai or o'opu to enter
 13 the streams and to go up. And so those streams,
 14 while they exist and have their own compliment of
 15 life forms may or may not have o'opu or opai in them.
 16 Being diadromous species -- diadromous means that
 17 during part of their life cycle they require a
 18 connection with the ocean as part of their life
 19 cycle.
 20 Q Do stream diversions and insufficient
 21 in-stream flows harm native species in East Maui?
 22 MS. WESTON: Objection. Vague and
 23 ambiguous.
 24 THE WITNESS: Sorry?
 25 MS. WESTON: That's for her. You can

1 go ahead.
 2 THE WITNESS: I guess it depends on
 3 what you mean by harm. I know on the island of Oahu,
 4 for example, in Waihole and Waikane where waters had
 5 been diverted for many years, when those waters were
 6 returned to those streams opai and o'opu almost
 7 immediately repopulated those streams. So in the
 8 grand look of ecosystems in Hawaii especially the
 9 stream ecosystems as long as there are protected and
 10 large streams that allow those opai and o'opu and
 11 other diadromous creatures to enter the sea and
 12 undergo their life cycle there, as soon as the
 13 connection is re-established, those species find
 14 their way back up into those streams.
 15 So I view our Hawaiian continuous
 16 perennial streams as extremely resilient as long as
 17 key elements of that system are present on an island
 18 or indeed in the archipelago.
 19 Q So when I talk about the four revocable
 20 permits in East Maui, you understand the ones I'm
 21 talking about, right?
 22 A Well, there have been revocable permits
 23 that continued east Maui irrigations diversion of
 24 waters for agricultural and other uses.
 25 Q But you understand that the four that we're

1 talking about in this lawsuit are the ones that were
 2 first issued in the year 2000 and that the Sierra
 3 Club has challenged the BLNR's decisions made in 2018
 4 and '19 to continue them. Do you understand that?
 5 A Yes, I do.
 6 Q Okay. And you understand that these four
 7 revocable permits allow A&B and EMI to continue to
 8 use approximately 33,000 acres of public land and
 9 divert water from dozens of streams?
 10 A That is my understanding.
 11 Q Okay. Did the Sierra Club request a
 12 contested case hearing in 2018 orally and in writing
 13 regarding A&B's request to continue the permits?
 14 A I believe so.
 15 Q How about in 2019?
 16 A In 2019 did you not -- did you not make
 17 that request at a board meeting?
 18 Q Well, so I have to ask -- I'm not
 19 testifying. I have to ask you the questions.
 20 A Oh, oh, okay. That is my recollection.
 21 Q And those requests were denied, correct?
 22 A That is correct.
 23 Q In both years?
 24 A I believe so.
 25 Q Okay. Have you read any of the reports

1 memoranda or letters from the Division of Aquatic
 2 Resources regarding any of the east Maui streams?
 3 A You know, as they were included or not
 4 included in the board packets for those RPs, I would
 5 have reviewed those. But as you know, we are asked
 6 to review sometimes very large amounts of information
 7 on a weekly basis. And so I don't -- I might not
 8 have a clear recollection of exactly what was in
 9 those packets.
 10 Q Well, to the extent that you specifically
 11 recall any Division of Aquatic Resource report,
 12 memorandum or letter, have you found those documents
 13 from that division useful?
 14 A Well, it's always useful to get the opinion
 15 of the divisions in matters that involve their
 16 expertise.
 17 Q And do you find that the reports,
 18 memoranda, letters from the Division of Aquatic
 19 Resources are credible?
 20 A When I look at those reports, if anything
 21 flies in the face of what I know as a biologist or
 22 otherwise, I typically question the staff on them.
 23 If not, then my policy is to take the staff
 24 submittals as their best efforts to compile the
 25 information that's relevant to the decision that's

1 about to be made.
 2 Q And is your assumption that the staff
 3 submittal, the folks who prepare the staff submittal
 4 seeks information from the Division of Aquatic
 5 Resources?
 6 MS. WESTON: Objection. Vague and
 7 ambiguous. Go ahead.
 8 THE WITNESS: I presume that that is
 9 the case. Often I, for example, we see that there
 10 are sections in which the comments from the various
 11 divisions are specifically mentioned.
 12 BY MR. FRANKEL:
 13 Q Would it disturb you to learn that the
 14 staff submittals that you've been receiving on this
 15 issue have not included information from the Division
 16 of Aquatic Resources?
 17 MS. WESTON: Objection. Vague and
 18 ambiguous.
 19 MS. MOMOSE: Join in the objection.
 20 MS. WESTON: Form of the question.
 21 THE WITNESS: Sorry, what?
 22 MS. WESTON: It assumes facts not in
 23 evidence.
 24 BY MR. FRANKEL:
 25 Q So she's going to object for the record,

1 but you can go ahead and answer the question.
 2 A Oh, I see, I see. Not necessarily
 3 depending on the information that was put before us.
 4 Q All right. How much water is the east Maui
 5 irrigation ditch system designed to capture from each
 6 stream, do you know?
 7 A I don't recall the details of that.
 8 Q Okay. Would it surprise you to learn that
 9 it's designed to capture all the base flow plus more?
 10 A I believe that when the ditch systems of
 11 Hawaii were originally set up, most of them were
 12 designed to take almost all of the water that was in
 13 a stream.
 14 Q Are you familiar with the Water
 15 Commission's 2018 decision?
 16 A The Water Commission's 2018 with regard to
 17 in stream flow, yes.
 18 Q Have you read --
 19 A Don't ask me to cite the details of that
 20 though.
 21 Q Understood. But have you read the whole
 22 thing or you have a familiarity with it? Did you sit
 23 down and read through that?
 24 A I did not sit down and read the entirety of
 25 the thing but I did take a look at the summary and I

1 did take a look at the various portions of it that
2 interested me at the time and that seemed relevant to
3 the decisions we were making.

4 Q Okay. Of the ten streams that the water
5 commission ordered to be fully restored, do you know
6 if there are still diversion structures remaining
7 that interfere or harm native aquatic species?

8 A I believe I have seen in the reports that
9 there are diversion structures that remain.

10 Q How about diversion structures that remain
11 that continue to interfere or harm native aquatic
12 species?

13 MS. MOMOSE: Objection. Vague.

14 MS. WESTON: Join.

15 THE WITNESS: Sorry, what was the
16 objection based on?

17 MS. MOMOSE: Objection. Vague as to
18 the question.

19 THE WITNESS: Oh, okay. Well, it was
20 difficult -- as I say, it's difficult to assess harm
21 of structures when the details of stream flow over
22 the course of the year are not absolutely clear. One
23 would have to go up and take a look at the presence
24 of stream creatures in the area at the flow that's
25 occurring and other elements there in order to -- in

1 order to assess whether or not there's current harm,
2 permanent harm, irreversible harm.

3 The impacts on streams, as I say, is
4 quite a complex matter. And so it would be difficult
5 for me to assess whether or not specific harm is
6 occurring without knowing the full context of the
7 different streams that are there. I will point out,
8 though, that because our streams are amazing,
9 resilient, when diversions, if they're in place or
10 even like a natural landslide that blocks a stream,
11 when that occurs, of course there's truncation of
12 flow.

13 But as that obstruction is removed
14 gradually or suddenly, we've seen that stream animals
15 are able to re-establish their connections with those
16 stream and re-establish a community within them.

17 Q Okay. So you talked about -- if I'm
18 understanding your answer correctly, in order to
19 determine whether the diversion structures remaining
20 or interfering or harming native aquatic species, you
21 need more information?

22 A No, not necessarily. Like I said, I can
23 presume certain things with my knowledge of stream
24 biology that over the course of time, whether
25 diversion exists in totality or partially, when those

1 diversions are removed, there's an extremely high
2 likelihood that stream fauna will re-establish within
3 that stream.

4 Q Okay. I want to not ask you about the
5 future. I'm asking about what's happening now or in
6 the past. I'm asking whether -- do you know if there
7 are still diversion structures remaining that
8 interfere?

9 A I believe I answered that, yes.

10 Q So --

11 A Oh, there are diversion structures
12 remaining and I know that in reports that we receive,
13 some of those -- some of those appear to obstruct the
14 stream flow. And so if you're associating stream
15 flow with the presence of stream animals, then those
16 streams would not be habitable at the present time.

17 But, you know, to ask whether or not past
18 diversions impose impacts, I think that's pretty
19 clear that any time that there's an interruption of
20 stream flow, there will be interruption of the
21 processes that occur within that stream. But it's
22 also clear that streams are very dynamic things. And
23 that when you re-establish flow, so, you know, for
24 example, in the long history of the ditch if there
25 was ever a ditch breakdown and water returned to a

1 particular stream, I would not have been surprised at
2 all to find that stream animals returned to that
3 stream almost immediately.

4 Q I understand. So you talked about the
5 impact that reduce stream flow can have on native
6 aquatic species. But I want to also ask you about,
7 not the impact from reduced stream flow but from
8 either blocking migration or in training organisms.

9 Are you aware for those ten streams that
10 the water commission ordered to be fully restored, do
11 you know if there are still diversion structures that
12 interfere with native aquatic species in terms of
13 their migration or entrainment?

14 A Can you explain entrainment for me?

15 Q Entrainment that's a fancy scientific word
16 for capturing when there's grates and either the
17 larvae are coming downstream or they're swimming
18 downstream or they're going upstream, if there's a
19 grate that dumps the water into a ditch, they're
20 entrained or captured because they're no longer in
21 the stream. They flow into the ditch and then out to
22 central Maui. So that's what the concept of
23 entrainment is.

24 A Thank you very much for clarifying that.
25 Well, you know, whenever there's diversion as I said,

1 it's going to have impacts on stream organisms. So
2 to the extent that stream diversion what you call
3 structures exist, it's bound to have some impact on
4 the stream organisms.

5 Q Okay. Now, are you aware that there are 13
6 east Maui streams that were not part of the Water
7 Commission's 2018 order?

8 A I am aware of that.

9 Q Now, BLNR has allowed A&B and EMI to take
10 water from these 13 streams pursuant to the revocable
11 permits, right?

12 A I believe that's correct.

13 Q And in its decision, the Board of Land and
14 Natural Resources imposed no limit as to how much
15 water can be taken from any of these 13 streams,
16 right?

17 A Yes, that's my recollection.

18 Q And did BLNR impose any conditions to
19 ensure that a minimum amount of water flowed in any
20 of these 13 streams?

21 A I believe we did impose conditions, but I
22 don't recall what the specific conditions were.

23 Q Did the board impose any conditions to
24 protect native aquatic species that might live in any
25 of these 13 streams?

1 A I believe that at the time the land board
2 did not do so with the knowledge that there were a
3 few streams that exist within the east Maui watershed
4 that provide the connectivity for stream organisms
5 and that the revocable permit being a temporary item
6 is in the context of the complex set of removal of
7 diversion structures for those streams that have been
8 ordered to do so as well as the analyses that are
9 going on with regard to future and current needs for
10 water by the Maui population.

11 Q Okay. Did BLNR impose any conditions to
12 ensure recreational uses of these 13 streams?

13 A Recreational uses for those particular
14 streams aside from people enjoying them from the
15 road, you know; so I believe the assessment -- the
16 assessments of recreational uses made that
17 particular consideration not a high priority with
18 regard to the water needs of Maui.

19 Q So let me ask you again. Did the board
20 impose any conditions to ensure recreational uses of
21 these 13 streams?

22 A I don't recall any specific conditions that
23 were imposed for recreational uses.

24 Q Did the board impose any condition to
25 protect the natural beauty of these 13 streams?

1 A You know, natural beauty is in the eye of
2 the beholder I suppose. So those viewpoints from the
3 highway where most of the public can see those stream
4 courses are in place, and I don't think that it was
5 ever an issue brought up that their natural beauty
6 was impaired except by maybe -- well, I don't recall
7 any individuals that made those points specifically
8 as a major element of their arguments but it could
9 be.

10 I mean, over the years from 2006 to the
11 present, decisions have been made by the board on the
12 east Maui streams. And so I don't have a very clear
13 recollection of whether or not recreational uses or
14 natural beauty elements were major elements of the
15 decisions that we were making.

16 Q Okay. So I guess there's two separate
17 issues that you talked about. One is whether the
18 issue was kind of raised and talked about but the
19 other is whether the board imposed any condition. So
20 my question is about whether the board imposed any
21 conditions to protect the natural beauty of any of
22 these 13 streams?

23 A Typically the board imposes conditions when
24 it's clear that those aspects might be impacted in a
25 major way. And so if the board and the staff's

1 consideration suggest that that is not a major issue,
2 then no specific conditions might be included in
3 those actions.

4 Q So you've explained why they might not
5 impose conditions but did they impose any condition
6 as far as you remember?

7 A As far as I remember, no.

8 Q Okay. Now, the board and the department
9 are landlords, right?

10 A I suppose. We're stewards in trust for the
11 people of Hawaii and for the natural resources of
12 Hawaii.

13 Q And the board and the department would have
14 imposed conditions to protect these 13 streams?

15 A I suppose when we indicate that the permit
16 must obey all existing environmental laws, that those
17 conditions would be held within those laws.

18 Q Okay. Any other conditions?

19 A Huh?

20 Q Any other conditions you can think of?

21 A No.

22 Q Did you know that A&B's consultant for the
23 DIS included that diversion of water from these 13
24 streams reduces habitat units on those streams from
25 588,000 square meters to 88,386 square meters, a

1 reduction of 85 percent?
2 A I'm not aware of the exact details, but I
3 do -- I am aware that there are reductions in habitat
4 cited, yes.

5 Q As a senior scientist for the Nature
6 Conservancy, does the reduction in the amount of
7 habitat along streams by 85 percent constitute a
8 significant impact on the streams?

9 A I would say that any time that you have a
10 major stream and you remove large amounts of water,
11 that there would have a major impact on the biota of
12 those streams. And so if it was a stream that had
13 never been diverted before, I would have been really
14 concerned with an 85 percent diversion rate.

15 However, if it was a stream that had been
16 diverted for the better part of 100 years, that would
17 be a different context.

18 Q So it wouldn't disturb you?

19 A It couldn't disturb me because I have seen
20 the resilience of streams. And when those stream
21 flows are re-established as long as there are healthy
22 streams within the area, it's likely that the stream
23 biota will return. And I'll point out that smaller
24 streams in particular often do not have the full
25 complement of opai and o'opu and other diadromous

1 particular action on a stream and the stated future
2 uses of the stream and the balance that must be made
3 between the resources that are within the stream are
4 native plants and animals and the needs of people,
5 agriculture and other uses that frankly we all rely
6 on that are provided by diversions let's say or water
7 sources.

8 Q So the restoration of streams creates
9 environmental benefits that you described in terms of
10 the repopulation of the streams by these native
11 species?

12 A Typically when you see restoration of flow
13 especially unimpeded and high quality waters and in a
14 perennial course, we see benefits, yes.

15 Q Do you understand that the board has
16 allowed A&B and EMI to take so much water from the
17 six connectivity streams and 13 other streams not
18 part of the water commission order that these streams
19 have less than the minimum flow necessary to provide
20 suitable habitat conditions for recruitment, growth
21 and reproduction of native stream animals?

22 MS. WESTON: Objection. Vague and
23 ambiguous as to form of the question.

24 MS. MOMOSE: Join in the objection.

25 THE WITNESS: I'm sorry. Can you

1 species but have the full complement of other nature
2 species that don't rely on that connection with the
3 ocean.

4 In the conservancy's planning process when
5 we look at impacts, we look at the history of the
6 impacts, the course of the impacts, the extent and
7 most importantly the irreversibility of those
8 impacts. And so in stream biology and we have a
9 great deal of knowledge with regard to that from our
10 studies in Pelekonu, from our involvement in the
11 Hawaii stream assessment, we have seen the broad
12 range of habitat that exists in the Hawaiian islands
13 for diadromous and other native species that are in
14 streams. And we also see where those streams are
15 intact, what the response is when streams are
16 channelized or diverted, dewatered, rewatered and it
17 gives us a confidence that when streams are rewatered
18 that elements of the streams that depended on those
19 waters typically show a strong return.

20 Q So there's -- go ahead.

21 A Yeah, and so when we look at streams and we
22 assess impacts on streams, we have to keep the
23 history of the streams, the impacts and the
24 irreversibility of those impacts in mind. That gives
25 me more comfort when I look at the course of a

1 repeat the key part of the question?

2 BY MR. FRANKEL:

3 Q Sure. Do you understand the board has
4 allowed A&B and EMI to take so much water from the
5 six connectivity streams and 13 other streams that
6 these streams have less than the minimum flow
7 necessary to provide suitable habitat conditions for
8 recruitment, growth and reproduction of native stream
9 animals?

10 A I do not understand that because I don't
11 believe that's the case. Any time that you're
12 talking about minimum stream flow, you're talking
13 about stream flow over time. And if you make your
14 measurements of minimum stream flow during a drought
15 year, you might find that everything is below the
16 minimum whether there was a diversion or not.

17 So when you look at the health of a
18 particular stream, you have to look at it over the
19 course of time and also against those processes that
20 I mentioned earlier about stream flow, about recovery
21 from diversion, about dewatering, rewatering. And so
22 it's not my understanding that those streams have
23 been in any way permanently impaired.

24 There certainly are streams that are below
25 their minimum, but I also note that in those streams

1 in which diversions were entirely removed, some of
2 them also fell depending on the times that they were
3 measured below those minimums and so to me I was
4 thinking we would need to have a longer course of
5 measurements over the course of the year: Wet
6 season, dry season in order to assess whether or not,
7 you know, what the true impacts were.

8 Q So you think you need more information?

9 A No, I think that we have enough information
10 to know that our streams are resilient and that
11 especially after a long course of dewatering of
12 streams, that the issue is with regard to stream life
13 are not as important as what can happen when those
14 streams are rewatered.

15 And so those kinds of decisions always come
16 into play when the landlord must look at uses for
17 agriculture, for people, for other things that we're
18 mandated to provide for the people of Hawaii by
19 natural resources and the native biota of places.

20 When I look at those kinds of decisions, I
21 often have to assess whether or not the current
22 status is likely to change in the future. And
23 because we're in a revocable permit mode, pending a
24 longer term, what, land disposition, the decision on
25 my part anyway as part of the land board was to

1 assess the current uses against the potential future
2 uses and to make sure that when those permanent --
3 those more permanent dispositions are put into place,
4 that sufficient conditions are in place to allow for
5 the continuation of biota and other mandated needs.

6 Q What justification did BLNR make for
7 allowing less water to remain in streams that is
8 needed to provide suitable habitat, conditions for
9 recruitment growth and reproduction of native stream
10 animals to the six connectivity streams that only are
11 given 20 percent of their base flow?

12 MS. MOMOSE: Objection. Assumes facts
13 not in evidence and as to form of the question.

14 MS. WESTON: Join.

15 THE WITNESS: So can you repeat the
16 question again for me, please.

17 BY MR. FRANKEL:

18 Q Sure. I'm not asking for your opinion
19 here. I'm saying at what justification did BLNR
20 offer or make for allowing less water to remain in
21 the six connectivity streams that are assured only 20
22 percent of their base flow that those streams are not
23 provided enough suitable habitat conditions for
24 recruitment, growth and reproduction of native stream
25 animals?

1 A At the time I don't recall any specific
2 justifications because when the board makes a
3 decision, it does so on the basis of information
4 that's placed before it. So the decisions are based
5 on the recommendations of staff and the information
6 that's at hand and the testimony that's provided.

7 So I'm not -- I don't recall whether or not
8 there were any specific justifications that were made
9 to allow for that particular decision. But except
10 for the fact that they would be implicit within the
11 information that was given by the staff and in
12 testimony.

13 MS. WESTON: David. Do you need a
14 drink of water?

15 (Recess from 9:15 a.m. to 9:21 a.m.)

16 BY MR. FRANKEL:

17 Q In October, 2019, what information did the
18 Board of Land and Natural Resources have as to
19 whether there was enough water flowing in each stream
20 in east Maui to ensure that populations of native
21 aquatic organisms within them had not been or were
22 not being adversely affected?

23 MS. WESTON: Objection. Vague and
24 ambiguous as to the form of the question.

25 MS. MOMOSE: Join in the objection.

1 THE WITNESS: So the question was?
2 BY MR. FRANKEL:

3 Q What information did the board have as to
4 whether there was enough flowing, water flowing in
5 each stream in east Maui to ensure the populations of
6 native aquatic organisms within them were not being
7 adversely affected?

8 A They probably -- we probably did not have
9 that specific information. But as I mentioned, that
10 information was probably not relevant to the decision
11 being made at the time because of the long-term
12 nature of the diversions of water in east Maui. So,
13 you know, when you're dealing with a status quo
14 situation that has occurred over the course of a
15 century and you're looking at the process of slow
16 return of waters to particular streams, then it's a
17 matter of -- it's a matter of not thinking about what
18 the status is since that status was established 150
19 years ago or whatever the date was when the
20 diversions occurred.

21 But in my mind, the decision is made with
22 an eye toward the potential for change of that in the
23 future knowing that that change has a very good
24 chance of existing.

25 Q Well --

1 A So in other words, what justification is
2 not an important question to me at the time
3 because --

4 Q But -- I didn't -- go ahead.

5 A Because the justification is internalized
6 in the history of the water use and the status of
7 those streams.

8 Q Well, are you --

9 A So you wouldn't have to justify the lack
10 of -- the lack of information on the health of a
11 stream below a diversion when you know that the
12 stream below the diversion has been dewatered for the
13 better part of a century.

14 In that case, you would say there's no need
15 for any justification because there hasn't been any
16 biota in that stream just like it hasn't been for
17 75 percent of the streams on the island Oahu. In
18 that case, what you would do is you would say what
19 are the other considerations with regard to use of
20 the needs of the waters of Maui, the maintenance of a
21 system that provides that water, the acknowledgment
22 of the temporary use of that system that's in place
23 and then the potential for changes of those systems
24 to see to the needs of -- the needs of in-stream flow
25 and the biota of those streams.

1 Q Well, you're not suggesting that the board
2 is a rubber stamp, just rubber stamping revocable
3 permits each year, are you?

4 A No, not necessarily. The revocable permits
5 bother me because I look to -- whenever there's a
6 long-term need, we should have long-term
7 relationships in place for those resources, for those
8 lands. And I know that that has been an issue for
9 the BLNR, and I for one am one of those board members
10 that asks the staff whenever they come with a
11 revocable permit what is the status on establishing
12 more permanent relationships upon which more
13 permanent conditions can be placed.

14 Q Well, you've been voting since 2006 except
15 for those two years when you were not on the board to
16 approve these revocable permits, correct?

17 A That is correct.

18 Q And are you suggesting the criteria for
19 deciding whether to approve these is so long as the
20 status quo is maintained, it doesn't matter what the
21 impact is to native aquatic organisms?

22 A No, I'm not saying that at all. I'm saying
23 that it's an acknowledgement that certain uses of
24 land, for example, agriculture in general can and has
25 displaced huge amounts of native biota including

1 endangered species. I'll point out that the species
2 that are involved in our streams, none of which have
3 threatened or endangered status at the moment fall in
4 a category in which one considers the impacts but
5 does not necessarily make them the highest priority
6 for the consideration of the decision being made.

7 Biota is really important to me as a member
8 of a conservation organization. I often have an eye
9 to what the impacts might be on our native species.
10 I recognize their value ecologically. As a
11 practitioner, I recognize their values culturally.
12 But I also recognize that there are many needs that
13 the BLNR is responsible for.

14 And so in this case, the established -- I'm
15 sorry, the continuation of permits to maintain an
16 infrastructure that provides for the water needs of
17 the greater part of Maui is a huge priority. And
18 although we were concerned about all of the elements
19 recreational, aesthetic, biological, cultural that
20 occur there, the need for water is an extremely
21 important need.

22 And one can argue about the amount of water
23 that's needed by the population, the kinds of uses
24 that are needed there. But it does boil down to
25 whether or not the infrastructure that's in place is

1 sufficient at present to see to those needs. And
2 two, to see to the potential future needs of water of
3 the island. And three, whether or not there's the
4 potential for establishment of better systems of
5 water procurement that allow for all of the needs,
6 the biotic needs, the cultural needs and the needs
7 for -- needs for the larger population of Maui island
8 and any island.

9 Q So in the context of the revocable permits,
10 did the board need any more information regarding the
11 impact of the diversion on native aquatic organisms?

12 A So I would conclude that the board would
13 not need more information on the impacts of the
14 diversions on native organisms because those
15 diversions already had an impact on the native
16 organisms and that those impacts are not
17 irreversible.

18 So extending the RPs for a number of years
19 especially in the context of 100-plus years of
20 diversion, put that as a lower priority for, in my
21 mind, as part of the landlord. However, it's not a
22 zero priority. And we have often acknowledged that,
23 that the establishment of in-stream flow standards is
24 an important thing both for the maintenance of the
25 native biota and for cultural and other uses.

1 That is the prize. I mean, that's the goal
 2 that we aim for and I think that it's a goal that's
 3 achievable. And to the extent that the revocable
 4 permits also are accompanied by steps that lead us
 5 toward that goal, then I'm satisfied to allow those
 6 permits as long as we see that there are also steps
 7 being taken to realize those goals.
 8 Q So there were impacts to native species
 9 from diversions back in 2006 when you authorized the
 10 revocable permits, right?
 11 MS. WESTON: Objection. Vague and
 12 ambiguous.
 13 THE WITNESS: I think impacts had been
 14 ongoing for 100 years.
 15 BY MR. FRANKEL:
 16 Q I understand that. And those impacts
 17 continued in 2006.
 18 A You would presume so.
 19 Q And 2007?
 20 A And all the way up until present.
 21 Q Okay.
 22 A To the extent they have not been rewatered
 23 and those conditions have changed. So the change of
 24 conditions is the important thing to me and the
 25 potential for change exists and the RPs are in place

1 and we move toward establishing those goals.
 2 Q What deadline did the Board of Natural
 3 Resources set for the alteration or removal of any of
 4 the diversion structures within the revocable permit
 5 area?
 6 A I'm not -- I don't believe I recall the
 7 exact time frame of the thing, but it wasn't an open
 8 ended -- it wasn't an open-ended thing. I also
 9 recognize whenever infrastructure that has been in
 10 place for a long time in a remote area requires
 11 removing, sometimes it's difficult to do so. I
 12 notice -- I note that when proposals to extend or
 13 reports on the removal of infrastructure falls
 14 behind, it's bothersome. We make a point of that.
 15 And if it's necessary, to give extensions, extensions
 16 are given but it's not meant to be -- it's not meant
 17 to be a forever thing.
 18 Q Do you realize there's no deadline that you
 19 set?
 20 MS. MOMOSE: Objection. Vague.
 21 BY MR. FRANKEL:
 22 Q Do you know?
 23 A I don't know that.
 24 Q Okay.
 25 A I don't recall whether or not there were

1 any time frames either offered or specifically set by
 2 the board.
 3 Q Okay.
 4 A But I do know that where streams are
 5 dewatered as a consequence of structures that were in
 6 place, that rewatering would require removal or
 7 modification of those structures. Sometimes
 8 modification doesn't require complete removal. And I
 9 know that we've had discussions on those points as
 10 well.
 11 Q Okay. You agree that diversion structures
 12 can interfere with native --
 13 A Can interfere?
 14 Q Can. By blocking migration upstream as was
 15 capturing or entraining the larvae?
 16 A I do agree with that.
 17 Q Do diversion structures facilitate mosquito
 18 breeding?
 19 A They can but so do natural ponding.
 20 Q Sure. Can diversion structures threaten
 21 the safety of recreational uses of public land?
 22 A I suppose they could. But so could natural
 23 obstacles.
 24 Q And can diversion structures mar natural
 25 beauty?

1 A Some people love going to dams and taking a
 2 look at dams. And so beauty is in the eye of the
 3 beholder. But when one wants to see a pristine
 4 stream, I suppose a diversion would be something that
 5 they would not want to see.
 6 Q And a dam wouldn't be natural beauty, would
 7 it?
 8 A No, a dam would not. Well, I don't know.
 9 Let me think about that. If I was at Menehune
 10 Fishpond and I saw the structure and the auwai. In
 11 fact, there are people in Nu'uaniu Valley that love
 12 the auwai system that was put in there. And that's
 13 arguably a non-natural system. And they're fighting
 14 hard to maintain the flow of those auwai.
 15 And when you look at them, you're reminded
 16 of the history of the place and it becomes an
 17 important part of the place. So I could see how, you
 18 know, one could actually appreciate the aesthetics of
 19 something like that.
 20 Q Before making its decision in 2018 and
 21 2019, did DLNR or BLNR have any information regarding
 22 which diversion structures create mosquito breeding
 23 habitat?
 24 A Probably not.
 25 Q What is the problem caused by mosquitoes in

1 our forest?
2 A The problems caused by mosquitoes in
3 general is can include threats to human health, can
4 include threats to the native biota in particular the
5 spread of maybe malaria and pox to our native forest
6 birds. And natural streams provide habitat for
7 mosquitoes. The answer is not so much diversions as
8 it is removal of mosquitoes.

9 So I know that there's work afoot to try to
10 find methods to completely remove mosquitoes from the
11 Hawaiian islands and those are -- that's a goal that
12 I think would be an amazing thing both for human
13 health and for our native biota.

14 Q One of the justifications the Nature
15 Conservancy propounds for fencing native forests is
16 to keep pigs out because pigs can uproot kapu'u and
17 create these little ponds of breeding grounds for
18 mosquitoes, isn't that right?

19 A As well as wallows.

20 Q Correct. So if a diversion structure
21 creates stagnant pools of water, that creates habitat
22 for mosquito breeding, right?

23 A It would be one of many natural and
24 unnatural sources of breeding for mosquitoes.
25 Mosquitoes will take advantage of a hole in a tree

1 against the day when they can expand into lower
2 elevations once mosquitoes are brought under control.

3 So the Nature Conservancy does not
4 engage in any low elevation mosquito control and
5 certainly not in those areas that are not dominated
6 by native forests because they fully realized that
7 mosquito habitat is widespread in the low lands and
8 in a variety of natural and man-created situations.

9 BY MR. FRANKEL:

10 Q Has BLNR or DLNR sought information
11 regarding which diversions cause the greatest threat
12 of entrainment or capture of native aquatic species?

13 A I know that that was pointed out in
14 testimony in the decisions that were made. And there
15 was, to my recollection, there was no specific
16 request for specificity on which diversions at what
17 locations. It was important enough to know that
18 those diversions and structures exist and that
19 they're problematic and that that information could
20 be used to establish the nature of more permanent
21 long-term solutions to the water diversion structure
22 problem.

23 Q So wait. Are you saying the board actually
24 sought that information about which ones were the
25 greatest entrainment or not?

1 trunk. They'll take advantage of an oxbow in a
2 stream course that creates a stagnant section of the
3 stream. It can be in the bromeliads growing in
4 people's yards. I think the point about diversion as
5 a mosquito habitat is not a very strong argument.

6 Q Even though U.S. Fish and Wildlife says so?

7 A U.S. Fish and Wildlife is mandated to point
8 out all of the potential impacts that might have that
9 they might have on native species. However, Fish and
10 Wildlife Service would probably also note that
11 natural and unnatural habitat for mosquitoes exists
12 in a wide variety of places.

13 Q So doesn't the Nature Conservancy attempt
14 to reduce mosquito breeding opportunities whether
15 they're natural, unnatural, whether they're pig
16 induced or not, and isn't it similarly a good idea to
17 reduce mosquito breeding opportunities along streams?

18 A Actually the --

19 MS. MOMOSE: Objection. Compound.

20 MS. WESTON: Join.

21 THE WITNESS: Actually the Nature
22 Conservancy focuses on more undisturbed native
23 ecosystems typically at higher elevations where
24 mosquitoes are not a problem to maintain the
25 integrity of those habitats for native forest birds

1 A The fact that they exist means that you
2 don't have to ask for specific locations or the like.
3 What is important is that you would know that that is
4 one of the issues that needs to be conditioned in the
5 future, you know, when we go from revocable permits
6 to a more permanent relationship.

7 Q Explain to me why you would deal with the
8 harm caused by entrainment when dealing with a lease
9 but not a revocable permit that's been reauthorized
10 for basically two decades now?

11 A Because in the lease you can establish
12 those conditions that will be -- that will extend for
13 longer than two decades. When you're -- in fact, I
14 would say that the revocable permits each time that
15 they've come up, there have been discussions of
16 what's important. I know that A&B and EMI have taken
17 note of those concerns. They have responded when
18 we've asked about what the nature of the course of
19 potential removal of structures or modification of
20 structures might be.

21 But I also know that it's more difficult to
22 work those things in when you don't have a permanent
23 relationship or a more long-lasting relationship
24 because when you say you have an apartment and it's a
25 short-term thing and you don't have a lease and it's

1 a month-to-month relationship, you're not likely to
2 put -- you're not likely to feel confident in the
3 improvements that you might make to a place. It's
4 always a longer term system that allows you to devote
5 resources to longer-term solutions for problems.

6 Q Okay. So I'm asking you about information.
7 So how hard would it have been for the Board of Land
8 and Natural Resources or the Department to ask the
9 applicant to provide a study regarding which
10 diversions cause the greatest threat of entrainment
11 or capture of native aquatic species?

12 MS. MOMOSE: Objection. Vague.

13 THE WITNESS: How what?

14 BY MR. FRANKEL:

15 Q How difficult would it have been to make it
16 a requirement that they provide that information to
17 you?

18 A It probably wouldn't be difficult, but it
19 would also be a matter of whether or not the
20 department or the board thought it was necessary.

21 Q Okay. Has BLNR or DLNR sought information
22 regarding which diversions cause the greatest
23 impediment to migration of native aquatic species?

24 A Same answer.

25 Q So what's that answer?

1 A The answer --

2 Q Have they asked for that information?

3 A The information is already present in
4 Seaworm's considerations of the impacts of diversions
5 and the need for in-stream flow standards. So one
6 doesn't have to ask for what those impacts are nor
7 what the specific locations are if one knows that
8 those impacts have been in place for a century or
9 more.

10 Q Okay. I don't think you're listening to my
11 question. I'm asking say there's 100 diversion
12 structures like there's probably more than that. Has
13 the board or the department asked which one of these
14 are the greatest threats that or the greatest
15 impediment to migration. So that at the next step,
16 they can determine which ones need to be gotten rid
17 of first. Have the done that? Have they sought that
18 information?

19 A No, because I don't think it would be
20 necessary.

21 Q Okay. What evidence did Alexander &
22 Baldwin and EMI submit to suggest that the diversion
23 structures on state land were not harming nature
24 species?

25 A I don't think that any evidence was

1 submitted because that was not an issue in the case.

2 Q Okay. What measures did BLNR require that
3 A&B implement to mitigate the harm to native species?

4 A I know that the future -- you mean
5 currently?

6 Q Well, in October, 2019.

7 A There were no specifics in place because
8 that was not an important issue. I mean, many of
9 these questions deal with mitigation for impacts.
10 It's almost as if you're saying all of these streams
11 are free flowing now and you are proposing to divert
12 the water from all of them, what are -- what measures
13 are you going to put into place to mitigate that?

14 So that question is not I won't say moot
15 but it's an inappropriate one to ask when the
16 diversions were put in place long ago all of the
17 impacts have been longstanding. And so it's not a
18 question of how you mitigate. It would be a question
19 of what would be the, you know, what kinds of plans
20 could be put into place to re-establish the systems
21 that are there. You know what I mean?

22 It is not a matter of saying one must
23 mitigate particular streams, identify which ones are
24 high priorities. In my mind, any of them would be
25 priority especially the larger ones let's say might

1 have the best potential for re-establishment for
2 biota. But all of that is taken with the
3 acknowledgment that it's not a race against time in
4 this particular situation.

5 We know that because there are protected
6 streams on the island of Maui in east Maui and west
7 Maui, and we know from evidence from prior
8 rewaterings of streams even ones that have been
9 dewatered for as long as Maui, that the potential is
10 very strong for recovery of ecosystem process and
11 composition.

12 So the questions that ask about mitigation
13 or identification of particular streams is not as
14 important in this case or don't seem relevant in this
15 case.

16 Q Okay. So even though the Hawaii Supreme
17 Court in the Waihole case required that the applicant
18 identify measures to mitigate harm, in this case you
19 do not believe that needs to be done?

20 A I didn't say that.

21 MS. WESTON: Objection to the form of
22 the question and misstating testimony.

23 MS. MOMOSE: Join in the objection.

24 THE WITNESS: So repeat your question.

25 MS. WESTON: Sorry.

1 THE WITNESS: That's okay.
 2 BY MR. FRANKEL:
 3 Q That's fine. So what measures did BLNR
 4 impose to protect native aquatic species from the
 5 adverse impact caused by stream diversions in 2018
 6 and 2019?
 7 A None because there were no impacts above
 8 and beyond that which has occurred for over a
 9 century.
 10 Q Okay. Did DLNR or BLNR ask how much water
 11 is available from alternative sources?
 12 A I know there was discussion of what
 13 potential alternative sources could be both in terms
 14 of wells and desalinization and other elements.
 15 Q Did the board or the department ask A&B and
 16 EMI to rely on other sources of water in conjunction
 17 with the use of east Maui stream water?
 18 MS. MOMOSE: Objection. Vague as to
 19 time.
 20 THE WITNESS: Yeah, I think over the
 21 course of time, over the course of years that I've
 22 served on the land board, those questions might have
 23 come up.
 24 BY MR. FRANKEL:
 25 Q In the decision making in 2018 and 2019,

1 did the department or board ask A&B and EMI to rely
 2 on other sources of water in conjunction with the use
 3 of east Maui stream waters so that not so much water
 4 would need to be taken from the streams?
 5 A I don't recall whether or not those
 6 specific meetings had those discussions.
 7 Q Yes. Okay. In fact, there's no
 8 requirement that they pump any ground water, is
 9 there?
 10 A I'm not aware of that.
 11 Q Okay. Did the Board of Land and Natural
 12 Resources ever determine that the use of water for
 13 concrete and restrooms at an industrial facility was
 14 a reasonable and beneficial use of east Maui stream
 15 water?
 16 A I think that the domestic use of water,
 17 water for agriculture, water for other uses, it's
 18 really difficult to separate infrastructure and human
 19 waste removal from water uses in general. I mean,
 20 you open a whole can of worms if you're going to try
 21 to subdivide the use of water from a particular
 22 source to agriculture only or drinking only or the
 23 like. And so the key part of the question was?
 24 Q So let me rephrase this so you can focus.
 25 I'll break this up into parts.

1 Did the board ever determine that the use
 2 of water for concrete, an industrial concrete plant
 3 is a reasonable and beneficial use of east Maui
 4 stream water?
 5 A Did the board ever?
 6 Q Determine.
 7 A I don't think we made a specific
 8 determination on that, but I will say that it would
 9 not be an unreasonable use if it means infrastructure
 10 for where people live or work on the island.
 11 Q When there's ground water available?
 12 A When there's water from any sources
 13 available.
 14 Q Okay. Did the board ever determine the use
 15 of water for restrooms at an industrial facility as a
 16 reasonable beneficial use of east Maui stream water?
 17 A I make no distinction between use of
 18 restrooms in any facility whether it's your house or
 19 a hotel or a factory.
 20 Q Did the board --
 21 A A restroom, I don't think there was any
 22 specific board -- what's the word for it?
 23 Q Determination.
 24 A Determination, that that was inappropriate
 25 nor would I -- nor would I think that it would be

1 inappropriate if it came before us now because I
 2 mean, you know, dealing with human waste is one of
 3 the major issues of our times.
 4 Q In October, 2019, did the board know how
 5 many acres Mahipono intended to cultivate in 2020?
 6 A They had made their projections. I think
 7 that was presented to us.
 8 Q Did the board know how many gallons of
 9 water per acre Mahipono intended to cultivate?
 10 A Yeah, I believe they gave that figure to
 11 us.
 12 Q Are you aware of an agreement that Mahipono
 13 entered into that limits the amount of water they can
 14 use from Nawahe'a water to 3,000 gallons per acre?
 15 A I don't recall whether or not that was made
 16 clear at any of our board meetings, but it could have
 17 been a discussion item.
 18 Q Did the department or board ask A&B or EMI
 19 for evidence, that is diversions were not causing any
 20 adverse impacts to any streams, stream life or
 21 recreational uses?
 22 MS. MOMOSE: Objection. Vague as to
 23 time.
 24 MR. FRANKEL: Thank you.
 25 BY MR. FRANKEL:

1 Q In 2018 or 2019.
 2 A And did the board what?
 3 Q Ask A&B or EMI for evidence that its
 4 diversions were not causing any adverse impacts to
 5 any streams, stream life or recreational uses?
 6 A No, because as I mentioned earlier, those
 7 impacts were presumed.
 8 Q Okay. Did A&B or EMI submit any evidence
 9 to BLNR that its diversions would not harm the
 10 streams, stream life or recreational uses?
 11 A No, for the same reason.
 12 Q Okay. Did DLNR or BLNR ask A&B and EMI to
 13 demonstrate the absence of practicable mitigating
 14 measures?
 15 A No, because mitigation of something that
 16 doesn't exist is different from mitigation for
 17 damages that could occur versus had occurred.
 18 Q Do you understand that the Hawaii Supreme
 19 Court came to a different conclusion in the Waihole
 20 case?
 21 MS. WESTON: Objection.
 22 MS. MOMOSE: Join.
 23 BY MR. FRANKEL:
 24 Q You don't have to answer that question.
 25 A Okay.

1 Q Did DLNR or BLNR ask A&B and EMI which
 2 streams the additional water that would be diverted
 3 in 2020 is going to come from?
 4 A Sorry?
 5 Q Did BLNR or DLNR ever ask A&B and EMI which
 6 streams the additional water that would be diverted
 7 in 2020 is going to come from?
 8 A I don't recall whether we asked them for
 9 that specific information.
 10 Q Okay. Has the board required A&B and EMI
 11 to install gauges or meters to measure how much water
 12 is being diverted from each stream?
 13 A I recall discussion on gauges, but I'm not
 14 specifically -- I don't recall what specifics might
 15 have been -- might have been there. Certainly the
 16 idea of returning waters suggests that one must
 17 measure the amount of water that's returned
 18 especially if one is dealing with in-stream flow
 19 standards.
 20 Q Okay. So you think -- I'm not sure if I
 21 totally heard what you said. Are you saying gauging
 22 or measuring or metering is a good idea?
 23 MS. MOMOSE: Objection. Misstates
 24 testimony.
 25 MS. WESTON: Join.

1 THE WITNESS: I'm saying that if one
 2 is to establish that in-stream flow standards are
 3 being met, then they need to be measured in some way.
 4 BY MR. FRANKEL:
 5 Q Okay. But did the board require the
 6 installation of any kind of measuring devices on any
 7 of the streams?
 8 A I don't believe so, not for the -- not for
 9 the RP.
 10 Q Okay. Has it required A&B or EMI to
 11 measure how much water is being taken from each
 12 stream?
 13 A Well, I think that the -- required to, I'm
 14 sorry?
 15 Q To measure how much water is being taken
 16 from each stream.
 17 A No.
 18 Q Why not?
 19 A Because the totality of the water that's
 20 being taken out and the impacts that the water is
 21 being removed are relevant when in-stream flow
 22 standards are established. And one can assess
 23 whether or not the stream flow has any potential of
 24 meeting those.
 25 Let's say you have 100 different small and

1 large streams, and you're trying to establish
 2 in-stream flow standards for them, it's a relatively
 3 complex thing. Seaworm would be the one that we
 4 would turn to to establish any kinds of measurement
 5 standards and recommendations on that part.
 6 Q Okay. What's the problem caused by
 7 invasive species?
 8 A Oh, they're manifold. I mean, they're all
 9 kinds of problems caused by invasive species.
 10 MS. WESTON: Can you be more specific?
 11 BY MR. FRANKEL:
 12 Q Sure. Are invasive species a problem in
 13 east Maui's forests?
 14 A Oh, certainly.
 15 Q What's the problem?
 16 A Well, at lower elevations because much of
 17 the system is nonnative vegetation already, you know,
 18 they completely displace native species. So same is
 19 true in our streams whether we -- in fact, the
 20 diversions actually prevent invasion of those
 21 diadromous species that invade streams by cutting off
 22 their access to the upper portions of those streams.
 23 But that's the balancing act that one plays between
 24 the benefits of a particular modification versus its
 25 impacts.

1 The invasive species, I mean, depending on
2 your specifics. So you have a specific invasive
3 species in mind?

4 Q Well, let me modify this a bit. Do you
5 know if there are more invasive species within the
6 revocable permit area in east Maui today than there
7 were in 2000?

8 MS. WESTON: Objection. Vague and
9 ambiguous.

10 THE WITNESS: I have no idea whether
11 or not there are more, but I presume that because we
12 have a continually increasing problem with invasive
13 species that the situation might be more -- no, I
14 have no clear idea of whether or not the invasive
15 species problem is better or worse than in the year
16 2000. It's likely to be worse though.

17 Q Do you know if miconia has been found
18 growing in the revocable permit area?

19 A I know that miconia that in the east Maui
20 watershed is a continual problem.

21 Q African tulips?

22 A African tulips are everywhere, oh, my gosh.

23 Q Tibochina?

24 A Tibochina is more of a problem on west Maui
25 but it's present on many islands in west forests.

1 almost -- what is the word for it?

2 Q Foolish.

3 A It would be futile.

4 Q Sure.

5 A But if it was in an area with very strong
6 native presence and incipient invasions, it might be
7 reasonable. But it might not necessarily be the case
8 that we would put that onus on the applicant.

9 Q Why not?

10 A Because on state lands, it may be that
11 there are other agencies or organizations that would
12 have that mandate and the desire and the ability and
13 the skills and the mechanism -- I mean, and the --
14 what's the word for it? Sometimes it requires
15 equipment, sometimes it requires technology,
16 sometimes it requires access to biological control or
17 the like.

18 Q Does the department have sufficient
19 resources to deal --

20 A The department never has sufficient
21 resources to deal with huge invasive species problems
22 that exist in Hawaii. So -- yeah.

23 Q So do you think it might be a good idea as
24 a condition of the permit to ask Alexander & Baldwin
25 to provide some money to Department of Land and

1 Q Okay. Has the board ever required as a
2 condition of its revocable permit or holder of
3 authorizations that A&B or EMI do any work to manage
4 the spread of invasive species on public land?

5 A On public land? I do not believe that
6 there were any conditions that are put in place for
7 that. For example, when we have state lands that are
8 in native dominated areas and activities are proposed
9 that may increase the invasibility of those say
10 disturbance of land or the like, we often put in
11 conditions with regard to consultation with division
12 of forestry and wildlife and the invasive species
13 committees to minimize those impacts. But we don't
14 normally put in conditions that say one must reduce
15 the level of existing invasive species presence.

16 Q But you could?

17 A You could do all kinds of things.

18 Q Okay.

19 A However, the idea of imposing invasive
20 species removal on state lands as a condition has not
21 been policy for the landlord.

22 Q Has not been in policy. Do you think it
23 would be a good idea?

24 A Not necessarily. If I was in a place that
25 was completely nonnative dominated, it would be

1 Natural Resources special funds so that it has more
2 resources available to control invasive species in
3 east Maui, wouldn't that be a good idea?

4 A Not necessarily.

5 Q You think it would be a bad idea?

6 A No, I'm neutral on the subject. I would
7 much rather have the legislature provide the funds --

8 Q Sure.

9 A -- that the DLNR needs. I would much
10 rather have everyone in Hawaii providing for the
11 funds that DLNR needs. It certainly can be the case
12 if applicants can contribute to that. In fact, EMI
13 is a partner in the east Maui watershed partnership.

14 Q Sure.

15 A And together with the federal government,
16 state government, Board of Water Supply puts in
17 proposals for watershed management including invasive
18 species removal. So, you know, people have their
19 roles to play in different ways.

20 Q Do you recall at the October, 2019 meeting
21 when your staff from Division of Forestry and
22 Wildlife were asked by Chris Yuen how much money
23 Alexander & Baldwin contributes to the east Maui
24 watershed partnership?

25 A I do not recall that specifically, but what

1 was the answer?
 2 Q Zero.
 3 A You know why? Because neither does
 4 Haleakala National Board contribute to that.
 5 Q So my --
 6 A And neither does any of the others. They
 7 all in combination apply for funds and those partners
 8 garner those funds. They don't necessarily have to
 9 come up with the funds themselves.
 10 Q So my question to you -- actually, let me
 11 take a step back. Have you heard the land division
 12 explain that one of its rationales for leasing and
 13 offering lands on a revocable permit basis is that
 14 they do not have the adequate resources to manage the
 15 land?
 16 A I don't know whether or not it's a
 17 matter -- did you say land division?
 18 Q Yes.
 19 A Land division doesn't necessarily make that
 20 call.
 21 Q Have you -- I'm asking whether you've heard
 22 them offer the rationale explanation?
 23 A I don't think I've heard it in those words.
 24 Q Okay.
 25 A I mean, normally they say we don't have

1 the -- it's not the state's mandate nor do we have
 2 the resources to say maintain a pasture. And so they
 3 will lease to someone who likes to ranch. And so
 4 they can maintain the pasture and the roads and
 5 various other infrastructure. But that's a little
 6 different than maintaining the integrity of native
 7 ecosystems or restoring nonnative ecosystems.
 8 Q Sure. Do you think it's worthy of
 9 discussion by the board to consider asking Alexander
 10 & Baldwin and EMI to either take active measures or
 11 contribute to the department to manage the spread of
 12 invasive species on public land in east Maui?
 13 A Do I think it would be reasonable? Is that
 14 what you said?
 15 Q Worth discussing.
 16 A Oh, worth discussing, it's always worth
 17 discussing.
 18 Q Okay. Now, do you think it would be worth
 19 advocating as a member of the board that that take
 20 place so that more work can be done to control
 21 invasive species?
 22 A I'd be willing to do that.
 23 Q Thank you. I asked you in the beginning
 24 about your expertise in cultural practices, but I
 25 wanted to ask you are you Hawaiian?

1 A In the past I would have had to say I had
 2 no evidence of that. I will point out that my
 3 grandmother could speak Hawaiian and I never
 4 understood why that was the case. And I was told as
 5 I was growing up that I was Japanese, Chinese and
 6 Scottish. But when I did my genetic testing on 23
 7 and Me, there were no Caucasian markers at all and
 8 Oceanian markers instead.
 9 So now even though I can't do my gynecology
 10 backwards in any clear way to point out where that
 11 Hawaiian connection comes in, now it seems like --
 12 now it seems more clear to me why I have such
 13 interest in these kinds of things.
 14 Q Okay.
 15 A Nor is it important, I think, for me to be
 16 genetically Hawaiian in order to be a cultural
 17 practitioner or -- yeah, or to have expertise in
 18 those matters.
 19 Q Okay. In your role at the Nature
 20 Conservancy, do you attend events with donors?
 21 A Do I attend events with donors?
 22 Occasionally I take donors on hikes, for example, or
 23 potential donors. As a member of staff, I'm often
 24 called to interpret places. But yeah, and so yeah, I
 25 have interaction with donors.

1 Sometimes we have a luncheon for folks that
 2 have been longstanding members of the conservancy and
 3 I'm there and I can present on what we're doing or
 4 elements of our work.
 5 Q Does Alexander & Baldwin contribute to the
 6 Nature Conservancy?
 7 A I know in the past Alexander & Baldwin had
 8 a close relationship with the conservancy. I
 9 think -- who was it that was on our board? Oh, my
 10 gosh, I'm blanking on her name, Meredith.
 11 Q Meredith Ching?
 12 A Yes.
 13 Q She's on your board?
 14 A Was on our board.
 15 Q For how long?
 16 A Oh, gosh. In the premillennial, I believe.
 17 Q Oh, she was off after 2000?
 18 A Maybe. Sec, the whole thing is I've been
 19 on the staff for the Nature Conservancy for 34 going
 20 on 35 years and so when board members come on, go
 21 off, come back on again, go back off, yeah, so I
 22 don't have a clear idea.
 23 Q Okay.
 24 A She could have been on up into the post
 25 2000 maybe; maybe not. I do know that in the past

1 when A&B or EMI have come up, I would point out that
 2 Waikamoi Preserve was donated as a conservation
 3 easement by negotiations with EMI and A&B and that
 4 we've had relationships with the board relationships
 5 with A&B and asked the AG specifically and in
 6 Sunshine, whether or not I should recuse from such
 7 consideration and I've been advised --
 8 MS. WESTON: Objection.
 9 Attorney-client privilege.
 10 THE WITNESS: Okay.
 11 BY MR. FRANKEL:
 12 Q So Alexander & Baldwin has been a major
 13 donor to the Nature Conservancy?
 14 A Oh, I don't know.
 15 MS. MOMOSE: Objection. Vague.
 16 THE WITNESS: I really don't know.
 17 BY MR. FRANKEL:
 18 Q Okay.
 19 A As a staff member, I've tried very hard not
 20 to be ones asking for funds to support the
 21 conservancy. So, for example, when I'm on hikes,
 22 it's not for an ask or anything. It's just to share
 23 what's awesome about our native ecosystems.
 24 Q Tell me about your interactions or
 25 conversations you've had with Meredith Ching, have

1 you had any with her?
 2 A Not really. When she -- let's see. Maybe
 3 way back when if we were on Maui and she was taking
 4 part in an excursion in Waikamoi or something like
 5 that, she'd be there and we'd be looking at iwis
 6 together and the like but no detailed discussions on
 7 what her land uses are or anything like that.
 8 MR. FRANKEL: I'm done.
 9 MS. WESTON: Great.
 10 MS. MOMOSE: I have nothing further.
 11 MS. WESTON: I have nothing further.
 12 (Deposition concluded at 10:10 a.m.)
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1 WITNESS CERTIFICATE
 2 I, SAMUEL GON, III, do hereby certify that
 3 I have read the foregoing typewritten pages 1 through
 4 71, inclusive, and corrections, if any, were noted by
 5 me, and that same is now a true and correct
 6 transcript of my testimony.
 7
 8 DATED this _____ day of _____, 2020.
 9
 10
 11 _____
 12 SAMUEL GON, III
 13
 14 Signed before me this _____ day of _____ 2020.
 15
 16 _____
 17
 18
 19
 20
 21
 22
 23 Deposition of SAMUEL GON, III
 24 Case: SIERRA CLUB vs. BOARD OF LAND AND NATURAL
 25 RESOURCES
 Civil No.: 19-1-00019-01 JPC
 Deposition Dated: March 11, 2020
 Taken By: Myrla R. Romero

1 CERTIFICATE
 2 STATE OF HAWAII)
 3) SS:
 4 CITY AND COUNTY OF HONOLULU)
 5
 6 I, MYRLA R. ROMERO, do hereby certify:
 7
 8 That on Wednesday, March 11, 2020, at
 9 8:30 a.m., appeared before me SAMUEL GON, III, whose
 10 71-page deposition is contained herein; that prior to
 11 being examined SAMUEL GON III, was by me duly sworn
 12 or affirmed pursuant to Act 110 of the 2010 Session
 13 of the Hawaii State Legislature; that the deposition
 14 was taken down by me in machine shorthand and was
 15 thereafter reduced to typewritten form under my
 16 supervision; that the foregoing represents, to the
 17 best of my ability, a true and correct transcript of
 18 the proceedings had in the foregoing matter; that
 19 pursuant to Rule 30(e) of the Hawaii Rules of Civil
 20 Procedure, a request for an opportunity to review and
 21 make changes to this transcript were made by the
 22 deponent or a party prior to the completion of the
 23 deposition.
 24
 25 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 30th day of March, 2020, in
 Honolulu, Hawaii.

 MYRLA R. ROMERO, CSR NO. 397
 Notary Public, State of Hawaii