

1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
2 STATE OF HAWAII

3	_____)	
4	SIERRA CLUB,)	CASE NO. 1CC191000019
)	
5	Plaintiff,)	
)	
6	vs.)	
)	
7	BOARD OF LAND AND NATURAL)	
	RESOURCES, et al.,)	
8)	
	Defendants.)	
9)	
	_____)	

10

11 TRANSCRIPT OF PROCEEDINGS

12 had before the HONORABLE JEFFREY CRABTREE, Judge
13 Presiding, Sixth Division, on Tuesday, August 4,
2020; Further Jury-Waived Trial, Afternoon Session.

14

15

APPEARANCES:

16

DAVID KIMO FRANKEL, ESQ. For Plaintiff

17

WILLIAM J. WYNHOFF, ESQ. For DLNR, BLNR and
MELISSA D. GOLDMAN, ESQ. Suzanne Case

18

19

DAVID SCHULMEISTER, ESQ. For Alexander & Baldwin
TRISHA H.S.T. AKAGI, ESQ. and East Maui Irrigation

20

CALEB P. ROWE, ESQ. For County of Maui

21

22

REPORTED BY:

23

MILANI BALLESTEROS, RMR, CRR, CSR #407
Official Court Reporter
Circuit Court of the First Circuit
State of Hawaii

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1 TUESDAY, AUGUST 4, 2020 1:00 P.M.

2 --ooOoo--

3 THE COURT: All right. We're on the record.
4 I'm looking at my video screen. It looks like we
5 have everybody, all counsel, Mr. Hirokawa's back.
6 Ready to go, everyone? All right.

7 MS. GOLDMAN: Your Honor, Melissa Goldman
8 with the State. Just drawing your attention to Devon
9 Miller, who's sitting in today. He is -- we had him
10 call in from another room instead of sitting in here,
11 so you'll see him on your screen.

12 THE COURT: I'm sorry, the name that you
13 just said is garbled. Who is that?

14 MS. GOLDMAN: It's Devon Miller, D-E-V-O-N.

15 THE COURT: And I can hear you clearly.
16 Thank you.

17 MS. GOLDMAN: Okay.

18 THE COURT: All right. Please go ahead.
19 The witness is still under oath.

20 MS. GOLDMAN: Thank you, your Honor.

21

22 IAN HIROKAWA,
23 having been previously duly sworn, was examined and
24 testified as follows:

25

1 CONTINUED CROSS-EXAMINATION

2 BY MS. GOLDMAN:

3 Q. So Mr. Hirokawa, the board doesn't have to
4 take every recommendation made in a past submittal,
5 does it?

6 A. No.

7 Q. And sometimes they don't take those
8 recommendations?

9 A. Yes, sometimes they don't.

10 Q. Thank you.

11 MS. GOLDMAN: Your Honor, in light of your
12 earlier statement, we have no further questions for
13 this witness at this time.

14 THE COURT: All right. Thank you.
15 Mr. Frankel, back to you.

16 MR. FRANKEL: Thank you, Your Honor. I
17 won't be long either.

18

19 REDIRECT EXAMINATION

20 BY MR. FRANKEL:

21 Q. Mr. Hirokawa, Ms. Akagi pointed to various
22 pages in the water commission's 2018 decision
23 regarding alternative sources of water. Do you know
24 if that decision says that it would be impractical
25 for A&B to use any ground water?

1 A. I -- I don't know if it says that.

2 Q. Do you know if that decision says it would
3 be impractical to use water from streams west of
4 Maliko Gulch?

5 A. I don't know.

6 Q. Do you know if anything in the draft EIS
7 says that it would be impractical to use any ground
8 water or any of the water from streams west of Maliko
9 Gulch?

10 A. I -- I don't know.

11 Q. Okay. Let's talk about structures very
12 briefly. You were asked about that by Ms. Akagi. Do
13 you know if the purpose of the water commission's
14 decision on stream flow standards was to determine
15 how diversions would be modified?

16 A. Do I know if -- I'm sorry, can you repeat?
17 Do I know if...

18 Q. The purpose of the water commission's
19 proceeding and decision on stream flow standards was
20 to determine how diversions would be modified?

21 A. I don't know if that was a purpose.

22 Q. Okay. And the draft EIS was produced after
23 the water commission's 2018 decision, wasn't it?

24 A. Yes.

25 Q. And it included information about diversion

1 structures that had never been presented to the water
2 commission, hadn't it?

3 MS. GOLDMAN: Objection, Your Honor, calls
4 for speculation.

5 THE COURT: Overruled.

6 THE WITNESS: I don't -- I don't recall at
7 this time.

8 Q. (By Mr. Frankel) All right. And the county
9 talked to you about the importance of the county
10 receiving water. Do you know how much water the
11 county has been receiving for domestic purposes?

12 A. I -- I don't recall at this time.

13 Q. Okay. And so -- and as a base of
14 comparison, do you know how much water is being lost
15 due to seepage and evaporation in comparison to how
16 much water the county uses?

17 A. No.

18 MR. FRANKEL: All right. No further
19 questions, Your Honor.

20 THE COURT: All right. Thank you.

21 Mr. Rowe? I'm sorry, Ms. Akagi goes next,
22 yeah. I'm sorry.

23 MS. AKAGI: I have no further questions,
24 Your Honor.

25 THE COURT: All right. Thank you.

1 Mr. Rowe.

2 MR. ROWE: I have nothing further, Your
3 Honor.

4 THE COURT: Ms. Goldman.

5 MS. GOLDMAN: We have nothing further, Your
6 Honor.

7 THE COURT: All right. Mr. Hirokawa,
8 you're --

9 MS. GOLDMAN: We have nothing.

10 THE COURT: I'm sorry, go ahead. What were
11 you saying?

12 MS. GOLDMAN: I'm sorry. Oh, I was just
13 getting closer to the mike. We have nothing further.

14 THE COURT: Okay. All right. Mr. Hirokawa,
15 your testimony is finished. Thank you, sir.

16 THE WITNESS: Thank you.

17 MS. GOLDMAN: Thank you, Ian --

18 THE WITNESS: Thank you.

19 MS. GOLDMAN: -- for coming in.

20 MR. WYNHOFF: Your Honor, I have to step out
21 for literally one minute, so I'll be right back.

22 THE COURT: Okay. I take it Ms. Ching is
23 next? Why don't we get her --

24 MR. FRANKEL: Yes, Your Honor.

25 THE COURT: Why don't we get her settled in,

1 but we won't start until Mr. Wynhoff returns.

2 MS. AKAGI: Okay. Your Honor, I'm actually
3 going to swap out some equipment, 'cause Ms. Ching is
4 going to be sitting where I'm sitting right now.

5 THE COURT: That's fine.

6 MS. AKAGI: I know we just got back from
7 lunch, but can we take, like, a ten-minute break so I
8 we can swap out equipment?

9 THE COURT: That's fine. All right. Ten
10 minutes.

11 MS. AKAGI: Thank you.

12 MS. GOLDMAN: Thank you.

13 THE COURT: Quarter after. We're in recess.
14 (Recess taken.)

15 THE COURT: All right. We're back on
16 record, everyone. I see all counsel present. You're
17 ready to go? Well, wait a minute. Mr. Wynhoff or
18 Ms. Goldman, go ahead. (Pause.) You're muted.
19 (Pause.)

20 MR. WYNHOFF: Okay. I think you can hear me
21 now, Your Honor. I just wanted to say that
22 Ms. Goldman is still here, but we're just going to
23 put the camera on me because I would be lead on
24 Ms. Ching.

25 THE COURT: That's fine.

1 MR. WYNHOFF: So thank you, Your Honor.

2 THE COURT: Okay.

3 MR. WYNHOFF: Okay. Thank you.

4 THE COURT: All right. Ready to go? I see

5 Mr. -- I see Mr. Schulmeister back in the picture.

6 Ms. -- okay. Yeah, ready.

7 Mr. Frankel, go ahead. Oh, we need to swear
8 the witness first.

9 MR. FRANKEL: Yes, Your Honor.

10 THE CLERK: The witness is?

11 THE COURT: The witness is Ms. Meredith
12 Ching.

13 THE CLERK: Okay. If the witness could just
14 raise your right hand, you don't have to stand, and
15 I'll swear you in.

16 THE WITNESS: Okay.

17 (The witness was sworn.)

18 THE COURT: All right. Ms. Ching, please
19 state your full name and then spell it for our court
20 reporter. Thank you.

21 THE WITNESS: My name is Meredith Ching,
22 M-E-R-E-D-I-T-H C-H-I-N-G.

23 THE COURT: All right. Thank you.

24 Mr. Frankel, go ahead. (Pause.) You're muted.

25

1 MEREDITH CHING,
2 called as a witness by the Plaintiff, having been
3 first duly sworn, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. FRANKEL:

7 Q. Can you hear me now?

8 A. I can. I thought that was a trick question.

9 (Laughter.)

10 Q. You work for Alexander & Baldwin?

11 A. I do.

12 Q. You're the executive vice president of
13 external affairs?

14 A. I am.

15 Q. You've worked at A&B since 1982?

16 A. Yes.

17 Q. You've worked on East Maui water issues
18 since 1982?

19 A. Pretty much. That was one of the first
20 things I learned about when I got to A&B.

21 Q. And you've worked on this issue longer than
22 anyone else currently at A&B?

23 A. That's probably true, yeah.

24 Q. And you've been working on obtaining East
25 Maui water since you started in 1982?

1 A. From the beginning, yes.

2 Q. When you started working for A&B, two or
3 three of the long-term leases had expired and one or
4 two remained?

5 A. Yes.

6 Q. And the last lease expired in 1986?

7 A. Yes.

8 Q. And since then A&B and EMI have held
9 revocable permits to take water from East Maui?

10 A. Yes.

11 Q. BLNR has annually approved the continuation
12 of the revocable permits?

13 A. We have had revoc-- annual revocable permits
14 ever since, yes.

15 Q. Okay. Historically, until about 2004, A&B
16 and EMI diverted approximately 165 million gallons
17 per day on average from East Maui streams?

18 A. I'm sorry, can you name the time period
19 again?

20 Q. Until about 2004.

21 A. Yes, about.

22 Q. And then between 2004 and 2013, the
23 diversions averaged about 126 million gallons of
24 water daily?

25 A. Yes.

1 Q. And between 2016, with the closing of the
2 sugar plantation, A&B and EMI had been diverting
3 between 23 and 27 million gallons a day of water per
4 day on average?

5 A. I -- I think that's the rate range, between
6 20 and 30 million gallons per day.

7 Q. Well, has it gone up to 30?

8 A. It's in that range. I'm sorry, I don't
9 remember the exact numbers. I think there was a
10 number as high as 28, so I was just estimating.

11 Q. All right. All right. Now, EMI can
12 increase or decrease the amount of water taken from
13 different East Maui streams by opening and closing
14 different types of gates, right?

15 A. In -- generally speaking, yes.

16 Q. Okay.

17 A. Not for every diversion.

18 Q. Okay. Now, let's talk about A&B's
19 announcement that it was fully and permanently
20 restoring East Maui streams. In April 2016, A&B
21 issued a press release.

22 A. Yes.

23 Q. You helped draft it?

24 A. Yes.

25 Q. And you said A&B would be fully and

1 permanently restoring streams in East Maui?

2 A. I don't have the -- the exact release in
3 front of me, but I think the wording said we would
4 return stream full -- fully and permanently restore
5 stream flow to East Maui taro streams.

6 Q. All right. Well, let's take a look at
7 Exhibit 32, which is in evidence. Hopefully one of
8 your attorneys there can help you get that document.
9 It's Sierra Club's Exhibit 32.

10 A. Okay. She's bringing it.

11 Q. All right.

12 A. All right. Wait. There's no 32. It goes
13 from 28 to 33.

14 THE COURT: The Court has it. It's in the
15 exhibit folder.

16 Q. (By Mr. Frankel) Are you looking at the
17 Sierra Club's exhibits or a different set of
18 exhibits?

19 A. I'm looking -- it says S-21 to S-35. Oh,
20 that's --

21 Q. Okay. Correct.

22 A. Okay. Got it, the press release.

23 Q. Yeah. So the second paragraph says -- well,
24 why don't we start at the beginning. Alexander &
25 Baldwin announced its decision to fully and

1 permanently restore priority tunnel streams in East
2 Maui, right?

3 A. Yes.

4 Q. And then you name the streams that would be
5 permanently -- to be permanently restored, do you see
6 that, second paragraph?

7 A. Yes.

8 Q. And there are seven streams listed there.

9 A. Yes.

10 Q. And one of the streams you identify is
11 Kualani.

12 A. Yes.

13 Q. But East Maui Irrigation has never diverted
14 Kualani Stream, has it?

15 A. No.

16 Q. Okay. So A&B was taking credit for the
17 future restoration of a stream that it wasn't
18 actually restoring?

19 A. No, that's not what we were doing. As
20 explained in that paragraph, we listed the streams
21 that were identified jointly by the water commission
22 and the Native Hawaiian Legal Corp. Those are the
23 streams they identified as their priority taro
24 streams, and we just copied their list.

25 Q. Well, the first sentence of the paragraph it

1 says "the streams to be permanently restored,"
2 correct?

3 A. And it goes on to -- yes. And it goes on to
4 say "are the priority streams identified jointly in
5 2001 by the state commission on water resource
6 management and the Native Hawaiian Legal Corporation.

7 Q. So you're saying that your paragraph there
8 does not apply, that Alexander & Baldwin is going to
9 be restoring Kualani Stream?

10 A. The paragraph was intended to say that we
11 would permanently restore the streams that were
12 identified jointly by the water commission and the
13 Native Hawaiian Legal Corp. so that there would no
14 longer be diversions on them. So if there were never
15 diversions on Kualani, then it would remain as it is,
16 it didn't need to be restored.

17 Q. Except you said it was going to be restored.

18 MR. SCHULMEISTER: Objection, (inaudible).

19 THE COURT: Yeah --

20 COURT REPORTER: I'm sorry, what --

21 THE COURT: -- let's move on. You've made
22 your point.

23 MR. FRANKEL: All right. Thank you, Your
24 Honor.

25 Q. (By Mr. Frankel) And A&B also claimed

1 that --

2 THE COURT: Wait, time out.

3 COURT REPORTER: I didn't hear the
4 objection.

5 THE COURT: I'm sorry, we didn't hear the
6 objection clearly on this end. Could you restate it,
7 Mr. Schulmeister?

8 MR. SCHULMEISTER: Yes. I said objection,
9 we're beating this to death.

10 (Laughter.)

11 THE COURT: I was going to ask you what rule
12 of evidence that is, but let's just move on.

13 MR. FRANKEL: Thank you, Your Honor.

14 Q. (By Mr. Frankel) And A&B also claimed
15 that -- that it was going to be stopping -- it was
16 going to be restoring Waiokamilo Stream.

17 A. It's one of the streams that was identified
18 by Native Hawaiian Legal Corp. and the water
19 commission and included in this list, yes.

20 Q. But, in fact, by the time this press release
21 was out, all the stream flow had already been
22 restored to the stream, correct?

23 A. Yes, but the difference is we -- our intent
24 was that it was going to be permanently restored. It
25 was restored at that time based on compliance with

1 the 2008 Board of Land and Natural Resources order,
2 but we're saying we're permanently not going to touch
3 this stream again.

4 Q. And you announced that these streams were to
5 be fully restored, correct?

6 A. Yes, meaning that all the water would go
7 back in the streams.

8 Q. And, for you, a fully restored stream is one
9 with diversion structures that remain within it?

10 A. A fully restored stream is a stream that has
11 all of its natural flow flowing down the stream,
12 nothing diverted from it again.

13 Q. But the question is: From Alexander &
14 Baldwin's perspective, does a fully restored stream
15 have man-made -- or I should say human-made --
16 structures remaining within it?

17 A. It can as long as all the stream flow is
18 flowing down the stream. The way some of these
19 diversions are, they're integral to the stream, so
20 removal of them would actually cause way more
21 environmental damage than leaving them in place and
22 having the water bypass them in some fashion.

23 Q. And so from Alexander & Baldwin's
24 perspective, a fully restored stream can have
25 diversion structures within it, correct?

1 A. The intent here again was to restore stream
2 flow. And so, yes, it can or it cannot, it depends
3 on the type of diversion that is in the stream.

4 Q. Now, Alexander & Baldwin's announcement came
5 after Judge Nishimura's ruling in the Carmichael
6 case, correct?

7 A. Yes.

8 Q. She issued her decision in January 2016,
9 right?

10 A. I would have to let that stand for itself.
11 I wouldn't be able to cite the date, but...

12 Q. Okay. And Alexander & Baldwin continued to
13 take water from East Maui streams after that order?

14 A. Yes.

15 Q. For its own needs as well as for the county?

16 A. For whatever existing uses there were at the
17 time.

18 Q. And in February, March, April and May 2016,
19 A&B diverted more than 40 million gallons of water
20 daily from East Maui streams?

21 A. I don't know the number, sorry. We continue
22 to divert the streams for our needs and the county's
23 needs.

24 MR. FRANKEL: Your Honor, I don't -- I
25 don't -- if I'm -- if I'm stepping over the line you

1 don't want us to step on, let me know.

2 I would like to refer Ms. Ching to Exhibit
3 102, Sierra Club's Exhibit 102.

4 THE COURT: Well, if you're just going to
5 ask her what's in there, I don't think that's
6 particularly helpful, but if you're going to ask her
7 for some personal knowledge about what's in there,
8 that's fine.

9 MR. FRANKEL: Well, it's an interrogatory
10 response so it would provide information that she was
11 not just able to provide. But, yeah, I'm not sure
12 how you want to deal with that.

13 THE COURT: I just don't want to spend our
14 time or the witness's time pointing to something and
15 saying, yes, that's in there. If you're going to
16 elicit testimony from them about it, then of course
17 that's fair game.

18 MR. FRANKEL: Okay. Well, okay. Then,
19 yeah, I will refer to that in closing, and we'll move
20 on.

21 THE COURT: Thank you.

22 Q. (By Mr. Frankel) I want to ask you about
23 A&B sale of lands in Central Maui. A&B sold
24 approximately 30,000 acres of Central Maui lands to
25 Mahi Pono, right?

1 A. I believe it was roughly 40,000, but yes.

2 Q. And 30,000 of those acres approximately are
3 lands that have been traditionally irrigated through
4 East Maui irrigation system, correct?

5 A. Yes.

6 Q. Okay. And that sale occurred in December
7 2018?

8 A. Yes.

9 Q. A&B did not sell its revocable permits to
10 Mahi Pono, correct?

11 A. Correct.

12 Q. A&B and EMI still possess the four revocable
13 permits?

14 A. Correct.

15 Q. A&B did not guarantee to Mahi Pono that BLNR
16 would renew the revocable permits?

17 A. Correct.

18 Q. Or that BLNR would give Mahi Pono any water?

19 A. Correct.

20 Q. Mahi Pono assumed the risk that water from
21 East Maui streams would continue to be available to
22 irrigate crops from Central Maui?

23 A. They knew there was a risk, yes.

24 Q. But A&B promised that if A&B is unable to
25 legally deliver 30 million gallons per day to Mahi

1 Pono, implement its farming plan, A&B would be
2 liable, potentially liable, to pay Mahi Pono up to 62
3 million dollars, correct?

4 A. Can you ask the question again? It's a
5 little long. Sorry.

6 Q. Sure. A&B promised if A&B was unable to
7 legally deliver 30 million gallons per day to Mahi
8 Pono, implement its farming plan, A&B would
9 potentially be liable to pay Mahi Pono up to 62
10 million dollars?

11 A. I think that's a mischaracterization, so
12 what -- what Mahi Pono paid Alexander & Baldwin, the
13 price that Mahi Pono paid Alexander & Baldwin for the
14 land was for agriculturally productive land, that's
15 how they underwrote the deal and that's how they got
16 to the sales price. If at the end -- but they
17 understood there was risk about the water, that they
18 didn't have the water permits, they didn't have a
19 long-term lease, so if at the end of the day that
20 land wasn't able to be as agriculturally productive
21 as they assumed when they paid us the price, then we
22 owe them back money, yes. I mean, I think that's the
23 correct way to -- to characterize it.

24 Q. So let's break that down. The amount of
25 water -- the quantity of water is specifically

1 identified in the sales contract, and that quantity
2 is 30 million gallons a day, correct?

3 A. I -- the quantity of water for what? I
4 think you're taking this out of context.

5 Q. The quantity of water that triggers the
6 liability provision.

7 A. No. The quantity of water alone does not
8 trigger the liab-- the valuation of the land is -- it
9 doesn't trigger it alone, no.

10 Q. Okay. I -- okay, I'm not asking you if it
11 triggers it alone. Let's break this down. There's a
12 quantity of water that is specifically identified in
13 the contract, correct?

14 A. There is something called minimum quantity
15 of water in the sales contract, yes.

16 Q. And that minimum quantity of water is 30
17 million gallons a day, correct?

18 A. As it's used in the context of the sales
19 transaction and terms of the transaction.

20 Q. Okay. And there are certain potential
21 liabilities that A&B is exposed to if 30 million
22 gallons of water cannot be delivered; is that
23 correct?

24 A. I don't think so.

25 Q. All right. So let's turn -- maybe it would

1 be easiest to turn to your prior testimony, which is
2 the Sierra Club's Exhibit 124.

3 A. 124.

4 THE COURT: Now, that one is not in evidence
5 yet.

6 MR. FRANKEL: Correct.

7 THE COURT: Okay.

8 MR. FRANKEL: This is a deposition
9 transcript.

10 THE WITNESS: I have it.

11 Q. (By Mr. Frankel) So you recall, Ms. Ching,
12 that we -- you were deposed in some anonymous office
13 and we had a fire alarm that concluded the
14 deposition, do you remember that?

15 A. I remember it.

16 Q. Okay. So I'd like you to turn to page 52 of
17 that deposition.

18 THE COURT: Is that five two or six two?

19 MR. FRANKEL: Five two.

20 THE COURT: Thank you.

21 THE WITNESS: I have it.

22 Q. (By Mr. Frankel) So at the very end, the
23 last line, the question is asked to you, "What are
24 the circumstances under which Alexander & Baldwin
25 might have to provide 62 million dollars to Mahi

1 Pono?" Do you see that?

2 A. Mm-hmm.

3 Q. Mr. Schulmeister objects, and before you
4 answer this question, we'll give him an opportunity
5 to object. And then you answer, "Again, it's in
6 layman's terms. If at the end of the day they
7 weren't able to secure the amount of water that they
8 needed to make the land agriculturally productive as
9 they had valued it in the transaction with us." You
10 see that?

11 A. Yes.

12 Q. And then I -- you were asked, "Then what
13 happened?"

14 And your answer is, "That's when we would
15 owe them money for the reduced value of the land
16 which has been defined by the people who made the
17 deal as 62 million dollars." You see that?

18 A. Yes.

19 Q. All right. Thank you.

20 A. But that's not what you asked me. Just to
21 be -- just so you know what I'm thinking, that's not
22 what you asked me.

23 Q. All right. All right. We'll leave it at
24 that and move on.

25 Let's turn our attention to the information

1 that A&B has provided to BLNR. Now, Mahi Pono
2 planned to increase the amount of water diverted in
3 2020 to 45 million gallons a day, correct?

4 A. That's what I recall from their testimony.

5 Q. And in 2019 you folks -- Alexander & Baldwin
6 and East Maui Irrigation were diverting approximately
7 27 million gallons a day, correct?

8 A. I think so, yes, around there.

9 Q. So that's an increase of 66 percent.

10 A. I'll trust your math on that.

11 Q. Well --

12 A. I can grab a calculator, but, yeah, I trust
13 your math.

14 Q. I mean, you -- you went to Stanford in civil
15 engineering, right?

16 MR. SCHULMEISTER: David Schulmeister. I'll
17 just object. Argumentative.

18 THE COURT: Yeah, we don't need to go down
19 that road.

20 MR. FRANKEL: All right.

21 Q. (By Mr. Frankel) So the increase for 2020,
22 the proposal was to increase the amount of water
23 diverted from 27 million gallons a day that has been
24 diverted 2019 to 45 million gallons. Can you please
25 tell Judge Crabtree which streams the increase in

1 diversions would come from?

2 A. I -- I couldn't tell you that. I think
3 that's a better question for EMI.

4 Q. All right. Did you provide that information
5 to the Board of Land and Natural Resources?

6 A. Which streams? No.

7 Q. All right. And has Alexander & Baldwin ever
8 disclosed how much of the increased diversions would
9 come from the 13 streams unaddressed by the water
10 commission's 2018 order?

11 A. We've always told the board that the amount
12 of water we would be diverting would be within the
13 confines of the IIFS decision.

14 Q. Right, but my question is did you ever tell
15 them precisely which streams or which of the 13
16 streams the water would come from?

17 A. No.

18 Q. Has Alexander & Baldwin filed a petition to
19 amend the instream flow standards for the 13 streams
20 that the water commission did not address in 2018?

21 A. We have not filed a petition. But just to
22 be clear, the 13 streams are a part of the IIFS
23 decision. They weren't examined like the 27 streams,
24 but they were considered in the IIFS decision.

25 Q. In fact, the water commission explicitly

1 said they were not part of the petition, correct,
2 those 13 streams?

3 A. Yes, they would have said which 27 streams
4 were part of the petition.

5 Q. And A&B submitted evidence to BLNR that its
6 diversions were not causing any adverse impact to any
7 streams, stream life or recreational uses?

8 A. The Board of Land and Natural Resources, as
9 I understand it, through that link has had a copy of
10 the draft EIS, and there's some information in there
11 about the other 13 streams that weren't part of the
12 petition.

13 Q. And as far as you can recall, does that
14 EIS -- well, I'll get to that later. We'll
15 definitely get to that later.

16 Now, A&B and Mahi Pono claimed that they
17 would need 16.53 million gallons of water daily for
18 diversified agriculture in the first quarter of 2020.
19 That sound familiar?

20 A. No. Can you give me the source, please?

21 Q. Sure. I don't know how easy this is going
22 to be for you. We did this with one of the other
23 witnesses. If you could get two exhibits up at the
24 same time, it's Exhibit J-26, Sierra -- I'm sorry,
25 Exhibit J-26, Joint Exhibit 26, and Exhibit J-27.

1 A. Joint 26 and Joint 27. (Pause.) Okay.

2 Q. So if you look at the second page of J-26.

3 A. Okay.

4 Q. And the -- it's Bates stamp, which is the
5 big number at the bottom, page 8 of J-27.

6 A. It has the chart at the top, Exhibit A?

7 Q. Yeah.

8 A. Okay.

9 Q. Yeah. So in the first quarter, Mahi Pono
10 said it was going to be needing -- and this is J-26,
11 the second column in that table -- 16.53 million
12 gallons.

13 A. Right.

14 Q. But the status report indicated that
15 actually Mahi Pono didn't need anywhere near that
16 much water, right?

17 A. Right.

18 Q. And this is --

19 A. Diversified ag you're talking about?

20 Q. Right. In fact, it was down at quarterly
21 average was 2.5 million gallons a day, right?

22 A. Yes.

23 Q. All right. Now, you sent -- okay. So
24 we're done with those two exhibits. You sent the
25 status report to the Department of Land and Natural

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1 Resources in September 2019, do you recall that?

2 A. Prior to the hearing on the RPs, I recall
3 that, yes.

4 Q. And in that status report you reported how
5 much water East Maui -- how water from East Maui
6 streams was being used, do you recall that?

7 A. I recall that.

8 Q. And you reported that water was being used
9 to irrigate 6,500 acres of pasture.

10 A. I'd have to look at the submittal, but if
11 it's in the submittal, yes, we reported that.

12 Q. So let's look at J-21, the Joint Exhibit 21.

13 A. Okay.

14 Q. And page 96 of that report.

15 A. Based on the time stamp?

16 Q. Sorry --

17 A. Okay.

18 Q. -- it's the Bate stamp, yeah, on the bottom
19 right-hand corner, there's the big numbers there.

20 A. Okay. It's entitled Holdover East Maui
21 Water Permits?

22 Q. Right. And that's something you submitted
23 to the board, right?

24 A. Yes.

25 Q. If you go up a page, you see your signature

1 there?

2 A. Yeah, it's part of the -- the attachment to
3 the letter that's on page 94 and 95.

4 Q. Okay. So you reported that the water --
5 this water, East Maui water, was being used to
6 irrigate 6,500 acres of pasture, right?

7 A. Yes.

8 Q. It's that East Maui stream water that's
9 being used to irrigate those pasture -- that amount
10 of pasture, right?

11 A. Yes.

12 Q. How much East Maui -- what's the quantity?
13 How much East Maui water, stream water, was being
14 used to irrigate the 6,500 acres?

15 A. I couldn't answer that.

16 Q. And you didn't tell -- you didn't tell the
17 Board of Land and Natural Resources, did you?

18 A. We told them that we were complying with
19 whatever cap they had put on the total amount of
20 water that we could divert from the watershed and
21 that we were complying with all of their other permit
22 conditions including the instream flow standards,
23 both in a total quantity basis as well as stream by
24 stream.

25 Q. And, in fact, no one from the board or the

1 department asked you how much water was needed to
2 irrigate the 6,500 acres of pasture, did they?

3 A. No. I would guess because they're satisfied
4 that we were within all of the other permit
5 conditions.

6 Q. Okay. And you don't -- I don't -- I may
7 have -- how many gallons per acre are required for
8 pasture?

9 A. I don't know, but the normal diversified ag
10 standard is 2,500 acres -- gallons per acre per day.

11 Q. Yeah, that's right.

12 Okay. Maybe you could help me with this
13 confusion. So in the first quarter of 2020,
14 approximately 2 and a half million gallons a day of
15 water were used to irrigate land in Central Maui,
16 right?

17 A. Are you going back to J-27?

18 Q. That is -- you are great. You are great.

19 A. Thank you. Could you repeat the question?
20 I'm not that great.

21 Q. (Laughter.) The page 8 -- the -- Bate stamp
22 page 8.

23 A. Got it.

24 Q. So diversified agriculture total on this
25 page 8, that column 1, 2, 3, 4, 5, 6th column says

1 2.5 million gallons a day is the amount of water that
2 was used, right?

3 A. That was applied to the crop, yes.

4 Q. And that includes the irrigated pasture, the
5 4,700 acres of irrigated pasture -- sorry, the 6,500
6 acres of irrigated pasture.

7 A. You'd need to ask Mahi Pono that. I don't
8 know the exact breakdown of their crops. Isn't that
9 a different letter?

10 Q. Well, your -- actually, your submittal to
11 the board said you were including 6,500 acres of
12 irrigated pasture of East Maui water.

13 A. I'm sorry, that... can you give me the
14 exhibit number again? It was 20...

15 Q. J-21, and that's at Bate stamp 96.

16 A. That's '19. Right. So the thing with
17 farming plans is that they change a lot, so we -- we
18 said that -- I'm sorry, that was October 2019, right?

19 Q. No.

20 A. Sorry.

21 Q. Well, it was -- so, again, if you look at
22 Exhibit J-21.

23 A. Right. 96.

24 Q. Okay. Page 96. This is the very top of the
25 page, it says as of September 16th, 2019.

1 A. Right. And the numbers you're having me
2 look at now are from 2/1/2020.

3 Q. That's true. That's true.

4 A. Yeah. So things can change, especially with
5 a farm plan of this size and duration. You're never
6 going to have precision if you're talking about what
7 you expect to do. It depends on weather, it depends
8 on market demand, and I'm sure have been some COVID
9 impacts as well, and again those are questions you
10 should ask Mahi Pono.

11 Q. Okay. Well, looking at Exhibit J-21, the
12 second italicized paragraph and the third sentence in
13 that paragraph, it says, "This water is being used,"
14 and it continues.

15 A. Mm-hmm.

16 Q. So the 6,500 acres of irrigated pasture was
17 pasture that was being irrigated back then, wasn't
18 it?

19 A. In September 2019, yes.

20 Q. So you think potentially the pasture is no
21 longer being irrigated in 2020?

22 A. I don't know. It could be more, it could be
23 less, I -- I don't know. I'm not the proper source
24 for that.

25 Q. All right. Well, let's look at something

1 you are familiar with, and that's the draft
2 environmental impact statement. You're familiar with
3 the draft environmental impact statement, correct?

4 A. Yes.

5 Q. And that's Exhibit J-20, I believe.

6 A. Oh, okay. There are three books.

7 Q. So this is going to be...

8 THE COURT: Are you launching into a new
9 area here, 'cause we've been going 50 minutes. Be a
10 good time for a break if you're...

11 MR. FRANKEL: I'm actually trying to
12 conclude this area rather than launching --

13 THE COURT: All right. Go ahead.

14 Q. (By Mr. Frankel) So if you could turn to
15 page 79, the Bate stamp page 79.

16 A. Part 1?

17 Q. I believe so.

18 A. The title at the top is Water Lease Limited
19 to CWRM DNO Farm Plan?

20 Q. That's right. That's right. So if you look
21 at the --

22 MR. WYNHOFF: Your Honor, Your Honor, I'm
23 sorry. May I have the page number? I beg your
24 pardon.

25 MR. FRANKEL: Sure. It's Bate stamp page

1 79, EI-- draft EIS page numbers 2-18, if that helps.

2 MR. WYNHOFF: 79. Thank you very much, Your
3 Honor and Mr. Frankel.

4 Q. (By Mr. Frankel) So there's a line in this
5 table for pasture irrigated, you see that?

6 A. Yes.

7 Q. Now, this says 4,700 acres of irrigated
8 pasture, you see that?

9 A. Yes.

10 Q. Now, that's more -- that's less than the
11 6,500 acres that you talked about in your letter,
12 irrigated pasture, right?

13 A. Yes.

14 Q. Now, this says the surface
15 million-gallon-day requirement for the irrigated
16 pasture in the third column there is 4.2 million
17 gallons a day.

18 A. That's what the chart says.

19 Q. So the draft EIS is talking about the use of
20 more water for less land, for less acreage of crops
21 than you said you were going to be using, or you were
22 using, in 2019, correct?

23 A. Yes, but you're comparing apples and
24 oranges. One was a point-in-time description of what
25 was being used and -- and this is a description of

1 what Mahi Pono thinks its end point will look like
2 years from now, and -- and even in -- within this
3 document it says this farm plan will change from what
4 is in here. This is like the best guess at the time
5 that this was written.

6 Q. So --

7 A. Hundred percent it's not going to be exactly
8 like this when Mahi Pono completes its build-out of
9 its farm.

10 Q. Well, given that projection, are you still
11 thinking that your estimate that you provided to the
12 board was accurate in September 2019?

13 A. I think it was accurate. I -- I'm not
14 measuring the number of acreage, but from what I'm
15 told from people I trust, yeah, I think it was
16 accurate as a point-in-time description.

17 MR. FRANKEL: All right. So I'm going to
18 move on to another area, Your Honor, if you want to
19 take a break.

20 THE COURT: All right. Thank you. All
21 right. It's about nine minutes of, so we'll go ten
22 minutes, so we'll see you at 2:01. All right. Thank
23 you. We're in recess.

24 (Recess taken.)

25 THE COURT: We are back on record.

1 Everyone's present on the Court's video screen.

2 Mr. Frankel, go ahead.

3 Q. (By Mr. Frankel) All right. If you could
4 take a look at Joint Exhibit 27, J-27, which we've
5 been talking a little bit about.

6 A. Okay. (Pause.) Okay.

7 Q. Now, if I -- well, if I talk about system
8 loss, do you understand what I mean by that?

9 A. Why don't you define it for me.

10 Q. Well, let's turn to that same page 8, Bate
11 stamp page 8. And, again, this is a document you
12 provided to the Board of Land and Natural Resources,
13 correct?

14 A. Yes, jointly with Mahi Pono.

15 Q. And if you look at the third column on the
16 table on Bate stamp page 8 of Exhibit J-27, there's a
17 column that says system losses, you see that?

18 A. Yes.

19 Q. And that's a term that's taken and referred
20 to by the Commission on Water Resource Management's
21 decision and order, correct?

22 A. Yes.

23 Q. And the commission decided in their order
24 that there's a certain amount of water that, you
25 know, reasonably one could expect to be lost through

1 seepage and evaporation and such things, correct?

2 A. Yes.

3 Q. And they had a figure, and it was -- I guess
4 it's 22.7 percent, correct?

5 A. Yes.

6 Q. And so you calculated, or you and Mahi Pono
7 calculated, that for the quarter, approximately 6.31
8 million gallons of water were lost in the system
9 through seepage and evaporation, et cetera, correct?

10 A. We use the 22.7 figure to classify as system
11 losses, yes.

12 Q. Now, if we look at the last column on this
13 list in this table, the -- it's titled reservoir,
14 fire protection, evaporation, dust control,
15 hydroelectric. So evaporation you're counting as two
16 separate columns, aren't you?

17 A. Not really. So I think you're referring to
18 the second quarter report that we just filed with the
19 DLNR? No? Can I not talk about that? So in that
20 report we --

21 Q. I'm talking about this report, this quarter.

22 A. Okay. So the -- the number in the system
23 losses column, which is 22.7, is based, as you said,
24 on the DNO, but that 22.7 percent was derived when --
25 during sugar times, it was when there was a lot more

1 water going through the system, right? Do you
2 remember that? Okay. So -- so the number 22.7
3 percent isn't the right number now that there's a lot
4 less water being imported to Central Maui, 'cause the
5 same amount of loss happens. For example, most of
6 the losses are in the reservoirs 'cause they're
7 unlined, but that water that's lost actually goes
8 down into the aquifer and replenishes it, but it's
9 the same amount of loss happening with a much smaller
10 denominator. So we stuck with the 22.7 number in
11 that third column, but there is some losses that's
12 included in the last column. It's kind of a catchall
13 column.

14 Q. Okay. So let's break this down into small
15 bits if we can.

16 A. Okay. Sorry.

17 Q. So the amount of water lost by the system is
18 more than 22.7 percent, correct?

19 A. More than 22.7 percent of current water
20 deliveries to Central Maui.

21 Q. And can you please tell us how much water is
22 being lost in the system to seepage, evaporation, et
23 cetera, as the water commission used that term?

24 A. I cannot -- I'm saying it's a combination of
25 the third column and the last column, because there's

1 still water in the reservoirs, which is why we put
2 fire protection and dust control in that, because
3 that water is being used for fire protection. I
4 think everybody's heard about numerous fires on Maui
5 over the years, and it's used for dust control to
6 keep the soil down. I mean, you made a comment
7 earlier about hydroelectric, where does it go? It
8 goes back in the reservoir. Some of it stays, some
9 of it seeps into the ground. So I don't have the
10 exact calculation. I don't think anybody does.

11 Q. Okay.

12 A. System loss is a combination of those two
13 columns.

14 Q. So clearly the system is losing more than
15 22.7 percent of the water that flows through it,
16 correct?

17 A. The current water deliveries -- yeah, I -- I
18 don't know if you remember in -- in the IIFS decision
19 they pointed out that the system losses don't occur
20 in the EMI system. In fact, you may even have water
21 gains within the EMI system. The leaks are from
22 where the EMI system ends and you start distributing
23 the water through the farm in reservoirs and open
24 ditches and things like that.

25 Q. Okay. Okay. So the system losses are

1 occurring on Mahi Pono's land, correct?

2 A. On the farm, yes.

3 Q. The farm.

4 And, again, defining it for current uses, it
5 is losing more than 22.7 percent the water commission
6 established was a reasonable amount of water to be
7 lost, correct?

8 A. Because the denominator is lower, because
9 you're bringing in so much less water, the percentage
10 goes up. The amount of water is not -- relatively
11 not changing.

12 Q. And you do not know and you have not
13 disclosed to the Board of Land and Natural Resources
14 or the Department of Land and Natural Resources how
15 much water is being lost, have you?

16 A. We have through this chart. You can see how
17 much is actually being consumed and then you have the
18 things that are not consumptive uses per se, so we
19 have to the best of our ability, and in this second
20 quarter report we did a better job of explaining it.
21 We can always do a better job.

22 Q. Okay. Well, that's not in evidence. Maybe
23 it will be at some point. But the -- so are you
24 telling me that column 3 that's designated system
25 loss on Exhibit J-27, page 8, and the last column,

1 reservoir, fire protection, evaporation, dust
2 control, hydroelectric are the nonconsumptive uses?

3 A. Are -- are the nonspecific consumptive uses.
4 Again, fire protection would be a consumptive use,
5 but I can't tell you how much of it it was.

6 Q. Right.

7 A. Dust control is a consumptive use, but I
8 can't tell you.

9 Q. You've never told the Board of Land and
10 Natural Resources how much water is generally needed
11 for dust control?

12 A. It's in this column. We've told them by
13 providing that last column.

14 Q. Well, it's not broken down, is it?

15 A. No, it's not.

16 Q. Has anyone at the Board of Land and Natural
17 Resources ever asked you to break down this last
18 column so that they and the public could know how
19 much is actually being used for dust control and how
20 much of this other stuff, these other categories, are
21 not really an end consumptive use?

22 A. No.

23 Q. Let's move on, and I will not -- we're done
24 with that exhibit for now.

25 You started service on the water commission

1 in the year 2002, correct?

2 A. Yes.

3 Q. And that was less than a year after Na Moku
4 filed its petitions to set instream standard --
5 instream flow standards -- or I should say -- let me
6 rephrase that. That was less than a year after Na
7 Moku filed its petition to amend instream flow
8 standards for 27 East Maui streams, right?

9 A. Yes, it was less than a year.

10 Q. And you served in the water commission until
11 June 30th, 2009?

12 A. Yes.

13 Q. You knew at that time that the commission
14 was underfunded?

15 A. I knew at the time that the commission --
16 that there were resource limitations, and yeah.

17 Q. And as a commissioner, you made no efforts
18 to increase funding for the water commission while
19 you served on it?

20 A. No, I didn't think that was our role unless
21 we were asked to.

22 Q. Okay. Switching gears. Last year you met
23 privately with Department of Land and Natural
24 Resources staff, didn't you?

25 A. We were asked to meet with DOFAW and DLNR

1 land management staff, yes.

2 Q. And that was without anyone from Na Moku
3 being there, correct?

4 A. That's correct.

5 Q. And no one from the Sierra Club being there,
6 correct?

7 A. That's correct.

8 Q. All right. Let's talk about the
9 environmental impact statement that Alexander &
10 Baldwin was working on. Now, you remember the team
11 working on the EIS, right?

12 A. Yes.

13 Q. You've reviewed drafts of the draft EIS?

14 A. Yes.

15 Q. You corrected mistakes?

16 A. I -- we corrected things for clarity and
17 mistakes, yes.

18 Q. You suggested changes to wording?

19 A. For clarity and if it was -- there were
20 errors, yes.

21 Q. And the draft EIS was prepared in good
22 faith?

23 A. I believe so.

24 Q. It is not intended to mislead anyone?

25 A. It's not intended to mislead anyone.

1 Q. It's intended to provide relevant, accurate
2 information?

3 A. Yes.

4 Q. The public can rely on it?

5 A. Well, if the EIS is not final, there will be
6 changes between the draft and the final. So I -- I
7 wouldn't say that the draft EIS is the end all be
8 all, that there could be mistakes, there could be a
9 lot of things, right.

10 Q. Okay. But when you put it out, as far as
11 you knew, there were no mistakes that were there that
12 were -- that could be misleading to the public?

13 A. No, I'm -- I mean, we missed something.
14 There was an appendices to one of the studies that
15 wasn't included, right. It's a massive document and
16 we did the best we could, we're not perfect.
17 Hopefully everything will be corrected by the time
18 it's final.

19 Q. Okay. Now, Alexander & Baldwin entered into
20 a contract with Wilson Okamoto to prepare the draft
21 and final EIS, right?

22 A. Yes.

23 Q. And that contract included services provided
24 by Trutta Environmental Solution?

25 A. Yes.

1 Q. Which is run by James Parham?

2 A. Yes.

3 Q. And it described Parham's methodological
4 approach?

5 A. Yes.

6 Q. And the contract called for paying
7 Mr. Parham's company more than \$300,000?

8 A. I don't remember the exact amount, but the
9 entire EIS is going to cost well in excess of 2.5
10 million, so that could be.

11 Q. Well, let's focus on Mr. Parham for a
12 second. Let's look at Exhibit 35, Sierra Club's
13 Exhibit 35, which is in evidence.

14 A. Okay. It's Wilson Okamoto's supplemental
15 proposal for professional services.

16 Q. And there's these what we call Bate stamp
17 numbers there at the bottom of the page, it says
18 A&B-001860. Can you go to that page?

19 A. Headed Phase 2?

20 MR. WYNHOFF: Mr. -- Mr. -- I mean, Your
21 Honor, may -- I'm sorry, I guess I'm a beat behind.
22 May I know what exhibit we're looking at, please?

23 MR. FRANKEL: Exhibit 35.

24 THE COURT: 35.

25 MR. WYNHOFF: Which one though? S -- SC?

1 MR. FRANKEL: Sierra Club's.

2 MR. WYNHOFF: Thank you.

3 MR. FRANKEL: Are you --

4 THE WITNESS: I'm there.

5 Q. (By Mr. Frankel) So on page 1860 you see
6 the amount of money that was provided for the Trutta
7 Environmental Solutions, Mr. Parham's company?

8 A. Yeah, there's a number of them.

9 Q. And they add up -- that's more than 300,000,
10 right?

11 A. Yes.

12 Q. All right. Now, Dr. Parham had a PhD and MS
13 in biology and a BS in fisheries management, right?

14 A. I'm sorry, I couldn't cite that, but he's
15 well credentialed.

16 Q. All right. And he's a research hydrologist
17 and aquatic biologist, right?

18 A. I believe so.

19 Q. And you met with Mr. Parham?

20 A. We did, before the studies were taken and
21 kind of so he could show us what his methodology was.

22 Q. All right. And you -- so you met him prior
23 to choosing him as one of the consultants when he
24 explained his methodology?

25 A. Yes, and also after they had done some

1 initial field work just to show us what it -- the
2 data output looked like.

3 Q. And A&B expressed no concern regarding his
4 methodology?

5 A. Correct, we expressed no concern.

6 Q. You -- no problem with his approach?

7 A. No. I believe the water commission had
8 hired Mr. Parham before to do some of their work.

9 Q. And you felt the information he produced
10 would be useful?

11 A. Yes.

12 Q. If Mr. Parham was -- report was inaccurate
13 or misleading, you would not have included it in the
14 draft EIS?

15 A. I'm sorry, could you repeat the question?

16 Q. If Mr. Parham -- Dr. Parham's report was
17 inaccurate or misleading, you would not have included
18 it in the draft EIS?

19 A. I -- I -- I don't know how we would know
20 it's inaccurate or misleading. We would've included
21 his report no matter what his outcome.

22 Q. Okay. Well, is there -- do you have a basis
23 to believe that his report was inaccurate or
24 misleading as you testify today?

25 A. No.

1 Q. Okay. Now, I'd like you to take a look at
2 an exhibit which is not in evidence yet, and that's
3 Sierra Club's Exhibit 37.

4 A. Okay. I'm sorry, I have it, an e-mail from
5 Yvonne Izu.

6 Q. So you recognize that e-mail?

7 A. Well, I'm just reading it from the top.
8 That's from Yvonne. But I generally remember it,
9 yes.

10 Q. And you were copied on the e-mail, correct?

11 A. Yes.

12 MR. FRANKEL: Your Honor, we'd like to move
13 Exhibit 37 into evidence.

14 THE COURT: All right. Counsel, let me
15 start with you, Mr. Schulmeister.

16 MR. SCHULMEISTER: No objection.

17 THE COURT: Thank you. Mr. Rowe?

18 MR. ROWE: No objection, Your Honor.

19 THE COURT: All right. Ms. Goldman or
20 Mr. Wynhoff.

21 MR. WYNHOFF: It's me, Your Honor. So, you
22 know, I guess -- I mean, this is really
23 Mr. Schulmeister's witness, but this is -- it's --
24 it's hearsay for starters, so I don't -- I don't know
25 why I would -- I'm not really disposed to wait my

1 hearsay objection, so I object.

2 THE COURT: All right. Okay. Mr. Frankel,
3 what's your basis?

4 MR. FRANKEL: I don't think it's being
5 proposed for the truth of the matter therein. It's
6 being proposed in terms of the discussion that was
7 had between Alexander & Baldwin and its consultant,
8 Mr. -- Dr. Parham.

9 MR. WYNHOFF: I mean, I don't understand
10 that. So if -- it sounds to me like it's just
11 irrelevant. And if he's just going to ask him
12 questions about it, why do we need the exhibit?

13 THE COURT: Mr. Wynhoff, thanks, but I'd
14 prefer to ask the questions about admissibility.
15 Thank you. So...

16 MR. WYNHOFF: Sorry, Your Honor.

17 THE COURT: It's okay. I mean, whenever I
18 hear it's not for its truth, the first thing I think
19 of is, okay, then why do we need it? So why do we
20 need it?

21 MR. FRANKEL: Your Honor, this -- this
22 exhibit demonstrates that A&B asked for a series of
23 calculations that it wants an answer that became the
24 basis of the report.

25 THE COURT: So you're saying it's from --

1 A&B is asking for information, but it's not from A&B,
2 it's from Morihara Group.

3 MR. FRANKEL: You know, I'm sorry, I don't
4 think I -- my next question was going to be whether
5 Yvonne Izu was Alexander & Baldwin's attorney. Maybe
6 I should ask that question first before I move it
7 into evidence.

8 THE WITNESS: Yes, she is.

9 MR. FRANKEL: Oops.

10 THE WITNESS: Oh, sorry.

11 THE COURT: Okay. Hang on. Give me a
12 second to scan it. (Pause.) Okay. I get it now.
13 All right. So this is from counsel for A&B to
14 Mr. Parham asking for -- they want -- A&B wants them
15 to do X, Y, and Z. Got it. Okay. I'm inclined to
16 allow that, Mr. Wynhoff. Do you have any further
17 objection you want to specify?

18 MR. WYNHOFF: Well, I -- I do, Your Honor.
19 It's a witness -- it's an exhibit from somebody who
20 isn't here to somebody else who isn't here, and their
21 only hope to this -- to this witness is that she saw
22 a copy of it, so I don't think it's -- I don't think
23 foundation has been laid, I don't think it's properly
24 authenticated, I don't think it's relevant, and
25 absolutely definitely hearsay, and I haven't heard

1 any -- even a glimmer of what might be an exception
2 to it.

3 THE COURT: I respectfully disagree with you
4 on that one, but -- you probably need to ask
5 Ms. Ching if she believes this is a true and accurate
6 copy of what was sent to her.

7 MR. WYNHOFF: I don't doubt that it's --
8 that it's -- I mean, Your Honor, with all due
9 respect, there's no question as to its authenticity,
10 but that's not the issue.

11 THE COURT: Okay.

12 MR. WYNHOFF: And I hear you and your
13 ruling, and I respect that, you're the judge. I
14 completely respect that.

15 THE COURT: All right. The objection is
16 overruled. Go ahead.

17 Q. (By Mr. Frankel) Just to make sure we have
18 got a good record here, Ms. Ching, do you believe
19 this is a true and correct copy of the e-mail that
20 you were copied on March 7th, 2019?

21 A. I mean, I would have to check it, but I have
22 no reason to think that it's not.

23 Q. Yeah. Now, in this -- and, again, so Yvonne
24 Izu was Alexander & Baldwin's attorney, right?

25 A. Yes.

1 Q. And in this e-mail she laid out a series of
2 calculations that Alexander & Baldwin wanted
3 answered, correct?

4 A. Yes.

5 Q. And we won't go through them now.

6 You know, A&B has not called Dr. Parham as a
7 witness in this case, right?

8 A. I'll have to defer to my attorney.

9 Q. All right. In any case, after this e-mail
10 and after meeting with him about his methodology and
11 of course after signing the contract, he produced a
12 report, right?

13 A. Yes. You know, can I refer to one --
14 something I -- a time line I have so I can put
15 this -- the timing of this into -- no, I can't.
16 Okay.

17 Q. Sorry. But, you know, your attorney can ask
18 you that in few minutes --

19 A. Okay.

20 Q. -- clean that up.

21 So you looked at his report, right?

22 A. That's -- I'm not going to be able to put
23 this into context until I understand where it fit
24 amongst everything, like -- and I'm absolutely bad at
25 dates, I'm sorry.

1 Q. I understand. After he completed his report
2 though, you saw a copy of it, right?

3 A. I don't know when that was, but, yes, when
4 it was completed before he put it into the draft EIS.

5 Q. Okay. And he noted that diversion and
6 aqueduct system -- that these diversion and aqueduct
7 system were built to capture 100 percent of normal
8 low flow plus some smaller amount of storm run-off,
9 didn't he?

10 A. Yes.

11 Q. And he also wrote when low flow conditions
12 persist and overall diversion amounts do not exceed
13 the conveyance capacity of the aqueduct, the systems
14 can be dewatered below diversions resulting in
15 negative impacts on species, habitat and passage,
16 right?

17 A. Yes.

18 Q. And he concluded that A&B's diversions
19 destroy 68 percent of available habitat along the
20 connectivity streams, didn't he?

21 A. I don't remember the exact number.

22 Q. Okay. And he also concluded that A&B's
23 diversions destroy 85 percent of the habitat units on
24 the 13 streams that the water commission did not
25 address?

1 A. I think what it said is that at full
2 diversion, only 15 percent of the habitat units would
3 remain. So his report identifies habitat units, not
4 number of fish or critters, it's just number of
5 square feet, so to speak, of habitat that -- that
6 there exists with or without diversions.

7 Q. And that was information you specifically
8 contracted for him to provide, and you sent e-mail --
9 or your attorney sent him questions regarding habitat
10 units, right?

11 A. The whole basis of his study, his approach,
12 is identification of habitat units, which was a way
13 to identify the impact of diversions on stream -- the
14 best way we could figure out on stream life without
15 having to have had baseline counts of fish in every
16 single stream and then post-diversion counts, which
17 wasn't possible, so it was the best approach we
18 thought to trying to identify the impact of stream
19 diversions on habitat.

20 Q. And the Board of Land and Natural Resources
21 has authorized Alexander & Baldwin and East Maui
22 Irrigation to fully divert the water under full
23 diversion conditions of those 13 streams the water
24 commission did not address or was not part of the
25 petition to the water commission, correct?

1 THE COURT: I'm sorry --

2 THE WITNESS: The board authorized an
3 amount --

4 THE COURT: I'm sorry, I didn't catch that
5 question. Please rephrase.

6 Q. (By Mr. Frankel) The Board of Land and
7 Natural Resources authorized Alexander & Baldwin and
8 East Maui Irrigation to fully divert, to divert as
9 much as has traditionally been diverted from the 13
10 streams, didn't it?

11 A. The board authorizes us to take a certain
12 amount of water out of the licensed area. They don't
13 speak to specific streams. They're leasing the
14 licensed area. The water commission's decisions
15 allow us to divert the streams pursuant to the
16 existing IIFS.

17 Q. And the Board of Land and Natural Resources
18 imposed no restriction on the amount of water that
19 you could divert from those 13 streams?

20 A. Correct.

21 Q. And Dr. Parham concluded that under those
22 conditions, 85 percent of the suitable habitat would
23 be destroyed?

24 A. Correct.

25 MR. FRANKEL: Your Honor, no further

1 questions.

2 THE COURT: All right. Thank you.

3 Mr. Schulmeister?

4 MR. SCHULMEISTER: I have no questions at
5 this time. As we discussed previously, I'm reserving
6 my examination for when we put our case on.

7 THE COURT: Understood. I just wanted a
8 clear record.

9 MR. SCHULMEISTER: Okay.

10 THE COURT: All right. Mr. Rowe.

11 MR. ROWE: I don't have any questions for
12 this witness, Your Honor.

13 THE COURT: Mr. Wynhoff.

14 MR. WYNHOFF: So good afternoon, Ms. Ching.
15 So Ms. Ching --

16 MR. FRANKEL: Your Honor, I -- I just want
17 clarity here in terms of the exhaustion rule. So
18 I don't -- I don't understand -- so Mr. Schulmeister
19 is not exhausting Ms. Ching, but the State is not. I
20 don't understand how -- the way it works. Seems like
21 there's a multiple -- I don't know, I just want to
22 get some clarity.

23 THE COURT: Are you objecting?

24 MR. FRANKEL: I think so. Again, I -- yes,
25 I was under the understanding that she was going to

1 be questioned by the Defendants on Tuesday.

2 THE COURT: Okay. Well, I don't think --

3 MR. FRANKEL: Maybe -- maybe my --

4 THE COURT: I don't think the State can be
5 bound by Mr. Schulmeister's wanting to recall
6 Ms. Ching. So --

7 MR. FRANKEL: Okay.

8 THE COURT: I mean, it would be nice not to
9 do it in bits and pieces, but if the State wants to
10 go now for some reason, maybe it fits into their plan
11 of how the case should unfold, so I'm going to go
12 with that.

13 MR. FRANKEL: All right.

14 MR. WYNHOFF: Thank you, Your Honor.

15 THE COURT: I'm not sure I'm going to give
16 you another bite at the apple though, Mr. Wynhoff, so
17 just know that.

18 MR. WYNHOFF: So, Your Honor, thank you for
19 letting me know. What my intention is is to ask some
20 questions within the scope of this -- this
21 questioning, and then when she comes back, then I'll
22 ask some questions within the scope of
23 Mr. Schulmeister's questioning, that's my intention.
24 I don't intend to ask the same questions twice or to
25 conduct -- to the extent I conduct a direct

1 examination. Perhaps I'll do that later. I don't --
2 I don't expect to do that though. Today, Your Honor,
3 I will represent that I will ask questions wholly
4 within the scope of the direct examination.

5 THE COURT: Understood.

6 MR. WYNHOFF: Thank you, Your Honor.

7 THE COURT: Go ahead.

8

9

CROSS-EXAMINATION

10 BY MR. WYNHOFF:

11 Q. So Ms. Ching, the -- the -- the four license
12 areas comprise some 33,000 acres of state land,
13 correct?

14 A. Correct.

15 Q. And the -- that is, in fact, part of a even
16 larger watershed of some 56,000 acres, is it not?

17 A. Correct.

18 Q. And some of that -- oh, I'm sorry.

19 A. I think it's around 50. I can't remember,
20 but, yes, you're correct, much larger.

21 Q. Okay. And the reason that it's larger is
22 that some of that other land is privately owned, in
23 fact much of it is owned by Alexander & Baldwin, am I
24 right about that?

25 A. Yes, but -- yes, yes.

1 Q. Okay. And so do you happen to know how many
2 streams there are within that entire watershed of
3 56,000 acres?

4 A. The numbers of streams get messed up because
5 when people -- tributaries and streams -- but I
6 believe it's around 36.

7 Q. Yes. Thank you. That's a really great
8 point, thank you for mentioning that. I know that
9 other people have mentioned that as well. Sometimes
10 it's kinda hard to remember. And we remember -- we
11 also remem-- or we do remember that Na Moku filed
12 petitions with respect to some 27 of those streams,
13 you remember that?

14 A. Yes.

15 Q. And that ultimately the water commission
16 came out with IIFS, that is an interim inflow --
17 instream flow standard for some 22 of those streams,
18 is -- am I remembering that correctly, Ms. Ching?

19 A. Yeah, my memory was all but three. And,
20 again, the stream count was different, it wasn't 27
21 by the time they came out with their decision. But
22 they restored water in all but three of the
23 petitioned streams.

24 Q. Okay. And the -- is my -- again, you've
25 been with A&B did you say since 1982?

1 A. Yes.

2 Q. I -- I -- I must have missed you by a couple
3 years at Stanford. I -- I graduated either before
4 you -- it seems like a long time ago now.

5 A. Yeah.

6 Q. The -- and I know you had testified on
7 direct that the revocable permits dated back to at
8 least the year 2000, Mr. Frankel asked you that, you
9 remember that, right?

10 A. Yeah, that the revocable permits that are
11 the subject of this lawsuit go back to 2000.

12 Q. Right.

13 A. We were on revocable permits after the lease
14 expired in '86 and revocable permits prior to that
15 for the other leases that had expired.

16 Q. So just to give us a little bit of
17 historical context, the system itself was actually --
18 it would've been built -- started -- parts of it were
19 built well over a hundred years ago, right?

20 A. It's -- I think it's 140 years ago.

21 Q. Yeah.

22 A. Yeah.

23 Q. And it was -- would've been -- it's probably
24 been in place for -- in total for 89 years, at least
25 since the '30s, right?

1 A. Yes. I believe the last improvement to the
2 system was in 1923.

3 Q. Okay. And so, I mean, again, to talk about
4 some of the historical sweep, do you remember -- do
5 you remember that the actual capacity of the system
6 was some 465 million gallons per day?

7 A. That order of magnitude. I've heard 450,
8 yes.

9 Q. And, in fact, the amount of the water that
10 A&B was using I think you had -- or A&B or EMI was
11 using was closer to 200 million gallons per day
12 during the -- during the sugar era?

13 A. Yeah, it was an average of about 165 million
14 gallons per day during sugar.

15 Q. Okay. And -- and the amount of water that
16 was -- was authorized -- the maximum amount of water
17 that was authorized by the board in the 2019
18 iteration of the revocable permits was 45 million
19 gallons per day, if I remember that correctly.

20 A. You're correct.

21 Q. I guess I was a little puzzled, and maybe
22 you can help me understand this. How -- how does 45
23 million gallons a day represent an increase in
24 comparison to the -- in comparison in the amount of
25 water that was used in previous times? Did you --

1 can you tell me -- not -- not to -- I'm not asking
2 you, I guess, to interpret Mr. Frankel's questions,
3 but if you can tell me how -- in what way you
4 understood that to be an increase.

5 A. Yeah, I -- I -- I can't because, in fact, if
6 you're just comparing caps on our revocable permit
7 the year prior, there was no cap because the IIFS had
8 been set, and our estimation of how much water can be
9 diverted from the license area after compliance with
10 IIFS is around 88 million gallons per day, so that's
11 half as much as what was being diverted during full
12 sugar, and more than 45 million gallons per day, so
13 it just depends on the context.

14 Q. And can you explain what you meant by you
15 just said that the amount of water that might be
16 available, at least what I heard was the amount of
17 water that might be available after -- after
18 satisfaction of the IIFS was some 88 -- 88 million
19 gallons per day? Can you explain what you meant by
20 that please, Ms. Ching?

21 A. Yeah, so after fully restoring the ten
22 streams that are in the 2018 IFS order and complying
23 with the stream habitat restoration, which is at 64
24 percent of median base flow I think, and complying
25 with the connectivity requirements, if you comply

1 with the entire water commission IIFS decision, based
2 on again this is just models we've done, we think the
3 amount of water that will be available to be diverted
4 is 88 million gallons per day on average, right?
5 There are going to be days where there's nothing,
6 there's going to be days where there's a lot, but
7 after we put the water back in the streams as
8 ordered, the max that could be diverted we estimate
9 to be 88 million gallons per day on average.

10 Q. Okay. So that's -- those -- those figures
11 in that discussion are based on what the CWRM
12 ordered, right?

13 A. Yes.

14 Q. And then -- then we next go to what the
15 board ordered, and what the board ordered is that,
16 although based on CWRM, there may be some 88 million
17 gallons per day, as you just discussed, the board in
18 2019 anyway authorized a maximum of 45 million
19 gallons per day?

20 A. Yes.

21 Q. And as I understood your testimony, and I
22 want you to correct me if I'm wrong or -- or just
23 help me understand this, is A&B doesn't know exactly
24 which streams the -- the 45 million gallons would
25 come from? Is that fair or am I misunderstanding

1 that?

2 A. Yeah, we -- we didn't know you're limited to
3 taking from certain streams, so when you operate a
4 water system like this, you kinda have to take water
5 where you can. There are times where there -- a lot
6 of streams are dry if you're going to go to the
7 streams with water, and it changes because this
8 watershed is so large that the weather -- weather
9 patterns change as you go through the system. So
10 they basically go to where they can get it from
11 depending on how much they need. So that's probably
12 a better question to ask of the EMI witness I think
13 will be forthcoming.

14 Q. So one of the things that Mr. Frankel was
15 talking to you about is you were saying, well, you
16 could just go -- go in there and open the gates and
17 close the gates and change the -- change the flow on
18 the streams, you remember him asking you that
19 question?

20 A. Yes.

21 Q. And I believe your answer was, well, it's
22 not that simple because there are different kind of
23 diversions and et cetera, et cetera, am I remembering
24 that correctly?

25 A. Yes.

1 Q. Okay.

2 A. Yes.

3 Q. And -- and let me just say this, but -- but,
4 but Mr. Frankel seems to have been focusing on --

5 THE COURT: Excuse me.

6 MR. WYNHOFF: -- these particular 13 --

7 THE COURT: Mr. Wynhoff --

8 MR. WYNHOFF: Yes, Your Honor.

9 THE COURT: -- excuse me.

10 MR. WYNHOFF: Yes, Your Honor.

11 THE COURT: Can you just please ask the
12 witness questions instead of recounting and rehashing
13 the testimony and asking her to interpret Mr. Frankel
14 and so forth? Let's just put some questions to the
15 witness.

16 MR. WYNHOFF: Sure, Your Honor. I was
17 trying to make sure that I was sort of covering
18 myself with being in the scope, 'cause you had put
19 that thought in my mind. But thank you for
20 mentioning it, and I will try to -- try to focus on
21 that.

22 THE COURT: Thank you.

23 MR. WYNHOFF: Thank you, Your Honor.

24 Q. (By Mr. Wynhoff) So let me ask you -- let
25 me ask you this, going back to my earlier question

1 about this is 56,000 acres watershed. If -- if
2 the -- if the water -- so let me try to ask it this
3 way: If the water -- if water is taken out of those
4 watersheds -- let me just ask you this: Assuming
5 that water comes out of the watershed, it's gotta
6 come from somewhere, would that be a fair preliminary
7 question?

8 A. Yes, I -- yes.

9 Q. Okay. So if the water -- so if the water
10 doesn't come out of the 13 streams, then presumably
11 it would come from some other streams, right?

12 A. Yes.

13 Q. And if the water comes from some other
14 streams, then there would be consequences on the
15 habitat in those other streams, right?

16 A. Yes.

17 Q. So it would not be fair, not be fair, I want
18 to emphasize the "not" so that you understand it, it
19 would not be fair to say that you can simply put
20 water back in the 13 streams without some cost to
21 cultural -- cultural or environmental interests
22 elsewhere?

23 MR. FRANKEL: Objection, Your Honor.

24 Incomplete hypothetical, lacks foundation, not --
25 beyond the scope of lay witness testimony.

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 THE COURT: You know, in print that question
2 is -- is problematic, Mr. Wynhoff. The objection is
3 sustained.

4 MR. WYNHOFF: I'll rephrase that.

5 THE COURT: Okay.

6 MR. WYNHOFF: Thank you, Your Honor.

7 Q. (By Mr. Wynhoff) If the water comes out of
8 the 13 streams and it comes from somewhere else, then
9 you would anticipate that there would be impacts
10 elsewhere, would you not, Ms. Ching?

11 MR. FRANKEL: Objection.

12 THE WITNESS: Yes. Oh, sorry.

13 MR. FRANKEL: Objection, Your Honor. Move
14 to strike. Lacks foundation, calls for expert
15 opinion. Yeah, I'll leave it at that.

16 THE COURT: Okay. Overruled. Well, if you
17 just -- I mean, it's just kind of a logical
18 syllogism.

19 MR. WYNHOFF: Yeah. Thank you, Your Honor.

20 Q. (By Mr. Wynhoff) So, Your Honor -- or
21 Ms. Ching, so with respect to A&B's use of the water,
22 going back to Exhibit J-20 for a bit, if you would go
23 back to J-20.

24 A. J-20?

25 Q. Yes, ma'am. Which I'm pretty sure, if I'm

1 not mistaken, that's going to be the draft EIS.

2 A. Oh, okay. Thank you, Trisha.

3 Q. Yeah.

4 A. Okay. I've got it.

5 Q. So the draft EIS is a 2,700 page document,
6 right?

7 A. Correct.

8 Q. And the draft EIS is going to cost -- or is
9 costing 2.5 million, right?

10 A. I think it will be more than that, but yes.

11 Q. And the draft EIS is studying the cultural
12 impacts of the water that -- that -- that A&B is
13 taking from -- from the watershed, right?

14 A. Amongst other impacts, but yes.

15 Q. Right. And the -- and the -- and in the
16 A&B, this 2,700 page study studies possible
17 alternatives, right?

18 A. Correct.

19 Q. And this process has so far been a
20 several-year process?

21 A. It has. I think we filed the print notice
22 for the EIS in July of 2016, then had to wait for the
23 IFS decision to be passed in order to properly assess
24 the condition. And we're still responding to 400
25 comment letters that were received.

1 MR. FRANKEL: Your Honor, I'm not -- I
2 won't -- I won't move to strike, but we're passing
3 beyond the scope of direct.

4 THE COURT: Yeah, the minute I heard the
5 word "cultural," I was waiting for that objection,
6 but it didn't come. So the answer stands.

7 MR. WYNHOFF: Well, Your Honor, Your Honor,
8 I -- I was going to talk -- I was -- I was -- I'm
9 actually moving on to the next question right now,
10 but I really do want to defend that. He asked about
11 the DEIS and I'm asking about the components of it,
12 so I don't think it's beyond the scope, and I'll just
13 say that it's a hypothetical non-objection because
14 I'm now going to move on to my next question.

15 THE COURT: Thank you.

16 MR. WYNHOFF: But I really -- all right.
17 Okay. Probably the judge has enough to decide
18 without ruling on moot questions. Thank you.

19 THE COURT: The judge has been wearing a
20 mask since 9 a.m., and I'll tell you, my -- I mean,
21 honestly, my level of concentration is starting to
22 fade, so let's try to keep it succinct.

23 MR. WYNHOFF: Okay. All right. Thank you,
24 Your Honor.

25 Q. (By Mr. Wynhoff) Ms. Ching, I'll have you

1 look, please, at Exhibit SC-32.

2 A. SC-32?

3 Q. Yeah, so that would -- I think it was SC,
4 yeah, Sierra Club 32.

5 MR. SCHULMEISTER: I think the Sierra Club
6 witnesses don't have a --

7 MR. WYNHOFF: Oh, okay. Then maybe --

8 THE WITNESS: Thank you.

9 MR. SCHULMEISTER: That's confused me also.

10 MR. WYNHOFF: Ms. Goldman just told me the
11 same thing, so thank you all very much.

12 THE WITNESS: Thank you.

13 MR. WYNHOFF: 32.

14 THE WITNESS: Okay. It's the press release?

15 Q. (By Mr. Wynhoff) Yeah, that's right. And
16 so what I wanted to ask you about there is you -- we
17 talked pretty clearly about wholly and permanently
18 restoring. But what I wanted to ask you about is
19 what did you mean by priority? You used the word
20 priority, priority taro stream, what does that --
21 what does that word mean there? The purpose in the
22 second sentence -- I'm sorry, I'm not done yet -- are
23 the priority streams. What are the prior-- what does
24 that mean?

25 A. So it refers to the -- at the time they

1 called it the 8 streams -- the 7 streams that were
2 identified by the Native Hawaiian Legal Corp. as
3 their priority taro streams, that's where the term
4 comes from, because I think that's where their
5 clients resided and -- and had taro operations or
6 wanted to have taro operations. So it links back to
7 when the water commission first acted on the 27
8 petitions. They bifurcated the 27 and addressed
9 eight first, and those were the priority taro
10 streams, and it's the same ones. We were just trying
11 to address their priorities.

12 Q. Thank you. And you know what, that reminds
13 me, when I was talking about decades ago at Stanford,
14 I actually meant to ask you this question and I
15 forgot. So when the -- when the CWRM first looked at
16 these eight streams, when was that, what year?

17 A. 2008.

18 Q. 12 years ago.

19 A. Yeah.

20 Q. And -- and then after that, then what
21 happened to -- were there further proceedings with
22 respect to other streams besides these eight priority
23 streams, or seven?

24 A. Right. So in 2010 they made a decision on
25 the remaining 19 streams, and then right after that

1 hearing was the filing for a contested case hearing.

2 Q. And -- okay.

3 A. Which started the process all over again.

4 Q. Right.

5 MR. FRANKEL: Again, Your Honor, I think
6 we're treacherously close to going well beyond
7 direct, beyond the scope.

8 MR. WYNHOFF: I'm astonished. But I have --
9 I'm going to ask -- I'm moving on to another area.
10 So I -- okay.

11 Q. (By Mr. Wynhoff) So then ultimately we end
12 up with this exhibit that came out from the CWRM in
13 2018, that was the several hundred page document that
14 was where you said the CWRM visited again.

15 A. That's when the final CWRM decision was made
16 after holding a contested case hearing.

17 Q. Okay. So you were talking about -- you were
18 talking about the land that was sold to Mahi Pono,
19 and -- and there was a discussion that it was 40,000
20 acres of which 30,000 acres were agricultural land, I
21 heard that correctly?

22 A. 30,000 acres were irrigated by the East Maui
23 system. The rest of it's irrigated by a West Maui
24 system.

25 Q. Okay. Thank you. And out of that 30,000

1 acres, do you remember the number of acres that are
2 so called important agricultural land?

3 A. I don't. I think it's like 21,000 or --
4 it's quite sizeable.

5 Q. Okay. I actually don't remember the number,
6 the exact number either, but I was going to suggest
7 that maybe it was 22, but between us we're in the
8 same ballpark.

9 What are agricultural lands as you
10 understand it?

11 A. Those are constitutionally mandated
12 designation for lands that are important to the
13 future of agriculture in Hawaii. So -- so they're
14 constitutionally protected, intended to be preserved
15 and kept for agricultural cultivation or agricultural
16 use.

17 MR. FRANKEL: Your Honor, I am going to
18 object because I think we are going beyond the scope
19 of direct. I think it's fair game. Mr. Schulmeister
20 I'm sure is going to address this on Tuesday, but I
21 don't think we went there in direct.

22 MR. WYNHOFF: Your Honor, if I might be
23 heard. We had -- specifically had a discussion about
24 40,000 acres and we had a discussion about 30,000
25 acres, and I just don't see how it could not be

1 asked -- how I could not be within the scope by
2 asking about some of the characteristics of those
3 30,000 acres. But in any event I'm moving on to my
4 next question again, so... I don't know if you want
5 to -- I'm happy to take some guidance if you think
6 that I'm off base. I don't think so.

7 THE COURT: My guidance is I think I'm done
8 for the day. I'm sorry. No, I'm sorry, I just --
9 honestly, I haven't -- this is the first time I've
10 worn a mask all day long like this, and it's taken a
11 toll on me. I'm just having a hard time following
12 the testimony at this point, so I think it's best to
13 just --

14 MR. WYNHOFF: You know, I really understand
15 that, Your Honor. I -- I will make -- I will make
16 one -- I can either ask one or two more questions or
17 I can simply stop. I'm happy to waive Ms. Ching. I
18 appreciate -- Your Honor, I appreciate with the
19 greatest amount of respect exactly what you're
20 saying, so tell you what I'll do, I'll -- I'll be
21 done. I don't want to do it if I'm not communicating
22 with you, and I appreciate your indulgence up till
23 now.

24 THE COURT: All right.

25 MR. WYNHOFF: Thank you, Ms. Ching.

1 THE COURT: All right. So we're going to
2 defer the rest of Ms. Ching's testimony till the
3 normal course that you folks have scheduled. I'm
4 going to call it a day.

5 And let's talk about -- let's talk about
6 what comes next.

7 MR. FRANKEL: Well, I guess I'm unclear what
8 that means in normal course. So on -- we don't have
9 court tomorrow. Thursday we're having the Maui
10 witnesses. Are -- we'll have Ms. Ching back on
11 Friday morning then you think, before the other
12 witnesses?

13 THE COURT: Well, let's see, we had...
14 there's nothing magical about this schedule, but it
15 was the schedule, and my schedule shows she wasn't --
16 Ms. Ching was not returning till next week Tuesday.

17 MR. FRANKEL: Right. So I guess the only
18 awkward thing, Your Honor, is we were planning to
19 rest on Friday after the two witnesses on Friday.
20 And, technically, Ms. Ching's testimony hasn't been
21 completed. I don't have -- I don't have a -- I mean,
22 I have some redirect questions, but as long as I'm
23 going to be able to ask them on Tuesday, I don't
24 think it's the end of the world. But, technically,
25 we -- we will have completed our case, and that's

1 what's a little bit awkward.

2 THE COURT: Well... the -- I mean, can you
3 think of some new information that you expect to get
4 from the witness that you did not get from the
5 witness today? Is there some whole new area?

6 MR. FRANKEL: No, it's not a whole direct --
7 a whole new area 'cause it's redirect. And -- right.
8 There's information. Is it -- is it going to make or
9 break our case? I don't think so. I think it's
10 helpful. That's -- that's what I'll say.

11 THE COURT: I'm more worried about if for
12 some reason one of the other parties decides not to
13 call Ms. Ching back, then what? So I think we need
14 an understanding that she will be available even if
15 someone else doesn't call her, 'cause I don't want to
16 leave -- you know, I don't want to leave any party
17 unable to finish their questions for Ms. Ching, so...

18 MR. SCHULMEISTER: Well, we have her
19 scheduled for Tuesday morning on our current
20 schedule.

21 THE COURT: Okay. I just want to say for
22 something -- if you change your mind for some reason,
23 the Court's expectation is that Ms. Ching would be
24 made available at any other party's request if you do
25 not call her. Can we have that understanding?

1 MR. SCHULMEISTER: Yeah, subject -- I mean,
2 I would like to be able to at least have her schedule
3 considered, but yes.

4 THE COURT: Of course, of course. Okay.
5 All right. So with that understanding, I think we're
6 all right. You know, Mr. Frankel, if we get to some
7 point where it really matters that some little piece
8 of her testimony needs to be part of your direct
9 case, I'll let that happen, but I -- I don't think
10 we're ever going to get there.

11 MR. FRANKEL: Thank you, Your Honor.

12 THE COURT: All right. 'Cause it's not your
13 fault that I'm not following the testimony very well
14 right now. Yes, Mr. Wynhoff?

15 MR. WYNHOFF: I'd just like to -- if
16 possible, I'd like to make sure that I understand
17 that Glenn Higashi is not going to come on until
18 Friday?

19 MR. FRANKEL: That's correct.

20 MR. WYNHOFF: Thank you, Mr. Frankel. Thank
21 you, Your Honor.

22 THE COURT: Okay. All right. Any other
23 housekeeping we can do right now?

24 MR. SCHULMEISTER: Yes. Are we going to
25 have an order of witnesses for Thursday?

1 THE COURT: Okay. That's fair. I think
2 we're -- I think the schedule says we're going to
3 have the Maui witnesses plus Ms. Townsend. Is that
4 still the plan? Do you have --

5 MR. FRANKEL: Yeah.

6 THE COURT: Do you have an order for the
7 witnesses?

8 MR. FRANKEL: It should be as I listed in
9 the witness list, and as I've been telling folks,
10 I -- I believe -- I -- I -- I haven't spoken to some
11 of my witnesses in a while. I'm hoping to speak with
12 them tomorrow, and I'm hoping the order is Miranda
13 Camp, Megan Loomis, Rob Weltman, and Lucienne de
14 Naie. I may have to split the order. Miranda's
15 schedule is -- I have not been able to nail down her
16 schedule. I've emphasized to her that I want her
17 first, but I haven't nailed that down yet.

18 THE COURT: All right. As -- you know, if
19 you get anymore clarity on that tomorrow, please pass
20 it along to all counsel through an e-mail. All
21 right.

22 MR. FRANKEL: Yeah.

23 THE COURT: All right.

24 MR. WYNHOFF: Thank you, Mr. Frankel.

25 THE COURT: Okay. Anything else today? All

1 right. Thank you. Everyone take care. We are in
2 recess. We'll see you again on Thursday.

3 (Proceedings concluded at 2:56 p.m.)

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I, MILANI BALLESTEROS, a Certified Shorthand Reporter in the State of Hawaii, do hereby certify that the foregoing pages 1 - 81, inclusive, comprise a full, true, and correct transcript of the proceedings had on Tuesday, August 4, 2020 in connection with the above-entitled cause.

DATED: August 5, 2020

/s/ Milani Ballesteros
 MILANI BALLESTEROS, RMR, CRR,
 CSR #407
 Official Court Reporter