

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

3	_____	)	
4	SIERRA CLUB,	)	CIVIL NO. 19-1-0019
5	Plaintiff,	)	
6	vs.	)	
7	BOARD OF LAND AND NATURAL	)	
8	RESOURCES, et al.,	)	
9	Defendants.	)	
	_____	)	

10 TRANSCRIPT OF PROCEEDINGS

11 had before the HONORABLE JEFFREY P. CRABTREE, Judge, Sixth  
12 Division, presiding on Thursday, August 6, 2020. FURTHER  
13 JURY-WAIVED TRIAL (Afternoon Session).

14 APPEARANCES:

15	DAVID K. FRANKEL, ESQ.	For Sierra Club
16	MELISSA D. GOLDMAN	For State of Hawaii
17	WILLIAM J. WYNHOFF	
	Deputies Attorney General	
18	DAVID SCHULMEISTER, ESQ.	For Alexander & Baldwin
19	TRISHA H. S. T. AKAGI, ESQ.	and East Maui
		Irrigation Company
20	CALEB P. ROWE	For County of Maui
	Deputy Corporation Counsel	

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22  
23 REPORTED BY:  
24 Lila H. M. Grumling, CSR 159  
25 Official Court Reporter  
First Circuit Court  
State of Hawaii

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1 THURSDAY, AUGUST 6, 2020

1:02 P.M.

2 --o0o--

3 THE COURT: All right, so we are back on  
4 record -- we're back on record after our lunch break.  
5 It's about 1 o'clock.

6 FTR on?

7 THE BAILIFF: Yeah.

8 THE COURT: All right, let's see, looking at  
9 my video screen here, I see everybody I'm supposed to see.  
10 All counsel are present. Looks like we have a witness  
11 ready to go. Everyone ready?

12 Okay, great.

13 UNIDENTIFIED MALE: Yes, Your Honor.

14 THE COURT: All right, Mr. Frankel, who's our  
15 next witness? And we'll swear her in.

16 MR. FRANKEL: Lucienne de Naie.

17 THE CLERK: Okay, the witness may remain  
18 seated. Just raise your right hand and I'll swear you in.

19 (The witness was duly sworn.)

20 THE COURT: All right, ma'am, good afternoon.  
21 This is Judge Crabtree speaking. If you would please say  
22 your full name and then spell it so our court reporter  
23 here on Oahu gets it correctly. Thank you.

24 THE WITNESS: Okay. My full name is  
25 Antoinette, A-n, like in Nancy, t-o-i-n, like in Nancy,

1 e-t-t-e. That's my first name. Lucienne, L-u-c-i-e-n,  
2 like in Nancy, "n," like in Nancy, "e." That's my middle  
3 name which I use as my common name. And my last name is  
4 small "d," like in dog, "e," then there's a space, capital  
5 "N," like in Nancy, a-i-e.

6 THE COURT: Is there any hyphen or anything  
7 between the "d" and the "N"?

8 THE WITNESS: No, just a space.

9 THE COURT: All right, thank you. All right,  
10 you're coming through loud and clear so keep doing  
11 whatever you're doing right now, and it should work pretty  
12 well.

13 Mr. Frankel, go ahead.

14 ANTOINETTE LUCIENNE DE NAIE  
15 was called as a witness by the plaintiff and, after having  
16 been first duly sworn, was examined and testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. FRANKEL:

20 Q. All right, Ms. de Naie, I'm going to ask you  
21 some questions that I know you might need to use some  
22 Hawaiian words in answering. When you do so, if you could  
23 please spell. That'll help us quite a bit.

24 Where do you live?

25 A. I live in East Maui in a community called

1 Huelo, H-u-e-l-o, in the ahupua'a of Puolua, P-u-o-l-u-a.

2 Q. And how long have you lived on Maui?

3 A. Since 1985 full-time.

4 Q. Are you a member of the Sierra Club?

5 A. I am.

6 Q. How long have you been a member of the Sierra

7 Club?

8 A. Since 1995.

9 Q. What role do you currently serve with the  
10 Sierra Club?

11 A. I am the conservation chair of the Maui Group  
12 of the Sierra Club. I am an outings or hike leader with  
13 the Maui Group of the Sierra Club, and I serve as the  
14 vice-chair of the Sierra Club of Hawaii Chapter.

15 Q. That would be the State chapter, correct?

16 A. That is the statewide chapter.

17 Q. What does an outings leader do?

18 A. An outings leader works with the outings  
19 committee to create a hike schedule and get permission for  
20 hikes and then lead those hikes with the idea of creating  
21 a -- a safe and educational experience for the  
22 participants.

23 Q. I'm going to ask you a question here, and  
24 before you answer, we're going to get a document to help  
25 the court reporter on this. I want to know which East

1 Maui streams you hiked on on a Sierra Club outing. What  
2 we're going to do -- I think we have a different court  
3 reporter here, but hopefully we can replicate this. It's  
4 a little challenging with the video and all.

5 If you could get Exhibit J-14 for Ms. de Naie  
6 and we're going to turn to, I believe it's, page 40 of  
7 that document.

8 THE WITNESS: (Indiscernible)

9 UNIDENTIFIED FEMALE: Can you see now?

10 THE WITNESS: I can, yes.

11 UNIDENTIFIED FEMALE: (Indiscernible)

12 THE WITNESS: Oh, good. Okay, I'm going to  
13 get to see the list. That's good.

14 THE COURT REPORTER: Who's speaking, judge?

15 THE WITNESS: All right, we have the screen  
16 here --

17 THE COURT REPORTER: Who's speaking?

18 THE COURT: Hang on. We're having  
19 difficulties on our end. Hang on one second. We'll get  
20 this sorted out.

21 Who was speaking?

22 THE COURT REPORTER: Just now, yeah. Like  
23 there's two women speaking?

24 THE COURT: Yeah, we have some overlapping  
25 voices there. The court reporter couldn't quite make out

1 who was speaking.

2 Mr. Rowe, you have your hand up. Go ahead.

3 MR. ROWE: Yeah, sorry, I think that was my  
4 assistant telling Ms. de Naie how to scroll.

5 THE COURT: Got it. Okay. All right, so it  
6 wasn't any kind of testimony. That's good.

7 All right, so Mr. Frankel, why don't you pick  
8 up again where you started before we had the jousting with  
9 the exhibit.

10 Q. (By Mr. Frankel) So Ms. de Naie, instead of  
11 reading off the names in Hawaiian, which might be a  
12 challenge, we've learned that it's probably easiest if you  
13 could go through and use the numbers that are on page 40,  
14 41. We all know that we're referring to Exhibit J-14 and  
15 Bates stamp 40. So can you go through -- again, the  
16 question is which East Maui streams have you hiked on on a  
17 Sierra Club outing?

18 A. All right, thank you. I hiked on number 1  
19 (Makapipi), number 2 (Hanawi), number 3 (Kapaula), number  
20 4 (Waiaka), number 5 (Pa'akea), number 6 (Waiohue),  
21 number 7 (Kopiliula), number 8 (East Wailuaiki), number 9  
22 (West Wailuaiki), number 10 (Wailuanui), number 12  
23 (Waiokamilo), number 14 (Palauhulu), number 15  
24 (Pi'ina'au), number 17 (Honomanu), number 19 (Ha'ipua'ena)  
25 -- number 18 (Punalau), sorry, number 19 (Ha'ipua'ena),

1 number 20 (Puohokamoa), number 21 (Wahinepe'e), number 22  
2 (Waikamoi), number 23 (Kolea), number 28 (Nailiilihaele),  
3 number 29 (Kailua), number 31 (Hoalua), number 32  
4 (Hanehoi), number 33 (Waipio), number 34 (Mokupapa),  
5 number 35 (Hoolawa), and number 36 (Honopou) on Sierra  
6 Club outings.

7 Q. Thank you. And without repeating any of  
8 those, which additional streams have you hiked on as  
9 individual or with friends?

10 A. Pull up again.

11 MR. ROWE: (Indiscernible) civil engineering.

12 THE WITNESS: (Indiscernible)

13 THE COURT: Time-out. We got this kind of  
14 cross-conversation going on in the background, and it's  
15 hard for our court reporter to figure out what she needs  
16 to be taking down. So what just happened? Was that --

17 THE WITNESS: Caleb just told me that he  
18 looked at the numbers. In case I forget which ones I had  
19 already said, he'd give me the list to refer to. I think  
20 I can actually remember just -- so number 16 (Nua'ailua),  
21 number 25 (Kaaiea), 26 (Oopuola), 27 (Puehu), 30  
22 (Hanahana), and 33 (Waipio).

23 Q. (By Mr. Frankel) So to be clear, 33 (Waipio)  
24 is one that you hiked as an individual. Have you also  
25 hiked on with -- to that stream also with the Sierra Club



1 or not?

2 A. Yes, I have. Sorry, I -- I don't live up  
3 there.

4 Q. And just to be clear, looks like 11 (Kualani)  
5 and 13 (Ohia), you haven't hiked to?

6 A. Actually, I probably have because that's on a  
7 trail that we go on, the Kualani. It's just higher up.  
8 So I believe the trail does actually go right past that  
9 stream.

10 THE COURT: Was that --

11 THE WITNESS: So Ohia and -- Ohia is below --  
12 below the ditch trail. So, no, I -- I've not hiked to  
13 Ohia Stream on a Sierra Club hike. (Indiscernible)

14 THE COURT REPORTER: I can't understand,  
15 judge.

16 THE COURT: Was that Kualani that you said a  
17 minute ago?

18 THE WITNESS: That would be, yeah, Kualani.

19 THE COURT: All right, thank you.

20 Okay, wait, the --

21 THE WITNESS: And --

22 THE COURT: I'm sorry, time-out. So the --  
23 Mr. Frankel, try to take it in short chunks, okay. It's  
24 going to make things a lot easier over here. Thank you.

25 MR. FRANKEL: Yes.

1 Q. (By Mr. Frankel) How often --

2 THE WITNESS: Do I need to look at the other  
3 streams from 37 (Kapalaalaea) on?

4 MR. FRANKEL: No, we don't need to look at  
5 that. And actually, you should probably not look at that  
6 computer for now. We're going to move on from the  
7 exhibit.

8 Q. (By Mr. Frankel) How often would you say  
9 that you hike in East Maui?

10 A. Oh, several times a month. I live there.

11 Q. What's that?

12 A. I live there so that's the easiest place to  
13 recreate.

14 Q. Why do you enjoy hiking to and along streams?

15 A. Oh, it's very emotionally, spiritually  
16 fulfilling to be by a beautiful stream, waterfalls, pools,  
17 to catch a glimpse of the ecosystem, little remnants of it  
18 or the native plants. It's -- it's just very much a part  
19 -- like some people go to church. I go hiking in the  
20 watershed.

21 Q. And what's special about seeing a free-  
22 flowing stream?

23 A. Well, first of all, you know it's a little  
24 safer. My parents always taught me that if the water is  
25 running, you have less chance of getting sick from

1 swimming in it. So a free-flowing stream is a safer  
2 stream 'cause it's cleaning itself. Also, a free-flowing  
3 stream is beautiful and the -- the sounds of the  
4 free-flowing stream, the beauty of the -- the waterfall,  
5 it's serene. It's just very compelling in terms of my --  
6 my human experience being out there in the streams, to see  
7 them flowing with water and see natural waterfalls.

8 Q. Tell me about the native species you've seen  
9 in East Maui streams.

10 A. Well, over the years, I was fortunate enough  
11 to hike with people who instructed me about these native  
12 species, and then as years passed, unfortunately, there's  
13 less of them. But the -- the general most common species  
14 that I've seen are the 'ohi'a trees, the 'ie'ie vines, the  
15 kopiko trees, the papala kepau (phonetic) native ferns.  
16 There's olomea trees. There are beautiful, beautiful  
17 species there. Oh, sorry. Too much?

18 Q. Yeah. So you used a lot of Hawaiian words.  
19 Hold on, Lucienne. Hold on. I'm not -- but you know  
20 what, you know, I want to focus -- my question is about  
21 native species in streams, within the stream. And so to  
22 the extent that the court reporter may not have gotten all  
23 those names of tree species, I'm not sure that that's  
24 important. If that's all right with Your Honor, we can  
25 move to the --

1                   THE COURT: Well, it's very important to both  
2 the court and the court reporter that we get down  
3 everything that's said. That's an understatement.

4                   So Ms. de Naie, I'm going to have to ask you  
5 to go back over what you said. And each time you use one  
6 of the Hawaiian words, please stop and spell it if you  
7 know how to spell it. If you don't know how to spell it,  
8 that's fine. But the reason we ask that is because it's  
9 just very difficult to pick up each vowel over here. So  
10 we need to make sure we can understand what you're saying,  
11 and the only way we really do that is to have you spell  
12 it. So I know that's a very strange way to communicate,  
13 but it's just we have to do it.

14                   All right, so could you --

15                   THE WITNESS: Okay.

16                   THE COURT: -- please repeat your last answer  
17 but with the spelling. Thank you.

18                   THE WITNESS: Thank you. The native plants  
19 that I've seen along the streams are the 'ohi'a trees,  
20 o-h-i-a. The -- is that fast -- too fast or --

21                   THE COURT: No, that was fine. Just keep  
22 going at that pace and that'll be great.

23                   THE WITNESS: The 'ie'ie vine, that's  
24 i-e-i-e; the kopiko trees, k-o-p-i-k-o; the native kepa  
25 kepau, I believe it's k-e-p-a-l-a k-e-p-a-u. I'm not

1 exactly sure on that one. And the olomea was the other  
2 one that I mentioned. That's o-l-o-m-e-a, "m," like Mary.

3 THE COURT: That was perfect. If you can  
4 keep doing that for the rest of your testimony, it'll be  
5 great. Thank you.

6 THE WITNESS: I'll do my best, Your Honor.

7 THE COURT: I know it's not easy. Thank you.

8 Q. (By Mr. Frankel) Ms. de Naie, can you tell  
9 me about the native species that you've seen in East Maui  
10 streams?

11 A. Yes. I have seen the native 'o'opu, o-o-p-u,  
12 several varieties, but I -- I can't remember exactly which  
13 varieties now. I -- I know I've seen a nopili, which is  
14 n-o-p-i-l-i. I have seen the native hihiwai,  
15 h-i-h-i-w-a-i, which is a little black shell limpet which  
16 sticks to the rocks --

17 THE COURT REPORTER: I can't --

18 THE WITNESS: And I've seen --

19 THE COURT REPORTER: -- understand that part.

20 THE WITNESS: -- the native opae --

21 THE COURT: I'm sorry, time-out.

22 THE WITNESS: -- o-p --

23 THE COURT: Sorry -- sorry, time-out. We  
24 missed a piece of that.

25 Which part?

1 THE COURT REPORTER: Hihiwai which is a?

2 THE COURT: After hihiwai, you gave sort of a  
3 description that got garbled on our end.

4 THE WITNESS: Sorry. What I said was there's  
5 a black shell type of limpet, the hihiwai, that sticks to  
6 the rocks.

7 THE COURT: Oh, limpet, l-i-m-p-e-t. Got it.  
8 Thank you.

9 THE WITNESS: And then there's the opae,  
10 o-p-a-e, I believe is the spelling, which is our native  
11 fresh water shrimp.

12 Q. (By Mr. Frankel) And why do you like to see  
13 these native species in the streams of East Maui?

14 A. Well, I'm a girl scientist, and it's  
15 fascinating to look for them. They -- they live under  
16 rocks, and it also is a sign that there's some health to  
17 the stream. Once again, I feel like if I'm leading a hike  
18 or on a hike of my own, it's nice to know that the stream  
19 is free-flowing enough to support the stream life. And,  
20 of course, they're not common so it's like you find a  
21 treasure when -- when you see these -- these native stream  
22 animals. There's also the damselflies that are native,  
23 too, that are beautiful that hover over the streams.

24 Q. Have you seen the East Maui Irrigation  
25 Company diversion structures on streams in East Maui?

1           A.       Yes, I have.

2           Q.       Describe in general what the streams look  
3 like above the diversion structures.

4           A.       Most streams look like a normal bubbling,  
5 happy stream above the diversion structures. And a few of  
6 them are diverted above the diversion structures, too. I  
7 don't want to get in the lead, but there are little side  
8 diversions that aren't by the main diversion structures  
9 that -- and then you have this mysterious thing where you  
10 have a stream but not a lot of water in it because it's  
11 already been taken higher up.

12          Q.       And describe what the streams in general look  
13 like below the diversion structure.

14          A.       Well, until recently, on most of our hikes,  
15 they were dry stone, sometimes overgrown with alien  
16 species. Some of them were actually almost covered with  
17 mud or dust because the little bit of water flow had dried  
18 up. There would be stagnant pools where -- you know, the  
19 deeper places in the streams. It was just a very striking  
20 contrast to a living stream.

21          Q.       How has your hiking experience been affected  
22 by the diversion of water from East Maui streams?

23          A.       Well, it's -- it's very disappointing to hike  
24 a distance in hopes of experiencing a beautiful flowing  
25 stream and to have perhaps a favorite pool or favorite

1 place be very diminished or dry all around it and not  
2 enough flow to make me feel very safe to -- to enter it.  
3 So that definitely affects my experience. It is very  
4 disappointing to have a favorite place where I enjoy the  
5 waterfall and if it's a low -- you know, low rainfall time  
6 of year, diversion would just take all of the water and so  
7 that waterfall would not be present. It's very  
8 disappointing to see the stream beds just overrun by alien  
9 species because there's no flow to drown them. So all of  
10 those things are really a loss of my enjoyment of what I  
11 have hiked and come out to see.

12 Q. How have the conditions of the streams  
13 changed since 2017 when the sugar plantation shut down?

14 A. Most of the streams that I have visited  
15 during that time have considerably more flow. The gates  
16 on not all of them but many of them are open, and there is  
17 not a diversion of water taking place. And so you have a  
18 more natural-looking stream, and that is a good enjoyment  
19 for me. The pools are fresher. They have flowing water  
20 going into them. Waterfalls would be present. It's  
21 really been a -- a big improvement to have the more  
22 limited diversions in terms of actually getting some of  
23 our streams back.

24 Q. And is that true for all streams?

25 A. The ways of EMI are mysterious, and some



1 streams appear to be --

2 THE COURT REPORTER: Judge -- judge --

3 THE WITNESS: -- diverted more than others --

4 THE COURT: Hold on --

5 THE WITNESS: -- and so --

6 THE COURT: Sorry --

7 THE WITNESS: -- (indiscernible) --

8 THE COURT: Time-out.

9 THE COURT REPORTER: Can you have her start  
10 at the very beginning of the answer again.

11 THE COURT: Yeah.

12 I'm sorry, can you please start that answer  
13 from the beginning again. Thank you.

14 THE WITNESS: Sure. The ways of East Maui  
15 Irrigation, or EMI, are mysterious and it appears that  
16 some streams are diverted more than others under the  
17 current, you know, regime. So some of the streams I  
18 visit, I have, you know, nice natural-looking flows or at  
19 least enough flow to look like a stream. And others,  
20 depending on the time of year, just everything is going  
21 into diversion, and the area below is -- is pretty dry.  
22 So it's been a mixed bag, but it's been an improvement,  
23 definitely an overall improvement.

24 Q. And how would your experience be affected if  
25 more water was diverted from these streams than is

1 currently being diverted?

2 A. Well, then you go back to what we've seen in  
3 the past which is basically streams being made  
4 artificially into intermittent streams, into streams that  
5 only come when it's raining, and that is just not  
6 something that I look forward to seeing. It's not why I  
7 hike out there. It doesn't bring pleasure to me to see  
8 streams go back to their dry, dusty, you know, overgrown  
9 alien state. So it would definitely affect my enjoyment  
10 of the hikes that I do in East Maui.

11 Q. I want to ask you about trash and debris  
12 you've seen in and along East Maui streams. Have you seen  
13 much trash and debris there?

14 A. Yes, I have. Since I've been hiking there 30  
15 years, I have seen a lot of trash and debris.

16 Q. Have you informed the Board of Land and  
17 Natural Resources about what you've seen?

18 A. Yes, I have.

19 Q. Are you able to remember what year that was?

20 A. Well, I think maybe 2017, 2018, 2019,  
21 possibly even earlier.

22 Q. Okay. Now, we're going to go through some  
23 photographs. I'd like you to take a look at Exhibit 57  
24 which is not in evidence yet.

25 THE COURT: Is this plaintiff's 57?

1 MR. FRANKEL: Correct.

2 THE COURT: All right.

3 THE WITNESS: They're bringing over the --  
4 the pad.

5 THE COURT: Okay, the court has it.

6 THE WITNESS: Thank you.

7 MR. ROWE: Could you give us a second, Your  
8 Honor? I'm sorry.

9 THE COURT: Yeah, that's fine.

10 (pause)

11 THE WITNESS: We have the exhibit up now.

12 Q. (By Mr. Frankel) Do you recognize this  
13 photograph?

14 A. Yes, I do.

15 Q. Who took this photograph?

16 A. I did.

17 Q. And what is this photograph very briefly?

18 A. It's a section of old pipe that has rusted  
19 into two portions that's just laying along a stream bed on  
20 Ho'olawa Stream in Huelo area.

21 Q. And is it a true and accurate depiction of  
22 what you saw that day in, I think, February of this year?

23 A. Yes, it is.

24 MR. FRANKEL: Your Honor, I'd like to offer  
25 Exhibit 57 into evidence.

1 THE COURT: All right, I'll ask,  
2 Mr. Schulmeister, are you active on this one?

3 Sorry, you're muted right now.

4 (pause)

5 Do we have him muted on our end? We do not  
6 have you muted on our end so.

7 THE BAILIFF: They were texting me they were  
8 having problems with it earlier.

9 THE COURT: Okay. All right, let's go to  
10 hand signals, Mr. Schulmeister. An objection would be  
11 thumbs down, okay.

12 Okay, we're doing a time-out. That's fine.

13 (pause)

14 Hopefully you can hear us. Don't worry,  
15 Mr. Schulmeister. We'll get it sorted out.

16 You're going to swap out something. That's  
17 fine.

18 (pause)

19 We've been going a half an hour. Why don't  
20 we just stretch our legs for five minutes. All right,  
21 we're in recess for five minutes.

22 (Recess taken.)

23 THE COURT: All right, we are back on record.  
24 And is FTR on?

25 THE BAILIFF: No.

1                   Now it is.

2                   THE COURT: Okay. All right, please go  
3 ahead. Mr. Schulmeister, the question was whether there's  
4 any objection to plaintiff's 57, the photograph.

5                   MR. SCHULMEISTER: I believe that I  
6 understood the last question to actually have said that it  
7 was taken February 20th. I don't know if the answer said  
8 that, but if that's the date and that's what the witness  
9 agrees with, that's fine. I have no objection.

10                  THE COURT: Well, I think the record shows  
11 that she did say it was taken February of this year. So  
12 I'm going to take that as no objection.

13                  MR. SCHULMEISTER: No objection.

14                  THE COURT: Thank you.

15                  How about you, Ms. Goldman?

16                  MS. GOLDMAN: No objection from the State,  
17 Your Honor.

18                  THE COURT: Mr. Rowe?

19                  MR. ROWE: No objection from the County, Your  
20 Honor.

21                  THE COURT: Exhibit 57 is received, no  
22 objection.

23                  (Plaintiff's Exhibit 57 was received in  
24 evidence.)

25                  Q.       (By Mr. Frankel) And Ms. de Naie, is -- that

1 pipe in that photograph, is that usable?

2 A. It doesn't appear to be usable since it's  
3 broken.

4 Q. All right. Now, I'm hoping we can take up  
5 three exhibits at once. If that proves too challenging,  
6 we'll do it one at a time. They're Exhibits 58, 59, and  
7 60.

8 A. We're pulling them up.

9 All right, so you want me to look at each one  
10 or --

11 Q. Yeah, bring them up on your screen first and  
12 then I'll ask you questions.

13 A. So I see 58.

14 Q. So --

15 A. I'm not sure if we can bring them all up at  
16 once.

17 Q. Okay.

18 A. I looked at 58 and 59 now.

19 And we're bringing up 60. All right, we're  
20 bringing up 60 now as well.

21 Q. Do you recognize these three photographs?

22 A. I do.

23 Q. Who took those photographs?

24 A. I did.

25 Q. And when did you take those photographs?

1           A.       Late February this year.

2           Q.       And what are they photographs of?

3           A.       Pieces of metal debris in Ho'olawa Stream in  
4 Huelo.

5           Q.       And do you know specifically what tributary  
6 of Ho'olawa that was?

7           A.       I think it was Ho'olawanui, the larger  
8 tributary, as I recall.

9           Q.       And are these photographs an accurate -- a  
10 true and accurate depiction of the metal and pipes you saw  
11 on or near Ho'olawanui Stream that day in February of this  
12 year?

13          A.       They are and there was more metal that I took  
14 other photos of that aren't here.

15                   MR. FRANKEL: Okay, Your Honor, I'd like to  
16 offer Exhibits 58, 59, and 60 into evidence.

17                   THE COURT: All right, Mr. Schulmeister.

18                   MR. SCHULMEISTER: No objection.

19                   THE COURT: Thank you.

20                   Ms. Goldman.

21                   MS. GOLDMAN: No objection from the State.

22                   THE COURT: Mr. Rowe.

23                   MR. SCHULMEISTER: No objection, Your Honor.

24                   THE COURT: All right. Plaintiff's Exhibits  
25 58, 59, and 60 are all admitted, no objection.

1 (Plaintiff's Exhibits 58, 59, and 60 were  
2 received in evidence.)

3 Q. (By Mr. Frankel) And Ms. de Naie, were these  
4 metal objects in use?

5 A. No, they were obviously debris and pretty  
6 dangerous.

7 Q. So there's an expression, one man's trash is  
8 another man's treasure. Is it at all conceivable to you  
9 that this metal was left there as some sort of treasure?

10 A. No, I could, I think, firmly say it was not.

11 Q. All right. We're going to move to another  
12 three exhibits. That's Exhibits 61, 62, and 63.

13 A. All right, we're looking at 61 now.

14 (pause)

15 We have 62 up, and I'm looking at 62.

16 (pause)

17 We have number -- Exhibit 63 up now, and I'm  
18 looking at it.

19 Q. And do you recognize these photographs?

20 A. I do.

21 Q. Who took these photographs?

22 A. I did.

23 Q. And are they true and accurate depictions of  
24 what you saw -- actually, can you tell me what stream  
25 these are on?



1           A.       These are on Hoalua Stream in Huelo.

2           Q.       Can you spell Hoalua Stream?

3           A.       H-o-a-l-u-a in Huelo, H-u-e-l-o.

4           Q.       And are these photographs a true and accurate  
5 depiction of what you saw in Hoalua Stream in February of  
6 this year?

7           A.       Yes, they are.

8           MR. FRANKEL: Your Honor, we'd like to offer  
9 Exhibits 61, 62, and 63 into evidence.

10          THE COURT: Mr. Schulmeister.

11          MR. SCHULMEISTER: No objection.

12          THE COURT: Ms. Goldman.

13          MS. GOLDMAN: No objection.

14          THE COURT: Mr. Rowe.

15          MR. ROWE: No objection, Your Honor.

16          THE COURT: Plaintiff's 61, 62, and 63 are  
17 all admitted, no objection.

18                   (Plaintiff's Exhibits 61, 62, and 63 were  
19 received in evidence.)

20          Q.       (By Mr. Frankel) And Ms. de Naie, just to be  
21 clear, what's the relationship between 61 and -- what  
22 we're seeing in Exhibit 61 and Exhibit 62?

23          A.       I believe 62 was a close-up of the ragged,  
24 jagged, rusted end of the pipe that's portrayed sticking  
25 out of the water in Exhibit 61.

1           Q.       All right, thank you.  And is -- I don't know  
2   if you can look at Exhibit 63.  Was that pipe functioning,  
3   as far as you could tell, when you were there?

4           A.       No, it appeared to be a pipe that had been  
5   connected to something and was now broken off and was just  
6   left in the -- the water, the stream.

7           Q.       All right.  Let's take a look at Exhibits 64,  
8   65, and 66.

9           A.       All right, we are looking at 64.

10                   (pause)

11                   We're now looking at 65.

12                   (pause)

13                   And we now have Exhibit 66 on the screen.

14           Q.       And do you recognize them?

15           A.       I do.

16           Q.       Who took these photographs?

17           A.       I did.

18           Q.       And are they -- oh, I should ask do you  
19   remember what stream you were at, where these are?

20           A.       Yes, these are Waiohue Stream, W-a-i-o-h-u-e.

21           Q.       And are these three photographs a true and  
22   accurate depiction of what you saw at Waiohue Stream in  
23   February of this year?

24           A.       Yes, they are.

25                   MR. FRANKEL:  Your Honor, we'd offer Exhibits

1 64, 65, and 66 into evidence.

2 THE COURT: Mr. Schulmeister?

3 MR. SCHULMEISTER: Your Honor, I'm going to  
4 object on lack of foundation here because I don't think  
5 it's been established -- she hasn't testified that these  
6 are actually in the licensed area, in other words, that  
7 this is on state land as opposed to private land.

8 THE COURT: Well, I'm not sure that goes to  
9 their admissibility. It might go to their relevance. Do  
10 you have any technical objection to their --

11 MR. SCHULMEISTER: Okay, so I'll add  
12 relevance to my objection then.

13 THE COURT: All right. Mr. Frankel, do you  
14 want to try to address that?

15 MR. FRANKEL: Sure.

16 Q. (By Mr. Frankel) Ms. de Naie, do you know --  
17 is this area on public land as far as you know?

18 A. Yes, Waiohue Stream is entirely on public  
19 land where the diversion is.

20 Q. Okay.

21 A. Higher up, there may be some other ownership.  
22 But where -- where these were taken, it is public land.

23 MR. SCHULMEISTER: I'm going to object.  
24 There's no foundation that she would know that, how she  
25 would know.

1 THE COURT: All right, well, I understand the  
2 nature of the objection. Anything further?

3 MR. SCHULMEISTER: Nothing further.

4 THE COURT: All right. Let me get the other  
5 parties' positions before I rule.

6 Ms. Goldman?

7 MS. GOLDMAN: No objection from the State,  
8 Your Honor.

9 THE COURT: Thank you.

10 Mr. Rowe.

11 MR. ROWE: No objection, Your Honor.

12 THE COURT: Court will allow Exhibit --  
13 plaintiff's Exhibit 64, 65, and 66 over objection.

14 (Plaintiff's Exhibits 64, 65, and 66 were  
15 received in evidence.)

16 Q. (By Mr. Frankel) Ms. de Naie, is this pipe  
17 that's depicted in these three photographs, was it still  
18 in use when you saw it in February of 2020?

19 MR. SCHULMEISTER: I'm going to object as  
20 lack of foundation that she would have the competence to  
21 know that.

22 THE COURT: I'll allow it. She can testify  
23 what she saw, and we can make inferences from that.

24 THE WITNESS: I had seen the pipe before when  
25 it was in use. It was put in use to try to create a

1 wetted pathway for fish to migrate past the diversion in  
2 Waiohue Stream because the rocks were often without high  
3 enough water that the fish could bypass them. The stream  
4 is supposedly fully restored, and the gate was closed,  
5 which we observed that day, so there would be no longer  
6 any need for this pipe. That's my opinion from what I  
7 saw.

8 Q. (By Mr. Frankel) Okay, we're done with those  
9 photographs.

10 I want to ask you about Puolua Stream. I'm  
11 not sure if I'm pronouncing that right. It's spelled  
12 P-u-o-l-u-a. What stream is Puolua Stream a tributary to?

13 A. It runs into Hanehoi Stream, H-a-n, like in  
14 Nancy, e-h-o-i, Hanehoi Stream, in the Huelo area.

15 Q. What kind of promise did A&B make regarding  
16 Puolua Stream?

17 A. Puolua Stream is a taro stream, and it  
18 irrigates taro patches, and it was promised in 2016 to be  
19 fully restored.

20 Q. And in 2018, what did the Water Commission  
21 order with respect to Hanehoi Stream and Puolua Stream or  
22 tributary?

23 A. As I recall, both were to be fully restored,  
24 to have no diversions.

25 Q. When was the last time you visited Puolua

1 Stream?

2 A. Earlier this week.

3 Q. And which ditch were you near on your visit?

4 A. Lowrie Ditch. Do you need spelling on that,  
5 court reporter?

6 THE COURT REPORTER: Yes.

7 THE COURT: Yes, please.

8 THE WITNESS: L-o-w -- capital L-o-w-r-i-e.

9 Q. (By Mr. Frankel) And was all the water in  
10 Puolua current -- was all the water in Puolua flowing  
11 within Puolua?

12 THE COURT: I don't understand --

13 THE WITNESS: No.

14 THE COURT: -- the question. Sorry. Please  
15 rephrase.

16 Q. (By Mr. Frankel) Was any of the water in  
17 Puolua Stream being diverted when you saw it this week?

18 A. Yes, it was.

19 Q. And so some of the water from the stream was  
20 going where, into what ditch?

21 A. The ditch crosses the stream and the stream  
22 has no choice but to go directly into the ditch, of Lowrie  
23 Ditch.

24 Q. Switching gears, what is the Sierra Club's  
25 interest in native aquatic species like 'o'opu and opae?

1                   THE COURT: Okay, time-out. We took that  
2 brief break for our technology fix, but we've been going  
3 almost a full hour so we'll take our recess now for 10  
4 minutes. So I'll see you all at five minutes after 2:00.

5                   We're in recess. Thank you.

6                   (Recess taken.)

7                   THE COURT: All right, we are back on record.  
8 I see counsel and the witness in my monitor.

9                   Is the FTR on?

10                  THE BAILIFF: Yes.

11                  THE COURT: Thank you.

12                  All right, please go ahead.

13                  You're muted.

14                  Q.        (By Mr. Frankel) Ms. de Naie, what is the  
15 Sierra Club's interest in native aquatic species like  
16 'o'opu and opae?

17                  A.        Well, as a conservation organization, we are  
18 dedicated to the well-being of our ecosystems, and these  
19 creatures were created to be part of our ecosystem, and  
20 they play a very, very big role in having healthy streams,  
21 healthy fisheries, and healthy -- you know, interrelated  
22 species, stuff that we may not even know of. So we are  
23 very, very interested in any initiatives that we can take  
24 to make sure that these species have a chance to survive  
25 and thrive.

1           Q.       And how are the Sierra Club's hikes affected  
2 by the diversion of East Maui streams?

3           A.       Well, our hikes are educational as well as  
4 recreational and authentic. So people come on the hikes  
5 to learn about nature, to see beautiful places, and to do  
6 so safely, under safe conditions. So stream flow actually  
7 addresses every one of those areas. From the educational  
8 standpoint, if we're trying to educate about native stream  
9 species, if we're trying to educate about native plants,  
10 having healthy streams and healthy stream ecosystems with  
11 watersheds that surround them are all an important part of  
12 being able to tell that story. If those things are gone,  
13 all we can say is they're not here and try to work to make  
14 that different.

15                   Also, the safety of our participants, if the  
16 streams are really, you know, very low water and very  
17 little flow, it's not safe for any recreational purposes  
18 to use the streams. And, of course, aesthetically,  
19 everyone oohs and ahhs over a beautiful stream or  
20 beautiful waterfall, but most people are not impressed by  
21 a dry, muddy stream bank or stagnant pool or a trickle  
22 instead of a waterfall.

23           Q.       How will those hikes be affected if  
24 diversions increase, if more water is taken from these  
25 streams in the future?



1           A.       Well, I will say that it's been great hiking  
2 the last few years and to be able to see some kind of life  
3 to -- to some of the streams, and it would just be  
4 devastating. And certainly it's an educational method but  
5 it's a very negative educational method that we're going  
6 in the opposite direction now after we've been seeing some  
7 -- some small beginnings of -- of progress in having a  
8 better ecosystem. There's still a lot to be done because  
9 you have the interference of the diversions, and the  
10 species need to travel up and down the streams. But at  
11 least there's water which is, you know, a start. So we  
12 will be negatively affected if we go back to same old,  
13 same old where, in the dryer season, most of the streams  
14 we hike are -- are not -- are not flowing.

15           Q.       And to be clear, are there some streams now  
16 where a stream is not flowing because of the diversion?

17           A.       There are a few. Yes, there are a few that  
18 are in that condition. And sometimes it's a tributary.  
19 Sometimes it's a whole stream. And it kind of depends on  
20 -- on season. Like I -- I kind of monitor streams, you  
21 know, few times like in season and take photos just to,  
22 you know, understand more of what's going on. And so it's  
23 very surprising to see a stream that, you know, this week  
24 is flowing very nicely maybe because we had the hurricane  
25 and the rain but, a few months ago, was pretty dry below a

1 diversion. And it's not a restoration stream. A lot of  
2 the streams that I go to are not necessarily restoration  
3 streams, and some of the streams that the Sierra Club  
4 hikes go to are not restoration streams either.

5 Q. And just to be clear, when you say  
6 restoration stream, can you be clear what you mean by that  
7 term, restoration stream?

8 A. Yeah, sorry. Streams that were promised to  
9 be restored -- the 10 streams that were promised to be  
10 restored as part of the decision of the State Water  
11 Commission in, I believe it was, June, 2018.

12 Q. All right. And what kind of impact does  
13 trash remaining on public lands in East Maui have on the  
14 enjoyment of Sierra Club hikes?

15 A. Well, I will say that people comment on it,  
16 and we've had members and participants say can't the  
17 Sierra Club report this to somebody? Of course we tell  
18 them we do, but our state authorities, I guess, are just  
19 too overworked to send anybody out to -- to check and see  
20 what the situation is on state land, that all this debris  
21 has been left behind over the years. And certainly  
22 there's some safety factors, too. If there are pipes  
23 along the side of the trail that are kind of partly  
24 overgrown by weeds and somebody steps a little bit to the  
25 side 'cause someone else is coming, they could trip over

1 that pipe. It's just not a -- it's not a good situation.  
2 They don't belong there and they certainly don't -- they  
3 don't enhance our hiking experience. They detract from  
4 it.

5 MR. FRANKEL: Thank you. I have no further  
6 questions, Your Honor.

7 THE COURT: Thank you.

8 Mr. Schulmeister.

9 MR. SCHULMEISTER: Yes. Thank you.

10 CROSS-EXAMINATION

11 BY MR. SCHULMEISTER:

12 Q. Ms. de Naie, can you hear me okay, by the  
13 way?

14 A. I can, David. Nice to see you again.

15 Q. Okay. Yeah, so we have seen each other  
16 before?

17 A. Oh, yes, for many years.

18 Q. But let me just ask -- what I'd like to do to  
19 begin with is to go a little bit more over your background  
20 that Mr. Frankel had covered earlier. You mentioned that  
21 you had been full-time on Maui since 1985, is that  
22 correct?

23 A. Yes, that's correct.

24 THE COURT: All right, time --

25 Q. (By Mr. Schulmeister) And --

1 THE COURT: -- time-out. Time-out.

2 Ms. de Naie, when you were closer to the  
3 microphone, it was loud and clear. And now you're kind of  
4 going back and forth a little bit. It's making it harder  
5 for us over here. I'm sorry. Yeah, if you could stay  
6 closer, that would help. Thank you.

7 THE WITNESS: Thank you, judge. I will do  
8 that. Thanks for letting me know.

9 THE COURT: Yeah, it's really good right now.  
10 Thank you.

11 Go ahead, Mr. Schulmeister. Thank you.

12 Q. (By Mr. Schulmeister) All right, and so from  
13 1985 to the present, so some almost 40 years, you have  
14 been a regular hiker in East Maui, is that right?

15 A. I have. I'm living on part of East Maui.

16 Q. So for the first 32 or three years of that,  
17 it was during the time that HC&S was still full  
18 cultivation of sugar, is that right?

19 A. That's true.

20 Q. And so when you fell in love with hiking  
21 these streams, it became like going to church for you, it  
22 was during that 30-some years where sugar was being  
23 cultivated?

24 A. That is true. You had to -- you had to  
25 search for the -- the places that the stream would still

1 run. There was a lot more hiking, and I was younger.

2 Q. And you mentioned, I think, the Hanawi and  
3 Palauhulu Streams just for example. Those are one of the  
4 streams that you hiked, correct?

5 A. Yes, they are.

6 Q. And those streams were always free-flowing  
7 even back in 1985, correct?

8 A. Well, to be factual, Hanawi immediately below  
9 the diversion, below the Wailoa -- or the Ko'olau Ditch,  
10 often was dry. Above, it was very robust. Below the  
11 highway by Big Springs, it had full flow and was a -- was  
12 a very exemplary stream used for studies and things. But  
13 in between, there was a -- a dry patch that I observed and  
14 others observed. And --

15 Q. Okay, what about --

16 A. Palauhuluhulu (phonetic)? That stream had  
17 areas that had natural pools that were spring fed. But  
18 under summer conditions, you know, low rain conditions,  
19 there could be some dry spaces there, too. There's very  
20 complicated diversions in that whole Keanae Wailuanui  
21 area, and it's -- many of them have now been disabled and  
22 so, you know, the water levels are -- are much more  
23 consistent.

24 THE COURT: What was that stream name you  
25 used? Palahuahua (phonetic)?

1 THE WITNESS: Oh, yeah, Pala, P-a-l-a,  
2 huluhulu, h-u-l -- l-u, I believe, like huluhulu,  
3 h-u-l-u-h-u-l-u. I feel like I'm at the spelling bee.

4 THE COURT: All right, thank you.

5 THE WITNESS: And Hanawi, do you need that  
6 one, too?

7 THE COURT: I think we have that one.

8 THE WITNESS: Okay.

9 Q. (By Mr. Schulmeister) Okay, just to be  
10 clear, you might want to refer to Exhibit J-14 at page 40  
11 which has the list of streams because I think you  
12 misspelled Palauhulu, just so the court reporter has to  
13 get it right.

14 THE WITNESS: Oh, thank you. Thank you for  
15 correcting that. It only has one hulu.

16 Q. (By Mr. Schulmeister) And Ms. de Naie, have  
17 you ever actually seen a diversion on Palauhulu Stream?

18 A. When we hike the trail from Wailuaiki and  
19 come down Pi'ina'au Road, I believe we do pass some  
20 diversion that's on Palauhulu Stream. That's my  
21 recollection.

22 Q. And what about the Pi'ina'au Stream? That's  
23 P-i-i-n-a-a-u. Have you ever seen a diversion on  
24 Pi'ina'au Stream?

25 A. It would be, once again, higher up along that

1 trail. They're not -- they're not marked, and I'm trying  
2 to remember which streams you see first. I recall there  
3 were ones that had these like piglike diversions where a  
4 waterfall would come down that would be feeding the  
5 stream, and I thought one was Pi'ina'au. And then this  
6 big pig would capture it, and it would be sent to a  
7 trough --

8 THE COURT: Sorry, time-out. Time-out.  
9 You're breaking up. We need to start that answer from the  
10 top and stay close -- consistently close to the microphone  
11 and maybe speak a little bit slower. Thank you.

12 THE WITNESS: Okay. All right. So my  
13 recollection is when hiking the Wailuaiki Trail that  
14 starts around the 22 mile marker on the Hana Highway and  
15 then makes a big loop and comes down Pi'ina'au Road --

16 THE COURT: Spell --

17 THE WITNESS: -- there are -- too fast?

18 THE COURT: Spell, please, the road.

19 THE WITNESS: Pi'ina'au, it's the one that  
20 David just spelled, P-i-i-n-a-a-u.

21 THE COURT: Thank you.

22 THE WITNESS: That there are along the trail  
23 -- as it begins to descend into the Pi'ina'au Road, there  
24 are a few streams that come down as waterfalls, and I  
25 thought one was Pi'ina'au Stream. And they are captured

1 by the basins. Those basins flow into, some say, a trough  
2 or ditch and are carried around and empty into the -- the  
3 Ko'olau Ditch. That's my recollection to the best of my  
4 ability.

5 Q. (By Mr. Schulmeister) So your recollection  
6 is this loop trail hike that you took, that started in  
7 Wailuaiki?

8 A. Yes, and then comes all the way down and  
9 descends from that -- that loop trail which is that -- I  
10 don't know. I guess it's a thousand feet, 12-hundred-  
11 feet elevation, and then you descend down Pi'ina'au Road  
12 and you end up in Keanae.

13 Q. Okay. And at the upper elevation of that  
14 trail, you believe you're above the Ko'olau Ditch?

15 A. I'm not sure how it works. I think that the  
16 -- the Ko'olau Ditch is maybe below it, and there's some  
17 sort of a loop up there that captures a lot of the  
18 waterfalls and streams in that area.

19 Q. Okay, but in any event, even during sugar,  
20 Palauhulu, Hanawi, Pi'ina'anu, in the lower reaches, they  
21 were very healthy streams fed by springs below the ditch,  
22 is that fair?

23 A. That is true, there were underground springs  
24 that made some very lovely pools along Palauhulu Stream  
25 and Pi'ina'au Stream below -- actually below the ditches



1 because they recharge from the spring.

2 Q. All right. Okay --

3 A. (Indiscernible) --

4 THE COURT REPORTER: What was that?

5 THE COURT: We got total overlap there so.

6 Did you finish your answer, Ms. de Naie?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

9 Q. (By Mr. Schulmeister) What I would like to  
10 do is go back to the history, from 1985 through, let's  
11 say, the close of sugar. During that time frame, were you  
12 a -- you mentioned that you were a member of Sierra Club,  
13 is that right?

14 A. From 1995 on, yes.

15 Q. And that was continuously till the present  
16 day, is that right?

17 A. Yes, I can remember 35 years of -- 35 years.

18 Q. And during that time, have you held, you  
19 know, officer positions or title positions, if you  
20 understand what I'm saying, as opposed to simply being a  
21 member?

22 A. Yes, I've been the chair of the Sierra Club  
23 Hawaii Chapter on at least one occasion, maybe two, and  
24 I've been the vice-chair of the Hawaii Chapter of the  
25 Sierra Club.

1 Q. Okay. And how long have you been the  
2 vice-chair?

3 A. In this particular time, I think four years.  
4 But I was the vice-chair in an earlier time as well.

5 Q. Okay. And what about Maui Tomorrow  
6 Foundation? Have you ever been a member or hold a title  
7 with Maui Tomorrow Foundation?

8 A. Yes, I've served on the board of Maui  
9 Tomorrow Foundation from, what, 19 -- 2017 until the  
10 present. And I was on the board years before, like 2000  
11 maybe to 2007, 2006, something like that.

12 Q. Did you say from 2000 to 2006 or 2007?

13 A. Something -- something like that. In the  
14 earlier part of the 2000s, I was a voting board member.

15 Q. All right, now, and you've been involved in a  
16 number of other community or environmentally interested  
17 organizations on Maui during the nearly four years that  
18 you've lived on Maui, is that correct?

19 A. Yes, I served on nine nonprofit boards, some  
20 of them environmental.

21 Q. Okay. And you are a frequent attendee at  
22 meetings of boards and commissions who are dealing with  
23 issues that pertain to East Maui or Maui generally in  
24 terms of environmental and water issues?

25 A. I have testified at various boards and

1 commissions and -- and meetings, yes.

2 Q. Now, were you in attendance at any of the  
3 meetings that the Board of Land and Natural Resources held  
4 in 2000 and 2001 when the Board first considered an  
5 application for a long-term lease by Alexander & Baldwin  
6 in connection with the East Maui watersheds?

7 A. Yes, I was at a meeting, I think it was, 2001  
8 that was held here in Maui.

9 Q. And were you -- at that point, you were on  
10 the board of Maui Tomorrow Foundation, is that correct?

11 A. I believe I was, yes.

12 Q. And did you hold a title with the Sierra Club  
13 also?

14 A. Oh, gosh. I'm not sure if I held a title in  
15 that particular year with the Sierra Club. I was possibly  
16 a voting member of the Sierra Club board in 2001. I'm --  
17 I'm sorry, I should have been prepared for this. I can't  
18 remember what happened every single year there.

19 Q. No problem. But at a minimum, you were a  
20 member of the Sierra Club at that time, correct?

21 A. Oh, yes, I have been a member for, you know,  
22 all these 25 years.

23 Q. And so the issue of whether or not  
24 Alexander & Baldwin would be -- should be able to get a  
25 long-term lease to continue to divert water from the state

1 watersheds in East Maui, that was an issue you were quite  
2 alert to and you understood in 2000 and 2001, would that  
3 be fair?

4 A. Yes, because I lived there and I hiked those  
5 streams so I seen them firsthand. Yes, I brought pictures  
6 to that hearing, what it looked like in my neighborhood.

7 Q. Now, at that time, were you personally in  
8 favor of restoration of East Maui streams?

9 A. Yes, I was.

10 Q. And that was in your individual capacity? I  
11 mean, did you want to see the diversions all eliminated in  
12 2000, 2001?

13 A. No, because I have friends that work for  
14 HC&S, and I realize we had to find a balance. But we very  
15 definitely did not have balance at that time in -- in any  
16 kind of a sharing of water with the communities that  
17 actually had riparian rights to share.

18 Q. Okay, now, and was that also -- so that was  
19 your personal position. Was that also the position of the  
20 Maui Tomorrow Foundation at the time?

21 A. Oh, boy. You know, I know Maui Tomorrow  
22 Foundation filed for a contested case. I was not a  
23 witness for that case so I'm -- I'm sorry, I -- I'm not  
24 really remembering exactly what would be asked for. I  
25 believe an EIS was being asked for and, I believe, that a

1 -- a process whereby the -- the actual needs of kuleana  
2 users and communities along the stream would be included  
3 in decisions about the lease.

4 Q. Do you remember becoming aware of the fact  
5 that there were a number of objections being made,  
6 including by Maui Tomorrow Foundation and also a number of  
7 clients of the Native Hawaiian Legal Corporation, to the  
8 lease process proceeding without stream restoration being  
9 dealt with first? Do you remember that -- being aware of  
10 that?

11 MR. FRANKEL: Objection, Your Honor.

12 THE COURT: What's the objection?

13 MR. FRANKEL: Relevance.

14 THE COURT: Okay, well, I'd ask you to  
15 rephrase it, Mr. Schulmeister. I'm trying to follow it  
16 here on the screen, and it's not easy. If you could boil  
17 that one down a little bit. Thank you.

18 Q. (By Mr. Schulmeister) You recall being aware  
19 in 2000, 2001 that Maui Tomorrow Foundation and also a  
20 number of clients with the Native Hawaiian Legal  
21 Corporation were objecting to the Board proceeding with  
22 the lease and a contested case hearing was requested? You  
23 remember that?

24 A. Yes, I believe that they asked for a  
25 contested case because more information was needed.

1 Q. Okay. And I think you mentioned that you  
2 recall the Maui Tomorrow Foundation was involved in a  
3 contested case pertaining to that, is that right?

4 A. My recollection is that there were two  
5 entities that requested a contested case. It was Maui  
6 Tomorrow Foundation and also the Hawaiian Legal.

7 Q. And you were on the board of Maui Tomorrow  
8 Foundation at the time, I think is what you testified,  
9 correct?

10 A. I believe I was. That's -- that's my  
11 recollection, that the early 2000 to maybe 2005 or 2006  
12 that I was a voting member of the board.

13 Q. Now, do you recall being aware that around  
14 the same time, a number of 27 petitions to amend the  
15 interim instream flow standards of streams within the East  
16 Maui ditch system were filed with the Water Commission by  
17 the Native Hawaiian Legal Corporation on behalf of their  
18 clients? Do you recall being aware of that?

19 A. I recall that, yes.

20 Q. And did you have an understanding as to what  
21 a petition to amend an interim instream flow standard or  
22 stream was?

23 A. Well, I did at some point because I -- I read  
24 those studies that the State put out in 2007 and I wrote  
25 comments on them. I think I was aware that there was some

1 process that needed to be followed, but not being an  
2 attorney, I wasn't aware of, you know, every detail of it.

3 Q. Okay. But did you have a general  
4 understanding, you know, that the petitions were asking  
5 for stream restoration for specific streams?

6 MR. FRANKEL: Objection, Your Honor. Vague  
7 and relevance.

8 THE COURT: Yeah, can you give me an idea  
9 where this is going, Mr. Schulmeister? And if you want to  
10 excuse the witness before you answer, that's fine, we can  
11 do that.

12 MR. SCHULMEISTER: Okay, why don't we excuse  
13 the witness.

14 THE COURT: All right. All right, ma'am, I'm  
15 going to ask you to step outside for a minute while we  
16 have a legal discussion and please stay handy. We'll  
17 probably have you right back in in just a moment.

18 (The witness was excused.)

19 THE COURT: All right, record should reflect  
20 the witness has left the room.

21 Go ahead, Mr. Schulmeister.

22 MR. SCHULMEISTER: Okay. I mean, the witness  
23 has testified already about restoration streams from the  
24 decision and order. The decision and order, we're talking  
25 about J-14. That's the Water Commission's decision in

1 2018. That decision, you know, was the final adjudication  
2 of these 27 petitions. She obviously has familiarity with  
3 it. And she also testified during the contested case  
4 hearing with regard to those streams and those petitions  
5 both on behalf of the Sierra Club and on behalf of  
6 herself.

7 Now, a major issue in this case is why is the  
8 Sierra Club suing in Circuit Court with regard to any  
9 failure on the part of the Board to address restoration in  
10 non-petition streams. So I think it's very important to  
11 bring out that the Sierra Club has been aware that the  
12 restoration streams were restored because Native Hawaiian  
13 Legal Corporation filed petitions that they were well  
14 aware of for almost 20 years, and during that entire time,  
15 they could have but never did petition to restore the  
16 streams that they're now complaining about. So it's very  
17 relevant to the exhaustion and primary jurisdiction  
18 arguments.

19 THE COURT: Do we need to do that through  
20 this witness? I mean, it sounds like something Sierra  
21 Club might stipulate to in terms of factual.

22 MR. FRANKEL: And I can say that the Sierra  
23 Club has not filed a petition to amend the instream flow  
24 standards for those 13 streams.

25 MR. SCHULMEISTER: Well, I think that this



1 requires a little bit more than just that. We have a  
2 situation where we have 18 years and the Sierra Club  
3 members and officers were intimately involved in parallel  
4 proceedings involving these streams for 18 years. It's  
5 not simply they didn't file. I need -- I believe I need  
6 to go on the record that they had multiple opportunities  
7 to, and there's nothing preventing them. And so I think  
8 in order to bring that out, I need to cover some of this  
9 history.

10 There's also another issue that I want to  
11 cover with this witness, and that is the Maui Tomorrow  
12 Foundation in their proposed findings for the IFS streams,  
13 they specifically argued to the Water Commission that the  
14 non-petition streams would be available for agriculture in  
15 Central Maui. And, of course, now they're taking the  
16 opposite position. So I believe all of this is very  
17 relevant.

18 THE COURT: Well, just putting the relevance  
19 issue on the side for a moment, I'm just trying to figure  
20 out why we need to do it through this witness because it's  
21 going to be laborious. I'm just wondering if there's a  
22 way to do it an easier way. Maybe instead of going  
23 through -- slogging through the whole history with her --  
24 wait, Ms. Goldman has her hand up. Go ahead.

25 MS. GOLDMAN: Thank you, Your Honor. I just

1 wanted to suggest that this all goes to the credibility of  
2 the witness, and because this is such a significant  
3 witness on behalf of the Sierra Club, it seems important  
4 to have these issues introduced through her, particularly  
5 if she was a board member at Maui Tomorrow when some of  
6 these things were going on.

7 THE COURT: All right, well, I'm sorry --

8 THE COURT REPORTER: The ending, I didn't  
9 catch the ending.

10 THE COURT: Yeah, the ending of your  
11 statement just faded away. Could you restate it but  
12 project a little more.

13 MS. GOLDMAN: Excuse me. I -- oh, yeah, it's  
14 especially relevant here because she was a board member of  
15 Maui Tomorrow while all of this was going on. And I  
16 believe that the document Mr. Schulmeister -- one of the  
17 documents he'll be trying to introduce, you know, which  
18 specifically states what was propounded to the court, was  
19 also during that period of time.

20 THE COURT: All right, well, I want you to be  
21 able to make your record, Mr. Schulmeister, so I'm going  
22 to allow you, but that should not be taken as some kind of  
23 a ruling by the court that I agree with your legal  
24 position. I'm just letting you make a factual record.  
25 But I hope you will, instead of slogging through the whole

1 history of this thing, try to get straight to it. And I  
2 think you can ask her some pretty simple questions that  
3 establish what it is you want to establish. And if she  
4 quibbles with you, then by all means, you can start  
5 digging into the history and proving this and proving  
6 that. But let's try to do it the easy way first before we  
7 have to do it the long way.

8 All right --

9 MR. FRANKEL: Your Honor --

10 THE COURT: Huh? Yes.

11 MR. FRANKEL: Just two things I want on the  
12 record.

13 THE COURT: That's fine.

14 MR. FRANKEL: I don't think it's accurate to  
15 say, as Ms. Goldman did, that she was a board member while  
16 all of this was going on. She was a board member in a  
17 couple periods of time, and there's a number of things  
18 that happened. I just want to be clear about that.

19 And I also am going to start objecting  
20 vigorously at some point to the degree to which Maui  
21 Tomorrow's sins, or whatever you want to call them, are  
22 attributable to the Sierra Club. And I just want to -- if  
23 you want to ask Lucienne about her knowledge, fine. But  
24 to the degree that you're asking -- you're attributing  
25 Maui Tomorrows' actions and knowledge to the Sierra Club,

1 we're going to be objecting like crazy. So I just want to  
2 let you know.

3 THE COURT: Okay, everyone's got their plan.

4 MR. SCHULMEISTER: Thank you. And I will try  
5 to get to the point.

6 THE COURT: Thank you.

7 MR. SCHULMEISTER: Shall we have the witness  
8 back?

9 THE COURT: All right, hang on. Let me see  
10 where we are in terms of a break. Let's go off record for  
11 a moment.

12 (Discussion off the record)

13 THE COURT: All right, back on record. We  
14 can probably go about another 10 or 15 minutes, and then  
15 we'll take a break.

16 All right, let's bring the witness back in.

17 MR. ROWE: I'll go get her, Your Honor.

18 THE COURT: Thank you.

19 (The witness returns.)

20 THE COURT: All right, Ms. de Naie, thank  
21 you for your patience. We're going to resume. So  
22 Mr. Schulmeister will be asking you more questions. Thank  
23 you.

24 THE WITNESS: Thank you.

25 Q. (By Mr. Schulmeister) I'd like to ask you to

1 refer again to Exhibit J-14 at page 40. So if you have  
2 that up, just let me know when you are ready.

3 A. Okay, we're getting that up, yes.

4 Q. Okay. So this is the list of streams that  
5 Mr. Frankel had walked you through, and he was asking you  
6 questions about which ones you hiked on. You recall that?

7 A. Yes.

8 Q. All right. So looking at page 40 -- and this  
9 is finding of fact number 58 of the decision and order  
10 from 2018 -- it lists the streams by license area. Do you  
11 see that, the first license area being Nahiku?

12 A. Yes, I see that.

13 Q. And you're familiar with the names of the  
14 four license areas, is that correct?

15 THE COURT: Wait a minute. Sorry,  
16 Ms. Goldman has her hand up. Yes, ma'am.

17 MS. GOLDMAN: Thank you, Your Honor. I  
18 apologize for interrupting. Which exhibit are we  
19 referring to? What was the exhibit number?

20 THE COURT: This is --

21 MR. SCHULMEISTER: J-14.

22 THE COURT: J-14, the D and O.

23 MS. GOLDMAN: Thank you.

24 THE COURT: Okay.

25 MS. GOLDMAN: Thank you.

1 THE COURT: Go ahead.

2 Q. (By Mr. Schulmeister) Do you need me to  
3 repeat the question, or do you remember the question,  
4 Ms. de Naie?

5 A. You asked if I was familiar with the names of  
6 the four lease areas. And --

7 Q. Right.

8 A. -- they have those four names.

9 Q. All right, the Nahiku, Keanae, Honomanu, and  
10 Huelo, correct?

11 A. Correct.

12 Q. And I think you mentioned that you actually  
13 live in the Huelo area of Maui but not in the actual  
14 state-owned watershed that's been referred to as Huelo, is  
15 that correct?

16 A. I live downstream from the state-owned lands.

17 THE COURT: All right, we have a problem  
18 again. Ms. de Naie, you're breaking up for some reason.  
19 I don't know what it is.

20 THE WITNESS: We have a new microphone, too.  
21 Well, I'm trying to stay right near it.

22 You need me to repeat that answer, judge?

23 THE COURT: Yes, please.

24 THE WITNESS: I live in Huelo but I live  
25 downstream from the state-owned lands.

1                   THE COURT: All right, thank you very much.  
2 Got it.

3           Q.        (By Mr. Schulmeister) And I'm not going to  
4 ask you to repeat the testimony obviously, but you had  
5 gone through and answered questions about which of the  
6 streams in each of the license areas that you had hiked,  
7 and that went all the way through to Honopou Stream which  
8 is the -- that's the western-most stream in the Huelo  
9 license area, number 36 on page 41 of Exhibit J-14,  
10 correct?

11           A.        Yes.

12           Q.        Now, you asked Mr. Frankel whether you should  
13 go on to streams after that. He said no, no, no, don't  
14 worry about that. Well, I'm going to ask you. What about  
15 the streams listed below that and going on to the next  
16 page?

17           A.        Let me pull that up.

18                   Halehaku Stream, I have hiked on a number of  
19 the branches, the tributaries of Halehaku.

20           THE COURT: Please use the paragraph number.  
21 Thank you. I think you meant 38 (Halehaku).

22           THE WITNESS: I'm sorry, 38 (Halehaku), yes.

23           THE COURT: Thank you.

24           THE WITNESS: And Keali Stream, we've led  
25 Sierra Club hikes on that stream, and I've hiked there

1 with friends. Those would be -- those would be the ones  
2 from that list, 39 (Keali) and 38 (Halehaku).

3 Q. (By Mr. Schulmeister) Okay, and those  
4 streams are further west of Honopou, is that correct?

5 A. They are.

6 THE COURT: Of where? Spell, please.

7 MR. SCHULMEISTER: Honopou, H-o-n-o-p-o-u.

8 THE COURT: Thank you.

9 Q. (By Mr. Schulmeister) So did you understand  
10 that these are streams that are within the collection area  
11 of the EMI ditch system but they're west of the western  
12 boundary of the state watersheds that are the subject of  
13 the licenses? You understand that?

14 A. Yes, I do.

15 Q. And you've understood that for a long time,  
16 right?

17 A. No one ever asked me, but I suppose I have.

18 Q. I think you have -- okay. I'd like you to  
19 look at Exhibit J-20 at page 40.

20 A. We're pulling it up.

21 Okay, I see a teeny-weeny map.

22 MS. GOLDMAN: Mr. Schulmeister, what page are  
23 you on?

24 THE COURT: Four-zero.

25 MS. GOLDMAN: (Indiscernible)



1 THE COURT: Four-zero.

2 Q. (By Mr. Schulmeister) Okay, now, before I  
3 ask you anything more specific about this particular page,  
4 this is part of J-20 which has been stipulated into  
5 evidence, and it's a copy of the draft environmental  
6 impact statement that was prepared by Alexander & Baldwin  
7 in connection with the lease application that we've  
8 already talked about a little bit that was made in 2001, I  
9 believe -- maybe it's 2000. So are you familiar with the  
10 DEIS?

11 A. From 2000? I'm familiar with the one that  
12 was issued, I think, last year.

13 Q. Right. No, that's what J-20 is. J-20 was  
14 issued last year. But it was --

15 A. Oh, okay.

16 Q. -- in connection with the lease application  
17 that was made back in 2000, 2001 which you testified  
18 earlier that you remember being aware of.

19 A. I'm -- I'm familiar that there was an EIS  
20 issued, yes.

21 Q. A draft EIS?

22 A. Draft EIS issued, yes.

23 Q. In fact, and this is something that you  
24 commented on in various public forums, correct?

25 A. Yes, I commented when they had the scoping

1 meetings in Haiku.

2 Q. So you're actually very familiar with the  
3 draft EIS, Exhibit J-20, correct?

4 A. Well, wait a second. I commented on the prep  
5 notice which was a, you know, very abbreviated version of  
6 the -- the -- that DEIS. I don't -- I don't know that  
7 I've gone to a meeting and commented on the draft EIS. I  
8 went to a scoping meeting on the prep notice and made  
9 comments on what needed to be in the draft EIS. That was  
10 my recollection.

11 Q. But you have reviewed the draft EIS, haven't  
12 you?

13 A. I've read some sections of it, yes.

14 Q. Okay. So I just wanted that context because  
15 the page that I've directed you to is a page from the  
16 DEIS. So now let me ask you a question about it. So this  
17 particular map is titled EMI Aqueduct System Collection  
18 Area. Do you see that?

19 A. Mh-hm. Yes.

20 Q. And the red area, according to the legend  
21 map, is to depict the collection area. Do you understand  
22 what that means, collection area?

23 A. Yes, it's the area that is subject to the  
24 state -- state leases, yes.

25 Q. Well, actually, if you look at the legend,

1 the license area is colored blue and it's a smaller --  
2 it's a smaller subsection of the area that is surrounded  
3 with the red, the collection area. Do you see that?

4 A. You're saying that the collection area is the  
5 upper parts of the stream where EMI owns land and the  
6 sections where EMI owns land as well as the state land,  
7 that's what you're saying?

8 Q. Well, what I'm asking you is whether you  
9 understand, if this is familiar to you, that the  
10 collection area that is depicted on page 40 actually  
11 extends both above and below the license area, correct?

12 MR. FRANKEL: I'm going to object. Lacks  
13 foundation.

14 THE COURT: Sustained. I don't even think we  
15 have agreement yet on what you are using as collection  
16 area.

17 MR. SCHULMEISTER: All right, let me withdraw  
18 the question and ask it this way.

19 Q. (By Mr. Schulmeister) Ms. de Naie, you  
20 understand that the EMI ditch system collects water from a  
21 larger portion of the East Maui watersheds that is  
22 actually covered by the licenses from the State, correct?

23 A. Yes.

24 Q. Okay. And so the -- all right. So I'd like  
25 to now direct your attention to page 58.

1           A.       Okay, we're working on it.

2                    Okay, we have it up.

3           Q.       All right, so page 58 is another map in the  
4 DEIS. This one is color-coded by license area. Do you  
5 see that?

6           A.       I do.

7           Q.       And here, you can see like, for example, in  
8 Huelo, that there's -- you know, there's areas -- both  
9 above the license areas and below the license areas, there  
10 are -- that the ditch system crosses and collects water  
11 from, correct?

12          A.       You know, I'm sorry, the map is a little  
13 small. Yes, I can see that there are ditches that are not  
14 in the license area and ditches that are in the license  
15 area. Is that what you're getting at?

16          Q.       Yes. And actually, living in Huelo, I think  
17 you testified on your direct examination that with regard  
18 to removal of diversions that on Hanehoi or Puolua Stream,  
19 there are diversions that haven't been completely removed.  
20 Remember that testimony?

21          A.       Yes.

22                    THE COURT: Mr. Schulmeister, the requirement  
23 about spelling Hawaiian names applies to counsel, not just  
24 witnesses. And I know you've used some of these before.  
25 But the problem is on our end, we don't necessarily hear

1 it the same way. It could be a very similar-sounding  
2 stream. That's why we need you to spell it each time  
3 unless it's something super obvious. All right, thank  
4 you.

5 Q. (By Mr. Schulmeister) All right, so Hanehoi  
6 being H-a-n-e-h-o-i, correct?

7 A. Are you asking me?

8 Q. Yes.

9 A. Yes, that's how it's spelled.

10 Q. And Puolua, maybe you could spell that one.  
11 That was your testimony.

12 A. It's P-u-o-l-u-a, Puolua.

13 Q. And the diversion you were talking about in  
14 your testimony there was on the Lowrie Ditch, is that  
15 correct?

16 A. It is, yes.

17 Q. And you mention that water is still flowing  
18 into the Lowrie Ditch last time you looked at it, is that  
19 correct?

20 A. Yes.

21 Q. And that's actually a diversion that's on  
22 private land, right?

23 A. That is on EMI land, and once it crosses the  
24 road, it's on state land. But there's only a pipe that  
25 carries a little bit of water from the stream under the

1 road to make it to the other part of the stream.

2 Q. Okay. So again, looking at page 58, this  
3 map, the -- I mean, you're familiar with the Water  
4 Commission decision that we were just referring to as  
5 being Exhibit J-14, correct?

6 A. The list of streams, yes.

7 Q. Well, not just the list of streams. You're  
8 familiar with the entire exhibit, right, the entire  
9 decision, findings of fact, et cetera, that the Water  
10 Commission made, correct?

11 A. Well, I'm familiar with the synopsis of it.  
12 I -- I couldn't speak to it line for line.

13 THE COURT: We're going to take our break  
14 now. And, please, I'm going to ask the witness to step  
15 outside for a minute and then have a brief discussion with  
16 counsel off record.

17 (The witness was excused.)

18 THE COURT: So we're in recess.

19 (Recess taken.)

20 THE COURT: All right, we are back on record.

21 It's 3:05.

22 FTR on?

23 THE BAILIFF: Yeah.

24 THE COURT: All right, thank you.

25 Mr. Schulmeister, go ahead.

1                   MR. SCHULMEISTER: I'm sorry, I can't see the  
2 witness.

3                   THE COURT: Oh, okay, good point.

4                   MR. ROWE: We were having the discussion out  
5 of her presence. We'll go get her now.

6                   (pause)

7                   (The witness returns.)

8                   THE COURT: All right, for the record, the  
9 witness, Ms. de Naie, has re-entered the room and is  
10 present.

11                   Mr. Schulmeister, please go ahead.

12                 Q.         (By Mr. Schulmeister) Ms. de Naie, I'm going  
13 to ask you to look at plaintiff's Exhibit 97.

14                 A.         We're getting that together.

15                   (pause)

16                   Okay.

17                 Q.         Do you have that?

18                 A.         Yes, we have that up.

19                 Q.         Okay. And on the first page, it has the  
20 caption Commission on Water Resource Management, State of  
21 Hawaii.

22                 A.         Yes.

23                 Q.         And then beneath that on the right, it  
24 says Declaration of Lucienne de Naie on behalf of Sierra  
25 Club.

1 MR. FRANKEL: Objection, Your Honor.

2 MR. SCHULMEISTER: I'm not finished.

3 THE COURT: Yeah, let him finish.

4 Q. (By Mr. Schulmeister) Is that correct?

5 THE COURT: Okay, now you can object.

6 MR. FRANKEL: Objection, Your Honor. This  
7 exhibit is not in evidence so it's not appropriate to be  
8 reading the contents of it --

9 THE COURT: Sustained.

10 MR. FRANKEL: -- until it is entered into  
11 evidence.

12 THE COURT: Sustained.

13 Q. (By Mr. Schulmeister) Do you recognize  
14 plaintiff's Exhibit 97?

15 A. Yes.

16 Q. And did you sign it on December the 28th of  
17 2014?

18 A. Yes.

19 MR. SCHULMEISTER: I would like to move  
20 plaintiff's Exhibit 97 into evidence.

21 THE COURT: All right, let me start with  
22 Mr. Frankel.

23 MR. FRANKEL: No objection.

24 THE COURT: How about from Ms. Goldman?

25 MS. GOLDMAN: No objection.



1 THE COURT: Thank you.

2 Mr. Rowe.

3 MR. SCHULMEISTER: No objection, Your Honor.

4 THE COURT: All right, plaintiff 97 is  
5 received, no objection.

6 (Plaintiff's Exhibit 97 was received in  
7 evidence.)

8 Q. (By Mr. Schulmeister) Okay, plaintiff's  
9 Exhibit 97 is the written testimony that you submitted on  
10 behalf of Sierra Club Maui in the interim instream flow  
11 standard proceeding that ultimately culminated with the  
12 decision that we've referred to as Exhibit J-14, is that  
13 correct?

14 A. Yes.

15 Q. And who actually wrote this declaration? Who  
16 drafted it?

17 A. I -- I wrote the declaration.

18 Q. And it was submitted by Mr. Isaac Hall on  
19 your behalf, is that correct?

20 A. Yes, it was reviewed by Mr. Hall. He  
21 probably made some changes in it because I'm not an  
22 attorney and he is. But basically, I provided the -- the  
23 outline of what, you know, I thought the Sierra Club  
24 should say.

25 Q. Okay, and was Mr. Hall -- I mean, he was

1 representing Maui Tomorrow in this proceeding, correct?

2 A. He was. But I believe he reviewed all of the  
3 statements of everybody who was involved, and that's my  
4 recollection.

5 Q. So at this time, you were submitting this  
6 testimony on behalf of Sierra Club, and then do you recall  
7 you submitted separate testimony on your own behalf? Do  
8 you recall that?

9 A. I did as a resident of the watershed area  
10 that is downslope from the lease area.

11 Q. Okay. And at this time, what was your  
12 position with Maui Tomorrow Foundation?

13 A. What year was this? 2015, I don't believe I  
14 was on the board at that time. I certainly gave some  
15 advice to Maui Tomorrow Foundation if they asked on water  
16 issues because I lived in the watershed there and was very  
17 concerned. But I wasn't a voting member of -- of the  
18 board at that time in '14 or '15.

19 Q. What about in 2017? 2017?

20 A. Yes, 2017, I was back on the board. I  
21 believe I was president in 2017. And then in 2018, I  
22 became vice-president.

23 Q. Now, when you were president in 2017, was one  
24 of your responsibilities communicating with Mr. Hall about  
25 his representation of Maui Tomorrow in this interim

1 instream flow standard proceeding?

2 MR. FRANKEL: Objection. Relevance.

3 THE COURT: You're on the same topic we were  
4 talking about before, right, Mr. Schulmeister?

5 MR. SCHULMEISTER: That's correct, I'm trying  
6 to make my record, Your Honor.

7 THE COURT: Okay, overruled.

8 THE WITNESS: Well, you're asking me if was  
9 my responsibility to communicate with Mr. Hall. No, our  
10 executive director, Albert Perez, of Maui Tomorrow, he --  
11 it was his responsibility to communicate with Mr. Hall.

12 Q. (By Mr. Schulmeister) Okay. I would like to  
13 ask you to look at Exhibit J-26 -- or is it AB-26? AB-26,  
14 excuse me.

15 A. AB-26. Okay. We're pulling it up.

16 THE COURT: So that is not in evidence yet  
17 according to the court's notes.

18 MR. SCHULMEISTER: All right.

19 THE COURT: All right.

20 THE WITNESS: All right, we have it pulled up  
21 now.

22 Q. (By Mr. Schulmeister) Do you recognize  
23 Exhibit AB-26?

24 A. I can read that it is a proposed findings of  
25 fact, conclusions of law from Maui Tomorrow to the Water

1 Commission, yes.

2 Q. Have you ever seen it before?

3 A. I have seen it. I'm not sure if I saw the  
4 final version. Once again, you know, Albert Perez is a  
5 pretty competent person, and he did more of the heavy  
6 reading on these kinds of things. He would ask my advice  
7 if there was a question about a stream or something that a  
8 resident would know, but I am not deeply familiar with  
9 this document, I have to honestly say.

10 Q. Okay. If you look at the end of the  
11 document, it appears to be dated in June of 2017. Is that  
12 when you were president of Maui Tomorrow Foundation?

13 MR. FRANKEL: Objection, Your Honor, just to  
14 the extent asking the witness to be reading the exhibit  
15 before it's received into evidence.

16 THE COURT: Sustained. I mean, you can still  
17 ask her the same question without looking at the document.

18 Q. (By Mr. Schulmeister) When you were  
19 president of Maui Tomorrow --

20 THE COURT: Mr. Schulmeister, the problem  
21 the court's having, I mean, this document isn't even  
22 file-marked. We have no idea of its provenance, no  
23 foundation. This witness couldn't possibly lay the  
24 foundation for its admissibility so I'm not inclined to  
25 allow a whole lot of questioning about it. But you can

1 ask her when she was a officer. That's completely  
2 independent of this document.

3 Q. (By Mr. Schulmeister) Were you the president  
4 of Maui Tomorrow Foundation on June the 7th of 2017?

5 A. (Indiscernible)

6 MR. FRANKEL: I didn't hear that. I don't  
7 know if anyone else did.

8 THE COURT: I did not hear it either. What  
9 was your answer, ma'am?

10 THE WITNESS: Yes, I was.

11 THE COURT: Thank you.

12 Q. (By Mr. Schulmeister) So while you were the  
13 president of Maui Tomorrow Foundation in 2017, did Maui  
14 Tomorrow Foundation take the position that the Water  
15 Commission should put more water into the petition streams  
16 because the non-petition streams would be available --  
17 there was no uncertainty about whether they would be  
18 available for use by Alexander & Baldwin for its  
19 diversified ag plan in Central Maui?

20 MR. FRANKEL: Objection. Vague. Compound.

21 THE COURT: Sustained. I'm looking at it in  
22 print, Mr. Schulmeister, and it's all of those things.

23 MR. SCHULMEISTER: Let me try again.

24 THE COURT: Okay, that's fine.

25 Q. (By Mr. Schulmeister) In June of 2017 while

1 you were president of Maui Tomorrow Foundation, did Maui  
2 Tomorrow Foundation advocate to the Water Commission that  
3 it should restore more water in the petition streams  
4 because the non-petition streams would be available for  
5 Alexander & Baldwin to use in Central Maui for its  
6 diversified agriculture plan?

7 MR. FRANKEL: Objection. Foundation,  
8 compound, relevance, vague.

9 THE COURT: Mr. Schulmeister, I really think  
10 we'd make progress if you broke that down. It's really  
11 about three questions squished together. Could you take  
12 them one at a time, please.

13 MR. SCHULMEISTER: All right.

14 Q. (By Mr. Schulmeister) In June of 2017 while  
15 you were president of Maui Tomorrow Foundation, did Maui  
16 Tomorrow Foundation advocate to the Water Commission that  
17 water in the non-petition streams would be available for  
18 agriculture in Central Maui?

19 MR. FRANKEL: Objection. Relevance, vague.

20 THE COURT: Overruled.

21 You may answer, ma'am.

22 THE WITNESS: What I -- all right, thank you,  
23 judge.

24 What I recall is that Maui Tomorrow noted  
25 that A&B had access to water that originated from their

1 lands in the watershed which was estimated to be a certain  
2 amount. I'm sorry, I'm not remembering the number of  
3 gallons or million gallons. But it was basically a third  
4 of the water that was produced in the watershed originated  
5 on their lands somehow and that, also, that there were  
6 streams beyond the lease area that were not the subject of  
7 any legal challenges that A&B used and that there were  
8 streams that were not named in the petition that A&B was  
9 also diverting. I do not recall that -- in fact, I  
10 wouldn't have supported having those streams that weren't  
11 in the petition being written off as all the water could  
12 be taken. In fact, I recall just as an individual  
13 speaking to the fact that -- at different meetings that we  
14 were leaving out a lot of the streams when we did -- when  
15 we set the instream flow standards of water stream that  
16 people depended on.

17 Q. (By Mr. Schulmeister) Okay, I think you  
18 earlier testified that it's always been your position  
19 going back from the very beginning of your involvement on  
20 Maui that the streams should be restored, correct?

21 A. Streams that, yes, should have a balanced  
22 use, just like the water code says, that the beneficial  
23 offstream usage should also be weighed against the needs  
24 of the streams themselves, traditional and cultural  
25 rights, and also people who live along the streams that

1 actually have riparian rights to use the streams, like  
2 many of my friends and neighbors do.

3 Q. And so your position -- you've had it for a  
4 long time and you still have it -- is that these things  
5 should be considered whether they're petition streams or  
6 not, right?

7 A. Yes, I believe that under our laws that the  
8 responsibility for the streams -- all streams is that of  
9 the BLNR and the DLNR as trustees to have enough  
10 information to know if we are properly apportioning the  
11 use of the streams. That's why we have the laws, to help  
12 guide us.

13 Q. But the issue that the Water Commission was  
14 dealing with in this case had to do with how much  
15 restoration should there be in the petition streams,  
16 correct?

17 A. It was because of the nature of the process,  
18 those were the streams that were listed. But I -- I do  
19 recall during the setting of the IIFS discussions that  
20 other streams were brought up, and people from other  
21 streams came and testified that although those streams  
22 weren't part of any petitions, they felt that they were  
23 important, too. So it's not a new topic.

24 Q. Right. And then if we look back again at  
25 Exhibit J-20 at page 58.



1           A.       We're pulling that up. Give us a minute  
2 here.

3                   (pause)

4                   All right, we're looking at the map from the  
5 draft EIS, yes.

6           Q.       Yes. And I think -- I just want to draw your  
7 attention to the color coding of the streams, okay. If  
8 you look at the legend on the left and you go -- and I  
9 realize this is kind of small but, actually, maybe on the  
10 computer, you can zoom in a little bit. I'm not sure.  
11 But you see that the streams that are colored -- I'm going  
12 to say it's kind of like a, I don't know, pink. But where  
13 it says fully restored streams, you see that?

14           A.       I see that, yes.

15           Q.       And if you look on the map, you'll see that  
16 there's quite a number of those in the Keanae license  
17 area?

18           A.       Yes, I see that.

19           Q.       And there's also one in Nahiku, Makapipi?

20           A.       Yes, I see that.

21           Q.       All right --

22                   MR. FRANKEL: Objection -- objection, Your  
23 Honor. It is my understanding we're going to let the  
24 documents -- use them in closing argument rather than  
25 having the witnesses read through them.

1                   MR. SCHULMEISTER: I have a point that I  
2 would like to get to, Your Honor.

3                   THE COURT: Overruled. Makapipi is  
4 M-a-k-a-p-i-p-i.

5                   MR. SCHULMEISTER: M-a-k-a-p-i-p-i.

6                   THE COURT: I think that's what I said. But  
7 I agree with what you just said.

8                   MR. SCHULMEISTER: Okay.

9           Q.        (By Mr. Schulmeister) All right, and during  
10 the questioning by Mr. Franklel, you had made a reference  
11 to, quote, restoration, close quote, streams, and then he  
12 asked you to explain what you meant by that. You remember  
13 that testimony?

14           A.        Yes, I said that the ones that were affected  
15 by the decision of the Commission on Water Resources in  
16 June of 2018, as I recall.

17           Q.        Right. And these pink streams in Keanae and  
18 Makapipi and Nahiku and also Hanehoi, the stream that  
19 you're near and dear to, and Honopou, which is on the far  
20 western end of the Huelo license area, those were all  
21 restoration streams in the decision and order also,  
22 correct?

23           A.        Yes, those are listed on paper as streams  
24 that are supposed to be fully restored.

25           Q.        Okay. But there's a number of streams in

1 Huelo that are blue, and those are referenced in the  
2 legend as non-IIFS streams. Do you see that?

3 A. I see that, yes.

4 Q. And those are the ones you understand have  
5 been the non-petition streams, in other words, the ones  
6 there was no petition for an IIFS amendment?

7 A. I call them the forgotten streams.

8 Q. Okay. But they were not the subject of an  
9 IIFS petition for amendment?

10 A. They were not.

11 Q. Okay. And so when the Water Commission was  
12 deciding -- you mentioned earlier that you understood that  
13 they had to do a balance because there were certain needs  
14 of offstream use, and they had to be balancing that  
15 against the stream restoration request, correct?

16 A. Correct. And obviously those needs changed  
17 greatly in 2017.

18 Q. Because the sugar company went out of  
19 business?

20 A. Right.

21 Q. Is that what you mean? All right.

22 A. Yes.

23 Q. But the decision came out in 2018, correct?

24 A. Correct.

25 Q. And were you aware of the fact that there was

1 a IFS contested case hearing that was held before the  
2 announcement that sugar went out, and there was  
3 recommended decision by the hearings officer; and then  
4 before the Commission ruled on it, the announcement was  
5 made in early 2016 that sugar was -- basically, it would  
6 be no more sugar cultivation, and then the hearing was  
7 reconvened specifically to consider the fact that there  
8 would no longer be sugar in Central Maui? Do you remember  
9 that?

10 THE COURT: No, don't answer that --

11 THE WITNESS: I do.

12 THE COURT: Don't answer that question.

13 I don't understand it, Mr. Schulmeister.

14 You're going to have to break it down.

15 MR. FRANKEL: And, Your Honor, I'm going to  
16 object not only on compound but also relevance.

17 THE COURT: Well, we're going to go down this  
18 road a little while longer, and then I'm going to impose a  
19 time limit. But for now, your objection's overruled.

20 Q. (By Mr. Schulmeister) Did you understand  
21 that when the Water Commission issued its ruling, it was  
22 after sugar cultivation had already stopped?

23 A. Yes, it was 2018.

24 Q. Right. And the discussion in the decision  
25 about agriculture in Central Maui was based on a

1 forecasted demand of diversified agriculture to replace  
2 sugar, do you remember that?

3 MR. FRANKEL: Objection. Lacks foundation.

4 THE COURT: Overruled.

5 THE WITNESS: Well, in the Alexander &  
6 Baldwin version of what they were going to do and then  
7 there was what people who analyzed their plan thought  
8 realistic. And their plan was very aspirational, and yet,  
9 it seemed that the demand for the water was on the spot,  
10 and the usable water would be way in the future sometime.

11 Q. (By Mr. Schulmeister) But the Alexander &  
12 Baldwin plan was the plan that was reviewed by the Water  
13 Commission when it issued its decision and order in 2018,  
14 correct?

15 A. I believe there were at least several  
16 versions of that plan that I saw bouncing around and each  
17 one different and the different water needs, and so forth.  
18 But I'd have to look at all of them. You know, I don't  
19 know what the hearings officer based his recommendation on  
20 or what the Commission later considered for their final  
21 decision.

22 Q. But you did understand that the -- to the  
23 extent that the Commission considered what the demand for  
24 water would be in Central Maui for agriculture, it was  
25 based on the amount of water that would be left after the

1 Commission's order for restoration of the petition streams  
2 was implemented, correct?

3 MR. FRANKEL: Objection. Foundation,  
4 speculation.

5 THE WITNESS: But that -- that --

6 THE COURT: Hold on. Don't answer. I'm  
7 trying to read the question on my screen here. Hang on.

8 (pause)

9 I'm sorry, Mr. Schulmeister, you need to  
10 rephrase.

11 MR. SCHULMEISTER: Okay.

12 Q. (By Mr. Schulmeister) Ms. de Naie, you  
13 earlier testified that you understood that there had to be  
14 a balance between restoration of streams and water being  
15 available for offstream uses, such as agriculture in  
16 Central Maui, correct?

17 A. I believe the technical term is beneficial  
18 offstream uses, and I think this is what the community has  
19 questioned, is there a proven beneficial use or is it a  
20 speculative use that may or may not ever happen because  
21 the water keeps being diverted with no purpose. That's  
22 what I understand.

23 Q. Right. But you understood the Water  
24 Commission had to make a judgment about that, right?

25 A. Yes, they did.

1 Q. And, in fact, that's largely what the Water  
2 Commission's decision in 2018 was about, correct?

3 MR. FRANKEL: Objection. Calls for  
4 speculation, lacks foundation, not the appropriate  
5 witness.

6 THE COURT: You can ask her her  
7 understanding, Mr. Schulmeister, but let's not ask her to  
8 characterize what CWRM did.

9 THE WITNESS: Thank you, judge. I appreciate  
10 that.

11 My understanding is that this -- this process  
12 had water recommendation from the hearings officer based  
13 on all these maps and everything that you're talking  
14 about. The Commission, after hearing from the plaintiffs,  
15 thought long and hard, came up with a different  
16 recommendation and also, I believe, referred to something,  
17 kind of like adaptive management where it would be  
18 revisited if -- if there was new information. You know,  
19 there's supposed to be monitoring. There's supposed to be  
20 a check-in on how we're doing. I don't think any of that  
21 has happened. And so we really are lacking the  
22 information to know if that was the final decision that  
23 can and will be made by the Water Commission.

24 Q. (By Mr. Schulmeister) But the Water  
25 Commission did, to your understanding, order restoration

1 of most of the petition streams, correct?

2 A. They did with no monitoring plan so there is  
3 no proof that the restoration has been implemented or not.

4 Q. And were you present at Maui Tomorrow  
5 Foundation when the Commission issued its ruling?

6 A. Maybe. When did it come out? 2018?

7 Q. Yes.

8 A. I'm not sure if I was president in 2018  
9 still. I think I was. I know it changed sometime in  
10 later 2018. Probably --

11 Q. Maui Tomorrow --

12 A. -- I still was, yeah.

13 Q. Maui Tomorrow Foundation did not appeal the  
14 Water Commission's decision, correct?

15 MR. FRANKEL: Objection. Relevance to this  
16 case.

17 THE COURT: I'll allow it if she knows.

18 THE WITNESS: Maui Tomorrow had no further  
19 funding to do any appeal, that's true.

20 Q. (By Mr. Schulmeister) And the -- what you  
21 referred to as the plaintiffs, are you talking about the  
22 clients of the Native Hawaiian Legal Corporation who had  
23 filed the IIFS petitions? Is that what you mean by  
24 plaintiffs?

25 A. Yes, they were the plaintiffs.



1 Q. Right. And they were largely advocating for  
2 restoration in Keanae but also Honopou Stream, correct?

3 MR. FRANKEL: Objection. Foundation,  
4 relevance.

5 THE COURT: I'm sorry, we have another  
6 problem. Could you restate the question. We couldn't  
7 quite get the whole question here in the courtroom. I'm  
8 sorry.

9 Q. (By Mr. Schulmeister) The plaintiffs, as you  
10 refer to them, the clients of Native Hawaiian Legal  
11 Corporation who filed the IIFS petitions, they had been  
12 advocating for restoration of the petition streams which  
13 -- correct?

14 MR. FRANKEL: Objection. Foundation,  
15 relevance.

16 THE COURT: You may answer.

17 THE WITNESS: To my understanding from  
18 speaking to some of the folks who were represented by  
19 Native Hawaiian Legal Corp., who are my neighbors, is that  
20 they really wanted to include more streams in the  
21 petition, but this was as many as they could prepare a  
22 petition for which they thought was going to be acted on,  
23 you know, fairly quickly but, in the end, took, I don't  
24 know, 10, 12, 14 years. They had no objection to  
25 restoration of additional streams, but they did not have

1 the time to prepare to put them in the original petition.  
2 So those streams were not in the petition.

3 Q. (By Mr. Schulmeister) Was it your  
4 understanding that the ones in the petition were the ones  
5 they cared the most about?

6 MR. FRANKEL: Objection. Lacks foundation.  
7 Calls for speculation.

8 THE COURT: Sustained.

9 Q. (By Mr. Schulmeister) In your conversations  
10 with them that you just referred to, was it your  
11 understanding that they selected the streams to petition  
12 based on the ones that they cared the most about?

13 MR. FRANKEL: Objection. Hearsay, relevance,  
14 speculation.

15 THE COURT: Sustained. I don't know who they  
16 we're talking about.

17 MR. SCHULMEISTER: Well, I'm just referring  
18 back to her answer.

19 THE COURT: Well, you can refer back to  
20 whatever you wish. I'm just telling you I'm not clear on  
21 who they are. Are they just members? Are they  
22 plaintiffs? Are they the lawyers? I don't know. And I'm  
23 the factfinder so I think you would want me to know.

24 Q. (By Mr. Schulmeister) The IIFS petitions  
25 that were ruled on by the Water Commission, to your

1 knowledge, did the parties that you referred to as the  
2 plaintiffs, did they appeal it?

3 A. No, the plaintiffs did not appeal.

4 Q. Now, Ms. de Naie, since the Water Commission  
5 did the balancing based on the evidence before it on the  
6 petitions and the information that was provided on the  
7 water that was needed for Central Maui agriculture, if  
8 there was going to be additional restoration beyond what  
9 the Water Commission provided for, that water has to come  
10 from somewhere, right?

11 MR. FRANKEL: Objection, Your Honor.  
12 Foundation, speculation.

13 THE COURT: I'm sorry, were you done?

14 MR. FRANKEL: Assumes facts not in evidence.

15 THE COURT: The court's sustaining its own  
16 objection because I just don't understand the question. I  
17 mean, I'm sorry, Mr. Schulmeister, but I'm just -- you're  
18 asking a number of very long questions with multiparts to  
19 them. And I'm reading it here on the screen, and I'm  
20 having a difficult time figuring out what the thrust of  
21 the question is. I'm just going to ask you to rephrase it  
22 and try to boil it down a little bit to make my job  
23 easier. Thank you.

24 MR. SCHULMEISTER: Okay.

25 Q. (By Mr. Schulmeister) Ms. de Naie, you

1 understand that the EMI ditch system over the years has  
2 collected a certain amount of water on average? You're  
3 generally familiar with that?

4 A. I am, to the great detriment of the streams  
5 and the communities and our fisheries.

6 Q. And part of what the decision and order was  
7 all about was changing that, in other words, saying, all  
8 right, you've been diverting -- let's just take 130  
9 million gallons, as an example, a day and we have all  
10 these streams -- these petition streams we need to deal  
11 with. So, yes, some water is needed in Central Maui, but  
12 we're going to require some water be put back in the  
13 streams. Correct?

14 A. That was their decision as I understand it,  
15 yes.

16 Q. And so that's what they did? That was the  
17 balancing that they did, right?

18 A. That's the decision they made, yes.

19 Q. Right. So now if -- what's being asked is  
20 that they're going to restore water to more streams, and  
21 it's got to come from somewhere, right? In other words,  
22 there was a certain amount of water that was being  
23 diverted. Some of it was going to continue to be used for  
24 agriculture. Some of it was going to be used to restore  
25 streams. If now we have to add more streams, it's got to

1     come from somewhere.  It's either going to come from the  
2     streams that were fully restored, or it's going to reduce  
3     what's available for agriculture, right?

4                   MR. FRANKEL:  Objection, Your Honor.  Lacks  
5     foundation.  Calls for speculation.  Incomplete  
6     hypothetical.  Calling for expert testimony.

7                   THE COURT:  Overruled.  The witness may  
8     answer what her understanding is on that topic.  Court's  
9     not going to take it as binding on anyone else or as an  
10    expert or what have you.  But I'll be happy to hear  
11    Ms. de Naie's answer to that question.

12                   THE WITNESS:  You know, first of all, it's  
13    factual knowledge that these systems are old and are  
14    losing a lot of water so somehow it's off the table that  
15    we need to figure out how to make the system sufficient  
16    and have more water in more streams and still enough water  
17    for agriculture.  That's just something that can't even be  
18    discussed which is crazy.

19                   Secondly, we've been begging for years to get  
20    adequate information about all the East Maui streams so  
21    that reasonable decisions could be made by bodies, by BLNR  
22    and the Land Use Commission and the Water Commission, to  
23    determine what the proper balance would be, including  
24    having real realistic demands for agriculture year by  
25    year, what it's going to need and where and how viable

1 that is. So it's like asking me to solve an equation that  
2 has five unknowns when the information is not being  
3 provided and there's really a resistance to providing any  
4 of it.

5 I can't tell you how it should all work out,  
6 but I can tell you that every stream deserves to have an  
7 evaluation by our state agencies to make sure that they  
8 are fulfilling their public trust responsibilities for  
9 these streams. It's just the simplest thing I can say  
10 about it.

11 Q. (By Mr. Schulmeister) Okay, and you  
12 understand that's the Water Commission's job to do, right?

13 A. Is it the Water Commission's job?

14 Q. Yes.

15 A. And also the DLNR itself has other branches  
16 that are responsible for gathering that information. So  
17 that information needs to be available before a decision  
18 is made.

19 Q. All right, I'm going to ask you a few  
20 questions about the diversion structures because you gave  
21 some testimony about the fact that you would like to see  
22 diversion structures completely removed from the  
23 restoration streams, is that right?

24 A. Certainly some of the restoration streams  
25 should have -- completely removed because they have no

1 purpose anymore. They're not connected to any existing  
2 ditches. Some should have them modified. It's -- really  
3 an engineering study should be done on what could be done  
4 to efficiently create a more natural stream habitat or  
5 maybe improve the system.

6 Q. Are you on the regular e-mailing list from  
7 the Water Commission when they send out their agendas and  
8 submittals for Water Commission meetings?

9 A. No, I'm not on the regular list, but I do  
10 look at their website from time to time. I've been a  
11 little busy with my own life to -- to look at it recently.

12 Q. But you have gone to recent Water Commission  
13 meetings where the subject has come up as to what the  
14 Water Commission should do with regard to applications by  
15 EMI to modify and abandon diversions on the restoration  
16 streams, correct?

17 MR. FRANKEL: Objection, Your Honor.  
18 Relevance.

19 THE COURT: Overruled.

20 THE WITNESS: I've testified at a Water  
21 Commission meeting held here in Maui that I thought the  
22 A&B plans for modifying some of the diversions would not  
23 be ecologically sound and supported the opinion of the  
24 State Department of Fish and Wildlife in that same regard.  
25 They came to the same conclusions.

1 Q. (By Mr. Schulmeister) Are you talking about  
2 the meeting that was held on August 29th of 2019?

3 A. I'm sorry, I don't exactly recall the date,  
4 but it was last year.

5 Q. Was it at the Cameron Center?

6 A. I believe it was, yes.

7 Q. Could you look at Exhibit AB-73, please.

8 THE COURT: And that is not in evidence per  
9 the court's notes.

10 MR. SCHULMEISTER: Yes, this is a -- this was  
11 a subject of our request for judicial notice. But for  
12 now, I'm just going to ask the witness to see if she  
13 recognizes it.

14 THE WITNESS: We're working on it. We  
15 haven't pulled it up yet.

16 (pause)

17 All right, I'm looking at the minutes for the  
18 Water Commission meeting of July 29th.

19 MR. SCHULMEISTER: I believe it was August  
20 29th.

21 THE COURT: Yeah, August 29th.

22 THE WITNESS: Oh, I'm sorry.

23 THE COURT: Does yours say August 29th,  
24 Ms. de Naie?

25 THE WITNESS: Yeah, it's August 29th, 2019.



1 THE COURT: All right, thank you.

2 Go ahead, Mr. Schulmeister.

3 MR. SCHULMEISTER: I mean, again, this was  
4 downloaded from the Commission website. It's part of our  
5 request for judicial notice. I'd like to question the  
6 witness about it so I'd like to move it into evidence.

7 MR. FRANKEL: Objection.

8 THE COURT: I'm kind of stuck,  
9 Mr. Schulmeister. I personally don't have any doubts that  
10 -- I trust you that you downloaded this, but there's  
11 absolutely no admissible record on that. So you're asking  
12 me to take a leap of faith here over objection. I don't  
13 think I can do it. We need more foundation.

14 MR. SCHULMEISTER: I think there is -- our  
15 motion in limine did include declarations with regard to  
16 the downloading the documents from the website. This was  
17 taken under advisement. So I believe we did supply the  
18 foundation to support judicial notice for this.

19 THE COURT: Okay, I'm sorry, I wasn't making  
20 the connection between the motions in limine and this  
21 document so thank you. So hang on, let me --

22 Okay, we're going to have to take a brief  
23 recess. I have to go -- the motions in limine are sitting  
24 on my desk in my chambers. I'll be right back.

25 We're in recess.

1 (Recess taken.)

2 THE COURT: All right, we're back on record.

3 FTR on?

4 THE BAILIFF: We're not on record. Sorry, I  
5 just took us off mute.

6 THE COURT: All right, we are back on record.

7 FTR?

8 THE BAILIFF: Yes, I just took it off.

9 THE COURT: All right, so is this motion --

10 MR. SCHULMEISTER: Your Honor, if I may?

11 THE COURT: I'm sorry, what?

12 MR. SCHULMEISTER: I just want to -- I  
13 apologize. The motion in limine on judicial notice  
14 actually did not include this particular minutes that were  
15 downloaded from the website. So we would have to -- if  
16 the authenticity is being questioned, we'd have to deal  
17 with it with either another witness or another request for  
18 judicial notice. But I will withdraw the motion to admit  
19 it right now.

20 THE COURT: All right, thank you. We'll  
21 straighten it out.

22 MR. SCHULMEISTER: But I would like -- all  
23 right. But I would like to continue my examination.

24 THE COURT: You may but we're going to call  
25 it quits in 10 minutes.

1 MR. SCHULMEISTER: Understood.

2 THE COURT: All right.

3 Q. (By Mr. Schulmeister) All right,

4 Ms. de Naie, you do recall --

5 MR. SCHULMEISTER: I'm sorry, are we ready?

6 THE COURT: We are. I'm sorry, you and I  
7 unfortunately started talking at the same time. Please go  
8 ahead. You have the floor.

9 Q. (By Mr. Schulmeister) All right,

10 Ms. de Naie, you do recall being at a meeting at the  
11 Cameron Center last year where, as you said, you showed up  
12 and testified about permit applications by EMI for  
13 diversion modification and abandonment, is that correct?

14 A. Yes, that's correct.

15 Q. And did you appear on behalf of the Sierra  
16 Club at that meeting?

17 A. I did.

18 Q. And did you testify in opposition to the  
19 action items pertaining to the permits at that meeting?

20 A. I testified that they needed more  
21 modifications and supported the comments of the Department  
22 of Fish and Wildlife for the State who concluded the same  
23 thing.

24 Q. And do you recall part of your testimony was  
25 about the effects of diversions on the Huelo community?

1           A.       Yes, that they should be consulted because  
2 the effects of how the diversions were modified were going  
3 to have an effect on the people that lived downstream,  
4 kind of common sense.

5           Q.       And one of the effects potentially was  
6 because there's a Huelo group of residents who actually  
7 have a pipe in the stream and draw water for their  
8 domestic needs, is that correct?

9           A.       Yes, there is a pipe that serves a group of  
10 10 families or so as a registered diversion from back in  
11 the 1980s.

12          Q.       That's from Hanehoi Stream, H-a-n-e-h-o-i?

13          A.       Yes, it is drawn from Hanehoi Stream.

14          Q.       Right. And that water -- it's the position  
15 of the Sierra Club or your position, I should say, that  
16 that's a reasonable and beneficial use, domestic use of  
17 water from Hanehoi Stream by the association?

18          A.       Yes. Most of those are Hawaiian families  
19 that actually would have riparian rights, but this is the  
20 easiest way to get them because that pipe has been there a  
21 long time. It was for the school originally, and our  
22 school closed in the 1950s.

23          Q.       And among the uses that water is put to is  
24 flushing toilets?

25          A.       Possibly. I'm not sure what the water -- I

1 think that the water is used for irrigation for the, you  
2 know, people's land but possibly also for other domestic  
3 uses.

4 Q. And you consider flushing toilets to be a  
5 domestic use?

6 A. Well, we all got to go.

7 Q. Okay. Now, at the end of the discussion and  
8 testimony, the Water Commission voted to approve the  
9 action on the permits even though you did voice your  
10 concerns and comments, is that right?

11 A. I'm reading right here. It said the --

12 THE COURT: No --

13 THE WITNESS: -- Commission --

14 THE COURT: Ms. de Naie --

15 THE WITNESS: (Indiscernible) -- yes.

16 THE COURT: Ms. de Naie, please put that  
17 document away. It's not in evidence, and you should not  
18 be referring to it. I'm sorry, I didn't know it was still  
19 up on your screen.

20 THE WITNESS: I'm sorry.

21 MR. ROWE: Apologize, Your Honor.

22 THE COURT: I should have anticipated that.  
23 I'll take the blame for that.

24 THE WITNESS: It's my --

25 THE COURT: So Mr. Schulmeister is asking you

1 just from your memory, all right, without looking at the  
2 document. So go ahead.

3 THE WITNESS: They voted to proceed to  
4 approve the permits and Mr. Hannahs met with me on break  
5 and said, you know, there's going to be another level of  
6 review so we -- we have to (indiscernible).

7 THE COURT: Time-out. I'm sorry, we're  
8 having a problem here in the courtroom. Hold on.

9 THE COURT REPORTER: I can't get the name.  
10 When she hit a name, I didn't catch who that was.

11 THE COURT: I'm sorry, Lila, I can't hear  
12 you.

13 THE COURT REPORTER: Yeah, she mentioned  
14 someone in her answer, and I didn't catch the name.

15 THE COURT: I'm sorry, the problem was you  
16 mentioned an individual's name that you were speaking  
17 with, and we didn't get a spelling on that. So if you  
18 could give us that and then continue your answer. Thank  
19 you.

20 THE WITNESS: Okay. That would be Hannahs,  
21 H-a-n-n-a-h-s, I believe, Neil Hannahs. He's on the Water  
22 Commission. He is a volunteer commissioner.

23 THE COURT: All right, so go ahead and finish  
24 what you were saying when I interrupted you. Thank you.

25 THE WITNESS: He spoke to me during the break

1 of the meeting to assure me that they gave some credence  
2 to the comments from the community and that there was  
3 going to be another layer of review, I think, by the Water  
4 Commission staff to see if more could be incorporated into  
5 the permit process. I was never informed what happened  
6 after that. But it seemed a simple enough request, talk  
7 to the people below, downstream from you, about what  
8 you're going to do upstream.

9 Q. (By Mr. Schulmeister) Okay, and before the  
10 end of the meeting, you did not request on behalf of the  
11 Sierra Club a contested case hearing on the action that  
12 the Water Commission took with regard to these permit  
13 applications, is that correct?

14 A. I don't think that that was the meeting, no.  
15 That was the Water Commission meeting.

16 Q. No, my under -- right. You requested a  
17 contested case hearing in November of 2018 at the end of  
18 the Board of Land and Natural Resources meeting a year  
19 earlier, right?

20 A. Yes, on behalf of the Sierra Club, we  
21 requested -- Marti Townsend and myself were both there,  
22 and we requested a contested case hearing, yes.

23 Q. And so having gone through that process, you  
24 understood that if you wanted to challenge something that  
25 was being decided at a agency meeting like this, you had

1 to request a contested case hearing before the end of the  
2 meeting, right?

3 MR. FRANKEL: Objection. Calls for a legal  
4 conclusion.

5 THE COURT: She can -- you can just give your  
6 opinion without giving me a legal opinion. Go ahead,  
7 Ms. de Naie.

8 THE WITNESS: It is a mysterious process, and  
9 I've been corrected by the land board because I asked the  
10 wrong way, I think, at the 2018 meeting. But I -- I guess  
11 you would have to ask while you're there if you wanted a  
12 contested case.

13 Q. (By Mr. Schulmeister) And that's what you  
14 did in November of 2018 at the board meeting of Land and  
15 Natural Resources, correct?

16 A. We had to do something. I mean, this has  
17 just gone too far. We had to do something, yes.

18 Q. But you did not request a contested case  
19 hearing at the August 29th, 2019 Water Commission meeting  
20 with regard to the actions on the permits for modification  
21 and abandonment of the diversions on the restoration  
22 streams, correct?

23 A. We worked for years to get the diversions  
24 closed. We just wanted it done right. I don't know why  
25 everything's so difficult, but that was our only request,



1 that it be done better, just like the state agency  
2 requested also. We were not alone.

3 Q. And you also went to a November 20th, 2019  
4 meeting of the Water Commission where permits on diversion  
5 modifications was an action item. Remember that, November  
6 20th, 2019?

7 A. Oh, I think those were the ones for all of  
8 those 18 diversions that had already been disabled in 2005  
9 or 2006 in the Keanae area.

10 Q. And you objected to the action that the Water  
11 Commission took on November 20th of 2019 as well in  
12 testimony on behalf of the Sierra Club, is that correct?

13 A. We asked for them to consider ordering the  
14 removal, not just the disabling, of many of the pipes and  
15 submitted pictures, and the State Department of Fish and  
16 Wildlife took a very similar position and also submitted  
17 pictures. And it really should be done. There's no  
18 reason for those basins and pipes and things to be left up  
19 there on state land. That system is completely disabled.  
20 It is not the main ditch. It doesn't connect to the main  
21 ditch anymore. That's just trash that's being left in our  
22 stream. And, yes, we -- we politely asked that the permit  
23 could include those actions being part of what was  
24 required for the permit.

25 THE COURT: All right, so we're at 4 o'clock.

1 We need to stop for the day.

2 All right, is there anything else we need to  
3 put on record before we go off record to talk housekeeping  
4 type things?

5 MR. FRANKEL: I don't know if we need -- I  
6 just want to make sure Ms. de Naie is going to return  
7 tomorrow morning. I don't know if she was planning for  
8 that. I just want to make sure that happens.

9 THE COURT: Ms. de Naie, you're planning on  
10 coming back tomorrow morning, right?

11 THE WITNESS: Well, I wasn't planning on it  
12 before. But I didn't make plans for tomorrow morning  
13 because we never know.

14 THE COURT: Excellent.

15 THE WITNESS: So I can come back, yes.

16 THE COURT: All right, so we're going to  
17 resume at 9 o'clock tomorrow morning. So I'll ask you to  
18 please be there in your seat at 9:00 a.m. Is that all  
19 right?

20 THE WITNESS: Yes, I'll be back here at the  
21 County Building at 9:00 a.m.

22 THE COURT: All right, thank you. So you're  
23 excused. You can head home.

24 THE WITNESS: Thank you.

25 THE COURT: Anything else we need to put on

1 record before we go off record to talk about the schedule?

2 I'm not seeing anybody with their hand up.

3 All right, so we are in recess, and our court  
4 reporter is thanked and excused.

5 (The proceedings concluded at 4:02 p.m.)

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C E R T I F I C A T E

I, LILA H. M. GRUMLING, CSR 159, Official  
Court Reporter of the First Circuit, State of Hawaii, do  
hereby certify that the foregoing is a true and correct  
transcript of the proceedings had in connection with the  
aforementioned cause.

Dated this 7th day of August, 2020.

/s/ Lila H. M. Grumling  
Lila H. M. Grumling, CSR 159  
Official Court Reporter

Official Court Reporters  
First Circuit Court  
State of Hawaii