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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

SIERRA CLUB,

 Plaintiff,

 vs.

BOARD OF LAND AND NATURAL
RESOURCES, DEPARTMENT OF
LAND AND NATURAL RESOURCES,
SUZANNE CASE in her
official capacity as
Chairperson of the Board
Land and Natural Resources,
ALEXANDER AND BALDWIN,
INC., EAST MAUI IRRIGATION
COMPANY, LLC and COUNTY OF
MAUI,

 Defendants.

Case No. 1CC191000019

TRANSCRIPT OF WEBEX PROCEEDINGS had before the
Honorable Jeffrey Crabtree, Judge Presiding, on Friday,
August 7, 2020, for Further Jury-Waived Trial.

REPORTED BY:
A. HAUNANI HO, RPR, CSR 372
OFFICIAL COURT REPORTER
FIRST CIRCUIT COURT
STATE OF HAWAI'I

OFFICIAL COURT REPORTER
FIRST CIRCUIT COURT
STATE OF HAWAI'I

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19 RESOURCES, DEPARTMENT OF
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1 Friday, August 7, 2020, Honolulu, Hawai'i

2 9:04 a.m.

3 --o0o--

4

5 THE COURT: Let's go on record.

6 All right. We're now on record.

7 FTR is on?

8 THE BAILIFF: Yes, it is.

9 THE COURT: All right. Thank you.

10 All right. Hang on. Let me get my gallery
11 view here.

12 Okay. Now I can see everybody.

13 All right. So are we ready to go?

14 Let's see. I guess for the record I should
15 say all counsel are present. I can see them on my
16 video camera. Ms. de Naie is back in the witness chair
17 over there on Maui. I recognize her.

18 Let's see. Where were we in the examination
19 yesterday?

20 MR. FRANKEL: Your Honor?

21 THE COURT: Yes, sir.

22 MR. FRANKEL: You want us to make our
23 appearances for the morning?

24 THE COURT: Well, it's the same counsel, but I
25 guess we should straighten out the ones -- let's see,

1 Mr. Wynhoff or Ms. Goldman, who's going to be working
2 with Miss de Naie this morning?

3 MS. GOLDMAN: Miss Goldman for the State.

4 THE COURT: All right. Thank you.

5 And, Mr. Schulmeister, I see you, so I assume
6 it's going to be instead of Ms. Akagi?

7 MR. SCHULMEISTER: Yes, I will continue as
8 from yesterday.

9 THE COURT: All right. And that's where we
10 dropped off, right? You were still questioning her.

11 Mr. Rowe, good morning. You have your hand
12 up?

13 MR. ROWE: Yes. I just wanted to note that my
14 secretary Candice Stone is in the conference room to
15 assist us with exhibits.

16 THE COURT: All right. Thank you putting that
17 on the record.

18 All right. I think we're ready to go.
19 Mr. Schulmeister, please continue.

20 LUCIENNE DE NAIE,
21 called as a witness by Plaintiff,
22 having been previously sworn was
23 examined and testified as follows:

24 CROSS EXAMINATION

25 BY MR. SCHULMEISTER:

1 Q Okay. Good morning, Ms. de Naie.

2 A Good morning.

3 Q I would like to have you refer to Exhibit
4 J-14 at page 000278.

5 A We are pulling that up.

6 How's my sound quality, Judge? Or am I near
7 enough to the microphone?

8 THE COURT: Right now I think it's good. I
9 can hear you clearly. Thanks for asking.

10 THE WITNESS: Okay. Well, we're starting a
11 new day, and of course I have to glance at this so I'm
12 -- I'm gonna try to keep centered on the microphone.

13 THE COURT: Right. Thank you. That helps.

14 THE WITNESS: We do have the exhibit up,
15 Mr. Schulmeister.

16 Q (BY MR. SCHULMEISTER) And the page to
17 000278?

18 A Uh -- 000278. Let me scroll up.

19 The page here. To 2278?

20 Excuse me. I'm a little confused.

21 THE COURT: That would be the Bates stamp
22 number, --

23 MR. SCHULMEISTER: Yes. It --

24 THE COURT: -- Ms. de Naie. The actual -- the
25 page --

1 THE WITNESS: It --

2 THE COURT: -- number at the bottom --

3 THE WITNESS: It --

4 THE COURT: -- would be 255.

5 THE WITNESS: Okay. So it's -- it's the
6 paragraph number, not the page number --

7 THE COURT: No.

8 THE WITNESS: -- he was talking about. 255 is
9 the page number?

10 THE COURT: Yes, the one in the middle --

11 MR. SCHULMEISTER: Yeah, 2 --

12 THE COURT: -- at the bottom as opposed to the
13 bold one that's on sort of the lower right corner,
14 which would be 278.

15 THE WITNESS: We are still getting to 255
16 here. We have to tell the computer what to do.
17 233.

18 I'm sorry to take all this time, but I don't
19 really know how to operate this computer that well.
20 I'm just scrolling.

21 255. All right. So I'm on page 255. And at
22 the bottom it says 278. That's an exhibit, 278?

23 THE COURT: No, it's actually Exhibit J-14,
24 but that's the page number.

25 THE WITNESS: All right. Well, I'm on

1 the -- the printed page says 255 on the bottom. Am I
2 on the right page?

3 THE COURT: I think so.

4 MR. SCHULMEISTER: Yes.

5 THE COURT: Right, Mr. Schulmeister?

6 Okay. Let's go ahead. Thank you.

7 MR. SCHULMEISTER: Yes.

8 THE WITNESS: And then --

9 Q (BY MR. SCHULMEISTER) Okay.

10 A -- I'm supposed to look at what section?

11 Q And there's a paragraph near the middle
12 of the page. It has a paragraph number 106. Do you
13 see that?

14 A Yes, I do.

15 Q Okay. And I think yesterday you
16 testified that at the time the decision was made that
17 you believed that you were the president of Maui
18 Tomorrow Foundation, is that correct?

19 A Uh, yes, in -- in 2017 I believe that I
20 served as president.

21 Q And in 2018?

22 A I think so. I -- I'm sorry. It was -- I
23 forget whether I served for one year or two years,
24 but the -- our Board was concerned because I served on
25 so many boards and I didn't have enough time to -- our

1 president had stepped down and so I came back on the
2 Board after years of not being on the Board and agreed
3 to be president. I think it was two years, yes.

4 Q Okay. And I think yesterday you
5 mentioned that Albert Perez of Maui Tomorrow Foundation
6 was somebody that had some responsibility for
7 coordinating with Maui Tomorrow Foundation's attorney
8 Isaac Hall in presenting the positions of Maui Tomorrow
9 in the case before the Water Commission, is that right?

10 A Yes. Albert Perez is the Executive
11 Director of Maui Tomorrow and was at that time and he
12 was the chief liaison with the attorney Isaac Hall.

13 Q Okay. So now this paragraph 106, I
14 believe it's conclusion of law 106, the Water
15 Commission states that Maui Tomorrow Foundation is
16 referred to here by the acronym MTF supports commercial
17 agriculture in Central Maui. In parentheses it refers
18 to Albert Perez, transcript of February 8th, 2017. Do
19 you see that?

20 A Yes, I do.

21 Q And also that there was a report that
22 Maui Tomorrow Foundation submitted to the Water
23 Commission that a -- and quoting from the report it
24 says, the closure of the HC&S sugar cane enterprise is
25 an opening to the next generation of diversified farm

1 businesses, close quote, and that HC&S's, quote, large
2 consolidated 35,000 acre block of central Maui farmland
3 can be used to generate multiple income streams while
4 growing food and fuel profitably for local consumption
5 and value-added export, close quote. Do you see that?

6 A Yes, I do.

7 Q So is that consistent with your
8 recollection of the position that Maui Tomorrow
9 Foundation was taking in 2017 before the Water
10 Commission?

11 MR. FRANKEL: Objection, Your Honor,
12 relevance.

13 THE COURT: Well, I'm going to let this go a
14 little while longer. We'll see where it leads, but I'm
15 frankly not quite getting it yet, Mr. Schulmeister, but
16 I'm going to give you more time to try to tie this
17 together.

18 You may go ahead and --

19 THE WITNESS: I think you need --

20 THE COURT: -- answer, Ms. --

21 THE WITNESS: -- realize --

22 Oh, thank you.

23 You need to realize this is about the Malama
24 'Āina report which said that diversified agriculture
25 should continue on a very different basis than the

1 sugar amount of cropping that was done and a very
2 different water use basis as well. It concentrated on
3 rebuilding the soil which would decrease the demand for
4 water by 40 to 50 percent while still producing viable
5 crops. That was the idea that Maui Tomorrow to my
6 recollection was supporting, not just let's continue
7 business as usual and divert every bit of water that
8 someone says doesn't need to be in a stream to Central
9 Maui and had no accountability for its use. That is
10 not what the Malama 'Āina report said and it's not what
11 Maui Tomorrow Foundation supported.

12 Q (BY MR. SCHULMEISTER) Okay. Now, could
13 you look at conclusion of law number -- or paragraph
14 number 112 on the next page?

15 A Yes.

16 Q And, you know, I'll just read it. It
17 says keeping the East Maui fields in agriculture is
18 important to the long term sustainability of Maui, and
19 a diversified agricultural industry contributes to
20 greater economic food and energy security and
21 prosperity and protects open space and working
22 agricultural landscapes. Do you see that?

23 MR. FRANKEL: Objection, Your Honor.

24 THE COURT: Basis?

25 MR. FRANKEL: Just I guess I thought we were

1 avoiding reading exhibits to witnesses. I thought
2 that's what we were not gonna be doing.

3 THE COURT: Well, I agree you, but I agreed to
4 give Mr. Schulmeister some scope here. So I'm gonna be
5 consistent with that.

6 All right. You may go ahead and --

7 THE WITNESS: Oh. The --

8 THE COURT: -- answer do you see that there on
9 the page, Ms. de Naie?

10 THE WITNESS: Yes, I see that there on the
11 page.

12 Q (BY MR. SCHULMEISTER) And do you agree
13 with it?

14 A Uh -- is there a definition of East Maui
15 fields? Because the fields where most of the stream
16 water goes are not in East Maui. East Maui fields
17 are -- are fields in Ha'ikū and, you know, out towards
18 Ke'anae as far as I'm understanding. So is there a
19 definition that was provided for East Maui fields?

20 Q Well, if it would help, you could look at
21 the previous two paragraphs. 110, where it says
22 keeping HC&S former sugar lands in agriculture would
23 promote the countywide policy plan's core principle of
24 maintaining open space. And then paragraph 111, which
25 talks about 22,254 acres of land irrigated with EMI

1 water that are designated as important agricultural
2 lands under the Hawai'i Revised Statutes.

3 A And so you're saying that those two
4 paragraphs tell me that on the next paragraph is East
5 Maui fields are those important ag lands that are in
6 Central Maui?

7 Q Well, Miss de Naie, the very first
8 paragraph that we were talking about was 106 which was
9 quoting from the Maui Tomorrow Foundation report
10 specifically talking about the closure of HC&S sugar
11 cane enterprise is an opening for diversified ag for
12 the 35,000 acre block of Central Maui farmland. So is
13 it your understanding that that's what we're talking
14 about here?

15 A Under -- if we're on 12, I -- I'm
16 following you on 106 and 110 and 111, I -- I agree that
17 keeping fields in East Maui in agriculture is
18 important, and it's often downplayed, but it's
19 important agricultural area. Ha'ikū, for instance,
20 every single stream is diverted by EMI and there is no
21 recourse to petition for them because they're not on
22 state land, and they are basically depriving farmers
23 there of free water that they could be using and
24 sending it to the -- the fields somewhere. So to me
25 those are the East Maui fields.

1 There's thousands of acres in -- in
2 quote-unquote East Maui east of Māliko Gulch that are
3 not part of the -- the EMI or Mahi Pono agricultural
4 effort, but they're forgotten.

5 It just seems to me that we -- if we get back
6 to balance here, it's like are we gonna have a farming
7 methods that are very wasteful of water or farming
8 methods that really put water as a precious resource
9 and try to keep it very, very effective and efficient
10 in the use and still make a profit. And that's what
11 the Malama 'Āina report was about. It was a new vision
12 based on many tried and true projects around the
13 country and even here in Hawai'i. And that -- that was
14 the idea is let's start a new conversation about taking
15 care of our soil and therefore our water use can be
16 reduced and there's more water for everyone. There's
17 more water just to leave in the streams for the -- for
18 the natural creatures that -- that no one takes for
19 farming.

20 Q Let me ask you this. When you wear your
21 hat as a Sierra Club member, do your positions change
22 from the positions you take when you're the president
23 of Maui Tomorrow Foundation?

24 A Well, I don't know how to answer that
25 question. I -- I am a person, and I serve as a

1 volunteer on the boards of nine different
2 organizations. I think I'm the same person in each
3 organization, as far as I know. Maui Tomorrow is an
4 organization with a whole board of directors of which I
5 am one of, you know, 12 or 13 members. It has several
6 staff people. I am not the, you know, only person who
7 makes the decision for Maui Tomorrow and I'm certainly
8 not the only person who makes the decision for the
9 Sierra Club, because all our decisions go through
10 multiple levels of review.

11 So I -- I can only speak to you as a -- a
12 person. I think I'm pretty consistent. I said at the
13 beginning I have friends that worked for years for HC&S
14 -- HC&S in various capacities. I never said HC&S
15 should be shut down, they're terrible people, whatever.
16 I just said, look, there's a long-term injustice here
17 that water is not being shared fairly. I've said this
18 since I first moved to East Maui in the -- in the
19 eighties and -- and became aware of the situation. And
20 I've gone through endless meetings, many of which you
21 know had nothing to do with the Water Commission,
22 anyone who would listen, to talk about the fact that
23 our streams are the life blood of our communities. The
24 community where I live and where many of my friends and
25 neighbors live, and they need to have a voice in our

1 planning process.

2 So we've had that voice through various
3 hearings, but 13 streams were left out. There's
4 absolutely nothing less important about those streams.
5 There are people growing kalo along those streams,
6 there's Hawaiian families that live along those
7 streams. They are important streams and it -- they
8 just need to have the same consideration that the 25,
9 26 streams that got a lot of scrutiny for ten years
10 got. These streams need to have some consideration.

11 I've felt that all along. No one has ever
12 said in my memory of any of the allies in East Maui
13 that any streams are more important than others. We
14 were always trying to be forced into that. It was A&B
15 that decided, you know, what the taro streams are and
16 what the good streams is, and to us they were all
17 important streams.

18 And I advocated more strongly for the streams
19 nearer where I lived because I -- I -- I knew them well
20 and I could go to bat for them. But you may recall in
21 our Sierra Club testimony we concentrated on four or
22 five streams that we hiked to regularly. Just to
23 emphasize that these -- these streams are very, very
24 important to our educational and recreational and
25 aesthetic use. It's not to say the other streams

1 weren't, but they were on the docket and we could
2 provide information about them.

3 So you really shouldn't assume that everyone
4 thinks that there should be no water for HC&S. That is
5 not it. It's a question of how to properly share the
6 water and to have good information data on which to
7 base that decision. That's what we've all asked for
8 for years.

9 So it's getting cheaper to -- to do gaging and
10 monitoring. There's new technologies. We really
11 should just jump in and -- and get the facts that we
12 need so we can make very wise decisions for our future
13 that have -- that can support everybody. I don't wanna
14 see no farming in Central Maui, but I don't wanna see
15 wasteful practices continue like I've seen for years
16 with, you know, water just pouring out of broken pipes
17 and so forth and so on. People have sent me pictures
18 personally for years of leaks and breaches in the
19 system of EMI, and --

20 MR. SCHULMEISTER: Your Honor.

21 THE WITNESS: -- it -- it just needs someone's
22 responsibility to -- to (indiscernible) --

23 MR. SCHULMEISTER: It's a (indiscernible)
24 question.

25 THE COURT: You don't get to interrupt the

1 witness, Mr. Schulmeister. I've been pretty clear
2 about that.

3 So that said, Ms. de Naie, I think you should
4 wrap up your answer pretty quickly.

5 THE WITNESS: All right. Sorry. I'm -- I'm
6 getting passionate here. I'm done.

7 THE COURT: All right. Thank you.

8 Go ahead, Mr. Schulmeister.

9 Q (BY MR. SCHULMEISTER) OKAY. So again,
10 the question was whether or not your view change if
11 you're wearing the hat of Sierra Club or Maui Tomorrow
12 Foundation. I take it that that long answer was
13 essentially a no, that you try to be consistent, is
14 that correct?

15 A I -- I feel what I feel based on what I
16 have experienced and I feel that I'm consistent based
17 on my experience.

18 Q Okay. And with regard to again the
19 exhibit, page -- the printed page 257. This is Exhibit
20 J-14. The Bates stamp page number is 000280. I'd like
21 to direct your attention specifically to paragraph 120.

22 A We're pulling that up again. Our
23 computer went to sleep.

24 Q And let me know when you have it.

25 A Okay. I see 120.

1 Q Okay. And there it says in order for the
2 East Maui fields to successfully remain in agriculture
3 a portion of the water needs under the diversified
4 agricultural plan must come from surface water. Do you
5 see that?

6 A Uh, yes. No one --

7 Q Okay.

8 A -- has ever disagreed with that.

9 Q Okay. And just so we're clear, when you
10 said -- what you're saying is you don't disagree with
11 the fact that former sugar lands in Central Maui
12 are gonna have -- if they're gonna remain in
13 diversified agriculture or be transitioned to
14 diversified agriculture, some of the water needs is
15 gonna have to come from surface water. Correct?

16 MR. FRANKEL: Objection, Your Honor, compound,
17 speculation, relevance, vague.

18 THE COURT: So, Ms. de Naie, the question is
19 if those lands are going to remain in ag, some of the
20 water needs will need to come from surface water. Do
21 you agree or disagree?

22 THE WITNESS: No one has ever disagreed with
23 that. It's always about the proportion.

24 Q (BY MR. SCHULMEISTER) Okay. Now let me
25 return to the subject of your hiking and your enjoyment

1 of hiking. Mr. Frankel asked you a number of questions
2 about your enjoyment of hiking, the frequency of your
3 hiking, and how your hiking is affected by the amount
4 of water in the streams. Do you recall that generally?

5 A Yes, I do.

6 Q And I believe one of the questions he
7 asked was whether it would diminish your enjoyment of
8 hiking if the total volume of water that is diverted
9 from the East Maui streams ended up being increased or
10 what is currently being diverted, which is in the range
11 of 25 million gallons a day. Do you remember that?

12 A Yes.

13 Q Okay. And I believe that you answered
14 something to the effect that, well, that's just gonna
15 return things to the way they used to be. But with the
16 Decision and Order having established at least ten
17 restoration streams, a number of habitat streams, I
18 mean isn't it true that even if the increase went over
19 25 million gallons a day, that does not mean that it's
20 going to go back up to what it was during the heyday of
21 sugar cultivation, correct?

22 A Well, I don't know how well you know the
23 stream systems, but some streams are much more heavily
24 diverted than others. It -- it might affect a certain
25 stream heavily even to increase a few million gallons a

1 day.

2 Also, since there's not a lot of monitoring or
3 reporting, I said this to you when you interviewed me
4 before, it's like we have no idea if the reported 25
5 million gallons a day that is there now is what is
6 really being done, and if -- if you guys go, oh, we'll
7 only go up to 30 or 35, we have no idea if that will be
8 truthful.

9 Just in general where it is now is workable.
10 And it seems that fields are being planted and there's
11 water for them. And your own reports show the use of
12 very little water. I think it was 3 or 4 million
13 gallons a day for -- for irrigation. So that's been
14 steady for the last couple of years.

15 We just say that let's get some data on this
16 so that we make the right decision. But, yes, it does
17 affect even having another million gallons withdrawn
18 could affect a certain stream heavily. And EMI does
19 not give any of our communities privileged information
20 about where they're taking water when and we're --
21 we're left unknowing. So we might have a flood or we
22 might have a dry stream, and we don't know which we're
23 gonna get.

24 Q Miss de Naie, so long as the interim
25 instream flow standards in the streams that were

1 ordered to be restored, partially or fully, are
2 complied with, then your enjoyment of hikes with regard
3 to those streams is still gonna be considerably better
4 than it was during the time that the sugar plantation
5 was in operation. Correct?

6 A Unless it becomes like what happened in
7 2008 and 2010 where it's a paper IIFS. In other words,
8 it's certified by the Commission, but no one ever
9 checks to really see if those are the levels that are
10 met. This is happening in Nā wai 'Ehā, and it's
11 because people are carefully monitoring the
12 (i ndi scerni ble).

13 THE COURT: Please spell --

14 THE WITNESS: So --

15 THE COURT: Ms. de Naie, I'm sorry.

16 THE WITNESS: -- the -- the --

17 THE COURT: Ms. de Naie, please spell

18 lawalahai, if I pronounced that correctly.

19 THE WITNESS: Oh, Nā wai 'Ehā?

20 N-A-W-A-I-E-H-A.

21 THE COURT: All right. Thank you.

22 THE WITNESS: It's the -- it's the West Maui
23 area.

24 Really, it's like the idea that there are
25 stream flow standards, and the reality of what is in

1 the stream are two completely separate discussions
2 because there's no robust testing or monitoring
3 program.

4 And those left to live on the streams
5 understand that. Those who look at papers go
6 everything's okay. But it's not okay.

7 Q (BY MR. SCHULMEISTER) But I believe you
8 testified that things are vastly better currently than
9 they were before, as far as --

10 A They are cur --

11 Q -- streams --

12 A -- and --

13 Q -- (i ndi scerni ble) --

14 A Oh, if -- if there is a more statutory
15 diversion of water. In other words, someone says,
16 well, okay, now is the time you can take 40 million or
17 50 million, that may mean that the streams that
18 supposedly have restored flows of 20 percent or, you
19 know, 64 percent don't really get them, because that
20 amount of water is needed.

21 It's always the company's need first and the
22 stream's need is a big end of the -- the end of the
23 priorities. That is what we have experienced. That's
24 why people in our community have gone to court for
25 years and years and years, because the reality is not

1 what is on the piece of paper. We need something that
2 really guarantees our streams will have the flows in
3 them that were promises -- promised on the piece of
4 paper.

5 So just this, you know, semantics of 5
6 million, 10 million more, this or that, it's pointless
7 without a -- a real robust data gathering effort and
8 monitoring effort. It's called accountability. We do
9 not have accountability for our stream flows.

10 Q Well, do you have any idea -- let's say
11 the total aggregate diversions in fact, okay, in fact,
12 increased from 25 million gallons a day to let's say 35
13 million gallons a day. I'm asking you, in other words,
14 if that's a fact, do you know how much and how exactly
15 that would affect your enjoyment of hikes that you take
16 two or three times a month?

17 A Well, I can tell you from hiking for
18 years when a large amount was diverted and the streams
19 would only have flows after rains, that gives you a
20 little bit of a -- of a -- of a sense. Like the rains
21 would add back, and then the rains would stop, and then
22 the diversions would continue, and it -- it -- it does
23 really affect just not having that extra flow of what
24 might be a -- a million gallons or a half a million
25 gallons.

1 Especially in certain streams. Certain
2 streams just seem to be used like a plumbing system for
3 the East Maui Irrigation. They are diverted in one
4 place, a phony waterfall dumps them in another stream,
5 and then that's taken into another ditch. It's like un
6 -- until we really have more accountability, I just
7 have to say that my experience is that my enjoyment of
8 hiking in a natural stream could certainly be affected
9 by as little as an increase of 5 million gallons a day,
10 especially in certain streams.

11 Lacking all of this information of knowing
12 what goes in what stream and -- and what the -- what
13 the usual flow of the stream. The stream I live on,
14 Hanehoi, no one even knows what its base load is.
15 There's been no testing ever done. It's been the
16 subject of litigation for 20 years. And no one has
17 ever bothered to get that information.

18 So we just need to step up to the plate with
19 these resources before we start giving them hither and
20 non and saying this will have this effect and this will
21 have that effect and this will have no effect. We
22 really have no idea. I know because I walk on the
23 ground and I see, you know, what conditions are over
24 the years of heavy diversions.

25 You know, there are some months back in the

1 bad old days of heavy diversions where much less water
2 was taken from the streams and, you know, so they were
3 much more enjoyable for that month. But we have no
4 control over it. And there just should be a much
5 greater system of cooperation and -- among the
6 communities, the state, and whoever the diverter is,
7 EMI, whoever owns EMI these days. There just should be
8 a -- you know, a mutual conversation, because we're all
9 in this together.

10 Q Now, Hanehoi is a full restoration stream
11 under the Decision and Order, correct?

12 A Yes, under the Decision and Order.

13 Q Right. So any increase in diversions of,
14 you know, over what's currently being diverted would
15 not be coming from Hanehoi Stream under the Water
16 Commission's decision, right?

17 A Well, right now it's unclear whether
18 Lowrie Ditch is in operation or not. Puolua Stream,
19 which is a tributary, and an important tributary of
20 Hanehoi, there were some sections that only ran
21 downstream of Puolua in the past. That is still being
22 diverted. And the Huelo Stream, or the West Hanehoi
23 Stream, which is an important tributary which joins the
24 stream below the highway, still has water leaking out
25 at the diversion into the Lowrie Ditch.

1 You know, we should just be told, is the
2 Lowrie Ditch gonna be closed? It has stagnant water
3 and -- and weeds in it. It's like this just doesn't
4 seem the way to run a system on -- on public land.

5 Q I think you testified yesterday that the
6 diversion of Lowrie is not on public land, is that
7 correct?

8 A Parts of it are and parts of it aren't.
9 There are -- there are parts of the Lowrie diversion
10 that are on public land, and --

11 Q But --

12 A -- and parts of it aren't.

13 Q But in any event, the Board's decision
14 that is being challenged in this case has conditions
15 that the restoration streams called for in the Decision
16 and Order had to be complied with, correct?

17 A Yes, just as there was in 2008 and 2010.
18 But it's not what happened.

19 THE COURT: Okay. Mr. Schulmeister?

20 THE WITNESS: So we'll see.

21 THE COURT: Mr. Schulmeister, I'm going to ask
22 you to please ask this witness questions about her
23 personal knowledge, that's what we do with witnesses,
24 and not ask her to confirm this or that about the DLNR
25 or anything else. Let's just get to her personal

1 knowledge, we can conclude her testimony, and then you
2 can make whatever arguments you wish to make at another
3 time about the significance and relevance of the
4 various orders and jurisdictions and so forth. But
5 thank you.

6 Q (BY MR. SCHULMEISTER) Miss de Naie, do
7 you think that the incremental additional enjoyment of
8 hiking that you believe you would have if no further
9 water was diverted is more important than the
10 employment of farm laborers in Central Maui like Mahi
11 Pono?

12 MR. FRANKEL: Objection, relevance.

13 THE COURT: Sustained.

14 Q (BY MR. SCHULMEISTER) Miss de Naie, You
15 testified earlier that you thought there needs to be
16 balance, correct?

17 A Yes.

18 Q And when I -- you know, I'd like to know
19 how you balance the incremental enjoyment from hiking
20 at 25 million gallons a day versus 35 million gallons a
21 day against the ability of Mahi Pono to grow out his
22 diversified ag plan.

23 MR. FRANKEL: Objection, relevance.

24 THE COURT: Sustained.

25 Q (BY MR. SCHULMEISTER) Miss de Naie, has

1 EMI ever interfered with providing you or the Sierra
2 Club members access to the areas in East Maui that you
3 like to go hiking?

4 A Not in my current experience.

5 Q Okay. And who do you normally deal with
6 at EMI when you need to get access for hikes?

7 A We get waivers from the -- Jackie at the
8 EMI office in Pā'iā. we let her know if we're
9 proposing a hike and all the participants go in and get
10 a waiver that's good for -- if we have several hikes in
11 the EMI areas, lease areas, the waiver will cover the
12 two hikes over a -- a three-month period.

13 Q Okay. And do you also have interactions
14 with Mark Vaught? V-A-U-G-H-T. Do you know who that
15 is?

16 A Oh, yes, I've known Mark for years.

17 Q Okay. And is he the -- to your knowledge
18 does he have a position with East Maui Irrigation
19 Company?

20 A Yes, he's the -- he's the new Garret Hew.
21 I -- I don't know the exact position, Vice President of
22 EMI, something like that.

23 Q Okay. And have you had any --

24 A Want me to --

25 Q -- communications --

1 A -- spell Mr. Hew?

2 THE COURT: I'm sorry. Ms. de Naie, please
3 don't interrupt Mr. Schulmeister. It makes it very
4 hard for our court reporter. I know sometimes we start
5 talking at the same time, but just be careful about it.
6 Thank you.

7 THE WITNESS: Yes. I'm sorry. Should I spell
8 Mr. Hew's name for the court reporter?

9 THE COURT: Yes, please.

10 THE WITNESS: Garret Hew? I just mentioned a
11 proper name.

12 THE COURT: Yes, please go ahead.

13 THE WITNESS: So I believe it's G-A -- ooh, I
14 don't know if it's one R or two, E-T-T, and then H-E-W.

15 THE COURT: Thank you.

16 Go ahead, Mr. Schulmeister.

17 MR. SCHULMEISTER: Actually, it's one T.

18 THE WITNESS: Oh, one T.

19 Q (BY MR. SCHULMEISTER) Have you had
20 conversations or communications with Mr. Vaught about
21 your concerns about what you described as trash and
22 debris in the watershed?

23 A Yes, I have.

24 Q Okay. And has he ever asked you to
25 identify where it is so his crew can go retrieve it?

1 A Yes, he did send me a text saying we
2 should get together and look at a map. And something
3 happened and we both got busy. But I think I did
4 mention a few locations to him, and I noticed that some
5 of the trash that I had sent photos of has been
6 removed.

7 Q Okay. And has Mr. Vaught ever done
8 anything to interfere with your ability to hike in East
9 Maui?

10 A No, but he didn't follow through on
11 meeting with our community, which we really strongly
12 asked for, and he seemed to promise when he came to
13 work for Mahi Pono, and as a result when the stream
14 diversion was closed on Hanehoi and a large wall of
15 water was released, people were swimming in pools and
16 were nearly swept over the edge on a waterfall because
17 no one knew that some big wall of water was coming down
18 the stream. That was a -- a sad breach in
19 communications.

20 Q A big wall of water came down when a di
21 -- when a -- explain that again? A big wall of water
22 came down as a result of what?

23 A The upper diversion was being repaired
24 and modified to allow the stream to flow. And so the
25 water that normally would have passed through that

1 diversion was being impounded by some sort of barrier.
2 When the diversion was completed, the cement was dry
3 and the -- the grate that it -- it had captured the
4 water was -- was filled in.

5 That large amount of impounded water was
6 released at a higher elevation and came rushing down
7 the stream. And there are some pools along the length
8 of the stream that are used by our community. And
9 people were in the pools and all of a sudden the pool
10 ends in a 200 foot waterfall, and all of a sudden there
11 was a -- a wall of muddy brown water on a sunny day
12 that came down like a flash flood, and people had to
13 grab onto roots.

14 And, of course, they contacted me to find out
15 what was going on. I contacted Mark, and Mark said,
16 yeah, that was the day that we finished work.

17 And I said well, Mark, you should have told us
18 if you were letting go of a -- a large amount of water,
19 'cause it's going to be a very unnatural condition from
20 what's in the stream. And so they're just
21 opportunities for communication that did not happen.
22 People took a video of it so I know it actually
23 happened. I've seen the video.

24 MR. SCHULMEISTER: All right. I have no
25 further questions of this witness.

1 THE COURT: All right. Thank you.

2 All right. Ms. Goldman, you're up.

3 Actually, I think we --

4 MS. GOLDMAN: I think I'm going --

5 THE COURT: Hold on. I apologize.

6 We've been going 45 minutes so let's take our
7 break now for a little more than ten minutes. I'll see
8 you all at five minutes of. All right? So that's
9 about 12 minutes from now.

10 We're in recess. Thank you.

11 (Recess taken at 9:44 a.m.)

12 (Proceedings resumed at 9:59 a.m.)

13 THE COURT: All right. We are back on record.

14 FTR on?

15 THE BAILIFF: Yes.

16 THE COURT: Let's see. I can see all the
17 attorneys in my screen. Looks like we're ready to go.
18 Welcome back, Ms. de Naie.

19 Ms. Goldman, you ready?

20 All right. Go ahead.

21 MS. GOLDMAN: Ready, Your Honor.

22 Miss Goldman for the State. How's the sound?

23 Good? Okay.

24 CROSS EXAMINATION

25 BY MS. GOLDMAN:

1 Q All right. Miss de Naie, please take a
2 look at Plaintiff's Exhibit 58.

3 THE COURT: Was that 5-8?

4 THE WITNESS: Yes.

5 MS. GOLDMAN: Yes, Your Honor. 5-8.

6 Q (BY MS. GOLDMAN) This photo is
7 Ho'olawanui Stream. That's H-O-O-L-A-W-A-N-U-I Stream,
8 right?

9 A Yes.

10 Q And the debris that you've been referring
11 to is the pipe, right?

12 A Yes. It's a broken off section of pipe.

13 Q Okay. You can put that photo aside for
14 now.

15 So you testified that these photos, this photo
16 and some of the others you discussed yesterday were
17 taken in February of this year, right?

18 A Yes, they were. There was a site visit
19 --

20 Q So --

21 A -- arranged in February of this year.

22 Q Pardon me. So you couldn't have given
23 them to the Board prior to their latest renewal
24 decision which was November of 2019, right?

25 A I'm sorry. The audio is very bad. All I

1 heard was 2019. What -- what else did you say?

2 Q And so you couldn't have given these
3 photos to the Board prior to their latest renewal
4 decision, which happened in November 2019, right?

5 A No, I gave other photos in -- in 2019 and
6 2018.

7 Q Okay. And like these photos, those
8 photos also didn't have GPS coordinates on them, did
9 they?

10 A No, I don't own a GPS.

11 Q And you realize that the total licensed
12 area covered by the revocable permits in this case is
13 32,000 acres, right?

14 A Yes. But I believe I gave --

15 Q And that --

16 A -- the stream locations.

17 Q And the total watershed area is actually
18 56,000 acres, right?

19 A Yes.

20 MS. GOLDMAN: Okay. Thank you.

21 No further questions from the State.

22 THE COURT: All right.

23 Mr. Rowe, you're up.

24 MR. ROWE: I have no questions, Your Honor.

25 THE COURT: All right. Thank you.

1 Back to you, Mr. Frankel.

2 REDIRECT EXAMINATION

3 BY MR. FRANKEL:

4 Q Just two quick questions. Ms. de Naie,
5 yesterday you referred to in answering questions from
6 Mr. Schulmeister about comments from the State's
7 department of Fish and Wildlife, and I want to direct
8 your attention to Exhibit J-19, Joint 19, which is in
9 evidence.

10 A Okay. We are pulling that up.

11 Ah, yes, I see. This is the letter that I was
12 talking about. It's Division of Forestry and Wildlife.
13 Thank you. It's not Fish and Wildlife. Is that -- is
14 that the point that you're trying to make?

15 Yeah, it's State Division of Forestry and
16 Wildlife that made comments very similar to those of
17 the Sierra Club that the debris and unneeded dams and
18 so forth should be removed when possible.

19 MR. WYNHOFF: Your Honor.

20 THE COURT: Hello?

21 MS. GOLDMAN: Excuse me, Your Honor. We were
22 just wondering where the question was.

23 THE COURT: Okay. I think Ms. de Naie was
24 trying to anticipate Mr. Frankel's question.

25 And, Ms. de Naie, I appreciate you being

1 proactive. But, again, that's not how things work in a
2 courtroom. You need to just wait for the question.

3 Okay?

4 THE WITNESS: Oh, I'm sorry. I was
5 embarrassed when I read it and realized my mistake.
6 Sorry.

7 THE COURT: Okay. All right. So just stand
8 by. Here comes another question and just answer that
9 question and we'll keep moving along.

10 Q (BY MR. FRANKEL) So this question is I
11 just want a really narrow focus. Do you recall the
12 2001 meeting of the Board of Land and Natural Resources
13 when the revocable permits were approved for another
14 year?

15 A I do recall being there, yes.

16 Q And who testified for the Sierra Club at
17 that meeting?

18 A My recollection is that the chair then,
19 Miranda Camp, testified for the Sierra Club.

20 Q And who testified for Maui Tomorrow?

21 A Well, my recollection is I think it was
22 Mark Sheehan who I think was president of Maui Tomorrow
23 at that time.

24 Q And who did you testify in behalf of?

25 A I testified on behalf of -- of my

1 community in Huelo, H-U-E-L-O, and -- and other East
2 Maui communities, because I -- I had friends in all
3 these other communities that were affected by the
4 leases.

5 MR. FRANKEL: Thank you, Your Honor. No
6 further questions.

7 THE COURT: All right. Thank you.
8 Back to you, Mr. Schulmeister.

9 MR. SCHULMEISTER: No further questions.

10 THE COURT: All right. Thank you.

11 Ms. Goldman?

12 MS. GOLDMAN: Nothing further from the State.

13 THE COURT: Thank you.

14 Mr. Rowe?

15 MR. ROWE: I have nothing further, Your Honor.

16 THE COURT: All right. Thank you.

17 Ms. de Naie, your testimony is finished.

18 Thank you for coming in.

19 (Witness exits.)

20 THE COURT: All right. What's next?

21 MR. FRANKEL: Your Honor, before I call Martha
22 Town -- Miss Townsend to the stand, I would like to
23 move and I'd like to ask this court for judicial notice
24 of one of the plaintiff's exhibits. And I'd like to
25 give you some context, but the exhibit is Plaintiff's

1 Exhibit 87.

2 THE COURT: Hang on. Let me get it up on the
3 screen here.

4 It would really help if you gave me and
5 everyone else advance notice when you're gonna do these
6 things, I'll tell you. But go ahead.

7 MR. FRANKEL: Okay. Well, Your Honor, the
8 trial memo, the first footnote, which I believe is on
9 page 4 or so, I do mention it. This is -- well, I
10 should -- let me back up.

11 This is an excerpt of a book by Handy and
12 Handy, Native Planters in Old Hawai'i, Their Life,
13 Lore, and Enjoyment. The Hawai'i Supreme Court has
14 taken judicial notice of this book in three different
15 cases.

16 One is Reppun vs. The Board of Water Supply,
17 and the citation I'll give you is 65 Haw. 531 at 541,
18 and note 3, and note 14 as well. So, anyway, that's
19 one case.

20 The second case in which the Supreme Court
21 took judicial notice of this book is McBryde Sugar
22 Company, 55 Haw. 260, and this is cited on page 270,
23 292, and note 35.

24 And in the second Waiāhole case In Re Water
25 Use Permit Application, which is 105 Hawai'i 1 at 11,

1 and specifically -- and, again, this is all in that
2 footnote in the trial brief, in our trial memo on,
3 sorry, page 3 of the trial memo, all of the citations
4 are there.

5 The last case I mentioned is particularly
6 important because the Hawai'i Supreme Court cited the
7 Water Commission's citation of this book for the
8 proposition that in traditional Hawaiian culture no
9 ditch was permitted to divert more than half the flow
10 from a stream, and it is that particular fact that
11 we're asking the court to take judicial notice of.

12 Exhibit 87 is -- I mean, the Handy book is 600
13 pages. What was provided to the court is the cover,
14 the first two pages, the Table of Contents, and the
15 section on Water.

16 And if you'd like when Miss Townsend comes on
17 the stand, I can ask her about the authenticity. But
18 that's -- anyway that's that.

19 THE COURT: All right. So let me start with
20 seeing if there's any objection. Mr. Schulmeister?

21 MR. SCHULMEISTER: Your Honor, I don't object
22 to it being, you know, admitted for the purpose of
23 historical information. But I would object to the
24 characterization that the 50 percent is some sort of
25 legal requirement. I don't think there's any basis for

1 that.

2 THE COURT: All right. I think, Mr. Frankel,
3 you're nodding your head, so I take it you're okay with
4 that limitation? Yes?

5 MR. FRANKEL: Understood. It's evidence, it's
6 not law.

7 THE COURT: Okay. All right. So Ms. Goldman?

8 MR. WYNHOFF: Your Honor, I'll be addressing
9 this 'cause I'm gonna be working with Ms. Townsend as
10 well. May I have --

11 Mr. Frankel, may we have the specific
12 reference to that one particular point so that I could
13 look at that?

14 MR. FRANKEL: Yes.

15 MR. WYNHOFF: May we --

16 MR. FRANKEL: Sure. Wow, I thought I -- let
17 me -- I thought I had. I thought I had the page number
18 written down.

19 It is page -- it's page 58 at the very bottom.

20 THE COURT: Which is Bates 19 I believe.

21 MR. FRANKEL: Of the pdf, yes.

22 THE COURT: Yeah, I see it.

23 MR. WYNHOFF: Your Honor, I --

24 Thank you, Mr. Frankel.

25 Your Honor, I have I guess a slightly

1 different reaction than Mr. Schulmeister that perhaps
2 this -- we can know this all. I would actually be
3 willing to basically stipulate that, you know, that was
4 the gist of water rights under the traditional system.
5 But I don't really feel comfortable in stipulating the
6 entire document into evidence, because, you know,
7 obviously it's an excerpt of a vastly larger document
8 and that would mean the whole document, either this
9 small excerpts of it contain a bunch of excerpts from
10 hearsay and I could have I suppose, but did not go over
11 it to see if there's anything else in there.

12 If we're looking at this particular item from
13 it, I'd prefer to focus our attention on that
14 particular item.

15 THE COURT: So, Mr. Fran --

16 MR. WYNHOFF: Which, as I said, I don't
17 particularly disagree with.

18 THE COURT: Very well. Let me circle back to
19 Mr. Frankel before I go to Mr. Rowe.

20 So, Mr. Frankel, are you really just looking
21 for this one piece where -- I'm going to read it into
22 the record just so we're clear here. As, quote, water
23 rights of others, taking water from the main stream
24 below the dam had to be respected, comma, and no ditch
25 was permitted to divert more than half the flow from a

1 stream.

2 Is that all you're trying to get in through
3 this document?

4 You're nodding.

5 MR. FRANKEL: Yes, Your Honor.

6 THE COURT: All right. So that I think
7 addresses your concern, Mr. Wynhoff. With that
8 clarification, what's your position?

9 MR. WYNHOFF: We would like -- with that
10 clarification then, I think it's not necessary for the
11 document to be received into evidence.

12 THE COURT: So you're objecting to the
13 document being introduced?

14 MR. WYNHOFF: Yes, Your Honor. Your Honor has
15 now read in that particular statement and I have no
16 objection to that particular statement being received
17 into evidence, which basically it has been already.

18 THE COURT: All right. And Mr. Rowe?

19 MR. WYNHOFF: (Indiscernible).

20 THE COURT: I'm sorry. I thought you were
21 done, Mr. Wynhoff. Go ahead. Were you finished?

22 MR. WYNHOFF: Your Honor, my last statement
23 was simply but the document, no, and I apologize. I
24 know I should make an effort to be done when I'm done.
25 Thank you, Your Honor.

1 THE COURT: All right. Mr. Rowe, how about
2 you?

3 MR. ROWE: I'll join in the statements made by
4 Mr. Wynhoff.

5 THE COURT: All right.

6 All right. So the proposal on the table,
7 Mr. Frankel, is that you withdraw your request to admit
8 the entirety of Plaintiff's 87 and we instead come to
9 some kind of a stipulation on the portion that I just
10 read into the record. Is that acceptable?

11 MR. FRANKEL: Yes, Your Honor, that's
12 absolutely acceptable to the Sierra Club.

13 THE COURT: All right. So what would the
14 stipulation be? That that sentence is part of -- is a
15 fair description of the traditional history of
16 diversions?

17 MR. WYNHOFF: Well, I thought my stipulation
18 would have been that it's evidence if that's what it
19 shows, Your Honor. I don't know that I -- I might be
20 willing to go with a fair description of it. Again, I
21 don't think I know anything to the contrary.

22 THE COURT: All right. I didn't mean fair in
23 any special way. I just -- I included that in the
24 sentence. I don't -- I can say I guess accurate would
25 be a better word than fair.

1 Can we all stipulate that this passage I read
2 into the record is a accurate description of what the
3 traditional diversion rule was? How about that?

4 MR. SCHULMEISTER: Your Honor, I'll be happy
5 to stipulate to -- that that's a correct statement from
6 this publication.

7 THE COURT: Oh, I see. Okay. You're going
8 even more thin.

9 MR. FRANKEL: Your Honor, I -- you know,
10 that -- I think that's fine. If it's just a simple
11 statement that -- and, here, let me see if I can phrase
12 this in a way that all -- will be acceptable to
13 everybody. Just a simple statement. According to
14 Handy and Handy, Native Planters in Old Hawai'i, Their
15 Life, Lore, and Enjoyment, comma, and then that
16 sentence you read.

17 And I suppose it should be prefaced with this
18 clause, in traditional Hawai'i, and then the sentence,
19 water rights of others taking water from the main
20 stream below the dam had to be respected and no ditch
21 was permitted to divert more than half the flow from a
22 stream, end quote. That's all.

23 THE COURT: All right. Mr. Schulmeister,
24 how's that?

25 MR. SCHULMEISTER: That's -- that's fine.

1 THE COURT: Okay. Thank you.

2 Mr. Wynhoff?

3 MR. WYNHOFF: Yes, Your Honor.

4 Thank you, Mr. Frankel.

5 THE COURT: All right. Mr. Rowe?

6 MR. ROWE: I'm comfortable with that, Your
7 Honor.

8 THE COURT: Okay, great. So we've got it.
9 Thank you.

10 MR. FRANKEL: Thank you, Your Honor.

11 So the Sierra Club would like to call our next
12 witness, Marti Townsend.

13 THE COURT: All right. Thank you.

14 Ms. Townsend, I'll remind you you're still
15 under oath. We don't need to reswear you. All right?

16 THE WITNESS: No, I haven't -- I haven't been
17 sworn in. Have I?

18 UNIDENTIFIED SPEAKER: No.

19 THE COURT: Oh, you're right. I think I've
20 just been looking at your face on the camera so much I
21 just sort of assumed you had testified. I apologize.

22 All right. Let's swear in Ms. Townsend.

23 THE CLERK: Ms. Townsend, you may remain
24 seated and I'll swear you in. Raise your right hand.

25 You do solemnly swear or affirm that the

1 testimony you're about to give will be the truth, the
2 whole truth, and nothing but the truth? If so, respond
3 by saying I do.

4 THE WITNESS: I do.

5 THE CLERK: Thank you.

6 THE COURT: All right. Go ahead, Mr. Frankel.

7 MARTI TOWNSEND,

8 called as a witness by Plaintiff,

9 having been first duly sworn was

10 examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. FRANKEL:

13 Q Ms. Townsend, where do you work?

14 A Sierra Club.

15 Q What is your title at the Sierra Club?

16 A I am the Chapter Director for the Sierra
17 Club Hawai'i.

18 Q What are your responsibilities as the
19 Director of the Sierra Club's Hawai'i Chapter?

20 A I am responsible for all operations of
21 the Sierra Club in the State of Hawai'i. This includes
22 all fundraising, all of the compliance, and I also
23 serve as spokesperson, and I -- I participate in all of
24 the advocacy, lobbying, litigation. So all aspects of
25 the Sierra Club from the statewide chapter to the

1 groups. I am supposed to ensure that we are complying
2 with national policies and, yeah, are doing our job
3 like we're supposed to, fulfilling our mission.

4 Q What type of organization is the Sierra
5 Club?

6 A A nonprofit.

7 Q What type of nonprofit is the Sierra
8 Club?

9 A It's a 501(c)(4).

10 Q And can you briefly highlight the
11 distinct -- the difference between a 501(c)(4)
12 nonprofit and a 501(c)(3) nonprofit?

13 A A 501(c)(3) nonprofit is authorized by
14 the IRS to accept tax deductible contributions and
15 conduct charitable activities. A 501(c)(4) nonprofit
16 organization is able to engage in lobbying in
17 particular and -- but cannot except any non-tax
18 deductible contributions. So all gifts to the Sierra
19 Club are not tax deductible, and in exchange the Sierra
20 Club is able to lobby legislators -- elected officials
21 on issues.

22 Q Why did the Sierra Club become a
23 501(c)(4) organization rather than a 501(c)(3)
24 organization?

25 A Because we saved the Grand Canyon. In

1 1966 the Sierra Club fought to protect the Grand Canyon
2 from a federal proposal to install two dams on the
3 river that runs through the Grand Canyon. We were
4 successful in protecting the Grand Canyon in its
5 natural state, but the federal government sought to
6 revoke our 501(c)(3) status. And we basically
7 negotiated AN arrangement where the Sierra Club was
8 allowed to continue to operate and function as a
9 (c)(4).

10 Q Can you very briefly explain the Sierra
11 Club structure starting at the local level and moving
12 up?

13 A Okay. So in Hawai'i we have four county
14 based groups. They are all volunteer led. And they
15 work on issues that are specific to their geographic
16 area, their county. They are nested under the Hawai'i
17 State Chapter, so includes me. We have an elected
18 executive committee of all volunteers, and we focus on
19 issues of statewide concern, but then also support the
20 groups on their very local issues that they work on.

21 And then we are nested beneath the national
22 Sierra Club, which is headquartered in California. And
23 it has an executive committee elected by members that
24 set the policies and direction for the Sierra Clubs
25 nationwide.

1 Q And among all that convoluted structure
2 part, is it all one organization?

3 A Yes. They're one Sierra Club. It is not
4 convoluted. It is very systematic. And we have one
5 employer identification number and we -- we -- like we
6 have -- well, one system, and everything that we do is
7 consistent with that.

8 Q And how many members -- well, I'm sorry.
9 How do members of -- I think you referred to the
10 executive committee. How do members of the executive
11 committee get chosen?

12 A Our executive committees, all of them,
13 from national to state level to the county levels are
14 elected by the membership of the Sierra Club. So to be
15 more clear, for those members living in each geographic
16 area, they elect their group executive committee, they
17 elect the statewide executive committee, and they elect
18 the national committee members.

19 Q And how long are the terms on the
20 executive committees?

21 A For Hawai'i it's two years.

22 Q And if there are say four slots up for
23 election on the executive committees position, how many
24 candidates are put on the ballot?

25 A Five. Our by-laws require that there is

1 always one more candidate than there are open seats.

2 Q Are any of the officers of the executive
3 committee paid by the Sierra Club?

4 A No.

5 Q How many members do Maui groups executive
6 committee have?

7 A Their by-laws are authorized for up to
8 nine, and I believe their current is seven.

9 Q How many members does the state chapters
10 executive committee have?

11 A Eleven.

12 Q How many dues paying members does the
13 Sierra Club have in Hawai'i?

14 A About 5,000.

15 Q And how many dues paying members does the
16 Sierra Club have on Maui?

17 A Over 800.

18 Q What kind of interaction do you have with
19 Sierra Club members on Maui?

20 A A lot of interaction. They -- they are
21 the people that I'm accountable to. So I am -- I call
22 them, e-mail them, text them, and -- and they do the
23 same for me. They need my permission to engage in
24 certain activities, and then I look to their input and
25 advice for things that I am carrying out on their

1 behal f. And that's true for all of the groups.

2 Q Who makes the decision as to whether the
3 Sierra Club should file suit or not?

4 A Um -- okay. That's a con -- take a
5 little bit of an answer. First, the group that is
6 closest to wherever the claim is being brought, they
7 have to pass a motion at a regular executive committee
8 meeting asking to file suit.

9 That motion is passed up to the statewide
10 chapter. I review that. If I -- if I feel that
11 there's a claim sufficient, I fill out what's called a
12 new matter form, and I do that in conjunction with an
13 attorney locally and an attorney that works for the
14 national Sierra Club.

15 That's presented to our statewide executive
16 committee. They re -- they assess the claims. They
17 have to also look at our ability to pay for the
18 litigation, like anticipate how much it'll cost,
19 ability to cover. And then -- and also if there are
20 other ways for us to accomplish our goals.

21 One of the things the national Sierra Club
22 wants to make sure we do is ensure the litigation --

23 THE COURT: I'm sorry.

24 THE WITNESS: Oh, I'm going too fast. I'm
25 sorry.

1 THE COURT: You are.

2 THE WITNESS: Sorry.

3 THE COURT: Please slow down.

4 THE WITNESS: Okay.

5 THE COURT: Thank you.

6 THE WITNESS: Should I start from the
7 beginning and?

8 THE COURT: Let me take a quick survey here.

9 THE WITNESS: Okay. Sorry.

10 THE COURT: Off record.

11 (Off record.)

12 THE COURT: All right. So we are back on
13 record, and the court relayed to the witness that where
14 we dropped off was you were making a statement about
15 how the national organization wants to make sure of
16 certain things. So why don't you go ahead and pick up
17 your answer there. Thank you.

18 THE WITNESS: Thank you.

19 The national Sierra Club wants to ensure that
20 the litigation that we take up as one organization is
21 consistent with our mission and policy positions. And
22 once the -- if the statewide executive committee
23 approves the litigation, and commits to paying for it,
24 it is then sent to the national litigation committee,
25 which is comprised of seven lawyers. Some of them are

1 employees of the Sierra Club and some of them are
2 volunteer attorney. They review the case and then
3 approve it, if it meets all of the requirements.

4 So there are three formal votes that are taken
5 on a -- a decision to file suit, and there are several
6 sort of informal checks and balances that we do as
7 staff to support the volunteers.

8 Q (BY MR. FRANKEL) Okay. Thank you.

9 Has the Sierra Club sued Maui County over any
10 issues?

11 A Yes.

12 Q What's an example of that?

13 A Well, we just recently won this U.S.
14 Supreme Court case against Maui and the Lahaina
15 Injection Wells. Very proud of that.

16 Q And a couple -- did the executive branch
17 of Maui County and the legislative branch of the
18 county, the council and the mayor, did they have the
19 same position regarding how to deal with the lawsuit?

20 A Okay. I'm sorry.

21 MR. SCHULMEISTER: Your Honor, I'm --

22 THE WITNESS: In --

23 MR. SCHULMEISTER: I'm gonna object.

24 THE COURT: Sustained.

25 MR. SCHULMEISTER: This does not appear to be

1 relevant.

2 THE COURT: Well, I'm not so worried about the
3 relevance as more about how would she know. So you'd
4 need to lay more of a foundation before you get into
5 that.

6 MR. WYNHOFF: Your Honor, I would also object
7 on 403 grounds. I mean, we've really gone far afield.

8 THE COURT: Yeah. Let's start with that,
9 Mr. Frankel. What are you trying to show here?

10 MR. FRANKEL: I almost feel to answer the
11 question maybe Ms. Townsend shouldn't be in the room.

12 THE COURT: Okay.

13 MR. FRANKEL: Because I wanna --

14 THE COURT: All right. Time out.

15 Ms. Townsend, sorry. We often excuse
16 witnesses while we're having legal argument. So I'm
17 gonna ask you to step outside.

18 THE WITNESS: Okay.

19 THE COURT: Thank you.

20 (Witness exits.)

21 MR. FRANKEL: You know, and I just wanna -- so
22 our offices are -- I just wanna make sure she goes out
23 in the corridor. This will be very quick.

24 (Counsel exits.)

25 (Counsel resumes.)

1 MR. FRANKEL: Sorry.

2 THE COURT: Okay.

3 MR. FRANKEL: So we have talked earlier, there
4 was a motion in limine about Sandy -- I can't remember
5 his last name -- Baz, from the county testifying as to
6 the -- certain issues. And I am going to be filing, I
7 don't know what you'd call it, a trial brief or
8 whatever, as to why he should not be allowed to
9 testify.

10 And the argument that I will be laying out is
11 policy by the -- in the county is a product of the
12 legislative and executive branches. It is passed by
13 ordinance by the council and approved by the mayor. So
14 really it's the general plan that speaks to the policy
15 of a county.

16 In the litigation that Marti was referring to
17 there was a split between the council and the mayor, in
18 terms of settlement negotiation -- in terms of whether
19 to settle the case before the U.S. Supreme Court made
20 its decision.

21 And so I want to make it clear on the record
22 that the legislative and executive branches do
23 sometimes have different positions on issues, but when
24 it comes to general policy issues, there is only one
25 voice, and that's the voice expressed in the general

1 plan that is passed by the council and approved by the
2 mayor.

3 THE COURT: All right. Well, I have lots of
4 questions about that. But let me hear from counsel.

5 Since, Mr. Wynhoff, since you started the
6 discussion on relevance, I'll let you go first. And
7 then I'll hear from Mr. Schulmeister and Mr. Rowe,
8 since we're talking about his county. He gets to go
9 last.

10 MR. WYNHOFF: So, Your Honor, that is actually
11 a really fascinating question that Mr. Frankel knows
12 quite a bit about and he delved into it a little bit
13 with the State as well. So I have -- it's not a
14 hundred percent clear to me exactly what he's going to
15 file with respect to this case, and I'm looking forward
16 to seeing it.

17 But what is pretty clear to me is that -- two
18 things with respect to this water case. I think we
19 all, you know, ordinary people reading the paper, which
20 most of us or some of the older of us still do,
21 understood that there is a -- there were people in
22 the -- on the Maui County Council who didn't agree with
23 the mayor taking the case all the way up to the Supreme
24 Court or pursuing it in the Supreme Court. But the
25 fact is that nevertheless the mayor did do that. I

1 believe that Mr. Rowe, for example, reports to the
2 mayor. And if the mayor or, you know, the corp counsel
3 reports to the mayor and the mayor tells him to do it,
4 then that's what the corp counsel do.

5 To the extent that we're talking about, you
6 know, okay, I'm more familiar with the public policy of
7 the State. The public policy of the State is typically
8 set by the legislature, but I'm not exactly sure how
9 that relates to this particular case.

10 And so having made that long winded point with
11 respect to my first point, my short winded point is
12 going to be that the issue of what the county did or
13 did not do in the water right -- in the well injection
14 case is so far peripheral and far afield from this that
15 it ought to be barred under Rule 403.

16 My third point even shorter is I don't think
17 this witness -- there's no foundation for her knowing
18 anything about it at all. The people he ought to ask
19 would be the county I would think.

20 Thank you, Your Honor.

21 THE COURT: All right. Mr. Schulmeister?

22 MR. SCHULMEISTER: I mean, I basically join in
23 that, but I'd just like to add that, you know, the
24 Water Code, you know, the State Water Code specifically
25 requires the Water Commission to consult with the mayor

1 of the county where streams are located with regard to
2 any amendment of interim instream flow standards.

3 So, I mean, that's just in anticipation of
4 this later argument he's gonna make. But, actually,
5 the Code actually requires consultation with the mayor.
6 So to the extent that what's being -- what's at issue
7 here is how much water should be left in the streams,
8 you know, I can't see how the Water Commission would be
9 required to consult with the mayor, but the court would
10 be allowed to exclude consideration of what the mayor
11 has to say. I think that's a fundamental
12 contradiction.

13 THE COURT: And Mr. Rowe?

14 MR. ROWE: Thank you, Your Honor.

15 I'm questioning the relevance of at least for this
16 particular case. I think if anything it shows that
17 there are multiple ways to interpret a policy between
18 the legislation -- the legislative and the executive
19 branch. If anything, I think it goes against what
20 Mr. Frankel is trying to assert that it does say.

21 It's showing that there can be some sort of
22 official document that can be interpreted in multiple
23 ways and that setting what an official quote-unquote
24 policy is is really up to -- is a matter of
25 interpretation.

1 You know, I agree with the general premise of
2 there being a separation of powers. However, with
3 regard to specific policies I think it's pretty obvious
4 that there are different ways to interpret various
5 things. So I'm just not entirely sure how this is
6 relevant to proving that and how this is even an
7 argument that can be made factually.

8 THE COURT: All right. So the objection is
9 sustained. The court's just not convinced at this
10 point that either this witness could possibly lay a
11 foundation or that it's relevant. But it's without
12 prejudice. We'll see how things unfold here depending
13 on what kind of arguments the County or the State or
14 A&B or EMI on this issue. But right now I'm not seeing
15 it. So let's do other testimony before we get into
16 this area, if ever.

17 MR. FRANKEL: Thank you, Your Honor.

18 I'll go get the witness back.

19 THE COURT: All right.

20 (Counsel exits.)

21 THE COURT: All right. We are back on record.

22 Welcome back, Ms. Townsend.

23 Just for planning purposes, we've got maybe
24 10, maybe 15 minutes before the break. Go ahead.

25 Q (BY MR. FRANKEL) Ms. Townsend, what is

1 the relationship between Maui Tomorrow and the Sierra
2 Club?

3 A There's no formal relationship. We are
4 different organizations. Sometimes we align on issues
5 and sometimes we do not.

6 Q What is the Sierra Club's mission?

7 A Sierra Club's mission is to help people
8 explore, enjoy, and protect the environment. We focus
9 on getting people out into nature so they can develop a
10 relationship with the natural environment and a love
11 for the natural environment, and from there help them
12 each person in taking actions to protect the
13 environment.

14 Q What does the Sierra Club do to help
15 people enjoy and explore nature?

16 A Well, we do a wide variety of things.
17 Most importantly, we lead what we call outings, which
18 are activities outside, and usually they are hikes. We
19 also do evasive species removals, trail maintenance,
20 native species planting, things of that nature.

21 Q And what kind of hikes does the Sierra
22 Club offer in East Maui?

23 A A wide variety of hikes around streams,
24 and the whole point of East Maui streams. The
25 watershed is amazing.

1 Q And how are members of the Sierra Club
2 affected by the diversion of East Maui streams?

3 A Well, when water is diverted, the streams
4 do not flow as much as they naturally would, and so
5 it's harder for people to get to those natural places,
6 right. To be able to experience the stream in its
7 natural state you would have to hike farther, because
8 the water runs out before it gets down to the ocean,
9 and the hike is less enjoyable. It is hot when it
10 really should be cool. There are invasive species in
11 the water as well as around the stream. There are
12 mosquitoes. And so it's just the overall experience of
13 the hike is less pleasant and you have to -- to get to
14 that point where you can experience a waterfall or just
15 the natural state of walking along the stream, you have
16 to go much farther into the forest.

17 Q And how will these hikes be affected if
18 diversions increase?

19 MR. SCHULMEISTER: Your Honor, --

20 THE WITNESS: (Indiscernible) --

21 MR. SCHULMEISTER: -- I'm gonna object.

22 Your Honor, I would like to object. I think
23 there's inadequate foundation that she has personal
24 knowledge of what goes on in these hikes.

25 THE COURT: Okay. Well, I think she just

1 answered the question though. I mean, how is that
2 different from what she just testified to?

3 Mr. Frankel?

4 MR. FRANKEL: That -- I just wanna nail every
5 corner of the structure down solid, Your Honor. But
6 you're right. That's fair.

7 THE COURT: All right. Let's move on to a new
8 area.

9 MR. FRANKEL: Okay.

10 Q Well, hopefully this is new enough. What
11 kind of impact does trash remaining on public land in
12 East Maui have on the enjoyment of Sierra Club hikes?

13 A Yeah, it's -- it's like a --

14 MR. SCHULMEISTER: Your Honor, I'm gonna make
15 the same objection. There's no foundation that she has
16 personally seen any trash or has personal knowledge of
17 this.

18 THE COURT: All right. Sustained.

19 But I'm --

20 MR. FRANKEL: Okay.

21 THE COURT: I'm not sure --

22 MR. FRANKEL: I'll --

23 THE COURT: -- it's necesse -- that said, I'm
24 not making a ruling that she has to have personally
25 seen it. I mean, she's the head of the organization

1 so. We'll see how it unfolds.

2 Q (BY MR. FRANKEL) So have you -- have you
3 as Director, are you in communication with Sierra Club
4 members on Maui?

5 A Yes.

6 Q And have they discussed -- have you had
7 discussions with them regarding their experiences
8 hiking in East Maui?

9 A Yes.

10 MR. SCHULMEISTER: I'm gonna object as calling
11 for hearsay.

12 THE COURT: That's okay. Overruled.

13 Q (BY MR. FRANKEL) So based on your
14 experience and understanding as the Director of the
15 Hawai'i Chapter of the Sierra Club, what kind of impact
16 does trash remaining on public land in East Maui have
17 on the enjoyment of Sierra Club hikes?

18 MR. WYNHOFF: Objection Your Honor. I didn't
19 object to the last one because the yes or no answer
20 didn't call for hearsay, but this one, number one,
21 calls for hearsay, number two, lack of foundation.

22 THE COURT: All right. Understood.
23 Overruled.

24 You may answer.

25 THE WITNESS: Okay. So the experience of

1 trash, especially this kind of trash, like the word
2 trash doesn't sometimes encapsulate what we're looking
3 at. It's -- you know, it's gnarled, twisted metal.
4 It's, you know -- we'll have concrete that's falling
5 apart with like rebar sticking out. It -- it -- it
6 looks -- the -- it interrupts the experience that one
7 has when they are trying to commune with nature.

8 The Sierra Club members on Maui have actually
9 taken me on hikes to -- to show me and to help make the
10 case for why this was my -- it was important for us to
11 pursue that. So, you know, it's -- you're -- you're
12 walking through nature, you -- well, you're walking up
13 the trail and along a dry stream bed, it's hot, you're
14 sweating, the tripping on the base of roots,
15 mosquitoes, and finally you get to a place where the
16 water starts to flow and it's cooler, there are less
17 mosquitoes, you start to see beautiful native forest,
18 you start to native critters in the water, and it's
19 like an emotional experience.

20 And then all of a sudden you see this old
21 dilapidated diversion, or a wall of a diversion or
22 something, and it just like is a scar, a -- a rick in
23 that experience of being in nature. And -- and then
24 you -- you cr -- you somehow, you know, try to safely
25 bypass that and you have to start over again in terms

1 of like getting back into the emotional experience of
2 being in untouched nature.

3 Q (BY MR. FRANKEL) What is the Sierra
4 Club's interest in native aquatic species like 'o'opu
5 and 'ōpae, and maybe -- I don't know if we have a
6 different court reporter, so maybe I should spell that.
7 O-O -- okay.

8 THE COURT: You're okay?

9 THE WITNESS: The Sierra Club's interest is in
10 protecting and enhancing native ecosystems. So having
11 these native species in the stream fulfills our
12 mission, helps fulfill our mission. We're also
13 interested in ensuring just a healthy ecosystem
14 overall. And these -- having these types of native
15 species in the stream is an indicator that we have a
16 healthy ecosystem from the top of the stream all the
17 way down to the ocean to the ocean fisheries, because
18 we recognize that it is all connected mauka to makai.

19 Q In your role -- were you done?

20 A Uh-huh.

21 Q In your role as Sierra Club Director,
22 have you testified before the BLNR on the continuation
23 of A&B and EMI's revocable permits?

24 A Yes.

25 Q Which years?

1 A Every year since I've been hired, which
2 was 2015. So 2015, 2016, 2017, 2018, 2019. I will
3 make one caveat. There are sometimes multiple hearings
4 in a year. There was one in which I was unable to
5 attend and so a Maui group staff person attended in my
6 place.

7 Q And was that testimony delivered on
8 behalf of Sierra Club's members?

9 A Yes.

10 Q And does that include Miranda Camp?

11 A Yes.

12 Q Does that include Megan Powers?

13 A Yes, definitely.

14 Q And does that include Rob Weltman?

15 A Yes. I -- I actually consult them in
16 writing testimony to ensure that what I am relaying to
17 decisionmakers is accurate.

18 Q And what has been the Sierra Club's
19 position on the continuation of the revocable permits?

20 A We are opposed.

21 Q How are the Sierra Club's interests
22 adversely affected by the continuation of the revocable
23 permits?

24 A Well, continuing revocable permits as we
25 have been continues to ensure that the diversions

1 continue without adequately protecting public trust
2 resources and mitigating the harms that the public has
3 repeatedly raised with the Board.

4 Q In which years did the Sierra Club
5 request contested case hearings on the continuation of
6 the revocable permits?

7 A 2018 and 2019.

8 Q And those requests were approved or
9 denied?

10 A Denied.

11 Q Okay. I wanna ask you about the
12 information that was given to members of the Board of
13 Land and Natural Resources before decisionmaking in
14 2018. Did you review the staff submittal that was
15 provided to members of the Board?

16 A Yes.

17 Q What information was given to the Board
18 members regarding the instream uses of the 13 streams
19 that were not the subject the Water Commission
20 contested case?

21 MR. WYNHOFF: Objection, foundation.

22 THE COURT: Sustained. I mean, how would she
23 know what the Board got, other than what's already in
24 the record?

25 MR. FRANKEL: Well, I guess that's precisely

1 it, Your Honor. But -- so let me rephrase.

2 Q So you reviewed the staff submittal,
3 right?

4 A Yes.

5 Q And you were at the Board meeting in
6 2018, right?

7 A Yes.

8 Q Based on your review of that, what
9 information was given to the Board members regarding
10 the instream uses of the 13 streams that were not
11 subject of the Water Commission's contested case?

12 MR. WYNHOFF: Objection, foundation. Your
13 Honor, this is gonna be simply argument. We've already
14 argued about what's incorporated by reference and et
15 cetera, et cetera, and it's cumulative and it's Rule
16 403.

17 THE COURT: Sustained.

18 MR. FRANKEL: Okay.

19 Q All right. What conditions did the Board
20 of Land and Natural Resources impose in 2018 and 2019
21 to protect the stream flows of these 13 streams?

22 A None.

23 MR. WYNHOFF: Foundation, Your Honor.

24 Foundation. I'm sorry. I didn't -- I wasn't
25 fast enough.

1 THE COURT: Well, I'm going to assume the
2 answer is based on the D&O, or the D -- I'm sorry, the
3 BLNR decisions that are already a matter of record. So
4 where --

5 MR. FRANKEL: Thank you, Your Honor.

6 THE COURT: I mean, the same thing I told
7 Mr. Schulmeister I say to you, Mr. Frankel. Let's get
8 the witness's personal knowledge about this case and
9 not use her testimony to rehash things that are already
10 in the record.

11 MR. FRANKEL: All right, Your Honor. No
12 further questions.

13 THE COURT: All right. Thank you.

14 All right. Mr. Schulmeister, you're up.

15 MR. WYNHOFF: Your Honor. Your Honor.

16 THE COURT: Actually, let me ask. Unless
17 you're all going to be very brief, it's time for a
18 break.

19 So brief or not?

20 MR. WYNHOFF: Your Honor, I am gonna be brief.
21 But, Your Honor, my -- simply my housekeeping question
22 is should I get Glenn Higashi to start walking over
23 here or are we gonna do him later today after lunch?
24 That's all.

25 THE COURT: No, we can start him before lunch.

1 So yeah, make the call please.

2 All right. Let's --

3 MR. WYNHOFF: Yes, Your Honor.

4 THE COURT: We have to take a break anyway.

5 So let's take it now. I mean, it's not like

6 Ms. Townsend is going to be leaving when her testimony

7 is done. So I'm sure she'll be available.

8 So we'll take an 11 minute recess right now.

9 We'll see you all back here at 11:00 o'clock.

10 We're in recess. Thank you.

11 (Recess taken at 10:50 a.m.)

12 (Proceedings resumed at 11:00 a.m.)

13 THE COURT: We are back on record.

14 FTR on?

15 THE BAILIFF: Yes.

16 THE COURT: All right. So let's see. Where

17 are we?

18 We're -- I think, Mr. Frankel, you had

19 finished with Ms. Townsend, right?

20 And Mr. Schulmeister?

21 MR. SCHULMEISTER: Yes. I'm prepared.

22 THE COURT: Okay.

23 All right. Everyone ready to go?

24 All counsel are present.

25 MR. SCHULMEISTER: Okay.

1 THE COURT: All right. Please go ahead.

2 CROSS EXAMINATION

3 BY MR. SCHULMEISTER:

4 Q Ms. Townsend, does the Sierra Club have
5 as one of its objectives to block the return of Central
6 Maui to agriculture?

7 A No.

8 Q Okay. And but the Sierra Club does want
9 to end the revocable permits being issued that would
10 support the diversion of water for agriculture, is that
11 right?

12 A Not quite, if I may clarify. What we are
13 opposed to is continuing revocable permits, the
14 practice of continuing revocable permits as they have
15 been. What we have been advocating to the Board is to
16 do some -- some fact based limitations on the water.
17 Basically give -- give Central Maui the water it needs
18 for the farming it is actually doing and no more.

19 Q Okay. So -- all right. And Sierra Club
20 has undertaken a number of actions in its effort to
21 stop the continuation of the RPs, is that correct?

22 A We have submitted testimony to the Board,
23 public testimony. We have commented on the draft EIS.
24 We have requested a contested case hearing, twice. I
25 think that's it in terms of the Board of Land and

1 Natural Resources.

2 Q Okay. But the Sierra Club also undertook
3 a major lobbying campaign with the legislature to
4 prevent the passage of any legislation that would
5 authorize the continuation of the Board's issuance of
6 holdover permits while a long-term lease application is
7 pending, correct?

8 MR. FRANKEL: Objection, relevance.

9 THE COURT: Overruled.

10 THE WITNESS: We do lobbying. We have lobbied
11 on many bills regarding water and streams. We have
12 lobbied against legislation that would have allowed
13 continued diversion of water inconsistent with
14 protection of public trust resources.

15 Q Okay. And this -- you were the person
16 who was primarily responsible for orchestrating this
17 lobbying campaign at the legislature?

18 A I don't know orchestrate. I am the
19 Chapter Director so I employed staff and I direct them.
20 We have a lobbyist and it is her responsibility to stay
21 focused on the legislature and the county council. And
22 when the legislature's not in session, the Board of
23 Land and Natural Resources, as well as other agencies.

24 Q Okay. So far as it's involved
25 encouraging members of the public and like you

1 mentioned there's a large number of Sierra Club members
2 in Hawai'i to come to the legislature specifically to
3 support the objective of making sure or trying
4 to prevent there being any legislative authority for
5 continuing the holdover permits while a long-term lease
6 application is pending, correct?

7 MR. FRANKEL: Objection, relevance.

8 THE COURT: Overruled.

9 THE WITNESS: I'm sorry. Could you restate
10 your question?

11 MR. SCHULMEISTER: Well, I'm gonna hold my
12 breath and ask if it could be read back.

13 THE COURT: Actually, I was gonna ask that you
14 rephrase it too, Mr. Schulmeister. It really was
15 compound. If you could break it down a little bit, it
16 will be easier to follow. Thank you.

17 MR. SCHULMEISTER: Okay.

18 Q So, Ms. Townsend, part of the effort, the
19 lobbying effort, involved rounding up lots of Sierra
20 Club members and other people to show up at the
21 legislature to testify against there being any
22 authority to continue the revocable permits, is that
23 correct?

24 A Uh, it -- not exact -- I mean, may I just
25 restate that what we do is we help people to engage in

1 testimony. Like to understand what bills are being
2 proposed and how the proposals affect their interests.
3 And we do that for a wide variety of bills. And some
4 of them do include issues around stream diversions.

5 Q Okay. And a lot of the language that was
6 presented by the Sierra Club, including yourself, was
7 couched in terms of this being, you know, a corporate
8 bailout of A&B and it should not be countenanced by the
9 legislature, correct? Do you remember that?

10 A Yeah, if you're speaking about a -- a
11 specific house bill, yes.

12 Q Okay. And so in addition to the efforts
13 at the legislature, I think you just testified you also
14 attended BLNR meetings on behalf of the Sierra Club and
15 again asking to have the holdover, annual holdover
16 permits denied. Correct? Have them denied.

17 A So denial only after all other options.
18 I mean, so you can see in our testimony, we outline the
19 specific steps that the Board could take to address our
20 concerns while still issuing a revocable permit -- a
21 revocable permit for some amount of water.

22 Q Right. And then -- and as following the
23 process that you described that the Sierra Club goes
24 through, the Sierra Club also went through the entire
25 process to authorize and follow through on the filing

1 of this lawsuit, also in an effort to block the
2 continuation of the revocable permits, correct?

3 A Yes, we followed this process, um -- to
4 approve litigation for the purpose of ending the
5 practice of this, you know -- you know, summarily
6 continuing revocable permits.

7 Q Okay. And one of the things requested
8 was a declaration that the permits are void or invalid,
9 is that right?

10 A Yes. If you're asking about the remedy
11 asked for in this case, I think so, yes.

12 Q And the Sierra Club also filed an amicus
13 brief in the Carmichael appeal arguing the same thing,
14 that the RPs should be declared invalid and no water
15 should be authorized to be diverted from state
16 watershed lands under these RPs, correct?

17 A I think that's a slight overstatement.
18 We -- we want the Board of Land and Natural Resources
19 to assess whether alternative water sources are
20 available before taking public stream water.

21 Q And I think you mentioned that Sierra
22 Club's also been involved in commenting on the draft
23 environmental impact statement, correct?

24 A Yes.

25 Q And, actually, the Sierra Club has

1 advocated that there be an environmental impact
2 statement, correct?

3 A Yes.

4 Q All right. So you're not objecting to
5 the fact that one is being prepared, correct?

6 A Yeah, we just wanna make sure it's done
7 well.

8 Q Right. And --

9 A We're helping.

10 Q I'm sorry? I was hearing --

11 A I -- I --

12 Q -- some --

13 A I -- I added that we are helping.

14 Q Okay. I don't know if that was my audio
15 or -- but --

16 THE COURT: Yeah, there --

17 Q (BY MR. SCHULMEISTER) -- are you done?

18 THE COURT: Yeah, there was a --

19 THE WITNESS: Yes.

20 THE COURT: There was little gurgle there in
21 the pipeline and I didn't quite hear it either,
22 Mr. Schulmeister, so you're not alone on that.

23 MR. SCHULMEISTER: Okay.

24 Q And have you been involved in organizing
25 the preparation of hundreds of comment letters to be

1 sent in response to the Department -- the draft
2 environmental impact statement objecting to any
3 continuation of the lease of East Maui water under the
4 proposed lease application?

5 MR. FRANKEL: Objection, assumes facts not in
6 evidence.

7 THE COURT: Overruled.

8 MR. FRANKEL: Compound.

9 THE COURT: Overruled. You may answer

10 THE WITNESS: Um -- okay. So I'm not sure how
11 to answer your question. I will say that we do
12 encourage the public to comment on draft environmental
13 impact statements, and so we did do that.

14 I -- I don't know off the top of my head how
15 many people actually submitted comments. So it's hard
16 for me to answer your question in that regard.

17 Q (BY MR. SCHULMEISTER) And did you
18 prepare form letters and suggested language for these
19 people to use?

20 A We emailed our members and explained to
21 them what was in -- in the EIS and suggestions for
22 things that we thought were of concern.

23 Q And these were Sierra Clubs members both
24 in Hawai'i and also all across the mainland?

25 A Uh -- hmm, I -- I'm not sure. I don't

1 think we emailed people not in Hawai'i.

2 Q Okay. And then you also submitted a
3 comment letter under Sierra Club's logo in addition to
4 all these letters that you suggested that other people
5 write, correct?

6 A Yes, the Sierra Club submitted official
7 organizational testimony, and individuals are free to
8 participate however they see fit.

9 Q Could you look at what's been marked
10 trial exhibit AB-174 as a proposed exhibit.

11 A One second.

12 MR. FRANKEL: Your Honor?

13 THE COURT: Yes, sir.

14 MR. FRANKEL: We don't have an AB-174.

15 THE COURT: Well, it's --

16 MR. SCHULMEISTER: Actually, it was emailed to
17 you several days ago.

18 MR. FRANKEL: We had a -- well, Your Honor, we
19 had a deadline for the exchange of exhibits long before
20 that, and we also had a deadline for submitting
21 exhibits to the court which was last week Friday.

22 THE COURT: Right. And this one was submitted
23 when, Mr. Schulmeister, for the record?

24 MR. SCHULMEISTER: It --

25 MR. FRANKEL: It was emailed to us --

1 THE COURT: No, I asked Mr. --

2 MR. FRANKEL: -- yesterday --

3 THE COURT: -- Schulmeister.

4 MR. SCHULMEISTER: I think it might have been
5 emailed on a Wednesday, this week, right? This is a
6 letter signed by Marti Townsend. It's the letter that
7 she just referred to.

8 THE COURT: Okay. Yeah, I'm looking at it.

9 MR. SCHULMEISTER: Was it Thursday?

10 THE COURT: Yeah. I mean, yeah, we don't like
11 having late exhibits, but this one doesn't seem that
12 controversial. It came from Ms. Townsend. So I'm
13 going to allow questioning. Go ahead.

14 MR. FRANKEL: Okay. Your Honor, can you -- I
15 need time to find my copy, because I haven't -- I don't
16 know, I have to find the email.

17 THE COURT: All right.

18 MR. FRANKEL: Mr. Schulmeister, did you send
19 that or did somebody else in your office send that out?
20 I gotta search for it.

21 THE COURT: Okay. Let's go off record.

22 We're off record.

23 (Off record.)

24 THE COURT: All right. We're back on record.

25 During the break, Mr. Frankel has a copy of

1 AB-174. Correct, Mr. Frankel?

2 MR. FRANKEL: Yes.

3 THE COURT: All right. And, Ms. Townsend, you
4 have that?

5 THE WITNESS: Yes.

6 THE COURT: All right. Go ahead,
7 Mr. Schulmeister.

8 Q (BY MR. SCHULMEISTER) Okay. So this is
9 the comment letter I believe dated November 7th, 2019.
10 Is that your signature on the last page?

11 Oh. I don't see a signature.

12 A I don't see that there's a signature.

13 THE COURT: I'm sorry. I didn't --

14 THE WITNESS: I don't --

15 THE COURT: -- hear that last comment?

16 THE WITNESS: I usually don't sign EIS comment
17 letters. Testimony to elected officials I tend to
18 sign. I don't see a signature on this one.

19 Q (BY MR. SCHULMEISTER) Okay. But is this
20 the comment letter that you sent?

21 A Yes, I believe so. Looks like it.

22 MR. SCHULMEISTER: Okay. I'd like to move the
23 admission of AB-174 into evidence.

24 THE COURT: All right. Mr. Frankel?

25 MR. FRANKEL: Relevance, Your Honor.

1 THE COURT: Yeah. What is the relevance,
2 Mr. Schulmeister?

3 MR. SCHULMEISTER: Well, I think the
4 relevance -- I think we're (indiscernible) to the
5 witness --

6 THE COURT: I'm sorry to interrupt. I haven't
7 read it yet so I have no idea what's in there. That's
8 why I'm asking you.

9 MR. SCHULMEISTER: Yeah. Well, I'm intending
10 to ask the witness about comments made about the Mahi
11 Pono farm plan and the availability -- the fact that
12 the instream flow standards may be amended and whether
13 or not Mahi Pono has taken that into account. So I
14 think that's relevant to the discussion here.

15 THE COURT: Okay. Well, if you're just going
16 to ask her about that --

17 If you have anything additional, Mr. Wynhoff.

18 But just as a preliminary point,
19 Mr. Schulmeister, if this is something she can testify
20 about from memory, there's no reason to put this
21 document into evidence yet. I mean.

22 All right, Mr. Wynhoff. Go ahead.

23 MR. WYNHOFF: Your Honor, that's kind of my
24 point too. I also -- frankly, I don't want to have it
25 in evidence because I don't want it to be evidence of

1 the truth of what's in here, and so I would object to
2 it on that basis too. I mean, just the fact that it
3 exists, I don't dispute that.

4 THE COURT: Okay. And this is a long letter,
5 Mr. Schulmeister. I don't have time to read it now to
6 decide what might be relevant and what isn't. But just
7 as a general rule, you know, we don't put documents
8 into evidence just because somebody issued them. First
9 we ask them questions, try to get their personal
10 testimony from their memory.

11 Yes, Mr. Frankel. Go ahead.

12 MR. FRANKEL: Your Honor, I just wanted to --
13 Miss Townsend, you can't -- don't -- you
14 should not be looking at it right now.

15 THE WITNESS: I'm sorry.

16 THE COURT: I agree.

17 THE WITNESS: And if we have (indiscernible)
18 the whole thing. Okay. Sorry.

19 THE COURT: Yeah. Just leave it face down for
20 now, Ms. Townsend.

21 THE WITNESS: Okay. Face down.

22 THE COURT: All right. So, Mr. Schulmeister,
23 I'm giving you, you know, leeway to go ahead and start
24 asking her questions about what might be in here, but
25 without introducing the document yet. So go ahead.

1 Q (BY MR. SCHULMEISTER) All right.
2 Miss Townsend, do you recall one of the comments that
3 you were making was a rhetorical question essentially
4 that doesn't Mahi Pono understand that even with a
5 long-term lease, CWRM could amend the instream flow
6 standards and reduce the amount of water flowing to
7 central Maui? Do you recall asking that as a
8 rhetorical question when you mailed that out in an
9 email?

10 MR. FRANKEL: Objection, Your Honor,
11 relevance.

12 THE COURT: Overruled.

13 THE WITNESS: Uh -- yes, I recall -- and that
14 in -- in the letter to the Commission.

15 Q (BY MR. SCHULMEISTER) All right. And,
16 in fact, Sierra Club would like to see the interim
17 instream flow standards amended to reduce the amount of
18 water flowing to Central Maui, correct?

19 A Hmm, not exact -- what we would like in
20 saying is that farming conducted -- diversified
21 agriculture conducted on Central Maui, um -- is done
22 within the limitations of the water that is available
23 where the streams are fully protected. We would like
24 for farming in Central Maui to only use the water
25 that's considered in excess of what the stream needs to

1 survive in a healthy state.

2 Q Okay. So, for example, the Sierra Club's
3 position is that the non-petitioned streams, the 12
4 that have been talked about as not having been -- or
5 13, depending how you count them, as not having been
6 the subject of an amendment, that the amount of water
7 -- that those streams should be restored before water
8 is used for agriculture in Central Maui, is that
9 correct?

10 A Um -- only slightly, if I may restate it.
11 What we would like the Board of Land and Natural
12 Resources to do is to assess the actual water duties,
13 that is the amount of water actually needed to farm.
14 That we see is their role as the landlord basically for
15 the State on behalf of the public. And so that's also
16 what we're asking them to do.

17 I guess on some basic level you don't
18 necessarily have to have an instream flow standard to
19 do that. The fact that these particular streams do not
20 have an instream flow standard I think the -- raises
21 the obligation of the Board to ensure that whatever
22 diversion's allowed doesn't cause harm.

23 Q Okay. So a major part of the motivation
24 of the Sierra Club is to make sure that these 12 or 13
25 streams are evaluated, and if there needs to be more

1 water returned, that that's somehow incorporated in any
2 lease or RP in the future, is that correct?

3 A The evaluation is secondary to our -- our
4 ultimate goal is to ensure that public water is not
5 wasted. So we want there to be a -- you know, we want
6 the Board of Land and Natural Resources to operate as a
7 guardian for public trust resources and ensure that the
8 gold that runs through East Maui is not wasted and is
9 instead used to (indiscernible).

10 So the motivation, you know, asking the Board
11 to collect information and to make informed decisions,
12 those are all interim steps towards our ultimate goal
13 of ensuring that both the streams survive and
14 diversified agriculture living within the available
15 amount of water also thrive.

16 Q Okay. And so just to be clear, you don't
17 contend that the use of the water for agriculture in
18 Central Maui would be wasting the water?

19 A Uh -- no, growing food is a -- is
20 a legitimate use of water.

21 Q Okay. And even when you say the goal is
22 to not waste, it's because you're concerned about
23 having the -- any water that's not needed available for
24 the instream values in the streams, right? That's the
25 reason, right?

1 A Yes. We want the streams to flow, flow
2 (i ndi scerni bl e).

3 Q Okay. And -- all right. So I think we
4 went over all the things that Sierra Club has done.
5 The legislative lobbying, the testimony before the
6 Board, the lawsuit, the amicus brief in the Carmichael
7 case, the comments on the environmental -- draft
8 environmental impact statement.

9 The one thing the Sierra Club has not done is
10 file a petition with the Water Commission to look at
11 these 12 or 13 streams, correct?

12 MR. FRANKEL: Objection, relevance.

13 THE COURT: Overruled.

14 THE WITNESS: Um -- correct. The Sierra Club
15 has not filed a petition with the Water Commission.

16 Q (BY MR. SCHULMEISTER) And do you
17 understand or does Sierra Club understand that when the
18 Water Commission issued its decision, J-14, and I'll
19 ask you to look at J-14 right now before I finish my
20 question.

21 A Okay.

22 THE COURT: I'd like her to try to answer
23 without reviewing a document.

24 MR. SCHULMEISTER: Okay, fine.

25 THE COURT: Because we're trying to get

1 testimony.

2 MR. SCHULMEISTER: All right.

3 Q Miss Townsend, do you understand that
4 when the Water Commission issued its decision, right,
5 which had restoration of a number of streams, that it
6 expressly stated that it was without prejudice to
7 anybody, you know, revisiting this in a subsequent
8 proceeding?

9 A Yes. I think that was the point of our
10 comment in the DIS -- DEIS as well.

11 Q Okay. So why was the Sierra Club so
12 focused on, you know, blocking the continuation of
13 legislative authority for the RPs, blocking the
14 issuance of the RPs, but not just simply putting the
15 issue back to the Water Commission in terms of whether
16 or not restoration for these 12 streams is appropriate
17 under the public trust doctrine?

18 A Um -- so there are a lot of factors that
19 go into the decisions that we make, and we -- sounds
20 like we have present that option. In these decisions
21 that -- that we're talking about today, the revocable
22 permits are ongoing, and we had a ripe case in this
23 moment. And, honestly, we have to -- we have limited
24 resources on so we have to use them in the ways we
25 think we can do best.

1 And, honestly, I think even with the Water
2 Commission setting instream flow standards, the Board
3 continues to issue revocable permits in ways that are
4 not consistent with the public trust. And from my
5 perspective, because I work on stream issues on other
6 islands as well, getting clarity on this particular
7 issue will help -- will benefit the streams statewide.
8 Revocable permits are being improperly continued in our
9 opinion.

10 Q Isn't that the reason not to ask the
11 Water Commission to amend the interim instream flow
12 standards for the streams that you're worried about?

13 MR. FRANKEL: Objection, Your Honor.
14 Objection, argumentative.

15 THE COURT: Sustained. Let's get to some
16 personal knowledge testimony. This sounds more like a
17 policy debate to me.

18 MR. SCHULMEISTER: All right. I just --

19 Q Actually, just one final question. Was
20 there anything that has prevented the Sierra Club from
21 filing a petition to amend the IFS?

22 A Capacity. Capacity of our organization.

23 Q That's more difficult than legislative
24 lobbying, appearing before the BLNR, filing this
25 lawsuit, putting an amicus brief in to the Supreme

1 Court, that is more difficult and more resource
2 capacity than just filing a petition to amend the IFS?

3 A Uh -- yes. I mean, if I need to
4 elaborate, like look how long it took for the Water
5 Commission to rule in the previous petition. And I
6 wasn't present at the time, but I have heard from our
7 members about how difficult it was to get testimony
8 from people just to be because there's so many
9 extenuating circumstances. It just made it, you know,
10 uncomfortable for people to publicly speak on this, and
11 it has been a very taxing experience for them.

12 MR. SCHULMEISTER: I have no further
13 questions.

14 THE COURT: All right. Thank you.

15 Mr. Wynhoff, you're up.

16 MR. WYNHOFF: Your Honor, I think that
17 generally speaking we were having Mr. Rowe go next, and
18 that -- I don't know that I'm really wed to that, but I
19 think it would be best to be consistent with the
20 (i ndi scerni ble).

21 THE COURT: Actually, I'd respectfully
22 disagree. We've been following A&B, State, and then
23 County for a while now. At least I have.

24 MR. FRANKEL: Actually, Your Honor, I have to
25 agree with Mr. Wynhoff, unfortunately. But it was only

1 altered because we had witnesses on Maui.

2 THE COURT: Ah. Okay.

3 MR. FRANKEL: And so we made an exception to
4 that.

5 THE COURT: Got it.

6 MR. FRANKEL: That process.

7 THE COURT: Okay. Thank you. I had forgotten
8 that we changed gears. You are correct, Mr. Wynhoff.

9 All right. Mr. Rowe, you're next.

10 MR. ROWE: Thank you.

11 Thank you, Your Honor.

12 CROSS EXAMINATION

13 BY MR. ROWE:

14 Q Good afternoon, Ms. Townsend. My name's
15 Caleb Rowe. I'm a Deputy Corporation Counsel from the
16 County of Maui.

17 A Hi, there. I can see you.

18 Q Okay. Are you generally aware of the
19 findings and the determination of the Commission on
20 Water Resources Management in 2018?

21 A Generally aware, yes.

22 Q Were you aware -- okay. And are you
23 aware that the Commission determined that the
24 Department of Water Supply for the County of Maui's
25 provision of water to the upcountry communities was a

1 public trust purpose?

2 A Yes.

3 Q Would the -- is the policy or the view of
4 the Sierra Club that that is an accurate determination
5 of the public trust?

6 A Yes.

7 Q Okay. And so do you think that
8 consideration of the County's needs for -- to
9 (indiscernible) domestic water were appropriately
10 considered by the Board of Land and Natural Resources?
11 That it was properly before them?

12 MR. WYNHOFF: Objection, --

13 THE WITNESS: (Indiscernible) --

14 MR. WYNHOFF: -- compound.

15 THE WITNESS: -- the question.

16 THE COURT: Okay. Please rephrase, Mr. Rowe.

17 MR. ROWE: Yes.

18 Q Do you agree that it was proper for the
19 Board of Land and Natural Resources to consider the
20 County's public trust uses in granting its
21 determinations?

22 A Yes.

23 MR. ROWE: Yeah. I've got nothing further for
24 this witness, Your Honor.

25 THE COURT: All right. Thank you.

1 Mr. Wynhoff.

2 MR. WYNHOFF: And, Your Honor, after all that,
3 I was just gonna say anyway that I don't have any
4 questions for Miss Townsend. Thank you very much.

5 THE COURT: Okay.

6 All right. Back to you, Mr. Frankel.

7 MR. FRANKEL: Just one question.

8 REDIRECT EXAMINATION

9 BY MR. FRANKEL:

10 Q If you know, Miss Townsend, do you know
11 when the petitions to set -- to amend the interim
12 instream flow standards that were set by the Water
13 Commission in 2018, do you know when those petitions
14 were originally filed with the Water Commission?

15 A Um -- it's my understanding it was in
16 2001, a very -- a long time ago.

17 MR. FRANKEL: Thank you. No further
18 questions, Your Honor.

19 THE COURT: Thank you.

20 Mr. Schulmeister?

21 MR. SCHULMEISTER: No further questions.

22 THE COURT: Thank you.

23 Mr. Rowe?

24 MR. ROWE: No further questions, Your Honor.

25 THE COURT: Mr. Wynhoff?

1 MR. WYNHOFF: Nothing, Your Honor. Thank you.

2 THE COURT: All right. Thank you.

3 Ms. Townsend, your testimony is concluded.

4 You can obviously remain.

5 Is the next witness -- I know we had him walk
6 over a while ago. I assume he's available?

7 Yes?

8 MR. WYNHOFF: Yes, he is, Your Honor.

9 THE COURT: All right. Let's take a brief
10 break now. Because otherwise we're looking at going
11 more than an hour by the lunch break. Let's take seven
12 minutes now. I'll see you at 20 minutes to 12:00. All
13 right? Thank you.

14 We're in recess.

15 (Recess taken at 11:33 a.m.)

16 (Proceedings resumed at 11:40 a.m.)

17 THE COURT: All right. We are back on record.

18 FTR on?

19 THE BAILIFF: Yes, it is, Judge.

20 THE COURT: All right. I'm looking at the
21 screen. I see all counsel. I see a witness there with
22 Mr. Wynhoff. It looks like we're ready to go.

23 I guess --

24 MR. WYNHOFF: Can we do a sound check for
25 Mr. Higashi, Your Honor?

1 THE COURT: Sure.

2 Mr. Higashi, go ahead and say something.

3 THE WITNESS: Good morning, Your Honor. How
4 is that? Can you hear me okay?

5 THE COURT: Solid.

6 THE WITNESS: Very well.

7 THE COURT: All right.

8 MR. WYNHOFF: Thank you, Your Honor.

9 THE COURT: Go ahead. So let's fill this 20
10 minutes, and then I have a brief thing to say before we
11 break for lunch.

12 Go ahead.

13 Oh, we need to swear the witness. Okay.
14 Please swear in Mr. Higashi.

15 THE CLERK: You may remain seated. Just raise
16 your right hand.

17 Do you solemnly swear or affirm that the
18 testimony you're about to give will be the truth, the
19 whole truth, and nothing but the truth? If so, please
20 respond by saying I do.

21 THE WITNESS: I do.

22 THE CLERK: Thank you.

23 THE COURT: Mr. Higashi, this is Judge
24 Crabtree speaking. Please state your full name and
25 then spell it for our court reporter. Thank you, sir.

1 THE WITNESS: Okay. My full name is Glenn
2 Robert Higashi. Spelled G-L-E-N-N, R-O-B-E-R-T,
3 H-I-G-A-S-H-I.

4 THE COURT: Thank you. Mr. Wynhoff, go ahead.
5 I'm sorry, Mr. Frankel.

6 MR. WYNHOFF: This is Mr. Frankel's witness at
7 this time, Your Honor.

8 THE COURT: I'm sorry. I need another cup of
9 coffee. Mr. Frankel, go ahead.

10 THE COURT: You're muted.

11 MR. FRANKEL: All right. Let's start again.

12 GLENN HIGASHI,
13 called as a witness by Plaintiff,
14 having been first duly sworn was
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. FRANKEL:

18 Q Mr. Higashi, you work at the Department
19 of Land and Natural Resources, right?

20 A That's correct.

21 Q In the Division of Aquatic Resources?

22 A That's correct.

23 Q You're an aquatic biologist?

24 A Yes.

25 Q And you've been one for about 35 years?

1 A Yes.

2 Q Most of your career has been spent doing
3 stream work and surveying streams statewide?

4 A Yes, it has.

5 Q You surveyed and studied the streams
6 flowing in East Maui?

7 A Yes, I have.

8 Q You spent time in about 15 of those
9 streams?

10 A Uh, I would say more than 15.

11 Q Okay. How many would you say?

12 A Hmm, close to 20 something.

13 Q All right. And you were there last --
14 well, you were there in the fall of 2019?

15 Is that right?

16 A That's correct.

17 Q Have you --

18 A That's correct.

19 Q -- been there more recently?

20 A Not because of the COVID, no.

21 Q Oh, yeah, yeah.

22 Now, the Division of Aquatic Resources where
23 you work has relied on Michael Kido's work, hasn't it?

24 A No, it hasn't. It -- we've been doing
25 our own work.

1 Q Well --

2 A He -- he -- he produced an atlas based on
3 all about observations. We did over 90,000
4 observations when we do surveys, and with our
5 observations comes different -- millions of pieces of
6 information regarding the habitat (indiscernible). And
7 this is basically what the whole watershed atlas is
8 about and this is basically --

9 THE COURT: Okay. Time out.

10 THE WITNESS: -- about all invasive --

11 THE COURT: Time out.

12 THE WITNESS: -- (indiscernible).

13 THE COURT: Mr. Higashi, I apologize for
14 interrupting, but for some reason the audio has gotten
15 much worse all of a sudden. So a couple of things.
16 One, maybe slow down a little bit. That might help.

17 THE WITNESS: Okay.

18 THE COURT: And two make sure --

19 THE WITNESS: Okay.

20 THE COURT: -- make sure you're speaking
21 directly towards the microphone in front of you. And
22 try to keep your head at a consistent distance. I know
23 that's not easy. We all move around when we're
24 talking, but it's very sensitive on the microphone that
25 you guys are using. So it's important to try to stay

1 at a consistent distance from it.

2 All right. So I think --

3 THE WITNESS: Okay.

4 THE COURT: I think I stopped hearing clearly
5 about halfway through that answer. So I think I'd like
6 you to just start your answer over again from the top.
7 I'm sorry.

8 THE WITNESS: Okay. Would -- can you repeat
9 the question again, and then I can?

10 MR. FRANKEL: Yeah. If that's all right with
11 Your Honor?

12 THE COURT: Yes.

13 Q (BY MR. FRANKEL) The Division of Aquatic
14 Resources has relied on Michael Kido's work.

15 A No, it hasn't. We've done our own
16 surveys and studies.

17 Q That's fine as far as I'm concerned. So
18 you were a coauthor on a report in November of 2009
19 with a long name which I'll read off. The Use of
20 Hawaiian Stream Habitat Evaluation Procedure to Provide
21 Biological Resource Assessment in Support of Instream
22 Flow Standards for East Maui Streams.

23 A Yes.

24 Q And in that work you cited the work of
25 Michael Kido in three places, didn't you?

1 A It may have been. Sorry, but I don't
2 remember the exact citations.

3 Q Okay. So that would be an example of the
4 Division of Aquatic Resources relying on the work of
5 Michael Kido if they cited to his work, correct?

6 A Yes, but I believe that he wasn't the
7 only individual that was cited in that report.

8 Q Sure. Sure. I'm just -- right. That's
9 great.

10 Now, and the Division of Aquatic Resources
11 cites Michael Kido's work in the bibliography on its
12 website, doesn't it?

13 A I believe so.

14 Q Okay. I wanna ask you about the
15 importance of our streams. Now, they provide habitat
16 for native species, right?

17 A Yes.

18 Q And they contain endemic animals?

19 A Yes.

20 Q Found nowhere else in the world?

21 A Yes.

22 Q Such as 'o'opu and 'ōpae?

23 A Yes.

24 Q They're unique?

25 A They are.

1 Q The streams provide nutrients for reef
2 fish?

3 A Yes.

4 Q And prey for reef fish?

5 A Yes.

6 Q 'O'opu and 'ōpae are part of the food
7 chain?

8 A Yes, they are.

9 Q And they have cultural importance?

10 A Yes, they do.

11 Q Let's talk about the threat streams face.
12 In 2005, DLNR developed Hawai'i's Comprehensive
13 Wildlife Conservation Strategy, right?

14 A Yes.

15 Q And you provided a little bit of help in
16 the drafting of that, right?

17 A I -- I believe so.

18 Q And that 2005 conservation strategy noted
19 that stream diversions were a key threat to species and
20 habitat.

21 A I wouldn't say a key threat, no.

22 Q But if the document itself used the term
23 key threat, are you disagreeing with the document or
24 are you disagreeing with your recollection of what the
25 document says?

1 A Right now I'm disagreeing with what -- my
2 recollection of what the document says.

3 Q So if the document says that, would you
4 agree with its assessment that it's a key threat if
5 that's what it says?

6 A It's one of the key threats. I wouldn't
7 say it was the key threat.

8 Q Okay. Okay.

9 Q Now that document identified insufficient
10 instream flows as a threat, right?

11 A It may have.

12 Q And --

13 A (Indiscernible).

14 Q Okay. And it calls for a decrease in the
15 number of stream diversions?

16 A It may have. I don't recall.

17 Q And that comprehensive wildlife
18 conservation strategy was completed in 2005, right?

19 A I believe so.

20 Q All right. Now, let's shift gears to
21 2009. In 2009, the Division of Aquatic Resources,
22 together with the Bishop Museum, prepared that report
23 with a long title that I read off a couple minutes ago,
24 right?

25 A Yes, it did.

1 Q And you were one of the coauthors of that
2 report?

3 A Yes, I am.

4 Q And among the report's conclusions, and
5 there are many conclusions in that report, right?

6 A Yes.

7 Q Among them were that typical stream
8 diversions divert one hundred percent of the water at
9 low to moderate flows and under these conditions a
10 hundred percent of downstream moving individuals would
11 be entrained by diversion. Is that --

12 A Can you --

13 Q -- right?

14 A -- explain what you mean by entrained and
15 -- and with the hundred percent flows?

16 Q Well, those are terms that you've used in
17 your work, is that right?

18 A Yes.

19 Q So maybe you could explain to the court
20 what you mean by the word entrain.

21 A Okay.

22 MR. WYNHOFF: Be sure you speak up, Glenn,
23 okay?

24 THE WITNESS: Yes.

25 MR. WYNHOFF: You might be dropping a little

1 bit.

2 THE WITNESS: Entrain means to capture.
3 Whether it's migrating animals that are going upstream
4 or larvae that's coming downstream.

5 Q So -- well, is it your recollection
6 that your report in 2009 concluded that typical stream
7 diversion structures divert a hundred percent of the
8 water at low to moderate flows?

9 A Low to moderate flows meaning 60 percent
10 of the base flow, given base flow. Unless the flows
11 are (indiscernible), yes. But it doesn't divert
12 freshets and rain flooding.

13 Q So maybe you could explain to the court
14 what you mean by base flow. That might help a little
15 bit.

16 A Base flow is the -- usually it's the
17 natural flow within the stream that's contributed by
18 ground water and it's aug -- augmented by the addition
19 of rainfall or freshets, which give it a total flow, or
20 basically that's what it is.

21 Q And would you describe the base flow as
22 the condition where -- of low and moderate rates of
23 flow?

24 A I didn't understand that question. Can
25 you rephrase that question?

1 Q Sure. So I'm trying to understand words
2 that are in the 2009 report, and let me know if you
3 think we need to look at that report, but that report
4 uses the term low to moderate flows. And my question
5 to you is is that term low to moderate flows the same
6 thing as the base flow which you just described?

7 A Low to moderate flows.

8 Q Would it help to look at the document to
9 help you refresh your recollection?

10 A Yes, it might. It might, yeah.

11 Q Okay. So if we could look at Exhibit
12 DLNR S-19. S-19.

13 A Do you think you can it or do you want
14 to have --

15 MS. GOLDMAN: (Indiscernible) from the State
16 --

17 MR. WYNHOFF: Why don't you go over and --
18 I'll have Miss Goldman go look over his
19 shoulder and help him find it this first time.

20 THE COURT: All right. So for the record S-19
21 is in evidence.

22 MS. GOLDMAN: Go down. Yeah. So actually
23 it's always gonna be a State, yeah.

24 THE COURT: Whoever was just talking, we can't
25 understand you.

1 MS. GOLDMAN: That was Miss Goldman. I'm just
2 instructing the witness how to find the exhibit, Your
3 Honor.

4 THE COURT: All right. Thank you.

5 MS. GOLDMAN: Sorry.

6 THE WITNESS: Okay.

7 MS. GOLDMAN: You done?

8 MR. WYNHOFF: Thank you, Your Honor.

9 THE COURT: All right. So, Mr. Higashi, do
10 you have Exhibit S-19 in front of you there?

11 THE WITNESS: Yes, I do.

12 THE COURT: All right. Thank you.

13 Go ahead, Mr. Frankel.

14 Q (BY MR. FRANKEL) If you could go to page
15 18 of that exhibit, there is -- yeah.

16 A Eighteen.

17 Page 18.

18 MR. WYNHOFF: Mr. -- Your Honor, are we
19 talking about Bates stamped 18?

20 THE COURT: I hope so.

21 MR. FRANKEL: Hold on.

22 THE WITNESS: Eighteen. You wanna make this
23 monitor?

24 THE COURT: I think it's the same as the Bates
25 stamp as the pdf page, the one I'm looking at.

1 MS. GOLDMAN: There you go.

2 THE WITNESS: I'm not used to using this.

3 MS. GOLDMAN: I know. I'm sorry. But you
4 just passed it.

5 Is that better?

6 THE WITNESS: Yeah. Oh, you have it.

7 MS. GOLDMAN: There you go.

8 MR. WYNHOFF: Your Honor, just so you know and
9 for the record, we were just monkeying around trying to
10 make it a little bigger on Mr. Higashi's screen, which
11 I think we have accomplished. So now if we can make
12 sure that he's on the correct page, we'll be all set.

13 THE COURT: All right. Well, I'm looking at
14 what I think is page 18 and it's got three color
15 photographs in the middle of it.

16 MR. FRANKEL: So, yeah, I -- I'm sorry.
17 I'm -- I will instead refer to page 19. I'm looking at
18 a different version of the document, but I can adjust.

19 THE WITNESS: Maybe it's the height.

20 THE COURT: Yes. Just for --

21 MS. GOLDMAN: Yes. Try --

22 THE COURT: Mr. Frankel, there's no way you
23 should be looking at a different copy of the document,
24 so I hope you can fix that over the lunch break. Okay?
25 We went to a lot of trouble to make sure everybody

1 would be looking at the same documents, and this is
2 why.

3 MR. FRANKEL: You know, I (i n d i s c e r n i b l e) --

4 THE WITNESS: No, I ' m n o t (i n d i s c e r n i b l e) --

5 MR. FRANKEL: I mean, I can explain, but not
6 --

7 MS. GOLDMAN: No, I (i n d i s c e r n i b l e) --

8 MR. WYNHOFF: He ' s l o o k i n g a t w h a t e v e r --

9 MR. FRANKEL: Okay.

10 MR. WYNHOFF: -- (i n d i s c e r n i b l e).

11 MR. FRANKEL: Okay.

12 THE COURT: Okay. None of whatever just
13 happened is on the record. I can't understand it.

14 MR. WYNHOFF: Your Honor, again, I know it's
15 very difficult and annoying to have things in the
16 background and so I apologize, and that is logistic
17 stuff. We were just talking about the exhibit and we
18 will try to keep that to a minimum. I understand that
19 completely, Your Honor.

20 THE COURT: Okay. Mr. Higa --

21 MR. WYNHOFF: Sorry about that.

22 THE COURT: Mr. Higashi, are you now on page
23 19 of the exhibit?

24 THE WITNESS: Yes, I see the same photos.

25 Yes.

1 THE COURT: All right. Go ahead.

2 Q (BY MR. FRANKEL) So above --

3 MR. WYNHOFF: Your Honor. Your Honor, I'm
4 really very sorry.

5 Mr. Frankel, I'm sorry. I think that
6 Mr. Higashi is still on 18, which has three photos.
7 Are you on a page with three photos or two photos?

8 MR. FRANKEL: So we're going to the next page,
9 page 19 of the Bates stamped numbers, and there's two
10 photos on that page towards the bottom.

11 MR. WYNHOFF: I think you're fine, yeah.

12 THE COURT: All right. Got it?

13 Q (BY MR. FRANKEL) And two sentences above
14 the photograph there's a sentence that reads -- well,
15 actually, I'm sorry, three sentences above, that says
16 typical stream diversion structures divert one hundred
17 percent of the water at low to moderate flows.

18 And you are coauthor of this report so I'm
19 just trying to get an understanding. Is that -- when
20 you describe low and moderate flows there, are you
21 talking about the base flow?

22 A we're talking about below the base flow.

23 Q Less than the base flow?

24 A Yes.

25 Q Is that defined anywhere do you recall in

1 the study? Was that --

2 A I don't recall where -- if it was defined
3 or not.

4 Q Okay. All right. Great.

5 A (Indiscernible).

6 Q You can put that exhibit away for now.

7 Or, Yeah, just --

8 MR. FRANKEL: Thank you, Mr. Wynhoff.

9 Q So diversion structures can harm native
10 species, right?

11 A Yes.

12 Q By blocking migration?

13 A They don't completely block migration
14 because we have freshets and stuff like that. The
15 animals still get by.

16 Q So but there are some structures that
17 could block migration?

18 A It's possible, yes.

19 Q And they can entrain or capture them?

20 A Yes.

21 Q And also they may remove water that
22 species need?

23 A Yes.

24 Q Now, if water flows through a culvert or
25 a pipe or over a lip, animals have difficulty -- native

1 species sometimes have difficulty climbing above that,
2 right?

3 MR. WYNHOFF: Your Honor, may I object to that
4 as compound please.

5 THE COURT: That's true.

6 MR. FRANKEL: I'll rephrase it.

7 THE COURT: That's true. We've got three
8 different things going on there, Mr. Frankel. Culvert,
9 pipe, and a lip.

10 MR. FRANKEL: Okay. I'll break it up.

11 Q If the water flows through a culvert,
12 animals, the native species, can have difficulty
13 getting over -- through that, right?

14 A No, they can go through a culvert. As
15 long as that culvert is in the same level as the stream
16 bed.

17 Q But if it sticks up --

18 A Or if it's --

19 Q Sorry.

20 A If it's -- if it's elevated, they still
21 can get over it. Okay. But if it sticks out and
22 there's no water surface, then we have an issue.

23 Q So for some culvert and some pipes that's
24 an issue?

25 A Yes.

1 Q Similarly, if there -- for lack of a
2 better word, if there's a lip that sticks out, that can
3 be difficult for the species to get up as well, right?

4 A Yes.

5 Q And are diversion structures in East Maui
6 streams still causing problems for native species?

7 A What do you mean still causing problems?

8 Q Are they causing problems today?

9 A They restored flow in a lot of the
10 streams. So it depends on the streams you're talking
11 about.

12 Q So are there some diversion structures
13 however that are causing problems for native species
14 regardless of the flow issue? I want you to focus on
15 the structures. Are there still some structures along
16 East Maui streams on public land that are causing
17 problems for native species?

18 A I don't know, uh -- that they are. I
19 mean, it's -- it depends if they're open or not
20 and -- and I would have -- you would have to address it
21 individually. I mean, I couldn't tell you, if you
22 wanted the overall general answer.

23 Q Well, do you recall what a deposition is?

24 A Yes.

25 Q And you were deposed twice, is that

1 right?

2 A That's correct.

3 Q And is it your testimony today that
4 diversion structures are not causing any problems for
5 any native species in East Maui?

6 A No, they're causing problems. But like I
7 said, it depends on what structures you're talking
8 about.

9 Q Okay. That's fair. So there are some
10 diversion structures that are still -- that are causing
11 problems for native species today on East Maui streams,
12 right?

13 A Yes.

14 THE COURT: All right. So it's noon. We'll
15 take our lunch recess now until 1:00 o'clock. We'll go
16 off record and the court reporter is thanked and
17 excused.

18 (Recess taken at 12:00 p.m.)

19 (Proceedings resumed at 1:03 p.m.)

20 THE COURT: All right. We are back on record.
21 FTR on?

22 THE BAILIFF: It is.

23 THE COURT: Okay. Looking at my screen I see
24 everybody I'm supposed to be seeing, I believe. Ready
25 to go everyone?

1 I don't think we need to do appearances. All
2 counsel are present. The witness is present.

3 Let's proceed.

4 MR. FRANKEL: Thank you, Your Honor.

5 Q Mr. Higashi, do you remember before lunch
6 we were talking about what might constitute low and
7 moderate flows?

8 A Yes.

9 Q You know, I just wanna assure you,
10 Mr. Higashi, what we're trying to do is search for the
11 truth, and I'm not trying to embarrass you. But if you
12 could take a look at Exhibit S-19, and turn to page 29
13 of that document.

14 Now, S-19, that's the report or study you were
15 coauthor of, right?

16 A That's correct.

17 Q Okay. So are you at page 29 yet?

18 A I'm trying to get there.

19 MS. GOLDMAN: Stay there.

20 MR. WYNHOFF: Miss Goldman's gonna help him
21 get to that right page, Your Honor.

22 MS. GOLDMAN: Mr. Frankel, was it 29?

23 MR. FRANKEL: Correct.

24 MS. GOLDMAN: Okay. Just a sec. Thank you
25 for bearing with us.

1 MR. WYNHOFF: Thank you. We're there.

2 Q (BY MR. FRANKEL) So if you could just
3 silently to yourself read that paragraph that's
4 numbered 13.

5 THE WITNESS: I mean, it's -- it's off.

6 MS. GOLDMAN: Yeah.

7 Q (BY MR. FRANKEL) Mr. Higashi, are you
8 there? You're looking at it?

9 A Yes, I am. Yes, I'm looking at it.

10 Q Based on your report's talking about, you
11 know, a hundred percent of the removal of the water
12 occurring approximately 70 to 80 percent of the time.

13 Do you wanna amend your prior answer about
14 what a low and moderate flow is? Does it suggest to
15 you that when the report talked about low and moderate
16 flows that was base flow?

17 MR. WYNHOFF: Compound, Your Honor.

18 THE COURT: Sustained.

19 MR. FRANKEL: Okay.

20 Q Mr. Higashi, do you see where it says in
21 general the diversions were engineered to capture low
22 to moderate stream flows and results in one hundred
23 percent removal of water approximately 70 to 80 percent
24 of the time? Do you see that?

25 A Yes, I do.

1 Q So if the base flow is the amount of
2 water in a stream, that is contributed to it from
3 ground water and not storm water, right?

4 A That is correct.

5 Q And generally base flow is what you have
6 in East Maui approximately 70 to 80 percent of the
7 time?

8 A Right.

9 Q Okay. So when it talks about low to
10 moderate stream flows in the sentence, that's a
11 reference to base flows here, isn't it?

12 A I believe so.

13 Q All right. Thank you. Thank you.

14 And then I just -- I wanna be clear, so are
15 there some diversion structures on public land, public
16 land, in East Maui that are adversely affecting native
17 species?

18 A There may be.

19 Q Well, do you know of any?

20 A Offhand it would depend on I guess which
21 areas the water were restored and which ones weren't.

22 Q But my question is not about the quantity
23 of water. I'm talking about the diversion structures
24 themselves. Are you aware of any diversion structures
25 on public land that are currently having an adverse

1 affect on native species?

2 A No.

3 Q Okay. I wanna ask you about the
4 determination that the Division of Aquatic Resources
5 has made regarding the minimum amount of water that
6 aquatic life needs to remain in East Maui streams.
7 That's 64 percent of base flow, right?

8 A Sixty-four percent of the median base
9 flow.

10 Q Okay. And that's what's needed for
11 native species to grow and reproduce?

12 A Yes.

13 Q That's the official position of DLNR's
14 Division of Aquatic Resources?

15 A Yes, it is.

16 Q And that has been the official position
17 since 2010?

18 A Yes.

19 Q And that's still your position today?

20 A Yes, it is.

21 Q There is a substantial difference in
22 habitat quality between a stream with 64 percent of its
23 base flow and one with just 20 percent of its base
24 flow. Is that right?

25 A Yes.

1 Q At 20 percent base flow, the animals do
2 not have enough water to grow. Is that right?

3 A Yes. Correct.

4 Q At 20 percent base flow, the animals do
5 not have enough water to reproduce?

6 A Correct.

7 Q At 20 percent base flow, there is not
8 enough water for 'o'opu or 'ōpae to have a normal life.

9 A Correct.

10 Q For a stream that has all of its base
11 flow diverted, you're left with a dry stream bed.

12 A Not necessarily.

13 Q And if there is no spring directly below
14 that diversion structure, you're gonna have a dry
15 stream bed, is that right?

16 A Not necessarily.

17 Q Okay. Okay. We've talked about the fact
18 that you had your deposition taken. Why don't we take
19 a look at Exhibit 123, which is the deposition
20 transcript.

21 And if you could turn to page 20 of that
22 document.

23 A I'm not there yet, Mr. Frankel.

24 Q All right. That's fine.

25 MS. GOLDMAN: This is Miss Goldman, just

1 assisting the witness in pulling up the exhibit.

2 THE COURT: I couldn't understand what you
3 just said. Please repeat, Ms. Goldman.

4 MS. GOLDMAN: I'm assisting the witness in
5 pulling up the exhibit.

6 THE COURT: Thank you.

7 MS. GOLDMAN: Just a moment. Thank you.

8 MR. WYNHOFF: We're looking at Exhibit 123,
9 page 20.

10 MR. FRANKEL: That's right.

11 THE WITNESS: We can move to another --

12 MS. GOLDMAN: (Indiscernible).

13 MR. WYNHOFF: If you guys can please try to
14 not talk to yourselves it would just be easier for the
15 court reporter.

16 MS. GOLDMAN: Sorry, Your Honor. We're having
17 some technical difficulties. May we have a moment to
18 make sure everything's still on the computer?

19 THE COURT: Yes.

20 MS. GOLDMAN: Thank you.

21 MR. WYNHOFF: Okay. Tell you what we're gonna
22 do, Your Honor. We're gonna move Mr. Higashi over to
23 my seat and then we'll go on from there. Okay?

24 Mr. Higashi, if you would switch with me
25 please.

1 So I have it up on my screen, Your Honor. I'm
2 gonna sort of look over his shoulder and we're ready to
3 go.

4 THE COURT: Thank you.

5 Q (BY MR. FRANKEL) So if you could look at
6 line 15 on page 20, you see there is a question being
7 asked of you, now is there a significant difference in
8 habitat quality in a stream with 20 percent base flow
9 and one with no base flow or all the base flow can be
10 taken and diverted?

11 And do you recall answering, well then, you
12 have a dry stream bed, yeah, so you don't have any
13 animals.

14 A Okay. Yes, I see that.

15 Q And are you disputing the truth of that
16 today?

17 A I mean, well, I would assume that no bo
18 -- base flow would mean that you don't have any water
19 in it, but again if -- if the stream itself is one of
20 those streams where the water goes underground, it
21 still -- there's still flow.

22 Q Okay.

23 A Just not on the surface.

24 Q Okay. Well let's look on the next page,
25 the very stop of the page. The first question there,

1 line 1, and certainly taking all the base flow would
2 have an adverse effect on native species, and your
3 answer is well, you would have a dry stream bed, yeah.

4 Is that -- do you recall answering that way?

5 A Yes.

6 Q And are you disputing -- are you
7 disagreeing with what you said back in 2000 -- earlier
8 this year?

9 A No.

10 Q Okay. And how long can 'o'opu and 'ōpae
11 survive in a dry stream bed?

12 A They can't survive.

13 Q All right. And in a general, more water
14 and better connectivity in a stream is a good thing for
15 native habitat restoration, right?

16 A Yes, it is.

17 Q All right. Since we have that document
18 open and since we have some difficulty with documents,
19 maybe you could turn to page 40 of that document.

20 MR. WYNHOFF: Your Honor, if I might, the use
21 of the deposition ought to be -- it would be for
22 impeachment. It's not itself extrinsic evidence. Or
23 may we have a question to see if there's a difference
24 in the testimony first?

25 THE COURT: Agreed.

1 MR. FRANKEL: Okay. That's fair.

2 And this gets back to the earlier question
3 when I asked Mr. Higashi whether diversion structures
4 are currently causing an adverse impact to native
5 species. If you recall that was a couple minutes ago.

6 MR. WYNHOFF: I'm sorry. May I ask what the
7 question was? I beg your pardon, Mr. Frankel.

8 MR. FRANKEL: The question is are diversion
9 structures in East Maui streams causing problems today
10 for native species.

11 THE COURT: You mean regardless of the flow,
12 right?

13 MR. FRANKEL: Thank you, Your Honor, yes.

14 THE COURT: Okay. Just the structures
15 themselves.

16 MR. FRANKEL: Right.

17 Q And your ans -- so I'll ask you again.
18 What is your answer to that question?

19 Mr. Higashi?

20 A Whether they're causing problems with the
21 flow? Or what -- what are you -- I'm sorry. Can you
22 repeat it?

23 Q No problem.

24 Are there any diversion structures on public
25 lands in East Maui today that are causing an adverse

1 impact on native species? And the focus of this
2 question is on the structures, not on the amount of
3 water in the stream.

4 A What do you mean by adverse impact?

5 Q Okay. So I want you to assume that the
6 term adverse impact refers only to the individual
7 creature, critter, animal, however you want to call it,
8 and the larger sort of population of that -- that that
9 creature is a part of. So are there diversion
10 structures on public land in East Maui streams today
11 that you know of that are causing an adverse impact,
12 harming, the 'o'opu and/or 'ōpae?

13 MR. WYNHOFF: Objection, Your Honor, compound.
14 Individual animals and species makes that two
15 questions.

16 THE COURT: Sustained.

17 MR. FRANKEL: Okay.

18 Q So let's focus on just individuals then.
19 Are you aware of any diversion structures in East Maui
20 on public lands that are causing an adverse impact to
21 individual 'ōpae or 'o'opu?

22 A Um -- for 'ōpae they're -- I don't think
23 they're causing an adverse impact in the sense that
24 there's -- these animals above these diversions.

25 Q And how about 'o'opu?

1 A 'O'opu it depends on the diversions
2 themselves and how they're constructed, the
3 infrastructure -- the structures.

4 Q Right, I understand it depends. So my
5 question is are there any. Or is it your testimony
6 that the diversion structures on public lands are not
7 causing any harm to native species today?

8 A Well, usually when there's freshets,
9 that's when they get past these diversions.

10 Q Okay.

11 A And I'm not saying that there may not be,
12 but as far as I know, no.

13 Q Okay. So let's look at page 40 of your
14 deposition testimony from this year.

15 MR. WYNHOFF: We're there, Your Honor. It
16 happened to be up already so we're all ready.

17 Q (BY MR. FRANKEL) So on page 40, line 4,
18 you see where you are asked, are diverse structures in
19 East Maui stream still causing problems for native
20 species? See that?

21 A Yes.

22 Q And your answer is I think they are?

23 A Yes.

24 Q Is your answer -- is your testimony today
25 different than it was back then? Or are you -- would

1 you like to amend -- would you like to change your
2 prior answer, or do you think you were wrong back then?

3 A No, I don't -- I don't think I'm gonna
4 change my answer.

5 Q Okay. So you think you might have
6 misstated things back in -- at the deposition?

7 MR. WYNHOFF: Your Honor, I think there's --
8 that's just simply a quibble to how different they
9 are, with all due respect, both the testimony and --

10 THE COURT: Whoa, whoa.

11 MR. WYNHOFF: -- today and the excerpt.

12 THE COURT: Hold it, Mr. Wynhoff. No way.
13 You don't make comments like that in front of
14 witnesses.

15 MR. WYNHOFF: Sorry, Your Honor.

16 THE COURT: Keep going, Mr. Frankel.

17 MR. FRANKEL: All right.

18 Q What I would like to do is take a look at
19 Exhibit 122, which is Mr. Higashi's deposition
20 testimony from 2019.

21 And this is gonna be a little bit of a
22 challenge because this is a deposition testimony with
23 four pages on one page. So I'd like to direct you to
24 the pdf page 5 but the real number 15.

25 THE COURT: Mr. Wynhoff, you probably know

1 this, but if not, you can hit control plus and it will
2 make the page bigger. It'll be easier to see.

3 MR. WYNHOFF: Thank you, Your Honor.

4 THE COURT: All right.

5 MR. WYNHOFF: Your Honor, I'm just gonna put
6 on the record please, if I might, my same objection
7 that we had last time. This is a 30(b)(6) witness and
8 so I don't think it's really proper to impeach him with
9 this deposition. I don't think it's a proper issue,
10 but -- oh, I'm sorry. I'm done. Thank you. That's
11 this one.

12 THE COURT: All right. I understand.
13 Overruled.

14 MR. WYNHOFF: Yes, Your Honor.

15 Q (BY MR. FRANKEL) So, Mr. Higashi, do you
16 remember back in the 2019 deposition we talked about
17 the letter written by the Division of Aquatic Resources
18 of April 2010, and I think that's the letter that had
19 those what you call report cards attached to it? Do
20 you know what I'm --

21 A Yes.

22 Q -- I'm talking about?

23 A Yes.

24 Q So in this deposition you were asked
25 about whether they've been altered or not and you were

1 asked, so they still cause a problem? Look at page 15,
2 line 12.

3 MR. WYNHOFF: Objection, Your Honor. Let's
4 have a question before we impeach the answer.

5 MR. FRANKEL: This is the same question.

6 THE COURT: I think the impeachment is that he
7 said he wanted to change his answer. But --

8 MR. WYNHOFF: Thank you, Your Honor.

9 THE COURT: -- it's a gray area. Mr. Frankel
10 you might be able to phrase it better. Just start with
11 the standard Q and A, see what his answer is, and then
12 use the depo.

13 MR. FRANKEL: Okay. All right. Although --
14 okay.

15 Q So all of the diversion structures that
16 you identified in April of 2010, are they still causing
17 problems to native species?

18 MR. WYNHOFF: Your Honor, maybe this
19 irregular, but I apologize. I will withdraw my
20 objection to the use of the deposition. I didn't
21 realize quite where we were. So if Mr. Frankel would
22 like to do it that way, then I would withdraw and I
23 apologize.

24 THE COURT: Well, I don't like witnesses
25 reading from depositions. Let's just do the usual thing.

1 Ask him a question. If he says something that's
2 inconsistent, then you can use his depo. But
3 otherwise, let's go with his testimony.

4 MR. WYNHOFF: Thank you, Your Honor.

5 THE COURT: Okay.

6 Q (BY MR. FRANKEL) So my question was, for
7 those diversion structures that were identified in
8 April 2010 letter, are there some structures there that
9 still are causing a problem to native aquatic species?

10 A I'd have to tell you I don't remember
11 what I said.

12 Q You don't -- okay. So would it help to
13 refresh your recollection to look at the -- how you
14 answered this question in 2019?

15 A Yes.

16 Q Okay. So if you could look at
17 Exhibit 122. This is page 15 of that. It's pdf
18 page 5, but I think you understand.

19 MR. WYNHOFF: Your Honor, I'm very sorry.

20 And Mr. Frankel.

21 Now it shut down for a little bit so we've got
22 to get back into the exhibit. I know. We're all
23 trying and I'm very sorry.

24 THE COURT: Is this still the locking
25 computer?

1 MR. WYNHOFF: You know, I thought I was
2 shutting it down halfway so that it wouldn't lock. I
3 don't know what happened.

4 THE COURT: Okay.

5 MR. WYNHOFF: I think it's AG password. Do
6 you know it?

7 MS. GOLDMAN: I don't. It's your computer.

8 THE COURT: Look at the yellow poster under
9 the keyboard.

10 MR. WYNHOFF: There we go.

11 Okey-dokey. Ready to go.

12 THE COURT: Please proceed.

13 MR. FRANKEL: I don't even know what my
14 question was now.

15 Q But do you see there that -- oh, yeah. I
16 wanted to know if this helped refresh your recollection
17 looking at page 15 of how you answered in 2019?

18 A Yes.

19 Q Okay. And so I would like to ask you
20 whether your answer is different today than it was back
21 then? Are these diversion structures a continuing
22 problem?

23 MR. WYNHOFF: Is there any specific line
24 reference to help us, Your Honor?

25 MR. FRANKEL: Oh, I'm sorry. Line 15.

1 THE COURT: Fifteen.

2 MR. FRANKEL: Page 15, line 2.

3 THE WITNESS: I'd say yes.

4 Q (BY MR. FRANKEL) Okay. And do you have
5 a different opinion today?

6 A No.

7 Q All right. Let's -- well, we might need
8 that document later, but for now don't look at it.

9 I want to ask you about the consequences of
10 increasing the amount of water diverted out of East
11 Maui streams today as compared to the amount diverted
12 over the last three years.

13 Increasing those diversions would have an
14 adverse impact on native species, right?

15 A What do you mean increasing those
16 diversions?

17 Q Sorry. The question. Increasing the
18 amount of water diverted would have an adverse effect
19 on native species, right?

20 A In -- well, basically, it'd be based on
21 whatever we said in the model was -- was the
22 requirement for each one of those streams for the
23 habitat that we set. So if things changed, then they
24 would have to be re -- relooked at and revisited.

25 Q Okay. But that's not my question. My

1 question to you is if the amount of water diverted were
2 to increase compared to the amount of water diverted
3 over the last three years, would doing so have an
4 adverse effect on native species?

5 A I don't --

6 MR. WYNHOFF: Objection, incomplete
7 hypothetical, Your Honor.

8 THE COURT: Overruled. You can --

9 MR. WYNHOFF: There isn't --

10 THE COURT: You may answer, Mr. Higashi.

11 THE WITNESS: I don't know.

12 Q (BY MR. FRANKEL) Would increasing the
13 amount of water diverted out of the East Maui streams
14 today as compared to the amount of diversions over the
15 last three years have an adverse impact on native
16 habitat?

17 A It may or may not.

18 Q And would it have an adverse effect on
19 the ecosystem health?

20 A Again, same answer, it may or may not.

21 Q Okay. Do you recall giving different
22 answers in your deposition in -- earlier this year?

23 A No.

24 Q All right. Let's turn to Exhibit 123.
25 Let's go to page 24.

1 THE WITNESS: I think the mouse works.

2 MR. WYNHOFF: Okay. Your Honor, may we
3 know -- it would probably be helpful to have the --

4 THE COURT: Line number?

5 MR. WYNHOFF: No, I -- apparently not.

6 Page 24. Thank you, Your Honor.

7 THE COURT: All right.

8 MR. FRANKEL: Page 24 starting with line 6.

9 Q You were asked I believe the same
10 question you were just asked today. Would an increase
11 in the amount of water being diverted out of East Maui
12 that has been occurring for the past three years or so,
13 would an increase adversely affect native species, and
14 your answer then was I think it would.

15 Is your answer -- is that the answer that --
16 would you like to amend the answer you prior -- gave me
17 previously today or that answer?

18 A No, it might have, it might have an
19 impact.

20 Q Okay. And then on line 11, you were
21 asked about the adverse effect on native stream
22 habitat. And you answer, well, you wouldn't have
23 stream habitat if they did that.

24 And I clarified the question, well, I didn't
25 say how much the increase was. But nevertheless you

1 said it would affect the habitat. Is your answer --

2 MR. WYNHOFF: Your Honor. Your Honor, I
3 object because I -- I would just -- if I might, I'd
4 like to add the actually (indiscernible) read. Not
5 that Mr. Frankel was being improper, but I think that
6 would be better please.

7 THE COURT: Yes.

8 MR. FRANKEL: All right. Will do.

9 Q So line 13. Okay. And would increasing
10 the amount of water diverted out of East Maui that has
11 been current for the past three years -- or it says and
12 has been current for the past three years or so
13 adversely affect native stream habitat?

14 And your answer was you wouldn't have stream
15 habitat if they did that.

16 The follow-up question, well, I didn't say how
17 much they're gonna increase.

18 And your answer is, yeah, okay. But, yeah, it
19 would affect the habitat.

20 Do you see that?

21 A Yes.

22 Q And would you agree with that statement
23 today?

24 A I -- I agree with the second part, the
25 second statement, but the first statement part of it,

1 that's not necessarily true.

2 Q Okay. That's fair. And then you were
3 asked and how about ecosystem health, and your answer
4 is yes. Do you see that?

5 A Yes.

6 Q And you agree?

7 A It's possible that it could affect the
8 ecosystem health.

9 Q Okay. You can turn the computer away for
10 a little bit. Oh, actually, sorry, you can't. We
11 wanna take a look at Sierra Club's Exhibit 67.

12 And what I wanna do is I wanna talk about
13 specific streams, and I wanna start with Waiohue
14 Stream. And I'm gonna spell that for the court
15 reporter. It's W-A-I-O-H-U-E.

16 THE COURT: And for the record, Plaintiff's 67
17 is already in evidence.

18 MR. WYNHOFF: What exhibit are we being asked
19 to look at, Your Honor?

20 THE COURT: Sixty-seven.

21 MR. WYNHOFF: Thank you, Your Honor.
22 Exhibit 67 is a one-page picture?

23 THE COURT: Yes, sir, a waterfall.

24 MR. FRANKEL: That's --

25 MR. WYNHOFF: Thank you, Your Honor.

1 Q (BY MR. FRANKEL) Does that look like
2 Waiohue Stream to you, Mr. Higashi?

3 A That's Waiohue wa -- it's the waterfall
4 and the stream.

5 Q That's a pretty spectacular pool, isn't
6 it?

7 A Yes.

8 Q All right. Now if you could look at
9 these exhibits --

10 MR. FRANKEL: And these also are in evidence,
11 Your Honor.

12 Q -- Exhibit 64, 65, and 66. And if
13 Mr. Wynhoff has difficulty bringing all three of them,
14 just any one of them is fine.

15 MR. WYNHOFF: Yes, I don't think we'll be able
16 to bring 'em all up so I'll do 66.

17 MR. FRANKEL: Okay.

18 MR. WYNHOFF: So we have 66 in front of us
19 which is a one-page picture. I'll try to make it a
20 little smaller so that we see the whole thing.

21 THE WITNESS: I can see it.

22 MR. WYNHOFF: Yes, Your Honor, we have it in
23 front of us, --

24 THE COURT: Thank you.

25 MR. WYNHOFF: -- 66.

1 Q (BY MR. FRANKEL) And you know what? We
2 probably should look at 65 instead so that -- it's
3 better context. I'm sorry.

4 MR. WYNHOFF: Sure. Sure. That's no problem.
5 I understand.

6 What we see in 65 is a one-page picture of
7 some water on the left and other stuff on the right.

8 MR. FRANKEL: Right.

9 MR. WYNHOFF: And we have that in front of us,
10 Your Honor.

11 Q (BY MR. FRANKEL) So, Mr. Higashi, do you
12 recognize this?

13 A Yes, that's a pool near that waterfall.

14 Q And what's that pipe there for?

15 A The pipe is taking water from the upper
16 waterfall and put -- bringing it down into the pool.

17 Q Mr. Higashi, does that pipe have any
18 function anymore or has it become superfluous with the
19 Water Commission's order and the modifications that
20 were made?

21 A I don't know. I don't know if it's still
22 functioning.

23 Q All right. Have you seen that recently?

24 A No, I haven't.

25 Q You didn't see the fall in 2019?

1 A No. We didn't visit Waiohue Stream in
2 2019.

3 Q All right. Let's discuss, and I'm gonna
4 stand and I'll spell it for the court reporter,
5 Puohokamoa Stream. P-U-O-H-O-K-A-M-O-A.

6 In 2010, the Division of Aquatic Resources
7 ranked it among other streams it was looking at for
8 restoration, right?

9 A Yes.

10 Q Division of Aquatic Resources ranked
11 Puohokamoa Stream as the third highest priority stream
12 for restoration.

13 A Yes.

14 Q But the Water Commission only restored 20
15 percent of the base flow to that stream.

16 A Okay.

17 Q Is that correct?

18 A Yes.

19 Q It would be --

20 A (Indiscernible).

21 THE COURT: I'm sorry. I didn't get that
22 answer.

23 THE WITNESS: I -- I said I guess so.

24 THE COURT: Well, we don't -- we don't --

25 Q (BY MR. FRANKEL) It would be --

1 THE COURT: Hold on. Hold on.

2 Mr. Higashi, don't say yes or whatever just
3 because Mr. Frankel is suggesting it. You need to say
4 I don't know or you do know and not guess. Okay?

5 THE WITNESS: Okay. I don't know on that
6 question then.

7 THE COURT: Okay. Thank you.

8 MR. WYNHOFF: Thank you, Your Honor.

9 MR. FRANKEL: Thank you, Your Honor.

10 THE COURT: No problem.

11 Q (BY MR. FRANKEL) Well, let's see.

12 Maybe take a look at --

13 MR. WYNHOFF: Your Honor, we are willing
14 to stipulate that that is a fact and the court can
15 instruct Mr. Higashi that that is a fact. The question
16 was to what extent it was restored and I think Mr.
17 Frankel has stated the fact correctly. So rather than
18 refreshing, we can just move on.

19 THE COURT: So twenty percent?

20 MR. FRANKEL: Yeah.

21 MR. WYNHOFF: Yes, Your Honor.

22 THE COURT: So you're agreeing --

23 MR. WYNHOFF: That's fine.

24 THE COURT: Okay. You're agreeing to 20
25 percent?

1 MR. WYNHOFF: Yes, Your Honor.

2 THE COURT: All right. Thank you. Thank you
3 for saving that time.

4 Q (BY MR. FRANKEL) And, Mr. Higashi, it
5 would be relatively easy to allow water to pass through
6 the Manuel Luis Ditch. Right?

7 A I don't know. Depends on which diversion
8 you're talking about.

9 Q All right. Well let's look at
10 Exhibit J-23.

11 MR. WYNHOFF: Your Honor, we have Exhibit J-23
12 as a letter, a multi page letter dated April 1, 2010.
13 If that's the right document, it is then in front of
14 the witness.

15 THE COURT: That's what I have as well. Thank
16 you.

17 Q (BY MR. FRANKEL) So you're familiar with
18 this letter right, Mr. Higashi?

19 A Yes, I am.

20 Q And towards the back of the letter there
21 are what you call report cards, right?

22 A Yes.

23 Yes, there is.

24 Q So if we turn to the page 7 of this
25 document, and the page numbers are at the very bottom

1 in big numbers.

2 Are you there?

3 A Yes, I am.

4 Q And you helped produce this document,
5 right?

6 A Yes.

7 Q All right. Do you see your report card
8 there for the diversion M. Am I correct in assuming
9 that the diversion ML-refers to the Manuel Luis Ditch?

10 A Yes.

11 Q And do you see where it says to the right
12 of the relatively big photo in the middle of the page
13 difficulty of diversion restoration simple.

14 THE COURT: I don't know what page you're on.
15 I'm sorry.

16 MR. FRANKEL: Page 7.

17 THE COURT: Thank you.

18 MR. FRANKEL: Oh, yeah, I -- I --

19 Q This is page 7. It deals with Puohokamoa
20 Stream?

21 A Yes, I see it.

22 Q Okay. So do you have any reason to
23 disagree with the conclusion you reached back in 2010
24 that it would be relatively easy to modify this
25 diversion structure?

1 A Yes.

2 Q When you say yes, you're saying you agree
3 with what -- you don't -- you haven't changed your
4 opinion?

5 A No, I haven't changed my opinion.

6 Q And, in fact, the Division of Aquatic
7 Resources noted that modification to the diversions on
8 this stream are relatively simple with v-notches. Is
9 that consistent with your opinion?

10 A Yes.

11 Q Now I'm not looking at that exhibit
12 anymore. Did BLNR require any modification of any
13 diversion structure on this stream?

14 A I don't know.

15 Q Would it help to refresh your
16 recollection if you looked at your deposition testimony
17 from earlier this year?

18 A I don't think so. No.

19 Q So it wouldn't help you refresh your
20 recollection?

21 Okay. So is your position then that you don't
22 know what the BLNR did?

23 A I don't know what the BLNR did.

24 Q All right. So let's look at
25 Exhibit 123. You know, I'll give it to you. I'm not

1 gonna go there. Your answer is -- that's fine. We'll
2 leave that. Let the court go there.

3 All right. But, Mr. Higashi, it would be
4 better if more water were restored to Puohokamoa Stream
5 than just 20 percent of its base flow, right?

6 MR. WYNHOFF: Objection, vague and ambiguous.
7 Better for that and whom and when.

8 THE COURT: That's fair. Please rephrase.

9 Q (BY MR. FRANKEL) It would be better for
10 the aquatic life if more water were restored to
11 Puohokamoa Stream than just 20 percent of its base
12 flow, is that right?

13 MR. WYNHOFF: Objection, still incomplete,
14 better if we clarified where.

15 THE COURT: No, overruled.

16 You may answer, sir.

17 THE WITNESS: Can you repeat the question,
18 please?

19 Q (BY MR. FRANKEL) It would be better for
20 native aquatic life at Puohokamoa Stream if more than
21 just 20 percent of its base flow were restored.

22 A You would think it would be better, but
23 it depends on the amount of suitable habitats in that
24 stream.

25 Q All right. And it would be better if the

1 diversions were altered or removed, the diversion
2 structures?

3 MR. WYNHOFF: Same objection to maybe -- or
4 may you can assume restoring at that stream.

5 MR. FRANKEL: And better for the aquatic life.
6 Thank you.

7 THE COURT: Yeah. Assuming all those things,
8 Mr. Higashi, --

9 THE WITNESS: You want me --

10 THE COURT: -- go ahead.

11 THE WITNESS: It would depend on what
12 structures we're removing and what -- where they are
13 within the stream.

14 Q (BY MR. FRANKEL) Sure. So you would
15 need to address both the quantity of water and the
16 diversion structures on that stream to make things
17 better for the native aquatic life there, right?

18 A You'd have to look at them individually
19 because they're in different parts of the stream, in
20 different sections of the stream.

21 Q All right. Let's turn to Ha'ipua'ena,
22 which is H-A 'okina I-P-U-A 'okina E-N-A Stream.

23 THE COURT: Okay. Mr. Frankel, sorry. Time
24 out. We've been going 45 minutes so we'll take our
25 break now. We'll go 10, 11 minutes. I will see you at

1 five minutes of 2:00 o'clock, everyone. Five minutes
2 of 2:00 o'clock everyone.

3 We're in recess.

4 MR. FRANKEL: Thank you, Your Honor.

5 (Recess taken at 1:45 p.m.)

6 (Proceedings resumed at 1:55 p.m.)

7 THE COURT: Okay. We are back on record.

8 FTR? Right?

9 THE BAILIFF: The FTR is on, yes.

10 THE COURT: Let's see. I think everyone's
11 present. No need to account for everyone.

12 Ready to continue, Mr. Frankel?

13 I think you're muted, but go ahead.

14 MR. FRANKEL: I guess I wasn't ready.

15 Q All right. Mr. Higashi, the Division of
16 Aquatic Resources ranked Ha'ipua'ena Stream as the
17 sixth highest priority for stream restoration, right?

18 A Yes. If that's what it said in the -- in
19 the report, yes.

20 Q But the Water Commission only restored 20
21 percent of the base flow to that stream, correct?

22 A Yes.

23 Q And the Board of Land and Nat --

24 MR. WYNHOFF: Excuse me, Your Honor.

25 MR. FRANKEL: Yeah?

1 THE COURT: I'm sorry. I didn't hear that.

2 MR. WYNHOFF: Your Honor, yeah, what he said
3 is again I don't think he remembers what you told him
4 before because he said assuming that what you're saying
5 is correct.

6 THE COURT: Time out. I needed Mr. Higashi to
7 answer the question. So let's try it again.

8 MR. WYNHOFF: Yes. Sorry, Your Honor.

9 Q (BY MR. FRANKEL) But the Water
10 Commission only restored 20 percent of the base flow
11 for this stream, right?

12 A Yes.

13 Q And the Board of Land and Natural
14 Resources did not require any modification of any
15 diversion structures on Ha'ipua'ena Street, did it?

16 A I guess so. I wasn't aware of what the
17 Board decided on that stream.

18 Q All right. Let's look at Exhibit 123.

19 A Is this the Sierra Club's exhibit?

20 Q Yeah. This is back to your deposition
21 testimony again.

22 A Okay.

23 Q At the very bottom of page 32.

24 A Uh-huh.

25 Q And the question that's to you that

1 and -- this says DLNR does not require any modification
2 of any diversion structures in the Ha'ipua'ena Stream,
3 did it?

4 And your answer to that is no, it didn't.

5 Do you see that?

6 A Yes. I see that.

7 Q Okay. And so testifying today as far as
8 you're concerned, as far as you know, did the Board of
9 Land and Natural Resources or the Department of Land
10 and Natural Resources require modification of any
11 diversion structures on this stream?

12 A I don't know if they did or they didn't.

13 Q All right. Let's focus on Hanawī Stream.
14 You can not look at the computer for a bit.

15 Now, diversion structures on Hanawī Stream,
16 the diversion structure on Hanawī Stream blocks
17 migration and entrains 'o'opu and 'ōpae, right?

18 A I would say it blocks migration. It
19 doesn't necessarily entrain. I agree with that.

20 Q All right. And a notch in the diversion
21 would help native species get past the diversion
22 and would -- would help them get past the diversion,
23 right?

24 A Hopefully, yes.

25 Q And in April 2010 the Division of Aquatic

1 Resources concluded that it would be simple to modify
2 the diversion structure.

3 A Are we talking about Hanawā Stream?

4 Q That's right.

5 A Yeah, we thought it would be simple, but,
6 again, we're not engineers so, you know, we have to
7 come up with what we think would be the simplest
8 answer.

9 THE COURT: I'm --

10 Q (BY MR. FRANKEL) But my question is --

11 THE COURT: Time out. Two things. One,
12 you've used this phrase notching a couple times now and
13 I kinda know what I think you mean, but it's not clear
14 from the record. And, number two, I'm having a harder
15 time understanding Mr. Higashi than I was before the
16 break.

17 So I don't know what changed, but we need
18 better somehow. So maybe get closer to the microphone
19 or keep your hand away from your mouth or whatever it
20 takes. It's just very difficult to hear you clearly on
21 this end, sir, so.

22 MR. WYNHOFF: Okay. Sorry about that, Your
23 Honor.

24 And thank you, Your Honor. We've moved the
25 microphone and Mr. Higashi will continue to try. We

1 really appreciate it if you remind us if the record
2 isn't improving.

3 THE COURT: All right. Thank you.

4 Mr. Frankel, go ahead.

5 Q (BY MR. FRANKEL) So, Mr. Higashi, can
6 you explain the use of the term notching that you used
7 in your April 2010 letter?

8 A So it was like a v-notch in the concrete.

9 Q And how does one go about creating a
10 v-notch?

11 A I don't know. You could do it with a
12 saw, a concrete saw, a hammer and chisel. Like I said,
13 I don't know how the structures are built so our -- the
14 simplest thing is what we know and what we're looking
15 at as far as the animals with this notch -- notch there
16 structures.

17 Q And by creating that notch, you create a
18 connectivity of water so the animals can get up and
19 down, right?

20 A Not necessarily creating connectivity.
21 It depends on how deep your notch is and your -- the
22 level of the water behind the concrete wall.

23 Q But that's the point of notching is so
24 that you do create that connectivity, right? So you
25 want a sufficient notch to create that connectivity?

1 A Yes, you want water to flow downstream at
2 that low point.

3 Q Okay. And in April 2010 the Division of
4 Aquatic Resources concluded that it would be simply to
5 modify the diversion structure with this notching,
6 right?

7 A Yes.

8 Q But the Board of Land and Natural
9 Resources has not required that this diversion be
10 notched any time soon, right?

11 A I guess so. I don't know.

12 Q Has the recommendation that you had in
13 April 2010, has that been implemented?

14 A I don't know because we don't follow the
15 recommendations through and we were not told what
16 happens af -- after the - after we make a
17 recommendation.

18 Q Okay. Now, just below the diversion
19 structure at Hanawī Stream is there something called
20 Big Spring?

21 A I guess so. Yeah, it's further down the
22 -- the stream, channel the -- the streams.

23 Q What's so special about Big Spring?

24 A Well, it provides more flow into the
25 system, into the stream.

1 Q A lot -- is there a lot of water
2 generated there?

3 A I assume there is. I don't know. I'm
4 not -- I'm not a hydrologist. I don't know the -- the
5 amount of water the springs put out.

6 Q Are you able to characterize it as being
7 a lot of water that's flowing from Big Spring or not?

8 A I don't know.

9 Q Okay. The key to ensuring the health of
10 native species in Hanawā Stream is not so much the
11 quantity of water flowing through it, but fixing the
12 structure so the native animals can get up and down
13 above the springs and above the diversion, right?

14 A Yes.

15 Q Okay. I wanna talk about a couple of
16 streams that the Water Commission did not address in
17 its order that were not subjects of the petition. The
18 first is Kōlea Stream.

19 MR. WYNHOFF: Object to the lead up, Your
20 Honor. First of all, it's two different things. I
21 think they did -- I think they did address them and I,
22 but -- even though they weren't necessarily part of the
23 petition. I object to the lead up.

24 THE COURT: Okay. I would really like us to
25 do what we usually do in trials, which is to get

1 personal testimony from the witness. Can we just go
2 straight to that? And you guys can make all the
3 connections later between what's in the D&O and what
4 isn't and all that stuff. Let's just get some facts
5 out that this witness has personal knowledge of.

6 Q (BY MR. FRANKEL) So you were -- you
7 helped author a report on -- so the reason for the
8 clarification, there's two bodies of water in this area
9 called Kōlea Stream, am I right?

10 Mr. Higashi?

11 A I guess so. I don't know. I don't know.

12 Q Okay. You were coauthor of a report on
13 one Kōlea Stream, am I right?

14 A Yes.

15 Q Okay. And in that report you concluded
16 that restoration of flow to increase animal passage
17 between diversions would benefit native species,
18 correct?

19 A Probably, yes.

20 Q All right. Now let's talk very briefly
21 about 'O'opuola Stream. That's spelled O 'okina
22 O-P-U-O-L-A.

23 A Okay.

24 Q Are you familiar with that stream?

25 A Not real familiar with it, no.

1 Q Okay. Does the name of the stream or the
2 translation is long 'o' opu fish suggest to you that it
3 might be good habitat for 'o' opu?

4 MR. WYNHOFF: Objection, calls for
5 speculation.

6 THE COURT: You may answer, sir.

7 THE WITNESS: I don't know.

8 Q (BY MR. FRANKEL) All right. Now, you've
9 worked with James -- Dr. James Parham before, right?

10 A Yes, I have.

11 Q And you worked with him on that 2009
12 report we talked about a long time ago, the one with
13 the long name, remember?

14 A Yes.

15 Q And you respect Dr. Parham's work, right?

16 A Yes.

17 Q And you are somewhat aware of the fact
18 that he produced a report in 2019 that is in Alexander
19 & Baldwin's Draft EIS, right?

20 A I guess so. I haven't seen it.

21 Q We talked about it at your deposition.
22 Do you remember?

23 A No, I don't.

24 Q All right. Do you have -- assuming,
25 Mr. Higashi, that Dr. Parham concluded that 85 percent

1 of the habitat units on the 13 streams that the Water
2 Commission did not address, assuming that's true,
3 that's a significant ecological impact, isn't it?

4 MR. WYNHOFF: I'm gonna object to that as
5 assuming facts not in evidence and I don't think
6 it's -- and also vague and ambiguous, incomplete
7 hypothetical.

8 THE COURT: Is Mr. Higashi giving -- are you
9 asking him for an expert opinion?

10 MR. FRANKEL: That's not an unfair question,
11 Your Honor, and to some degree I am. He's -- he works
12 for the State, but I'm asking him his opinion. And, in
13 fact, Your Honor, I did identify him in our pretrial
14 statement and the second naming of witnesses as an
15 expert witness.

16 THE COURT: Okay. And he was asked the same
17 question at his depositions plural.

18 THE COURT: Okay. Hang on. I need to ask my
19 court reporter to please scroll back a little bit so I
20 can see the question again.

21 Okay. Thank you.

22 All right. Here's the question, Mr. Higashi.
23 Assuming that Dr. Parham concluded that 85
24 percent of the habitat units --

25 All right. So I'm gonna repeat the question

1 that Mr. Frankel asked and I'm gonna read it exactly so
2 that the court reporter doesn't have to take it down
3 again.

4 Assuming, Mr. Higashi, that Dr. Parham
5 concluded that 85 percent of the habitat units on the
6 13 streams that the Water Commission did not address,
7 assuming that's true, that's a significant ecological
8 impact, isn't it?

9 Can you answer that question, please.

10 MR. WYNHOFF: Over objection, Your Honor.

11 THE COURT: What's the basis for the
12 objection?

13 MR. WYNHOFF: That it assumes facts not in
14 evidence, no sourcing was ever said.

15 THE COURT: Okay. Overruled.

16 You can try to answer it if you have
17 knowledge, Mr. Higashi, or if you have an opinion on
18 it.

19 THE WITNESS: Well, 85 percent habitat loss is
20 a -- is a big number, but then again you have to
21 understand what you're talking about on the 85 percent
22 that they take from the streams.

23 The 13 streams may not have habitat, and it
24 depends on what species you're talking about for -- for
25 all eight -- eight stream species. And if you're

1 talking about a few, then you're not talking about the
2 majority. And the thing is if you're talking about the
3 upper -- upper species, then you -- you don't have much
4 down -- downstream, and it may be that these systems
5 and watersheds may have terminal falls. And when I say
6 terminal falls, I mean falls that go directly to the
7 ocean, and those not have any habitat for three of the
8 native species. So right there that just cuts them out
9 of the picture.

10 So, yeah, 85 percent is of the habitat loss
11 probably for those 13 streams. But, again, the
12 habitats aren't continuous, they're not connected, and,
13 you know, it depends on -- again, like I said,
14 what -- what habitat animals you're talking about.

15 I can give you an example. Let say that the
16 stream has the habitat units of 20 and that it has 10
17 meter habitat un -- you have 10 meter habitat units
18 that have a -- a habitat suitability index or rating of
19 .2. Okay. Those 10 are gonna give you 100 habi --
20 habitat meters, which would give you a -- a 20 --
21 multiplied by that index will give you a -- a 20
22 habitat unit measurement. Right?

23 Now, that with the .2 shows that it doesn't
24 have much habitat that is suitable. It has some, but
25 it doesn't have much. And it doesn't necessarily mean

1 that that habitat will be -- how do you say it -- used
2 by those species.

3 So if that -- another stream has 10 habitat
4 units and it has its habitat unit index of 2, that
5 would give you the same 20, but it's more likely that
6 those -- that that stream will have single habitats and
7 those habitats will be utilized by the animals.

8 So this is -- it's -- there's really a
9 fine -- fine thing there when you're talking about
10 habitat units. I mean, the numbers may look -- you
11 know, give you one idea, but you have to dig deeper
12 into it than just the numbers. You have to look at the
13 indexes, you have to look at the species involved.

14 Q (BY MR. FRANKEL) All right. And,
15 Mr. Higashi, you have worked with Dr. Parham in
16 developing this methodology by which habitat units are
17 measured and the degree to which they're lost or not,
18 correct?

19 A Yes.

20 Q And any methodology is gonna have its
21 weakness, but this is the best methodology that the
22 Division of Aquatic Resources has been able to find and
23 use, is that right?

24 A Yes.

25 Q All right. And do you recall giving a

1 completely different answer at two different
2 depositions on this question regarding the significance
3 of reducing habitat units by 85 percent?

4 A I may have done that previously, but it's
5 because I looked at the model more closely this time
6 around before I came -- came to this trial.

7 Q Did you look at Dr. Parham's report that
8 was completed in 2019?

9 A Yes.

10 Q Okay. So I think that's a little bit of
11 a different answer than we got before. You are
12 familiar with his 2019 study, correct?

13 A Yes.

14 Q All right. And his 2019 study refined a
15 lot of the data that was used in 2009, didn't it?

16 A I'm sure it did, because ten years'
17 difference you're gonna get better -- better
18 information and more data.

19 Q All right. And so you have previously
20 testified twice that reducing the habitat units by 85
21 percent is significant, correct?

22 A It's significant, but it depends on the
23 streams that we're talking about and the streams where
24 you're putting water back into.

25 Q Sure. And we're talking about --

1 A (Indiscernible) stream.

2 Q Sorry. So I'm only talking, Mr. Higashi,
3 about the 13 streams that are not part -- were not
4 subject to petition before the Water Commission in
5 2018, or as Dr. Parham refers to them as the 13
6 non-IIFS streams. Do you know what I'm talking about?

7 A Okay. Are you talking about the taro
8 streams? Because there were streams that were set
9 aside for taro cultivation.

10 Q No. You know, maybe I --

11 MR. FRANKEL: Your Honor, I know that you
12 don't wanna do this, but I think to just make sure
13 we're all on the same page, I would like to have you
14 take a look at Exhibit J-20.

15 Can you get that, Mr. Wynhoff?

16 MR. WYNHOFF: It locked again.

17 THE COURT: It's the Draft EIS.

18 MR. WYNHOFF: The computer locked up, Your
19 Honor. We'll get it.

20 THE COURT: Let's go off record for a second.

21 (Off record.)

22 THE COURT: All right. Ready to go? Go
23 ahead.

24 MR. FRANKEL: I don't know if we're there.
25 Are you there?

1 MR. WYNHOFF: I'm looking for -- what am I
2 looking for?

3 MR. FRANKEL: That's fine. So we're --

4 MR. WYNHOFF: Exhibit J-20?

5 MR. FRANKEL: J-20.

6 MR. WYNHOFF: Okay. We have J-20 in front of
7 the witness, Your Honor.

8 THE COURT: Thank you.

9 Q (BY MR. FRANKEL) All right. I think
10 it might be good to go to page 604.

11 MR. WYNHOFF: Page 604, Your Honor?

12 THE COURT: Yes, sir.

13 MR. FRANKEL: And, Your Honor, so I just wanna
14 be --

15 THE COURT: Are you there?

16 MR. FRANKEL: -- clear that this is -- I'm
17 wrapping up. I'm about to wrap up if we can tie these
18 pieces together.

19 THE COURT: Thank you.

20 THE WITNESS: Okay.

21 Q (BY MR. FRANKEL) So --

22 A I'm there.

23 Q -- do you see at the bottom of page 64
24 there are stream names and there's a title Subject to
25 IIFS. Can you see that?

1 THE COURT: Is that 64 or 604?

2 MR. FRANKEL: 6-0-4. 6-0-4.

3 THE COURT: Okay. Thank you.

4 Q (BY MR. FRANKEL) You see that table at
5 the bottom of the page there? Streams and the license
6 area?

7 A Yes.

8 Q All right. So just sort of scrolling
9 down the first on page 604, they all say yes, yes, yes.
10 And then on the top of page 605, Puakea Stream says no.
11 Do you see that?

12 A Yes.

13 Q And then scrolling down to the next page.
14 On page 606, there are -- and I don't wanna trouble the
15 court reporter. So there's a number of streams
16 mentioned there where the column says No starting with
17 number 24. Do you see all those streams there?

18 A Yes.

19 Q All right. So that's what we're
20 referring to, or Dr. Parham's referring to as non-IIFS
21 streams. So we're not talking about the kalo streams
22 that you may have referred to.

23 And now if you could direct your attention to
24 page 629 of the document there, the report there, the
25 section that talks about non-IIFS streams. Do you see

1 that?

2 A 629.

3 Okay.

4 Q So if Dr. Parham concluded that with --
5 if these 13 streams were fully diverted, 85 percent of
6 the habitat units would be lost, is that a significant
7 ecological impact? Do you recall your prior testimony
8 on that?

9 A No, I don't.

10 Q All right. So let's look at Exhibit 123.

11 THE COURT: Page number and line, please?

12 MR. FRANKEL: Page 40, the very bottom, going
13 to page 41.

14 THE COURT: Thank you.

15 Q (BY MR. FRANKEL) So -- are you there
16 yet, Mr. Higashi?

17 MR. WYNHOFF: No, Your Honor. We're getting
18 there.

19 Yes, Your Honor.

20 THE COURT: Thank you.

21 Q (BY MR. FRANKEL) So on line 21 there on
22 page 40, you were asked, okay, so there's 13 streams
23 that are not affected by the Water Commission's order,
24 okay? And that would include Kōlea Stream. And he
25 concludes that the existing diversions reduced habitat

1 units on those streams from 588,000 square meters to
2 88,386 square meters, a reduction of 85 percent.

3 Knowing what you do about some or all of the
4 streams, is the reduction of 85 percent is that gonna
5 have a significant ecological impact? And your answer
6 back then was yes. Is that still your answer today?

7 A No.

8 Q All right. And let's look at
9 Exhibit 122. Sierra Club's Exhibit 122.

10 MR. WYNHOFF: Page, Your Honor?

11 MR. FRANKEL: The page is -- it's pdf page 9
12 but page 31 of the transcript.

13 MR. WYNHOFF: Thank you, Your Honor.

14 We're ready, Your Honor.

15 THE COURT: Thank you.

16 Q (BY MR. FRANKEL) So on line 19, page 31,
17 you were asked, in it you said that 85 percent of the
18 habitat units on these 12 -- actually it talks about 13
19 streams, that are not affected by the -- that do not
20 have an IFS pursuant to CWRM's decision in 2018, 85
21 percent of the habitat units are eliminated based on
22 the diversion. Is that significant?

23 You asked 85 percent?

24 Ms. Weston objects, speculation.

25 Ms. Akagi joins.

1 And you answer, if it's true, it would be
2 significant.

3 Do you see that?

4 A Yes.

5 Q And you were under oath both times that
6 you testified and -- at your depositions?

7 A Okay. At that time I was -- I believed
8 it was, as you say 85 percent, that's a big number.
9 But when I looked it up and I -- and I looked at what
10 that 85 percent meant, out of those -- 85 percent out
11 of those streams and figuring out how much habitat was
12 lost, it was less than one percent.

13 Q Well, is it 85 percent?

14 A No, it's less than one percent.

15 Q One percent of what?

16 A One percent of whatev -- whatever acreage
17 you're saying was lost by -- and it's not -- and it's
18 not really an acreage. It's by linear. It's -- it's
19 by -- I think you're under -- misunderstanding this.
20 Habitat units are not by square -- square meters.
21 They're by linear meter -- meters. And basically
22 they're developed to 10 meter grids. There's no
23 streams -- we don't have that many streams that have 30
24 meters at 10 meters -- 10 meters square in them. So it
25 was -- this model was developed based on a -- on linear

1 -- linear measurement on 10 meter grids with
2 (indiscernible) elevation model.

3 Q So you helped develop this model, right,
4 Mr. Higashi?

5 A Yes.

6 Q And this model says under the natural
7 flow scenario there's 588,000 square meters of habitat
8 units predicted, right, for these 13 streams?

9 A Yes.

10 MR. WYNHOFF: I don't think that's what it
11 says, Your Honor. May we look back at the actual
12 statement in the DEIS to make sure we have the correct
13 language?

14 THE COURT: Sure.

15 MR. WYNHOFF: Thank you, Your Honor.

16 All right. I'm gonna just show him my
17 computer, Your Honor, because I have it right here, and
18 that way we'll just have it.

19 We're on page -- I believe we're on page 629
20 of J-20, and that's where I am anyway and believe
21 that's what Mr. Frankel is asking about. And if I'm
22 wrong, then he can let us know.

23 Q (BY MR. FRANKEL) So, again, Mr. Higashi,
24 you talked about this thing, the model that you helped
25 develop, and using your model the different data under

1 the natural flow scenario over 588,000 square meters of
2 habitat units were predicted. Do you see that?

3 A Yes.

4 Q But under the full diversion scenario,
5 88,386 habitat units were predicted to occur. Do you
6 see that?

7 A Yes.

8 Q Thus, under the full diversion scenario,
9 only 15 percent of the habitat units remained in this
10 group of streams. Do you see that?

11 A Yes.

12 Q And if there's only 15 percent of the
13 habitat units that remain, that means 85 percent of the
14 habitat units were lost, right?

15 A Yes.

16 Q That's not one percent. That's 85
17 percent of the habitat units for those 13 streams that
18 are lost, correct?

19 A Yes.

20 MR. FRANKEL: No further questions, Your
21 Honor.

22 THE COURT: All right. So, Mr. Wynhoff, I
23 know you were going to reserve.

24 Is there anyone else who wants to --

25 MR. WYNHOFF: Your Honor.

1 THE COURT: I'm sorry. Go ahead.

2 MR. WYNHOFF: Your Honor, I am going to
3 reserve my direct. But remember I said I might ask a
4 couple on cross, and I do -- or and I probably do have
5 either two or three questions.

6 THE COURT: Right. Yeah, but I --

7 MR. WYNHOFF: It may not be. I --

8 THE COURT: That's fine. But I think we're
9 just going to go in our usual order though, right? I'm
10 gonna ask --

11 MR. WYNHOFF: Yes, Your Honor.

12 THE COURT: -- Mr. --

13 MR. WYNHOFF: Yes, Your Honor.

14 THE COURT: -- Mr. Schulmeister first, then
15 Mr. Rowe, and then the State.

16 So, Mr. Schulmeister, you are up.

17 MR. SCHULMEISTER: Yes. I have none at this
18 time, Your Honor.

19 THE COURT: Thank you.

20 THE COURT: Mr. Rowe?

21 MR. ROWE: I have no questions for this
22 witness, Your Honor.

23 MR. WYNHOFF: Thank you, Your Honor.

24 THE COURT: All right. Thank you.

25 Mr. Wynhoff, to you.

1 MR. WYNHOFF: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. WYNHOFF:

4 Q Mr. Higashi, we were just talking about
5 588,000 square meters. Do you see that?

6 A Yes.

7 Q How many acres is 588,000 square meters?

8 A 145.

9 Q 145 acres?

10 A Acres.

11 Q And there's -- there's 33,000 acres in
12 this -- in these RPs, is that correct?

13 A That's correct.

14 Q And there's 56,000 acres in the
15 watershed, is that correct?

16 A Right.

17 Q Let me ask you this. Is it -- do you
18 agree with Mr. Parham when he talks about 588 square
19 meters of habitat units? Does that make sense to you?

20 A No, because usually we don't -- we don't
21 say it's square meters of habitat units. We just say
22 it's --

23 THE COURT: Sorry, we can't --

24 THE WITNESS: -- habitat un --

25 THE COURT: We can't understand him. Mr.

1 Higashi , --

2 THE WITNESS: We -- we say --

3 THE COURT: Stop.

4 THE WITNESS: -- it (indiscernible) --

5 THE COURT: Hold it. Mr. Higashi , I think it
6 might help if you unfolded your arms. Okay. I mean,
7 people can just breathe easier when they don't have
8 their arms folded. Let's try that.

9 And --

10 THE WITNESS: Okay.

11 THE COURT: -- like you just moved a little
12 closer to the microphone so that's good. Thank you.
13 And please go ahead and start your answer from the top
14 because it was very fuzzy. Thank you.

15 MR. WYNHOFF: So, Your Honor, may I just ask
16 it again to help the witness?

17 THE COURT: Yes.

18 MR. WYNHOFF: Thank you, Your Honor.

19 Q So, Mr. Higashi , you see that it says 588
20 square meters of habitat unit. Do you agree with that
21 characterization of habitat unit was my question? If
22 you would speak up please, Mr. Higashi .

23 A Um -- I guess, yeah, if that's -- if
24 that's what he characterized it as. I mean, he was
25 the lead author on this paper.

1 Q Do you understand that habitat units
2 are given the unit of square meters or do you have a
3 different view of it?

4 A I think at that time probably it was
5 square meters. I think. Or -- and, no, I think at
6 that time it was probably linear meters. It might have
7 been linear meters, yeah.

8 Because where we were looking at is we were
9 looking at habitats in a -- a ten meter grid. And we
10 were looking at streams along that 10 meter grid, which
11 would be a length. It's the linear measurement.

12 MR. WYNHOFF: So thank you, Your Honor. Those
13 are my couple questions for cross, reserving direct.
14 Thank you.

15 THE COURT: All right. Thank you.

16 Mr. Frankel.

17 MR. FRANKEL: Yeah, sure.

18 REDIRECT EXAMINATION

19 BY MR. FRANKEL:

20 Q So I think I understand that you wanted
21 to compare the number of acres of habitat units to the
22 entire watershed. Is that what you were doing with
23 Mr. Wynhoff just now?

24 A Yes.

25 Q But most of that acreage is firm land.

1 That's not streams, right?

2 A Yes. But you can't -- and that's the
3 thing is you're -- you're trying to compare habitat
4 units in the square meter with this habitat units on
5 the linear measurement.

6 Q Well, Dr. Parham has a Ph.D., doesn't he?

7 A Yes, he does.

8 Q Where did you get your Ph.D.?

9 MR. WYNHOFF: Objection, Your Honor, it's just
10 argumentative, and actually rather disrespectful with
11 all respect to Mr. Frankel.

12 THE COURT: Well, he's entitled to ask about
13 his educational background.

14 THE WITNESS: My educational background is I
15 have a bachelors.

16 THE COURT: Okay.

17 THE WITNESS: My experience is the 30
18 something years I spent out in the streams. And to me
19 that's just as good as a Ph.D.

20 May I also add something else, Your Honor?

21 THE COURT: No. Let's -- I appreciate you --

22 THE WITNESS: Okay.

23 THE COURT: -- you got a lot on your mind
24 right now, 'cause Mr. Frankel's question was a bit
25 rude, frankly, but you know, so I'll just take --

1 THE WITNESS: No, we'll just have to do it --

2 THE COURT: Time -- time out.

3 THE WITNESS: -- defense will be --

4 THE COURT: Hold it.

5 THE WITNESS: -- the last --

6 THE COURT: Hold it.

7 THE WITNESS: -- the last --

8 THE COURT: Hold it. Everybody just take a
9 deep breath. We're fine. We're gonna get through
10 this. All right?

11 Mr. Frankel, please ask a regular kind of
12 question.

13 MR. FRANKEL: Thank you, Your Honor. I have
14 no further questions.

15 THE COURT: Okay.

16 Mr. Wynhoff, go ahead.

17 RE CROSS EXAMINATION

18 BY MR. WYNHOFF:

19 Q May I ask you, Mr. Higashi, to go ahead
20 and elaborate on that last answer that you wanted to
21 share with us.

22 MR. FRANKEL: Objection, form of the question.

23 THE COURT: Well, are you talking about his
24 opinion that a lot of experience is worth more than an
25 educational degree? Is that what you're asking about?

1 MR. WYNHOFF: Yes, Your Honor, it seemed that
2 he wanted to add to that and the court quite properly
3 asked him to stop and now I would like him to finish it
4 if he could be allowed to do so.

5 THE COURT: No, that's fine. I just wanted to
6 make sure we understood what the topic was.

7 Go ahead, Mr. Higashi.

8 THE WITNESS: Thank you, Your Honor.

9 Yeah. Well, a lot of the things that you
10 learn about the native animals is not from a Ph.D and
11 not from an academic college. It's basically being out
12 there in the streams to see what the animals do. And
13 the fact that we put together the watershed, Hawai'i
14 Watershed Atlas, which had over 90,000 observations,
15 and the model that -- that we came up with came from
16 --

17 THE COURT: Time out. Mr. Higashi, I'm very
18 sorry. I definitely want --

19 THE WITNESS: Yeah.

20 THE COURT: -- to hear your answer, but the
21 audio is just terrible right now.

22 THE WITNESS: Yes, Your Honor. I was --

23 THE COURT: We need -- we need to find --

24 THE WITNESS: I thought I was speaking --

25 THE COURT: Is there a way to move the

1 microphone, Mr. Wynhoff? Because you're coming --
2 Mr. Wynhoff, you're coming through much more clearly
3 than Mr. Higashi is. I don't know why.

4 MR. WYNHOFF: It's practice, Your Honor, and
5 I'm shouting.

6 Mr. Higashi, this is just the last thing so --

7 THE WITNESS: Yeah.

8 MR. WYNHOFF: -- just shout. Just have it.

9 THE WITNESS: Okay.

10 THE COURT: Okay.

11 THE WITNESS: Is that okay, Your Honor?

12 THE COURT: Yes.

13 THE WITNESS: Can you hear me now, Your Honor?

14 THE COURT: Yes. But even a little louder
15 would be even better.

16 THE WITNESS: Okay. Basically, what I was
17 trying to get -- get across was that, a lot of the
18 stuff that, you know, you learn at the universities and
19 stuff like that, you can't really learn in the -- you
20 can't -- what I learned, it's in my experience, it
21 can't be learned in books is basically what I want to
22 boil it down to.

23 You know, it's a matter of being out there in
24 the field, looking at the animals, seeing their
25 behavior and everything else, and looking at the

1 habitat and the surroundings that provides me with the
2 background to kind of put in information and data into
3 this kind of modeling -- models.

4 THE COURT: Understood. Thank you.

5 Mr. Frankel, anything further?

6 MR. FRANKEL: Yes, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. FRANKEL:

9 Q So, Mr. Higashi, has your experience
10 taught you that lack of water in streams is harmful to
11 native aquatic species?

12 A Yes.

13 Q And has your experience taught you that
14 diversion structures that were made in native -- in
15 streams can be a barrier to native species moving
16 upstream?

17 A Well, the thing is the native biota isn't
18 the only things that need water. So do people.

19 Q That's not my question. My question is
20 whether your experience has taught you whether
21 diversion structures can prevent native species from
22 migrating upstream?

23 A Yes.

24 Q And has your experience taught you that
25 diversion structures can entrain the larvae of native

1 species floating downstream?

2 A It's possible.

3 Q And how much experience do you have on
4 the 13 streams that the Water Commission did not --
5 were not subject of the petition that the Water
6 Commission addressed in the 2018 decision?

7 A How much what?

8 Q Experience.

9 A Experience?

10 Q How much time have you spent in those 13
11 streams?

12 A I wish I had spent -- I wish I had a lot
13 of time to spend in all those streams, but I can't,
14 basically we can't do that with -- with the limited
15 amount of time and budget that we have.

16 Q Okay. So you know what, I think what I'd
17 like to do is go through those streams and ask you
18 whether you have been to each of these streams that
19 are a part of Dr. Parham's study.

20 THE COURT: Let's just --

21 MR. WYNHOFF: Objection, beyond the scope of
22 the recross, Your Honor.

23 THE COURT: Well, I'm gonna allow it, since
24 he's coming back anyway. But instead of going through
25 each one, let's just ask Mr. Higashi which ones he has

1 been in. That might save some time.

2 MR. FRANKEL: You know, I don't think he is
3 quite sure about which of the 13 of the 13 we're
4 talking about.

5 THE COURT: Oh.

6 MR. FRANKEL: So that's the problem with that.

7 THE COURT: I see why you're saying that.

8 Okay. Go ahead.

9 Q (BY MR. FRANKEL) So let's go to Exhibit
10 J-20, page 38.

11 MR. WYNHOFF: That should be up here.

12 Is that Bates stamp page 38, Your Honor?

13 MR. FRANKEL: I -- you know, I don't know what
14 I'm talking about. No, it's page 605. It's -- there's
15 another number that says -- sorry. Bates stamp page
16 605.

17 MR. WYNHOFF: Thank you, Your Honor.

18 So, Mr. Higashi, the document you have before
19 you is at 629. We're moving it up to 605 as I
20 understand it.

21 Okay.

22 Q (BY MR. FRANKEL) So on --

23 MR. WYNHOFF: We're there, Your Honor.

24 Q (BY MR. FRANKEL) On line 6 there's a
25 stream, Puakea. P-U-A-K-E-A. Have you ever been to

1 that stream?

2 A I don't think so.

3 Q All right. Scrolling down to Bates stamp
4 page 606.

5 A Okay.

6 Q Are you there?

7 A Yes.

8 Q So you wrote a report or coauthored a
9 report on Kōlea Stream, No. 24, K-O with a macron,
10 L-E-A?

11 A Yes.

12 Q Have you ever been to Punalu'u Stream?

13 A Yes.

14 Q Okay. Have you been to No. 26, which is
15 spelled K-A 'oki na A-I-E-A?

16 A No.

17 Q Have you been to 'O'opuola Stream?

18 A Yes.

19 Q Have you been to Puehu, P-U-E-H-U?

20 A No.

21 Q How about Nā'ili'ilihalee? N-A with a
22 macron, 'oki na I-L-I 'oki na I-L-I-H-A-E-L-E?

23 A Um -- I don't remember.

24 Q How about Kailua Stream?

25 A I don't remember that one either.

1 Q How about Hanahana also known as Hanawana
2 or Hanauna, which is No. 31 on that page?

3 A No.

4 Q How about Waipi'o Stream on -- in East
5 Maui?

6 A Nope.

7 Q How about Mukupapa?

8 A I don't remember.

9 Q How about Ho'olawa?

10 A Yes.

11 Q And does that include the tributaries of
12 Ho'olawai Ii and Ho'olawanui?

13 A I think so.

14 Q All right.

15 MR. FRANKEL: No further questions, Your
16 Honor.

17 THE COURT: Thank you.

18 All right. Back through our roster here.
19 Mr. Schulmeister?

20 MR. SCHULMEISTER: No questions.

21 THE COURT: Mr. Rowe?

22 MR. ROWE: I have no questions, Your Honor.

23 THE COURT: Mr. Wynhoff.

24 RECROSS EXAMINATION

25 BY MR. WYNHOFF:

1 Q Mr. Higashi, some of those streams that
2 Mr. Frankel just talked to you about, those streams
3 have entries in the Hawaiian Atlas of Streams, correct?

4 A Yes.

5 Q And did you participate in preparing
6 those entries in the Hawaiian Atlas of Streams?

7 A Yes, I did.

8 MR. WYNHOFF: Okay. That would probably be
9 part of my direct, Your Honor, so I don't have anymore
10 questions right now today.

11 THE COURT: Mr. Frankel?

12 MR. FRANKEL: No more questions, Your Honor.

13 THE COURT: Mr. Schulmeister?

14 MR. SCHULMEISTER: No questions.

15 THE COURT: Mr. Rowe?

16 MR. ROWE: No questions, Your Honor.

17 THE COURT: Mr. Wynhoff? I don't think you
18 get anymore.

19 MR. WYNHOFF: No questions, Your Honor.

20 THE COURT: Okay.

21 MR. WYNHOFF: I don't have anymore. In
22 response to my own questions, no, Your Honor. Thank
23 you. But I appreciate the courtesy.

24 THE COURT: No problem.

25 All right. So we are pau with Mr. Higashi at

1 least for plaintiff's direct case, is that correct?

2 I see Mr. Frankel nodding. So that's -- I
3 think that's all we really need.

4 All right. Mr. Higashi, thank you for
5 spending this time with us and you are excused for the
6 day. But you are going to come back apparently and
7 you'll just be in touch with Mr. Wynhoff about that.
8 All right?

9 THE WITNESS: Yes. Thank you.

10 THE COURT: All right. Thank you. And I'm
11 sure you would show up anyway, but I'm directing you to
12 show up whenever he asks you to. All right?

13 THE WITNESS: Okay. Thank you, Your Honor.

14 THE COURT: No problem. Have a good weekend.

15 All right.

16 MR. WYNHOFF: Thank you, Your Honor. Just
17 give me one minute to walk out with Mr. Higashi and
18 show him the way out. I mean, if you're ever in my
19 office, you'll know I'm not joking.

20 THE COURT: That's fine.

21 MR. WYNHOFF: I'll be right back.

22 THE COURT: We'll wait.

23 We're off record.

24 (Off record)

25 THE COURT: Okay. We are back on record.

1 MR. WYNHOFF: Thank you, Your Honor.

2 THE COURT: We are back on record. Mr.
3 Wynhoff has returned.

4 Mr. Frankel, do you have any other evidence on
5 your case?

6 MR. FRANKEL: Yes, Your Honor. I'd like to
7 move into evidence, take judicial notice of our
8 Exhibits 101 and 115. 101 is the Board of Land and
9 Natural Resources defendant's answer to the first
10 amended complaint and 115 is the first amended
11 complaint itself. I believe those are -- yeah.

12 THE COURT: All right. And I think when you
13 were talking about this earlier you said something
14 about an Exhibit 31, a brief from A&B? Are you still
15 offering that?

16 MR. FRANKEL: Yep. I guess I thought we'd do
17 one subject at a time, but I could -- I mean they're so
18 completely different issues that I thought we could
19 separate them.

20 THE COURT: Okay. That's fine.

21 All right. As --

22 MR. WYNHOFF: Your Honor, may I?

23 THE COURT: Hold on. As to Exhibits 101 and
24 115, is there any objection to the court taking
25 judicial notice of them?

1 MR. WYNHOFF: I'm sorry, Your Honor. I'm
2 really sorry. So 101 and 105?

3 THE COURT: No, 101 and 115.

4 MR. WYNHOFF: 115. I'm back on it. Yes, we
5 object, Your Honor.

6 THE COURT: Okay. Basis?

7 MR. WYNHOFF: I -- I'd like to know what the
8 basis for the admission is. It's just the complaint in
9 this case. I've never seen the complaint be admitted
10 into evidence and so I don't -- I don't even really
11 know --

12 THE COURT: So --

13 MR. WYNHOFF: -- exactly how to object to it
14 yet.

15 THE COURT: Well, is that a -- I'd like some
16 category. Are you saying relevance?

17 MR. WYNHOFF: Okay. Relevance, 403. I don't
18 know, Your Honor. I'm sorry. I really think
19 it's -- well, okay, you asked me and that's what I
20 believe. Given that I don't know what would be the
21 basis for putting them in in the first place, it's
22 hearsay.

23 THE COURT: Okay. All right. Anyone else
24 like to lodge an objection before I hear back from
25 Mr. Frankel?

1 MS. AKAGI: I would, Your Honor.

2 THE COURT: All right.

3 MS. AKAGI: This is Trisha Akagi.

4 THE COURT: Go ahead, Miss Akagi. Welcome
5 back.

6 MS. AKAGI: We -- thank you.

7 I am going to object to Exhibit 115 on
8 relevance and hearsay grounds.

9 THE COURT: All right. Thank you.

10 Mr. Rowe, any objection?

11 MR. ROWE: Well, I'll join in the objection of
12 Alexander & Baldwin.

13 THE COURT: Thank you.

14 All right. So back to you, Mr. Frankel. I
15 think the objections on the table are relevance and
16 hearsay, if you would address those.

17 MR. FRANKEL: So let me first give you some
18 context. The important document is 101, which is the
19 Board of Land and Natural Resources' answer to the
20 first amended complaint. In their answer they admit to
21 various allegations in the paragraphs of the first
22 amended complaint. So those are admissions. They're
23 admissions by a party. So any hearsay objection is an
24 exception to the hearsay rule.

25 This is evidence for the judge to -- for the

1 court to consider. It is evidence that can be a basis
2 of findings of fact. And, of course, you can't -- 101
3 cannot go on its own. It has to come in with the
4 complaint because it's admitting to those paragraphs of
5 the complaint.

6 I think it's fair to say the paragraphs of the
7 complaint that BLNR defendants don't admit to are kinda
8 irrelevant at this point in terms of the evidence
9 that's going to be going into the findings of fact. I
10 don't know if I'm being clear enough.

11 THE COURT: I understand your point is that
12 the answer has admissions which you intend to rely on
13 is what I'm hearing. Right?

14 MR. FRANKEL: That's right.

15 THE COURT: All right. Back to you,
16 Mr. Wynhoff.

17 MR. WYNHOFF: I don't disagree with that, Your
18 Honor. I think that's true. I don't know that they'd
19 get admitted into evidence, but if that's the way the
20 court wants to do it, now that I hear the basis for it,
21 to the extent we have admitted stuff I guess that's
22 evidence.

23 THE COURT: All right.

24 MR. WYNHOFF: It seems fair.

25 THE COURT: All right. Thank you.

1 Ms. Akagi?

2 MS. AKAGI: Thank you, Your Honor. I don't
3 object to Exhibit 101, which is the answer. I believe
4 the court can take judicial notice of the paragraphs
5 that are being referenced in the answer and there's no
6 need to admit the first amended complaint into
7 evidence.

8 THE COURT: Well, hang on. Let me look at 115
9 and make sure there won't be any confusion.

10 Okay. So 115 is the complaint. It's 101
11 that's the answer.

12 Well, yeah, I mean I'm gonna need the -- I
13 mean it's not like interrogatories where the answer
14 repeats the allegations. It's just admit, deny, admit,
15 deny. So I'm gonna need the complaint in order to
16 figure out what the admissions are.

17 All right. Anything further on these two
18 topics?

19 MR. WYNHOFF: No, Your Honor.

20 THE COURT: All right.

21 MS. AKAGI: No, Your Honor.

22 THE COURT: All right. The court will take
23 judicial notice and receive into evidence Plaintiff's
24 Exhibits 101, 115 -- and 115, but they are limited. I
25 mean, in other words their impact as evidence in this

1 case is going to be limited to admissions in the
2 answer. No other material in the answer or complaint
3 is gonna be considered by the court.

4 (PLAINTIFF'S EXHIBIT NOS. 101 AND 115 ARE
5 RECEIVED INTO EVIDENCE.)

6 THE COURT: All right. So moving on, what's
7 your other one, Mr. Frankel?

8 MR. FRANKEL: It's Exhibit 31, and I need to
9 provide some context. And I think it might be helpful
10 for me to provide the context before people start
11 objecting.

12 THE COURT: Okay.

13 MR. FRANKEL: So there has already been --
14 Alexander and Baldwin filed a motion regarding
15 jurisdictional issues. This court ruled on that issue
16 on October 4th, 2019. But the -- Alexander and Baldwin
17 in its trial memo and in its opening statement raised
18 that issue once again.

19 And what the purpose of Exhibit 31, which is a
20 filing that Alexander and Baldwin made, is to show that
21 Alexander and Baldwin fully argued this case -- sorry
22 -- fully argued the issue of jurisdiction before Judge
23 Hi fo. Judge Hi fo rendered a decision, and Alexander
24 and Baldwin is collaterally estopped from relitigating
25 that issue, even though they've still been doing so.

1 And to the extent that this case may go up on
2 appeal, in addition to the reasons you articulated in
3 the October 4th, 2019 decision, I would like to show
4 this provides further evidence that Alexander and
5 Baldwin's collaterally estopped from raising this issue
6 again because they raised the same issue before Judge
7 Hi fo. Judge Hi fo ruled and her decision was not
8 appealed. And Judge Hi fo's decision by the way is
9 Exhibit J-10.

10 THE COURT: But if it's jurisdictional, it
11 doesn't matter, does it? I mean doesn't -- if I don't
12 have jurisdiction, I don't have jurisdiction. It
13 doesn't matter what anybody else did.

14 MR. FRANKEL: Uh. Okay. That's -- I feel
15 like Bill Wynhoff now I guess. I guess I --

16 MR. WYNHOFF: Oh, sure, drag me down too.

17 THE COURT: I mean, I --

18 MR. FRANKEL: Yeah, I -- that's --

19 THE COURT: And I'm required to raise that. I
20 mean you all know that. I have to independently
21 satisfy myself I have jurisdiction. So I don't think I
22 was stepping out by raising the issue sua sponte.

23 MR. FRANKEL: No, that's -- that's a good
24 point. That's -- yeah. All right.

25 THE COURT: Okay. All right. So are you

1 withdrawing your request to admit Exhibit 31?

2 MR. FRANKEL: I suppose I am.

3 THE COURT: All rightee.

4 All right. Anything else anyone wants to put
5 on the record today?

6 MR. FRANKEL: So I think I guess you've
7 indicated, Your Honor, that you'd like some things in
8 writing. So I will attempt to --

9 THE COURT: I -- no. I didn't say that. I
10 said if you want to put it in in writing, if you're
11 talking about the motions to dismiss.

12 MR. FRANKEL: No. I was talking about -- so I
13 wanna raise the issue of whether it's appropriate for
14 different people to testify on different issues. And I
15 don't know if we can address that orally right before
16 they testify or you want something in writing about
17 that. I mentioned earlier I think Sandy -- I can't --

18 THE COURT: Oh, Baz.

19 MR. FRANKEL: So I don't know if I could just
20 raise it orally or you need something in writing before
21 that. I think I also wanted to raise that about
22 Mr. Volner who will be testifying on Tuesday. Yeah.

23 THE COURT: Well, I mean writing is always
24 better for just decisionmaking.

25 MR. FRANKEL: Okay.

1 THE COURT: But if you wanna do it orally,
2 that's fine too. It's really your call, but I never --

3 MR. FRANKEL: All right.

4 THE COURT: -- I never try to discourage
5 people from giving me things in writing unless I think
6 it's really a giant waste of time. And I'm not saying
7 I think that would be a waste of time. If you feel
8 there's a legal issue you want to make a record on and
9 bring to my attention, then by all means go ahead.

10 MR. FRANKEL: Okay. All right.

11 THE COURT: Okay. Anything else we need to
12 discuss while we're on the record? If not, we can go
13 off and talk about timing next week.

14 I don't see anyone with their hand up so I'm
15 going to once again thank our super human court
16 reporter for her hard work today, and you are excused.

17 (Matter concluded at 2:56 p.m.)

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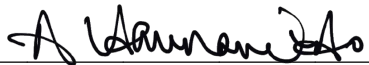
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STATE OF HAWAI'I)
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CITY AND COUNTY OF HONOLULU)

I, A. HAUNANI HO, RPR, CSR 372, Official Court Reporter, First Circuit Court, State of Hawai'i, certify that the foregoing pages comprise a full, true, and correct transcription of the proceedings had in the above-entitled cause, transcribed by me to the best of my ability.

Dated this 8th day of August, 2020.

OFFICIAL COURT REPORTER



A. HAUNANI HO, RPR, CSR 372