

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,	)		)	Cv. No. 19-1-0019
	)		)	
	)	Plaintiff,	)	
	)		)	
	)	vs.	)	
	)		)	
BOARD OF LAND AND NATURAL	)		)	
RESOURCES, et al.,	)		)	
	)		)	
	)	Defendants.	)	
	)		)	

TRANSCRIPT OF PROCEEDINGS

Had before the HONORABLE JEFFREY P. CRABTREE, Judge presiding, on AUGUST 11, 2020, regarding the above-entitled matter; to wit, FURTHER JURY-WAIVED TRIAL.

APPEARANCES:

DAVID KIMO FRANKEL, ESQ.				For the Plaintiff
DAVID SCHULMEISTER, ESQ.				For Alexander &
TRISHA AKAGI, ESQ.				Baldwin
WILLIAM WYNHOFF				For State of Hawaii
MELISSA GOLDMAN				(DLNR/BLNR)
Deputies Attorney General				
CALEB ROWE				For County of Maui
Deputy Corporation Counsel				

REPORTED BY:

Jamie S. Miyasato  
Official Court Reporter  
First Circuit Court  
State of Hawaii

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18  
19  
20  
21  
22  
23  
24  
25

I N D E X

WITNESSES

Page

MEREDITH CHING

Redirect Examination by Mr. Frankel.....	10
Recross-Examination by Mr. Wynhoff.....	18
Redirect Examination by Mr. Frankel.....	19

MEREDITH CHING

Direct Examination by Mr. Schulmeister.....	74
---	----

RICK W. VOLNER, JR.

Direct Examination by Mr. Schulmeister.....	103
Cross-Examination by Mr. Wynhoff.....	156
Cross-Examination by Mr. Rowe.....	160
Cross-Examination by Mr. Frankel.....	161

MEREDITH CHING

Direct Examination by Mr. Schulmeister.....	164
Cross-Examination by Mr. Frankel.....	195

---

1	<u>EXHIBITS</u>	<u>Page</u>
2		
3	Exhibits AB-165, AB-167, and AB-167.....	84
4	Exhibit AB-7.....	98
5	Exhibit AB-1.....	116
6	Exhibit AB-125.....	126
7	Exhibit AB-143.....	148
8	Exhibit AB-144.....	151
9	Exhibit S-5.....	170
10	Exhibit AB-19.....	175
11	Exhibit AB-22.....	181
12	Exhibit AB-35.....	192
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 AUGUST 11, 2020

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3 THE BAILIFF: The Circuit Court of the First  
4 Circuit, State of Hawaii is now in session. Calling Case  
5 No. 1 on the calendar. Civil No. 19-1-0019. Sierra Club  
6 versus Board of Land and Natural Resources. Jury-waived  
7 trial. Counsel, appearances please, starting with the  
8 plaintiff.

9 MR. FRANKEL: Good morning, Your Honor. David  
10 Frankel with the Sierra Club.

11 THE COURT: Good morning.

12 MR. FRANKEL: And I think appearing virtually  
13 with me today is Marti Townsend.

14 THE COURT: All right. Thank you. I don't  
15 see Ms. Townsend.

16 MR. FRANKEL: I think her video is off.

17 MS. TOWNSEND: I'm here.

18 THE COURT: There you are. Okay.

19 All right. Who's next?

20 THE CLERK: Alexander & Baldwin.

21 MR. SCHULMEISTER: David Schulmeister and  
22 Trisha Akagi for Alexander & Baldwin and East Maui  
23 Irrigation Company. And Meredith Ching, our party  
24 representative, is also in the room, but she's not on  
25 camera at the moment.

1 THE COURT: And State of Hawaii.

2 MR. WYNHOFF: Good morning, Your Honor. Bill  
3 Wynhoff and Melissa Goldman, deputy attorneys general on  
4 behalf of the State of Hawaii. Our party representative,  
5 Suzanne Case, is also with us this morning.

6 THE COURT: All right. Good morning. Welcome  
7 to all.

8 All right. I'm sorry. Mr. Rowe, how are you  
9 doing over there? Good morning.

10 MR. ROWE: Good morning, Your Honor. Deputy  
11 Corporation Counsel Caleb Rowe on behalf of the County of  
12 Maui. I have my secretary Candace Stahl in the  
13 conference room with me to assist me with exhibits.

14 THE COURT: Thank you. And I believe we have  
15 the same remote observers. Li`ula Kotaki, Summer Sylva,  
16 and Vince Raboteau. I guess Lauren Chun is --

17 MR. WYNHOFF: Yes, Your Honor. I failed to  
18 say Lauren Chun is with us.

19 THE COURT: Okay. I know I got various  
20 motions from Mr. Frankel. He has his hand up. Go ahead.

21 MR. FRANKEL: I have a few preliminary matters  
22 I'd like to raise before we bring the witness to the  
23 stand as it were.

24 I have a -- we're all -- this is all our first  
25 virtual trial, so I have a question as to what took place

1 on Friday. And I may have seen things wrong. I may be  
2 recalling things wrong. But I'd like to know -- I  
3 believe I saw before Mr. Higashi testified on Friday that  
4 Linda Chow walked into the room. She's one of the  
5 attorneys in the case who's made an appearance last year  
6 briefly. She hasn't really appeared in this trial. And  
7 I want to know whether she was actually in the room there  
8 on Friday.

9 MR. WYNHOFF: Your Honor, it's my recollection  
10 that she walked in for a few minutes because we were  
11 having trouble with Mr. Higashi's computer, and then she  
12 worked on that. And so I think Mr. Frankel -- he's not  
13 complaining, but I think he makes a good point that I  
14 should have been a little more diligent about mentioning  
15 that she was in the room. But I believe that David did  
16 see that correctly and that that's what happened. She  
17 wasn't there for very long and she didn't participate in  
18 any way at all except to help with the computer.

19 MR. FRANKEL: Okay. Thank you.

20 And then I was hoping before we bring on the  
21 witness if we could deal with the Sierra Club's Trial  
22 Brief No. 3, which deals with the deposition testimony of  
23 Glenn Higashi.

24 THE COURT: Do we need to deal with that  
25 before we hear from the witness?

1           MR. FRANKEL: No. But before we rest. And so  
2 I think we were going to -- I think the Sierra Club was  
3 going to rest after -- Ms. Ching is going to finish the  
4 redirect or finish Mr. Wynhoff's cross, finish my  
5 redirect, then I wrap, and then Mr. Schulmeister's going  
6 to start his direct with her. And rather than interrupt  
7 that, I thought we could deal with it now. But either  
8 way.

9           THE COURT: I'd -- I'll be happy to hear from  
10 anyone else. My general preference before I hear from  
11 anyone is to just go ahead and finish with Ms. Ching and  
12 then deal with whatever housekeeping issues we've got  
13 before you formally rest.

14          MR. FRANKEL: All right.

15          THE COURT: If anyone wants to be heard with  
16 another plan, I'm happy to hear it.

17          MR. WYNHOFF: You know, I think generally  
18 that's true. Mr. Frankel didn't actually file a motion,  
19 although I certainly understood that it was something  
20 that he was going to ask for relief with respect to. And  
21 candidly I'd like to have the opportunity to file a  
22 memorandum in opposition rather than just deal with it  
23 orally. But you know, I mean, it would be up to the  
24 Court. I have a pretty good handle on what I'm going to  
25 say, and I certainly don't want to introduce a bunch of

1 delay into the case.

2 THE COURT: That was going to be one of my  
3 questions on all three of the matters that Mr. Frankel  
4 filed, whether people are going to want some time to file  
5 written responses. But I'd really rather just get to the  
6 witness and keep things moving.

7 All right. So not hearing any objection to  
8 that proposed course, let's bring in Ms. Ching and finish  
9 her testimony.

10 THE WITNESS: Okay.

11 THE COURT: Good morning, Ms. Ching. This is  
12 Judge Crabtree. Can you hear me clearly?

13 THE WITNESS: I can. Thank you.

14 THE COURT: Great. Welcome back. Remind --  
15 respectfully remind you you are still under oath. No  
16 need to re-swear you. Are you ready to go?

17 THE WITNESS: Yes, I am.

18 THE COURT: Thank you. Mr. Schulmeister.

19 MR. SCHULMEISTER: Actually I believe that  
20 Mr. Wynhoff was in his questioning when we broke last  
21 time.

22 THE COURT: Okay. Hang on. Let me check my  
23 notes. You might be right.

24 Yeah. That's correct. Mr. Wynhoff started at  
25 about 2:30. And at about 3 o'clock was when I ran out of



1 gas and we called it quits. So Mr. Wynhoff, you're still  
2 up. Go ahead.

3 MR. WYNHOFF: Thank you very much, Your Honor.  
4 Your Honor, well, anyway, I decided that I'm not going to  
5 ask any more questions on cross. So thank you for the  
6 opportunity though, Your Honor.

7 THE COURT: All right.

8 MR. WYNHOFF: On this cross. Excuse me, Your  
9 Honor. I may have cross after Mr. Schulmeister's  
10 questions.

11 THE COURT: Okay.

12 MR. WYNHOFF: Thank you.

13 THE COURT: All right. Who's next? Let's  
14 see.

15 MR. FRANKEL: I --

16 THE COURT: We started with Mr. Frankel  
17 obviously. And then I think Mr. Wynhoff was the first  
18 questioner, right, after Mr. Frankel?

19 MR. SCHULMEISTER: I think I reserved when I  
20 called her. I think that -- I can't remember if Mr. Rowe  
21 was offered an opportunity to cross.

22 MR. ROWE: I was, Your Honor, and I didn't  
23 have any questions for the witness.

24 THE COURT: Wait a minute. Hang on. Okay.  
25 Got it. All right. So Mr. Rowe, you said no questions;

1 right?

2 MR. ROWE: Correct, Your Honor.

3 THE COURT: All right. Mr. Schulmeister.

4 MR. SCHULMEISTER: Yeah. I think I had  
5 already indicated I had no more questions. So at this  
6 point -- until I call her.

7 THE COURT: Okay.

8 MR. SCHULMEISTER: Mr. Frankel indicated he  
9 might have some --

10 THE COURT: Okay.

11 MR. SCHULMEISTER: Further redirect.

12 THE COURT: That's fine. I'm sorry. If you  
13 said today that you weren't going to ask any questions, I  
14 missed that. Sorry.

15 All right. Mr. Frankel, back to you.

16 MR. FRANKEL: Thank you, Your Honor.

17

18 MEREDITH CHING,

19 Called as a witness by the Plaintiff,

20 having been previously duly sworn,

21 was examined and testified as follows:

22

23 REDIRECT EXAMINATION

24 BY MR. FRANKEL:

25 Q Ms. Ching, Mr. Wynhoff asked you about 88

1 million gallons a day that A&B believes it can continue  
2 to divert based on the Water Commission's 2018 order. Do  
3 you recall that?

4 A I think the question was how much water could  
5 be diverted from the water -- licensed area after  
6 complying with the IIFS decision.

7 Q And that 88 million gallon figure is a number  
8 that Alexander & Baldwin calculated; correct?

9 A Yes. And I explained it was based on a model.  
10 We know it's a guess, an estimate.

11 Q It's an estimate, and you did not calculate  
12 that number; correct?

13 A Correct, I did not.

14 Q And you don't know if that number is an  
15 accurate calculation, do you?

16 A I know it's a result of a model, which by  
17 definition is an estimation.

18 Q Okay. And it's not the Water Commission's  
19 model? It's your Alexander & Baldwin's model; correct?

20 A Yes.

21 Q All right. Mr. Wynhoff asked you how long the  
22 ditch system has been operating. Do you remember that?

23 A Actually I don't remember that.

24 Q All right.

25 A Sorry.

1           Q           Okay. Well, you don't have any personal  
2           knowledge as to how long the ditch system has been  
3           operating; right?

4           A           I only know what I read in the history books,  
5           so when it was started to be constructed, etc.

6           Q           Okay. And that's been more than a century;  
7           right?

8           A           Yes.

9           Q           And how long did the streams exist without the  
10          diversion system on it before the diversion system was  
11          built?

12          A           I don't think I know when the island scheme  
13          came into existence. But the initial part of the system  
14          began to be built around 1878.

15          Q           And so the streams were in existence and  
16          flowing probably for hundreds, thousands, ten thousands  
17          of years before these barriers were put into the streams;  
18          right?

19          A           I can't speak to that.

20          Q           All right. Now, you testified that the East  
21          Maui Irrigation system irrigates approximately 30,000  
22          acres of land; right?

23          A           Yes, it can irrigate about 30,000 acres of  
24          farm land in Central Maui.

25          Q           And of which approximately 21,000 acres are

1 designated as important agricultural lands; right?

2 A That was a guess. I think it's 21- to 23,000.

3 Q And to be clear, those 21 to 23 acres are in  
4 Central Maui; right?

5 A Yes.

6 Q Not East Maui?

7 A No.

8 Q All right. Mr. Wynhoff asked you about the  
9 increase in water use and whether there's actually an  
10 increase or not. In 2017, A&B diverted approximately  
11 23.99 million gallons of water per day on average. Is  
12 that right? Does that sound about right?

13 A It sounds about right.

14 Q And 2018, A&B diverted on average 25.75  
15 million gallons of water per day; does that sound right?

16 A Approximately.

17 Q And in 2019, A&B diverted on average 27  
18 million gallons a day -- per day; right?

19 THE COURT: Mr. Frankel, I'm going to ask you  
20 to slow down just a little bit.

21 Go ahead, Ms. Ching.

22 THE WITNESS: Thank you. Can you repeat the  
23 last?

24 BY MR. FRANKEL:

25 Q In 2019, which is last year, A&B diverted on

1 average approximately 27 million gallons of water per  
2 day?

3 A Approximately. But let me just clarify again.  
4 It's EMI diverting the water; right? A&B is not  
5 diverting the water.

6 Q All right. And Mahi Pono asked for 45 million  
7 gallons a day in 2000; is that right?

8 A They indicated a farm plan that needed an  
9 average of 45 million gallons per day in 2020.

10 Q So there's been an increase from 2017, 2018,  
11 2019, and a proposed increase for this year, 2020; is  
12 that right?

13 A That's right.

14 Q All right. Now, you pointed out that EMI and  
15 A&B get the water from whatever stream has water; right?

16 A I don't think that's what I said. Can you  
17 remind me of the context?

18 Q Mr. Wynhoff was asking you or arguing through  
19 you that, you know, in order to get the water to Central  
20 Maui, EMI has to get the water from whatever stream has  
21 water available in it. You recall that?

22 A Yeah. I'm just a little confused on the  
23 context. So first of all, I'm not the expert on which  
24 streams specifically are being diverted. That's better  
25 asked of the EMI person.

1 Q Sure. And so that would include EMI getting  
2 the water from any of the 13 streams that were not  
3 addressed in the Water Commission's 2018 order; correct?

4 A EMI's going to get water while complying with  
5 the IIFS decision. So if the IIFS decision allows them  
6 to withdraw from a certain stream, they might consider  
7 using that stream or they won't consider using that  
8 stream.

9 Q Sure. And they will do so complying with the  
10 Water Commission's decision regardless of what impact  
11 that might have on a particular stream?

12 A I believe the Water Commission decision was --  
13 looked at impacts on the region and all the streams and  
14 balanced those impacts in a regional manner. I wouldn't  
15 say it's regardless of.

16 Q Are you aware that -- did A&B provide any  
17 information about the biological or recreational value of  
18 any of the 13 streams that were not the subject of the  
19 Water Commission's proceedings?

20 A Can you repeat the question?

21 MR. SCHULMEISTER: I'm sorry. I object.  
22 Provided to who and when?

23 THE COURT: Rephrase.

24 MR. FRANKEL: Sure, Your Honor.

25 BY MR. FRANKEL:

1           Q           Did Alexander & Baldwin provide to the Water  
2 Commission in its proceeding that concluded 2018  
3 information regarding the biological or recreational  
4 value of any of the 13 streams that were not subject to  
5 the petitions that were being considered?

6           A           I don't recall.

7           Q           All right. Now, Mr. Wynhoff suggested to you  
8 that wherever the water comes, there's going to be an  
9 impact on streams. Do you recall that?

10          A           No. Can you put in a broader context of what  
11 he was asking me about?

12          Q           That's all right. So if -- assuming there is  
13 an impact when one takes water from a stream, there would  
14 be less of an impact if Mahi Pono used more ground water  
15 instead of stream water, wouldn't there? Less of an  
16 impact on the stream?

17                   MR. SCHULMEISTER: I'm going to object. This  
18 is calling for an opinion, hypothetical.

19                   THE WITNESS: Do I answer? Sorry.

20                   THE COURT: Hang on. Thank you for asking,  
21 but I'm looking at the question again.

22                   I'll just note that's an extremely general  
23 question, but you may answer it.

24                   THE WITNESS: Yeah. I think it's too general.  
25 I don't know where they're getting the ground water from.



1 They could be getting the ground water from next to a  
2 stream and then it's going to impact that stream, and  
3 then there's a million different scenarios.

4 BY MR. FRANKEL:

5 Q Right. So there's a lot of things to think  
6 about. All right. And would the impact of taking water  
7 from East Maui streams be less if Mahi Pono planted crops  
8 that required less water?

9 A Depends on what impacts you're talking about.  
10 Everything has a different set of impacts.

11 Q Sure. So you want to look at that, consider  
12 them all. So would impact to streams be less, East Maui  
13 streams be less if Mahi Pono didn't need quite so much  
14 water because it planted crops that required less water?

15 A Impact to streams would be less if less water  
16 was diverted.

17 Q All right. And in fact, the impacts to the  
18 streams would be less if less water was lost due to  
19 seepage and evaporation because there wouldn't be a need  
20 to take so much water from the streams; right?

21 A Can you repeat the question?

22 Q Sure. Sure. The impact to the streams in  
23 East Maui would be lessened if less water was lost to  
24 seepage and evaporation because you wouldn't need quite  
25 so much water taken from those streams?

1 A It's possible.

2 Q Okay. And in fact, the impact to the East  
3 Maui streams would be lessened if Mahi Pono lined their  
4 reservoirs to reduce seepage; correct?

5 A Possibly. But there could be other impacts  
6 from doing that.

7 Q All right.

8 A Like --

9 Q And in fact, impact to East Maui streams would  
10 be lessened if Mahi Pono covered their reservoirs to  
11 reduce their operation because you wouldn't need to be  
12 taking as much water from the streams; isn't that right?

13 A I think my answer's the same. It's possible,  
14 but there would be other impacts.

15 MR. FRANKEL: Thank you. I have no further  
16 questions for this witness, Your Honor.

17 THE COURT: Thank you.

18 Mr. Wynhoff?

19

20 RE-CROSS-EXAMINATION

21 BY MR. WYNHOFF:

22 Q Ms. Ching, with respect to the 13 streams, do  
23 you recall that they in fact have an interim inflow  
24 standard?

25 A Yes, they do.

1 Q And can you tell the Court what that was if  
2 you remember?

3 A I don't remember specifically, but it's the  
4 status quo of the stream at the time that interim  
5 instream flow standard was passed.

6 MR. WYNHOFF: Thank you. Nothing further,  
7 Your Honor.

8 THE COURT: All right. Mr. Rowe?

9 MR. ROWE: I have no further questions, Your  
10 Honor.

11 THE COURT: Okay. Mr. Schulmeister, I assume  
12 you're still reserving?

13 MR. SCHULMEISTER: That's correct.

14 THE COURT: Okay. Mr. Frankel?

15

16 REDIRECT EXAMINATION

17 BY MR. FRANKEL:

18 Q Ms. Ching, you served on the Water Commission;  
19 correct?

20 A Yes.

21 Q Do you recall when the status quo standard was  
22 established in 1988, were the biological or recreational  
23 values of the stream considered at all?

24 A I don't recall.

25 Q Was any analysis provided to the Water

1 Commission of the biological value of any of the streams  
2 on East Maui -- in East Maui when that categorical status  
3 quo standard was established?

4 A You talking about in 1988?

5 Q Yes.

6 A I don't recall. I was on the Water Commission  
7 starting in 2002.

8 Q And by that time the Waiahole decision -- had  
9 the Waiahole decision from the Supreme Court come out  
10 yet?

11 A Yes.

12 Q And were you briefed about that decision and  
13 what the Supreme Court said about the status quo  
14 standard?

15 A I wasn't briefed. I think it preceded my time  
16 on the commission.

17 Q Were you informed by the Water Commission  
18 staff while you were a member of the Water Commission  
19 that the status quo standard simply allowed all the water  
20 that was diverted to continue to be diverted without any  
21 assessment of the biological value of those streams?  
22 Were you informed about that by the Water Commission  
23 staff when you were on the Water Commission?

24 A I don't recall. I don't think it came into  
25 question on the matters that were before us during my

1 tenure.

2 Q All right. Thank you.

3 No further questions, Your Honor.

4 THE COURT: Thank you. Mr. Wynhoff?

5 MR. WYNHOFF: Nothing further, Your Honor.

6 Thank you.

7 THE COURT: Mr. Rowe?

8 MR. ROWE: Nothing, Your Honor.

9 THE COURT: Mr. Schulmeister, I assume you're  
10 still reserving?

11 MR. SCHULMEISTER: Correct.

12 THE COURT: All right. Ms. Ching, your  
13 testimony is concluded for now. Thank you.

14 THE WITNESS: Okay.

15 MR. FRANKEL: So Your Honor, there's these --  
16 before we rest, I need to deal with the idea -- the  
17 deposition transcripts for Mr. Higashi.

18 THE COURT: All right. All right. So all I  
19 had time for was to skim it. So I have at least a  
20 general idea of what your issues are.

21 Counsel, I'll just take you one at a time.  
22 Starting with you, Mr. Wynhoff. What's your position on  
23 it substantively and procedurally?

24 MR. WYNHOFF: Well, okay. So we'll start off  
25 by saying we object and disagree. I'm going to say

1 procedurally I guess I also didn't review it in  
2 tremendous detail. But I -- to the extent I remember it,  
3 Mr. Frankel said that -- I don't really remember the part  
4 frankly about -- I mean, he asked -- I'm talking about  
5 the part that I don't remember as well -- too well first.  
6 But Mr. Frankel asked Mr. Higashi a bunch of questions  
7 where frankly Mr. Frankel said, These aren't questions  
8 for an expert. And I didn't object. And what I get out  
9 of that is Mr. Frankel says, well, I want to put in his  
10 whole deposition because I asked him questions that  
11 called for an expert opinion. And I don't really get  
12 that. So I guess I'll have to reserve on that.

13 With respect to the part about putting in all  
14 the -- all the -- the whole deposition because  
15 Mr. Higashi supposedly contradicted himself, well, I  
16 mean, that's just not the way it goes. There's no  
17 sanction for it. Mr. Higashi -- I think frankly a lot of  
18 those questions did not contradict each other. The  
19 questions in the deposition in particular were very  
20 scattered and all over the place. Mr. Frankel, as many  
21 of us do, asked more pointed questions in trial. But you  
22 have some kind of crazy, long question in a depo and then  
23 a pointed question in trial, that they don't even  
24 contradict each other.

25 And secondly to the extent that they do

1 contradict each other, the remedy -- the quote, remedy,  
2 closed quote, is exactly what Mr. Frankel did, is you  
3 lead in the contradictory evidence. There's no law or  
4 sanction if a witness says at trial the light was green  
5 and they said at -- at their deposition the light was  
6 red. It is what it is. You read into the trial what you  
7 said was red before. And, you know, we've all been  
8 there. You were under oath, etc., etc.

9 And then also with respect to this, you know,  
10 I really have a lot of respect for Mr. Frankel, and I  
11 mean this very sincerely. But I also have a -- I mean, I  
12 disagree with him on lots of stuff. But I also disagree  
13 with him -- he and I have been through a bunch of trials  
14 together and we've been through a bunch of 30(b)(6)  
15 depositions together. And I've done a few trials myself  
16 actually.

17 What I think happens with a 30(b)(6)  
18 deposition testimony is you want some of that testimony  
19 in evidence, you designate it, and it comes in that way.  
20 Mr. Frankel didn't designate any of the testimony, right  
21 or wrong. That's what he decided to do. And I don't see  
22 that anything that happened in this trial so far -- well,  
23 nothing that's happened in this trial should lead to in  
24 my opinion the idea that all of a sudden both of these  
25 depositions just get entered into evidence as substantive

1 testimony.

2 So thank you, Your Honor.

3 THE COURT: Okay. So what is your request, if  
4 any, regarding the procedure on how I should resolve this  
5 motion? Are you going to stand on the argument you just  
6 made, or do you want to file anything?

7 MR. WYNHOFF: I mean, I certainly know we're  
8 going to treat it as a motion, which I think is fair.

9 You know, Your Honor, I really -- I don't want  
10 to delay the trial and make it unfair for everybody. So  
11 I'm happy to -- I'm not happy, but I will stand on the  
12 argument I made. However, I would like to have the  
13 opportunity to have a rejoinder particularly with respect  
14 to the part of the argument about Mr. Higashi testifying  
15 as an expert because I really did not understand that.

16 THE COURT: Well, when you say you want a  
17 rejoinder, that sounds like you want to file something.

18 MR. WYNHOFF: No. I meant to say I want to  
19 hear what Mr. Frankel has to say about it, then argue  
20 some more.

21 THE COURT: Okay. All right.

22 Mr. Schulmeister, again, do you want to argue  
23 substantively now? Do you want an opportunity to respond  
24 in writing? What's your request?

25 MR. SCHULMEISTER: Your Honor, I believe we're



1 going to defer to Mr. Wynhoff on this issue.

2 THE COURT: All right. All right. How about  
3 you, Mr. Rowe?

4 MR. ROWE: The County will also defer to the  
5 State on this issue.

6 THE COURT: Okay. All right. Mr. Frankel,  
7 I -- here's a suggestion. It's not a ruling. I think  
8 it's an important enough issue that to make a good  
9 record, I would benefit from seeing things in writing. I  
10 don't think we need to delay the trial.

11 My thought is that it could become part of the  
12 post-trial briefing and proposed findings of fact and  
13 conclusions of law that either his depo transcripts are  
14 in or out, unless you have some particular piece of them  
15 that you wanted to use now as part of your case.

16 I mean, you've already gotten in the -- to the  
17 extent, you know, sections of the depo were read into  
18 evidence, they're already in the record. So I don't know  
19 what else you really need. And I -- I didn't really see  
20 that in your moving papers, although again, I just  
21 skimmed it so I could have missed it. But what's your  
22 position?

23 MR. FRANKEL: Well, two things. I understand  
24 what you're saying. I definitely understand that and I  
25 appreciate that.

1           I think there are some parts of the deposition  
2     that I quote in this memo that I did not read into the  
3     record on Friday. Are they absolutely essential to our  
4     case? You know, probably not. And the essential -- the  
5     essential parts I did read in.

6           What -- you know, in the one -- well, I've  
7     worked on our -- I've been working on our proposed  
8     findings of facts, conclusions of law for months now. I  
9     will be ready to file it within a day or two of our trial  
10    completing. It would be easier to cite to specific facts  
11    using the deposition transcripts as opposed to quite  
12    frankly a little bit more garbled version in the --  
13    that's the trial transcript. So it makes it easier to  
14    cite to for the findings of fact. But yes, if the --  
15    that's -- I'll just leave it at that.

16           THE COURT: And Mr. Wynhoff, back to you.

17           MR. WYNHOFF: Your suggestion is fine with us,  
18    Your Honor. Thank you.

19           THE COURT: Okay. If I'm going to defer  
20    making any binding decision on this until I've had a  
21    chance to receive written memoranda, then the issue  
22    becomes, well, if plaintiff is about to rest, then what?  
23    I suppose we could say you rest subject to the Court's  
24    ruling on the Higashi depo motion.

25           MR. FRANKEL: So let me complicate things

1 further, Your Honor. I'm sorry. 'Cause this is not the  
2 first time this problem is going to be posed to the  
3 Court. I was a little bit surprised to see I think it  
4 was late yesterday A&B filed a motion for the Court to  
5 take judicial notice of gobs and gobs of documents. And  
6 a hearing has been scheduled for the end of August. And  
7 I think we're going to conclude the trial before then.  
8 So it doesn't really make -- I don't know. I just don't  
9 understand.

10 THE COURT: I can explain that very easily --

11 MR. FRANKEL: Okay.

12 THE COURT: -- if you'd like to understand how  
13 that happened and what it really means.

14 All right. So I'm sitting in my office  
15 yesterday afternoon working literally on four MSJs in  
16 another case and through my law clerk heard that a person  
17 at Cades was calling because they wanted to file this  
18 motion, but technically I guess it's a hearing motion.  
19 And the court clerk does not accept hearing motions for  
20 filing without setting a hearing date. And I just didn't  
21 have the time or the inclination to go do a -- you know,  
22 an email blast to everyone trying to figure out what  
23 dates and blah, blah, blah. So I just said, Look, the  
24 rules require 18 days notice, just set it at 18 days just  
25 so we can get the darned thing on file and we'll worry

1 about the actual timing of it later. So that's all that  
2 means.

3 MR. FRANKEL: Okay. So I mean -- so we're in  
4 the middle of trial. Things are hard. Putting things in  
5 writing generally makes things easier for people. So my  
6 point is in addressing this issue with Glenn Higashi,  
7 we're going to similarly have to deal with A&B's motion,  
8 and both of them have to be addressed before trial's  
9 over. They can't be -- I don't think they can be  
10 addressed after trial's over.

11 You know, I don't have a -- I'm not -- I don't  
12 want to sound too dismissive, but I'm not particularly  
13 worried about the motions that A&B and the State filed  
14 this morning right before court as a Rule 52 motion. I  
15 glanced through them. So I'm not -- you know, I'm --  
16 I'm -- I'm fine resting with an asterisk that we will  
17 address the issue of the deposition transcripts later on,  
18 before trial's over. I mean, 'cause we're going to have  
19 to deal with A&B's thing as well. Am I being clear  
20 enough?

21 THE COURT: I think what you're saying is  
22 you're okay with my accepting written memoranda on this  
23 issue and you're okay with the Court deferring its  
24 decision, but you want to make sure you're not foreclosed  
25 from using the depo transcripts if I grant your motion.

1 So you want -- assuming you're going to rest here, you  
2 want an express reservation on the record that your  
3 direct case may be supplemented by the Higashi depositions if  
4 the Court grants your motion?

5 MR. FRANKEL: That sounds great. Yes, Your  
6 Honor.

7 THE COURT: All right. So that's the proposal  
8 on the table. Mr. Wynhoff, you object? You okay with  
9 that?

10 MR. WYNHOFF: Well, Your Honor, what I guess I  
11 would like to do is I'd like Your Honor to at least take  
12 a look at the motions, the 52(c) motions. I'm not really  
13 that eager to see another week of trial given that I  
14 don't think Mr. Frankel has proved his case sufficiently.

15 THE COURT: Right now we're just talking about  
16 the Higashi issue. That's all.

17 MR. WYNHOFF: Not on Higashi, Your Honor.  
18 Thank you.

19 THE COURT: Okay. So that's what the Court's  
20 going to do. When you're ready to rest, you can rest and  
21 I'll put an appropriate statement on the record that  
22 you're reserving your right to supplement the record  
23 based on the Higashi motion after I get memoranda from  
24 anyone who wishes to file it. Okay?

25 MR. FRANKEL: Yes, Your Honor. With that

1 said, Your Honor, the Sierra Club rests.

2 THE COURT: All right. And it's the Court's  
3 understanding that you're resting contingent on and  
4 subject to the Court's later ruling on your recent motion  
5 to add the deposition transcripts, plural, of  
6 Mr. Higashi. And the Court will rule on that later after  
7 receiving written memoranda. We'll set up a separate  
8 briefing schedule about that. But just in the interest  
9 of being able to keep the trial moving, we're going to  
10 set up that process.

11 All right. So the Sierra Club has rested.  
12 That brings some new issues on the table. Who wants to  
13 go first?

14 MR. SCHULMEISTER: Your Honor, on behalf of  
15 A&B -- it looked like Mr. Wynhoff was about to speak. I  
16 don't mean to cut you off.

17 MR. WYNHOFF: I was just going to say that I  
18 would be happy to defer to you.

19 MR. SCHULMEISTER: As Mr. Frankel noted, we  
20 did file a Rule 52(c) motion. And so I just wanted to  
21 bring that to the Court's attention. So we are moving to  
22 dismiss. And if there's argument on that, that will be  
23 handled by Ms. Akagi.

24 THE COURT: All right. You ready?

25 MR. SCHULMEISTER: Are you ready?

1 THE COURT: I thought that's what you were  
2 saying. But if you're suggesting something else, put it  
3 out there and I'll think about it.

4 MR. SCHULMEISTER: No. We're prepared to  
5 argue now.

6 THE COURT: I know what I wanted to do. We've  
7 been going 40 minutes, so before we launch into that  
8 argument, let's take our recess. All right. Ten minutes  
9 okay? All right. Ten minutes. So I'll see you at ten  
10 minutes till 10:00. Back on record at ten minutes till  
11 10:00. Thank you. We're in recess.

12 (A recess was taken.)

13 THE COURT: We are back on record. All right.  
14 Counsel, let's see. I see everyone present. So everyone  
15 ready to go with Ms. Akagi's argument? All right.  
16 Ms. Akagi, go ahead.

17 MS. AKAGI: Thank you, Your Honor. So first  
18 in our motion, the evidence in this trial has shown that  
19 there are two jurisdictional defects with plaintiff's  
20 case. The first is that the plaintiff has failed to  
21 exhaust its administrative remedies. The evidence in the  
22 record has made clear that, No. 1, plaintiff is  
23 challenging CWRM's June 2018 decision setting IIFS for  
24 certain streams in the East Maui watershed; and two, the  
25 claims raised by plaintiff raise issues that fall within

1 the exclusive jurisdiction of CWRM, which is C-W-R-M.

2 First, the setting of IIFS is statutorily  
3 limited to the authority of CWRM. There is no provision  
4 that allows any entity or person to compel CWRM to set an  
5 IFS. Moreover, the plaintiff is asking the BLNR or  
6 asking the Court to compel the BLNR to do something for  
7 which it has no authority. The BLNR has no authority to  
8 set IFS for portions of the stream that are not located  
9 on state land, nor does the BLNR have authority to set  
10 IFS that would bind any party other than a party to this  
11 litigation.

12 So the remedy that the plaintiff is actually  
13 seeking is -- falls within the exclusive jurisdiction of  
14 CWRM. And there is no evidence that plaintiff has filed  
15 a petition with CWRM to either -- to adopt IIFS, since  
16 there is no statutory provision by which someone can  
17 request CWRM set an IFS.

18 The second jurisdictional defect in  
19 plaintiff's claim is a lack of standing. The evidence  
20 presented by plaintiff makes clear that plaintiff has not  
21 established an injury in fact for either itself as an  
22 organization or its members.

23 Most importantly, what has become clear  
24 through the evidence at trial is that to the extent that  
25 there are any ongoing injuries to the organization or the



1 plaintiff's members, these injuries will continue if the  
2 amount of water that is currently being diverted  
3 continues.

4 And since plaintiff has requested that the  
5 Court allow the continued diversion of up to 25 MGD, then  
6 a favorable decision in plaintiff's favor would not  
7 remedy any injuries that itself as an organization or its  
8 members have. Therefore, plaintiff has failed to  
9 establish an injury in fact and has no standing to bring  
10 its claims.

11 As to plaintiff's two remaining claims, Count  
12 2, which is for breach of the public trust doctrine,  
13 plaintiff has not introduced evidence to establish the  
14 essential elements of its claim. As this is a direct  
15 action, plaintiff bears the burden of establishing by a  
16 preponderance of the evidence each of the essential  
17 elements of its claim.

18 One of the essential elements is establishing  
19 the standard of care imposed by the public trust doctrine  
20 on the BLNR in the context of considering the  
21 continuation of a one-year revocable permit.

22 Plaintiff has made a number of arguments that  
23 the public trust doctrine requires the BLNR to have  
24 undertaken various actions or corrected various  
25 omissions. But the plaintiff has offered no evidence or

1 legal authority to establish that that is required by the  
2 public trust doctrine.

3 Moreover, one of the requirements is that the  
4 public trust doctrine cannot require the Board to do  
5 something that is impossible or impracticable. And  
6 plaintiff has offered absolutely no evidence to establish  
7 that the things that it is arguing the BLNR was required  
8 to do would be possible or practicable given the  
9 circumstances, which include that this is a consideration  
10 of a one-year revocable permit.

11 Plaintiff has also failed to establish that  
12 there is an actual breach of the public trust doctrine  
13 for a number of the issues that it has raised.

14 For example, the plaintiff has argued that the  
15 BLNR failed to consider alternative water sources.  
16 Again, the evidence in the record shows that there was an  
17 extensive analysis of alternative water sources done by  
18 CWRM in the process of reaching its June 2018 decision as  
19 well as in the draft EIS. Plaintiff has offered no  
20 evidence that the public doctrine required more or that  
21 will BLNR's reliance on those analyses was a breach of  
22 the public trust.

23 Turning to Count 3, which is for violation of  
24 violation HRS Chapter 205A or the Coastal Zone Management  
25 Act. Plaintiff has failed to establish as a matter of

1 law a viable violation of the CZMA. HRS Section 205A-6  
2 is the statute that provides for a private cause of  
3 action to enforce certain provisions of the Coastal Zone  
4 Management Act.

5 There are three scenarios under which such a  
6 claim can be brought. Plaintiff has offered no evidence  
7 or legal authority to establish that it meets any of  
8 those three criteria. In addition, plaintiff has failed  
9 to submit evidence to establish that there has been an  
10 actual violation of the Coastal Zone Management Act.

11 For those reasons, we believe that plaintiff's  
12 claims should be dismissed and judgment entered in favor  
13 of Alexander & Baldwin, East Maui Irrigation Company.

14 THE COURT: I've got a question for you,  
15 Ms. Akagi.

16 MS. AKAGI: Yes.

17 THE COURT: On your discussion that CWRM, you  
18 know, considered all these various issues and options,  
19 what is your position on the evidence in the record as to  
20 what the Board actually considered? 'Cause it's one  
21 thing to say CWRM considered, you know, X, Y, and Z.  
22 It's not necessarily the same thing that the Board  
23 considered X, Y, and Z. So I'm just wondering what your  
24 position is on that.

25 MS. AKAGI: The evidence in the record shows

1 that CWRM's June 2018 decision was part of the  
2 information that was available -- made available to the  
3 Board prior to its 2018 decision and 2019 decision. In  
4 CWRM's June 2018 decision and order, there are lengthy  
5 sections discussing the alternative sources of water that  
6 CWRM considered. Then there is also a lengthy section in  
7 CWRM's conclusions of law stating the conclusions that  
8 were made as to whether or not those alternative sources  
9 of water were a viable alternative.

10 Given those considerations and that analysis,  
11 CWRM reached the conclusion that it was going to set IIFS  
12 such that there would be a little less than 90 MGD  
13 available for use for diversified agricultural in Central  
14 Maui. That information -- it's in the record that that  
15 information was all made available to the Board prior to  
16 the subject decisions.

17 THE COURT: Okay. So my follow-up question  
18 is, is making information available to the Board versus  
19 trying to parse out what the Board actually considered.  
20 I mean, let me give you an example. I mean, when I read  
21 a voluminous motion, you know, I read everything. But do  
22 I read every single case cited? No. I read the ones  
23 that I have an interest in or which seem particularly on  
24 point or which I have time for.

25 So -- so yes, information has been made

1 available to me. But that's not the same thing as saying  
2 I actually reviewed it and relied on it. So what am I to  
3 do with that?

4 MS. AKAGI: Well, absolutely, Your Honor. I  
5 think it is a reasonable inference that the Board  
6 considered the evidence that was presented to it, No. 1.  
7 No. 2, you have to remember that this is a direct action.  
8 It's not the defendant's burden to prove what the Board  
9 did or did not consider. The plaintiff has to prove that  
10 the Board did not consider the things that it should have  
11 considered. And there is no evidence in the record that  
12 the Board did not consider the analysis and the  
13 alternative sources that were addressed by CWRM.

14 THE COURT: Yeah. I understand. By I'm just  
15 trying to get at A&B's position on that. So basically,  
16 if I can put it in a nutshell -- you push back if I'm not  
17 saying this correctly -- but what I hear you saying is  
18 that all this information was made available to the  
19 Board, but you can't point the Court to any specific part  
20 or parcel of it that BLNR actually relied on?

21 MS. AKAGI: I can say at this point in the  
22 evidence, no, I cannot point to anything. But I will  
23 also point out that the plaintiff has not established any  
24 evidence that the Board did not consider this  
25 information.

1 THE COURT: Right. Understood. Thank you.

2 All right. How are we going to do this  
3 procedurally as far as the State and the County? Are you  
4 folks going to join? Are you going to make separate  
5 arguments on your own motion? What's your preference?

6 Yes, Mr. Wynhoff?

7 MR. WYNHOFF: My suggestion would be that,  
8 although I'm certainly -- and I think Mr. Frankel would  
9 prefer this. I would like to first join in on A&B's  
10 motion and the arguments and then briefly argue my own  
11 argument so that Mr. Frankel could respond to both. If  
12 he wishes to take 'em seriatim, I'm happy to do that too.

13 THE COURT: I think I'd rather have everybody  
14 make their arguments and then Mr. Frankel can respond to  
15 everyone's arguments instead of trying to do it in silos.  
16 So are you ready to make whatever additional arguments  
17 you want to take now?

18 MR. WYNHOFF: I am, Your Honor.

19 THE COURT: Okay. Please go ahead.

20 MR. WYNHOFF: So Your Honor, I think what --  
21 well, what plaintiffs have proven is exactly what has  
22 been pretty evident in this case throughout.

23 No. 1 is that more water would be better --  
24 would be better. If more water was left in the streams,  
25 that would be better for the streams. If more water was

1 left in those 13 streams, then there would be more  
2 animals in those 13 streams. I don't think that was ever  
3 seriously in dispute. We didn't argue with it. We might  
4 have quibbled as to the where the water may have come  
5 from, etc. But at this point I don't think we would ever  
6 argue that if you restore those streams, those particular  
7 streams, then there would be more animals in those  
8 streams. And that's pretty much what we talked about.

9 We also don't disagree that if some of those  
10 streams were restored, that the Sierra Club and people  
11 who testified would have the ineffable pleasure of  
12 walking along that particular stream as it gurgles down  
13 to the ocean as opposed to walking along some other  
14 streams. And they came in and they made a very heartfelt  
15 position that they and two or three of their friends feel  
16 really strongly that they should be able to walk down  
17 those streams.

18 But what we also -- what's also very clear and  
19 has been clear throughout, Your Honor, is that there is  
20 not an infinite amount of water in the world and what the  
21 terms of this public trust are -- the terms of this  
22 public trust are very clear in the Constitution, Article  
23 11 -- excuse me -- yeah -- Article XI, Section 1, I  
24 believe.

25 And those -- and those -- the terms of the

1 trust require that the trustee balance these uses, such  
2 as restoration of the stream and walking along the  
3 stream, the recreational value, with other uses. Other  
4 uses. And these other uses in this case is absolutely  
5 crystal clear at this point are at least 21 to 23,000  
6 acres of important agricultural lands that are supported  
7 by the public policy of both the county and the state.  
8 And those other values include domestic water use, which  
9 are themselves a public trust use.

10 So what the evidence very clearly establishes  
11 and Ms. Townsend specifically said, yeah, agricultural is  
12 fine, we support agriculture, but only after water is  
13 left in the streams. Well, the other thing that's very  
14 clear, Your Honor, is that the State's public trust duty  
15 is entrusted to the CWRM and to the Board of Land and  
16 Natural Resources. It is not entrusted to the Sierra  
17 Club. If the Sierra Club was the one who was balancing  
18 public trust duties, then clearly they would have chosen  
19 to walk along those streams and hear them gurgling down  
20 to the ocean. But they're not.

21 And in the same fashion, they're not entrusted  
22 to the farmers in Central Maui. Most likely if the  
23 farmers in Central Maui were entrusted with the public  
24 trust duty, then they like Ms. Townsend would have said,  
25 Well, we'd really like water gurgling down in the streams



1 as well. And that's great. As long as we have all the  
2 water we need for agriculture, you can put it back in the  
3 streams.

4 What is very clear, Your Honor, is that the  
5 terms of the trust under the Constitution require a  
6 balancing. And what is very clear is that the terms of  
7 the trust require the CWRM and the Board to engage in  
8 balancing. And there is literally no evidence at this  
9 point that they did that. So that's basically my  
10 argument.

11 I want to pivot to two points, Your Honor.  
12 First, I think it's remarkable that at this stage in the  
13 case it remains rather unclear what it is that plaintiffs  
14 are actually asking you to do. And we pointed that out  
15 in our memo. In very broad terms, are they asking you to  
16 rule that the Board did not properly exercise or fully  
17 exercise its duty to decide the public trust and  
18 therefore remand it to the Board for further  
19 consideration, or are they asking your Court -- are they  
20 asking this Court to substitute its own judgment for what  
21 is the appropriate thing to do?

22 I'm afraid that I'm thinking that I'm hearing  
23 that they're asking this Court after two weeks of hearing  
24 this evidence to decide itself that water ought to remain  
25 in the streams as opposed to being used for important

1 agricultural land. And with great respect, Your Honor,  
2 we think that is -- would be quite a reach for -- to ask  
3 this Court to make that kind of decision after the  
4 evidence that's -- that's done here as opposed to the  
5 years and years and decades that the Board and the CWRM  
6 have wrestled with this.

7 With respect -- and in any event, what we have  
8 in the evidence is that obviously important -- you know,  
9 historically important issues are at stake. And the  
10 proper -- and proper bodies grappled with it very  
11 carefully and very thoroughly and came up with a decision  
12 that certainly under any kind of -- maybe this Court  
13 would not make the same decision. Maybe it would. But  
14 with giving any level of deference at all, it's very  
15 clear that a proper decision has been made.

16 The final point I would make, Your Honor, is I  
17 would like to briefly address the question about whether  
18 there's evidence in the record as to what the Board  
19 actually considered. I think that's an interesting,  
20 important question. I know Your Honor has thought about  
21 it in other cases that I've been involved in too.

22 But without going there, the Court knows that  
23 what we have here is we have a sunshine board. In these  
24 cases anyway, all of the -- these are not contested  
25 cases. All of the decisions were made in a -- in an open

1 meeting based on evidence presented in the record. There  
2 are no discussions off of the record. The people who  
3 vote, the seven members of the Board of Land and Natural  
4 Resources, are not allowed to discuss it with each other  
5 ever except for -- I mean, you can have permitted  
6 interaction with one other person.

7 And Your Honor, it's basically -- we've argued  
8 this in other context too. There's never going to be any  
9 evidence of what actually was considered. What the Board  
10 decides is what four members vote on. There has never  
11 been and will never be without objection in a case where  
12 someone calls up Tommy (indiscernible) as a witness and  
13 says, Tommy, this is the evidence that was presented to  
14 you. What did you actually consider and what were the  
15 reasons that you voted yes on this progress?

16 The evidence in this case already includes the  
17 minutes of both the 2018 meeting and the minutes of the  
18 2019 meetings. And those minutes reflect that, for  
19 example, Ms. De Naie was there. And she was specifically  
20 asked. The Board members specifically asked, What do you  
21 want done about these 13 streams? And the 13 streams she  
22 said weren't important. We're not worried about them.  
23 Ms. Townsend was asked the exact same question, and she  
24 said that these streams were not important streams.

25 And so these things were -- and Ms. -- I

1 believe the transcript says that Ms. Case, the chair of  
2 the Board, said, Can you comment on your public trust  
3 duties? And Ms. De Naie for herself and Ms. Townsend on  
4 behalf of the Sierra Club asked them -- told them what  
5 they wanted to do, which did not include restoring these  
6 13 streams.

7 Melissa, let me see that note so I can tell  
8 the Court what exhibits those are.

9 The transcripts are in evidence already as  
10 S-39 and S-51.

11 So -- so Your Honor, again, just to recap, I  
12 won't even recap. That last point was to address the  
13 question that you asked Mr. Schulmeister.

14 Your Honor, thank you for the opportunity to  
15 have made this argument. I appreciate it.

16 THE COURT: All right. So just to summarize,  
17 your position on the evidence in the record of what the  
18 Board considered is found only in the minutes of the 2018  
19 and 2019 meetings and the transcripts?

20 MR. WYNHOFF: Your Honor, well -- no, I'm  
21 going to say no. The evidence of what the Board  
22 considered is the evidence of what was presented to the  
23 Board. This includes, but is not limited to, those items  
24 that you just mentioned.

25 THE COURT: All right.

1           MR. WYNHOFF: Include a lot of other stuff.  
2     For example, testimony from Sierra Club itself, written  
3     testimony.

4           THE COURT: Got it. Thank you.

5           All right. Mr. Rowe.

6           MR. WYNHOFF: Thank you, Your Honor.

7           MR. ROWE: Thank you, Your Honor. The County  
8     would join in the arguments made by both defendant  
9     Alexander & Baldwin and the State and has no further  
10    arguments.

11          THE COURT: Thank you.

12          Mr. Frankel, your turn.

13          MR. FRANKEL: Thank you, Your Honor. Let me  
14    apologize. This is not going to be as organized as I  
15    would like because I've been presented with a lot of  
16    stuff pretty quickly, but I'm going to try my best.

17                 And let me also say I also apologize to you  
18    and the court reporter that I may get excited and speak  
19    very quickly. And please, I am going to avoid doing so.  
20    Please let me know when I do so. But it is inevitable,  
21    Your Honor. I'm sorry. I'm just -- anyway --

22          THE COURT: I'm going to ask you to -- I'm  
23    going to ask you to work on that and exercise some  
24    restraint.

25          MR. FRANKEL: Thank you, Your Honor. I will

1 attempt to do so.

2 THE COURT: Thank you.

3 MR. FRANKEL: The Supreme Court held, quote,  
4 the State may compromise public rights in a resource  
5 pursuant only to a decision made with a level of  
6 openness, diligence, and foresight commensurate with the  
7 high priority these rights command under the laws of our  
8 state. That's from Waiahole, Your Honor, 94 Hawaii at  
9 143.

10 The Board of Land and Natural Resources failed  
11 to live up to this requirement.

12 Here's another section from the Waiahole  
13 decision. To give context, the context there is the  
14 context in this case. It's from 94 Hawaii 149.

15 Here the close of sugar operations in Central  
16 Oahu has provided the Commission a unique and valuable  
17 opportunity to restore previously diverted streams while  
18 rethinking the future of Oahu's water uses. The  
19 Commission should thus take the initiative, planning for  
20 the appropriate instream flows before demand for new uses  
21 heightens the temptation simply to accept the new  
22 diversions as a forgone conclusion.

23 The public trust authorized the Commission to  
24 reassess previous diversions and allocations, even those  
25 made with due regard to their effect on trust purposes.

1           The final quote I want to highlight to you  
2           from this Waiahole decision.

3           The Supreme Court condemned agency inaction  
4           that, quote, could drain a stream dry incrementally or  
5           leave a diverted stream dry in perpetuity without ever  
6           determining the appropriate instream flows.

7           In this case, Alexander & Baldwin's proposing  
8           and BLNR is allowing for the amount of water diverted  
9           from our streams to increase by 66 percent from what was  
10          diverted last year and almost 75 percent from what was  
11          diverted when this lawsuit was filed.

12          The defendants rely entirely on the Water  
13          Commission's 2018 decision. And their reliance is  
14          misplaced for six reasons.

15          First, the 13 streams were not, quote, the  
16          subject of the Water Commission's proceeding. And this  
17          exact language can be found in Exhibit J-14 at page 40  
18          and continue on to 41. The streams that were subject to  
19          the proceeding are underlined. The streams that were not  
20          are not underlined.

21          Commission of Water Resource Management did  
22          not consider the biological recreational value of these  
23          13 streams. And we know that because the Waiahole court  
24          talked about the status quo diversions -- sorry -- the  
25          status quo instream flow standards that were set decades

1 ago that were not based on biological values. And in  
2 fact, the Water Commission's own website says the same  
3 thing. And I will give you that exhibit a little later  
4 on. It's towards the end of the State's Exhibits.

5 The second reason why they cannot just simply  
6 rely on what the Water Commission did in 2018 is the  
7 purpose of that proceeding was to establish the minimum  
8 quantity of water that should flow within 27 streams.  
9 And that's Exhibit J-14 at page 18.

10 The decision says, quote, Our decision  
11 establishes a quantity of water that must remain in each  
12 stream. But -- but it was, quote -- this is on page 292  
13 of the decision. It was, quote, not the purpose of this  
14 proceeding to determine how the diversions will be  
15 modified.

16 And these -- many of these diversions are on  
17 public land. The Board of Land and Natural Resources is  
18 a landlord. It has authority. The legislature has given  
19 it authority. It can condition its approval to ensure  
20 that these diversion structures are not causing harm. It  
21 does not intrude on the Water Commission's jurisdiction  
22 by setting a deadline.

23 Third reason that the defendants cannot rely  
24 exclusively on the Water Commission's 2018 decision is  
25 that proceeding did not address the trash littering



1 public land.

2 The fourth reason is the Water Commission  
3 explicitly expected the Board of Land and Natural  
4 Resources to engage in a proper analysis. And that's on  
5 page -- again of Exhibit J-14, page 22, page 288.

6 Here's what the Water Commission said. The  
7 commission recognizes that authorizing how much water  
8 will be allowed to be diverted offstream once instream  
9 flow standards are met is the purview of the Board of  
10 Land and Natural Resources. The Water Commission noted  
11 that it did not, quote, did not have the authority to  
12 determine how much water may be used for non-stream uses.

13 And the Water Commission encouraged the Board  
14 to require a reduction in leakage and waste of water in  
15 the ditch system to obtain accurate information as to all  
16 offstream water uses, monitor stream flows, and to  
17 restore native habitat. That's page 22 and 23 of the  
18 decision. I'm summarizing that.

19 The fifth reason that they cannot rely  
20 exclusively on the 2018 decision is there is new  
21 information that was never, ever provided to the Water  
22 Commission. And that's Dr. Parham's report regarding  
23 impacts to the diversions of streams. It was provided to  
24 the Board but had never been provided to the Water  
25 Commission. And I'm going to return to that in a little

1 bit.

2 And the last reason is the Board of Land and  
3 Natural Resources cannot simply rubber-stamp a decision  
4 of the Water Commission. Rather, the Board of Land and  
5 Natural Resources is obligated to make a truly  
6 independent investigation as to what's in the State's  
7 best interest.

8 And we know that state agencies have a  
9 continuing duty. Just a few months ago, the Hawaii  
10 Supreme Court published a decision regarding Lanai,  
11 *Lanaians for Sensible Growth*, in which Justice Pollack  
12 enforced over and over and over again the continuing  
13 public trust duty. It was a three to two decision.

14 And I've heard Mr. Wynhoff argue, Well, you  
15 know, the minority view -- we gotta give more specific to  
16 the minority view because the chief justice is in the  
17 minority there.

18 But just a month later, the Supreme Court in  
19 *In re. Application of Gas Company* is a decision written  
20 by Justice McKenna. It's a four-zero decision. Justice  
21 Wilson was recused after oral argument. It's a four-zero  
22 decision. And again, the Court emphasized the continuing  
23 duty of agencies to fulfill their public trust  
24 obligation. It is not something that once it's done, it  
25 is over. It is a continuing duty. And in this case it's

1 highlighted by the fact that there's new information.

2 And I want to emphasize the importance of this  
3 new information. The study completed by Dr. Parham, as  
4 Meredith Ching testified to, was to provide relevant,  
5 accurate information. A&B improved Dr. Parham's  
6 methodology. It directed questions for him to answer.  
7 He followed the same approach that he and Glenn Higashi  
8 took in 2009. A&B determined that Dr. Parham's approach  
9 was the best approach to identify the impact of stream  
10 diversions on habitat.

11 And what did he conclude? That 85 percent of  
12 the stream habitat, the suitable habitat, is destroyed  
13 when all the water is allowed to be taken by A&B.

14 The Board of Land and Natural Resources  
15 breached its trust duties when it failed to provide any  
16 protection whatsoever to these 13 streams after receiving  
17 new information that no one had ever received before  
18 regarding the incredibly destructive impact that was  
19 occurring. That is a breach of trust.

20 The Board was presented a request to increase  
21 the amount of water diverted by 66 percent. And it had  
22 new information regarding the impact to these 13 streams.  
23 It did not attempt to protect them whatsoever.

24 On the flip side of that, it asked nothing of  
25 A&B. Ms. Akagi points out that, well, the Water

1 Commission study -- sorry -- decision talks about  
2 alternative water sources. Yeah, it does. There's a  
3 lengthy discussion about alternative water sources. And  
4 you know what it says? There isn't alternative sources  
5 of water. Yeah. And so yes, the Board has that  
6 information. But what the public trust doctrine requires  
7 is for A&B to reveal to the Board that there are no  
8 alternative sources of water. What is there  
9 impracticable to use? The only evidence before the Board  
10 was that there were no alternative sources of water.

11 And I can't give you the numbers off the top  
12 of my head, Your Honor, but there's millions of gallons  
13 of ground water and there's millions of gallons of water  
14 coming from the end of the public land that is the  
15 subject of the revocable permit. So there are millions  
16 of gallons of alternative water available and the Board  
17 did not require that they be used at all. And the Board  
18 never asked A&B why they could not use that water.  
19 That's a breach of trust.

20 There's a lot of waste, Your Honor. And I  
21 know we -- assuming we get to closing argument, I'm going  
22 to go through with a fine-toothed comb. But Alexander &  
23 Baldwin has revealed that it is wasting far more water  
24 than the Water Commission determined was appropriate.  
25 The Water Commission determined I think was 22.5 percent

1 of the water can be lost through seepage, evaporation,  
2 and similar kinds of losses. The Board of Land and  
3 Natural Resources never, never made a determination that  
4 more water could be wasted than that. Nevertheless,  
5 that's exactly what's been going on.

6 The -- the Board of Land and Natural Resources  
7 and the Department never requested until the Sierra Club  
8 sent an interrogatory about how the water was being used  
9 -- but never took that information to the next level.  
10 How precisely is it being used? These are public trust  
11 resources that need to be protected. If water use can be  
12 reduced by a million gallons a day, that's a million more  
13 gallons a day that can be put in the stream or in many  
14 streams.

15 The Board has to do its job as a trustee. It  
16 cannot simply receive a request from an applicant saying,  
17 You know what? Your staff recommended 35 million gallons  
18 a day but we want 45, and just approve it without asking  
19 the hard questions.

20 The Board knows that diversion structures on  
21 public land are harming native aquatic life. The Board  
22 has done nothing about it. The Board has been notified  
23 that there's trash on public land. And yes, it did  
24 require that A&B start cleaning it up. But the Sierra  
25 Club has continually pointed out there's more trash

1       there, and the Board and the department have done  
2       nothing.

3                There's case after case after case now about  
4       the Board and the Department's duties to investigate, to  
5       take steps to protect public land. They cannot simply  
6       rely on the representation of the applicant. That's in  
7       *Hawaii Gas Company* and it's also in the recent *Lanaians*  
8       *for Sensible Growth*. There's a duty to do something.  
9       You cannot just sit back and rely on applicant's  
10      representations, particularly when they're shown to be  
11      unreliable, as has shown to be the case here.

12              I may get my years wrong here, but in one  
13      year, Alexander & Baldwin said in its submittal to the  
14      Board there was little other debris left. The next year  
15      say they, Well, we've cleaned up hundreds of feet of  
16      pipe. And still after that we find more. The Sierra  
17      Club has documented and photographed even more trash.

18              The Board cannot let this situation remain.  
19      It is a trustee. It must be acting with respect to  
20      public land. And I will leave it at that, Your Honor.  
21      Thank you.

22              THE COURT: Thank you.

23              Ms. Akagi, I'm going to give you rebuttal.

24              MS. AKAGI: Thank you, Your Honor. First  
25      nothing that Mr. Frankel said establishes what the public

1 trust doctrine requires at the Board of Land and Natural  
2 Resources.

3           There was extensive discussion about the  
4 Waiahole case. The Waiahole case specifically addresses  
5 the obligations of CWRM. So for example, the need to set  
6 instream flows before planning additional increases in  
7 diversions. Well, CWRM has the authority to set instream  
8 flows for an entire stream. The BLNR does not. It makes  
9 absolutely no sense for the BLNR to set instream flows  
10 for only a portion of the stream that would only pertain  
11 to one or maybe two users of that stream and would not  
12 apply to anyone else.

13           Also there were a number of factual  
14 inaccuracies in the plaintiff's presentation. First, the  
15 plaintiff had said that Parham's report establishes  
16 there's an 85 percent destruction of suitable habitats.  
17 Parham's report addresses habitat units. There's no  
18 evidence in the record that these habitat units are  
19 suitable for any native aquatic species.

20           Second, the scenario that it referred to in  
21 Parham's report is a full diversion scenario. And the  
22 report makes clear that that scenario takes into account  
23 the level of diversions that were occurring during the  
24 peak of sugar cultivation, which is closer to 165 MGD,  
25 whereas the current level of diversion is 25 MGD or 45

1 MGD if you're looking at the cap that the Board has put  
2 on in 2019.

3 There's also no evidence in the record that  
4 there is incredibly destructive impact that is currently  
5 ongoing or being caused by any of the stream diversions  
6 that are currently in existence.

7 There was also arguments that the only  
8 information or that the Board was fully relying on CWRM's  
9 decision. That's incorrect. As Mr. Wynhoff had made  
10 clear, there's a lot of information that was made  
11 available to the Board.

12 With regard to alternative water sources,  
13 there was also information in the draft EIS that was  
14 presented that not only considered alternative water  
15 sources, but also stated why those alternative water  
16 sources were not feasible.

17 With regard to the waste of water or the  
18 seepage percentage, there is no evidence in the record  
19 that the current amount of seepage exceeds the amount  
20 that CWRM had stated was reasonable. In CWRM's decision,  
21 it stated that 22 percent of the water then being  
22 diverted or 41.67 MGD was reasonable. The amount that  
23 has been reported as of Quarter 1 2020 is 22.75 MGD,  
24 which is nowhere near the 41.67 MGD that CWRM had said  
25 was reasonable.



1           With regard to approving -- well, Mr. Frankel  
2           had referred to the staff submittal for the 2019 meeting  
3           that had recommended a 35 MGD cap. And the Board ended  
4           up approving a 45 MGD cap. It was not simply a request  
5           and then approved by the BLNR to increase it to 45 MGD.  
6           The minutes from that meeting, which is Exhibit S-51,  
7           shows that Mahi Pono presented extensive information  
8           about why it anticipated its needs would increase to 45  
9           MGD. And that information was made available and  
10          considered by the Board before it decided to set the cap  
11          at 45 MGD.

12           So in sum, again, there is no evidence to  
13          establish the -- that the public trust doctrine actually  
14          requires the Board to undertake the actions that the  
15          plaintiff is arguing needed to be taken. There's no  
16          evidence that the Board breached its public trust duties  
17          and failed to properly balance the needs of both  
18          conservation and offstream uses. And for that reason, we  
19          think that the motion should be granted.

20           THE COURT: Thank you. Mr. Wynhoff, final --

21           MR. WYNHOFF: Thank you, Your Honor. Your  
22          Honor, in Mr. Frankel's argument, he made a lot of  
23          arguments that are simply not reflected in the record of  
24          this case.

25           And what this Court is deciding is based on

1 what Sierra Club has proven and shown to this Court, is  
2 there any point in going forward with another week of  
3 trial. And the answer to that question is no.

4 Again, I join entirely in Ms. Akagi's  
5 arguments. I'm not going to repeat them. But I do want  
6 to make a couple of points.

7 First of all, Mr. Frankel started off by  
8 saying six -- he started off with six reasons, which I  
9 really like. That's a great argument because I like  
10 lists and everybody listened carefully to the six. But  
11 it starts off with an incorrect premise that is not  
12 reflected in the record. The premise for that argument  
13 is that the Board relied solely on the CWRM decision.

14 That is simply incorrect. And that's very  
15 replete in the evidence. I talked about the minutes. We  
16 went through. Your Honor made a great deal of -- a point  
17 of trying to figure out what evidence was before the  
18 Board. And certainly the CWRM decision was very  
19 important. But it was by no means the only evidence in  
20 front of -- in front of the Board.

21 And then so talking somewhat about those  
22 points -- the particular points, Mr. -- Mr. Frankel  
23 talked about the diversions that supposedly could come  
24 out. We have already pointed out, Your Honor, that in  
25 the CWRM decision, it specifically states that it was

1 CWRM's recommendation and thought that those diversions  
2 ought to stay there. He specifically said that. They  
3 ought to stay there in case things change in the future.

4 And there is, Your Honor, I submit not one  
5 shred of evidence that the diversions themselves with  
6 respect that the streams have been fully restored are in  
7 any way, shape, or form harming the animals. I don't  
8 remember hearing that, and I'm very confident that the  
9 record does not reflect that.

10 To the extent that the diversions are used to  
11 divert the water, yeah, it simply goes back to the same  
12 thing. The more water in a particular stream, the more  
13 animals you're going to have in that particular stream.

14 With respect to trash, that was a great  
15 argument, but it is absolutely completely not supported  
16 by the evidence. Your Honor, think back. When have we  
17 seen trash? I think we saw two pictures. That's what I  
18 remember. Maybe there was three or four. There was a  
19 rusty pipe somewhere and there was some other pipe that I  
20 think the evidence showed already was not trash at all  
21 but was actually being used to provide a wetted pathway.  
22 But the argument that there's gigantic mounds of trash  
23 all over that nobody cares about and nobody follows up on  
24 is utterly unsupported by the record. Utterly  
25 unsupported by the record.

1           Mr. Frankel says that -- makes a big point of  
2           the Parham study. That's new evidence that's presented  
3           to the Board. Yeah, okay. It's new evidence presented  
4           to the Board, and the Board took it into consideration.  
5           What the Parham decision says subject to the fact that it  
6           actually doesn't make sense on its face, as we've already  
7           seen a bunch of times -- it talks about habitat units  
8           measured by 588,000 square meters, which is actually a  
9           category in the state. 588,000 square meters is 145  
10          acres. Taken at its face value -- taken at face value in  
11          isolation, what that shows is area -- habitat units in  
12          the area of the 13 streams is less than it would  
13          otherwise be.

14                 Okay. I mean, again, we don't -- we've never  
15          disagreed with that. If a bunch of water was put back  
16          into those 13 streams, then there would be more habitat  
17          there. Whether exactly Parham had it right or not, the  
18          big picture cannot possibly be denied.

19                 But then where do we get the leap from the  
20          Board had new information and therefore should have  
21          changed its mind and come to a different conclusion than  
22          CWRM? That simply doesn't follow. What we know is that  
23          the Board had the Parham report. No reason -- I mean, we  
24          have to assume that it considered it. And it came to the  
25          same decision.

1           If this water isn't put into -- if this water  
2     is put back in those streams to restore those habitat  
3     units, it's gotta come from somewhere. And it's going to  
4     either come from other streams in the watershed or it's  
5     going to come from important agricultural lands or it's  
6     going to come from domestic use.

7           Now, the argument was that the Board should  
8     have considered the area west of Huelo and should have  
9     considered ground water. Your Honor, that is a  
10    remarkable argument that I really want you to understand.  
11    All of -- and Mr. Frankel -- of course, we all agree with  
12    this. This is Mr. Frankel's point in the beginning when  
13    he was talking about public and private water. All of  
14    the water in the state is a public trust resource.  
15    Whether it comes from west of Huelo or comes from the  
16    ground water is completely irrelevant to this point.  
17    It's not like this is somebody else's water and why  
18    didn't A&B simply take it from its own private land west  
19    of Huelo. It's still our water, Your Honor. It's your  
20    water and my water held in public trust for the people of  
21    the State of Hawaii managed by CWRM and the Board.

22           And it is a remarkable argument for another  
23    reason, Your Honor. And that is it's the exact same bait  
24    and switch that these folks have been using all along.

25           I told you about the minutes. They came to

1 the Board in 2018 and 2019 and said, Put the water back  
2 in these other streams, we're not worried about the 13  
3 streams, and now they come to Your Honor and say, oh,  
4 these 13 streams need the water. And then they have the  
5 temerity to come and say, oh, they should have gotten --  
6 take the water out of west of Huelo, ground water, and  
7 put it back in these 13 streams. What's going to stop  
8 them from coming back next time and say, take 'em out of  
9 Huelo and you didn't study Huelo.

10 Ground water. You think there's an infinite  
11 amount of ground water and you simply pump ground water?  
12 Everybody knows that's not true. It's a matter of common  
13 knowledge. You don't just simply pump ground water so  
14 you can put other water back in the stream.

15 Your Honor needs to really -- respectfully --  
16 I don't mean to put it that way. We would respectfully  
17 ask Your Honor to really focus on that argument which is  
18 extraordinarily important for at least those two reasons.

19 Your Honor, another source that Mr. Frankel  
20 suggests might be an easy way -- (indiscernible) -- is  
21 water that is wasted. Your Honor, there's no evidence in  
22 this case, absolutely none, that the water is being  
23 wasted. If there's seepage and leakage and evaporation,  
24 sure, that's true. There's evaporation in streams.  
25 There's -- obviously there's seepage in the stream. To

1 the extent there's seepage in the ditch, there's no  
2 evidence that it's more or less than anything else. I  
3 would assume that in effect there's seepage out of the  
4 watershed. It goes back into the watershed.

5 And specifically, Your Honor, specifically  
6 with respect to leakage, Mr. Frankel implies that the --  
7 that the -- well, not implies -- he said that the CWRM  
8 found that there should be less seepage. I respectfully  
9 beg to differ.

10 On page 194 of their decision, Finding of Fact  
11 3 -- 737, CWRM specifically said, the rate of -- what's  
12 the word they use? -- system losses -- system losses is a  
13 little more neutral than wastage. The rate of system  
14 losses was 22.7 percent in the past, and they now go on  
15 and specifically say because the same distribution would  
16 be used for diversified agriculture, the rate of 22.7  
17 percent losses should be applicable. And there's no --  
18 and so that's there. That's in the record. There's no  
19 reason to think that the Board didn't take that into  
20 account and didn't make a proper decision.

21 Again, sure, there could be -- there could be  
22 less leakage, I guess. But you -- those things -- none  
23 of that stuff is costless.

24 Mr. Frankel -- Mr. Frankel pounds the table,  
25 as he has done throughout this case, that the Board has

1 to exercise its -- has to do its job as the trustee. We  
2 100 percent affirm that and accept it and agree with it.  
3 The point is, Your Honor, there is not one shred of  
4 evidence that the Board did not do its duty as trustee.

5 Its duty as trustee is to follow the terms of  
6 the trust, which are most succinctly set out in Article  
7 XI, Section 1. And that -- the terms of that trust  
8 specifically require them to strike a balance. And the  
9 argument here is that it is unreasonable, so unreasonable  
10 that allowing some of this water to be diverted out of  
11 the watershed to water 30,000 acres of land in East  
12 Central Maui, 22,000 of which are important agricultural  
13 lands, and for domestic water use.

14 The argument that's being made that that is so  
15 obviously a breach of the trust in order to use it for  
16 those uses as opposed to allowing it to gurgle down in  
17 the stream and add to habitat is simply untenable based  
18 on this record, Your Honor. Thank you, Your Honor.

19 THE COURT: All right. Thank you.

20 Mr. Rowe?

21 MR. ROWE: I have nothing further to add, Your  
22 Honor.

23 THE COURT: All right. Mr. Frankel, I'm going  
24 to give you a very brief kind of a final -- final  
25 comments. But please don't use it to argue what you've



1 already argued. Just anything to respond to Ms. Akagi  
2 and Mr. Wynhoff. You're muted.

3 MR. FRANKEL: Thank you, Your Honor. First I  
4 want to point out that the quarterly report submitted by  
5 Alexander & Baldwin, which is Exhibit J -- I believe it's  
6 27 -- yes -- reveals that more than 22 percent of water  
7 currently is being lost to seepage and evaporation. More  
8 than what the Water Commission decided was a reasonable  
9 amount that could be lost, to wit, seepage and  
10 evaporation.

11 That's going on now. It's going on because  
12 the board did not ask prior to 2019 or prior to 2018 how  
13 precisely the water was being used so we could figure out  
14 exactly how much was being lost.

15 A couple things I forgot to point out. You  
16 know, a lot of the issues that A&B's raising had been  
17 raised in their five prior motions for summary judgment  
18 they've raised before, and this Court has addressed the  
19 jurisdiction, standing, what have you. I'm not going to  
20 rehash them.

21 I do think I need to clarify the relief that  
22 we're requesting. When we submit our proposed findings  
23 of fact, conclusions of law, the relief that we're  
24 proposing is going to be -- or some of the relief is  
25 going to be presented in the alternative because I don't

1 know exactly how this Court is going to address it.

2 But you know, one thing we have consistently  
3 said, although Alexander & Baldwin disagrees, to have the  
4 permits invalidated and yet use the Court's equitable  
5 powers to mandate the continued delivery of water to the  
6 County and actually even to some agricultural uses in  
7 Central Maui. So the amount of water that is diverted  
8 does not increase. So that the status quo is maintained  
9 while the BLNR does its trust duties.

10 And Mr. Wynhoff raised the issue about what's  
11 the Board going to do. Ultimately I don't know if you  
12 characterize it as a remand or not, but ultimately the  
13 Board is going to have to perform its trust duties  
14 properly. But until that happens, we want the status quo  
15 preserved. And whether that's in the form of the permits  
16 being validated or whether the permits are not  
17 invalidated but there's a limit determines how much water  
18 is diverted. Until all these various trust duties are  
19 performed, that's what we're asking.

20 And I should clarify we're not asking the  
21 Board to set instream flow standards. We're saying there  
22 should not be any increase in the amount of water  
23 diverted until the Water Commission sets new real  
24 meaningful instream flow standards. And if nobody  
25 petitions, well then there's no increase in the water

1 that's diverted.

2 It's A&B's burden. They want the water. They  
3 need to file the petition or maybe the Department can  
4 file. But in the meantime, there should not be an  
5 increase in the amount of water diverted. Thank you,  
6 Your Honor.

7 THE COURT: All right. Thank you. We've been  
8 going almost a full hour, so we're going to take a  
9 recess. I'm going to give this some thought. And I'll  
10 let you know what I'm deciding when we come back. So  
11 let's go a full 15 minutes. So see you at five minutes  
12 after 11:00. We're in recess.

13 (A recess was taken.)

14 THE COURT: We're back on record. FTR is on.  
15 Counsel all present. All right. So the short answer is  
16 I'm going to defer ruling. Rule 52(c) expressly gives  
17 the Court in a non-jury trial the power to decline to  
18 render any decision on partial findings until the close  
19 of all the evidence. And of course, findings of fact and  
20 conclusions of law are also required.

21 So I just need to spend more time with the  
22 CWRM exhibits, more time with the BLNR exhibits.  
23 Obviously the proposed FOF/COL that I'll be requiring  
24 after trial will be helpful.

25 So yes, Mr. Wynhoff, it means we'll have to

1 spend some more time in trial. But my hope is that the  
2 quality of decision making will be better with spending  
3 more time and attention on what's obviously an important  
4 motion. So that's the trade-off.

5 MR. WYNHOFF: Thank you, Your Honor.

6 THE COURT: So are we ready to go forward?

7 MR. SCHULMEISTER: Your Honor, again, I  
8 believe that Mr. Frankel -- did I interrupt you? I'm  
9 sorry.

10 MR. FRANKEL: I think I actually interrupted  
11 you. But Your Honor, you probably might want to set a  
12 deadline for State to file whatever opposition they want  
13 to file for -- on the regarding the Trial Brief No. 3.

14 THE COURT: Okay. I forget which -- what  
15 number is attached to which issue. Which one is that?

16 MR. FRANKEL: That's regarding the deposition  
17 testimony of Mr. Higashi.

18 THE COURT: All right. How do you folks want  
19 to handle that?

20 MR. WYNHOFF: Your Honor, I thought I heard  
21 you say that you were going to take it up post trial. So  
22 whenever -- whenever reasonable. I just assumed do it  
23 post trial frankly. But if I'm wrong, whatever  
24 reasonable deadline, I'm sure we can live with it.

25 THE COURT: What kind of -- are you proposing

1 any particular kind of deadline, Mr. Frankel?

2 MR. FRANKEL: You know, I think earlier the  
3 discussion -- there was some discussion about post trial.  
4 But I think that's not -- there has to be a decision on  
5 it before the trial concludes because it's evidence. So  
6 yes, it has to be before trial's over. I don't know when  
7 trial's going to end. You know, I worked on the memo --  
8 three memos over the weekend. I don't know when  
9 Mr. Wynhoff can get his done. But it would have to be  
10 done before closing argument. I mean, you have to make  
11 your decision before closing argument, I believe.

12 THE COURT: Well, that raises another issue.  
13 You know, Judge Castagnetti recently wrapped up a long-  
14 running foreclosure trial, and she did something a little  
15 differently than she has done before, and she thought it  
16 worked out really well. What she did was she ordered the  
17 proposed findings of facts and conclusions of law. And  
18 it was a long trial for a foreclosure case. I think it  
19 went like 10 or 14 days, something like that. So she  
20 gave a lot of time for the proposed findings of fact and  
21 conclusions of law and then had closing arguments  
22 afterwards as opposed to at the end of the trial and then  
23 followed by findings of facts and conclusions of law.  
24 She thought it helped her a lot to be able to have the  
25 benefit of the FOF/COL during closing argument. She

1 thought it made it much more focused. And I just have a  
2 lot of respect for her decision-making process, so I  
3 thought I might try it. Any comments?

4 MR. WYNHOFF: I think that's a good idea, Your  
5 Honor. I mentioned that right at the beginning. You  
6 know, if you -- if we just go five seconds after we close  
7 the case, I don't think they're likely to be as  
8 thoughtful and helpful as if we had a chance to think  
9 about it. That's just my input.

10 THE COURT: Mr. Schulmeister? Ms. Akagi?

11 MR. SCHULMEISTER: I would concur with that.

12 THE COURT: Mr. Frankel?

13 MR. FRANKEL: I do not like that idea for a  
14 couple reasons. You have emphasized that you did not  
15 want witnesses reading off of the exhibits. And there's  
16 a lot of very, very important information in the  
17 exhibits. And you know, I don't have my closing argument  
18 in any shape or form ready. But I am hoping to be able  
19 to highlight for you exhibits that are important. And --  
20 and I am concerned about -- I don't know how long it's  
21 going to take them to do their findings of fact,  
22 conclusions of law. Like I said, I'll get 'em done and  
23 to you a day after trial is over. I work on 'em every  
24 day, revise them every day.

25 So I don't want there to be this huge gap

1 between trial and closing argument because there's so  
2 much information that has not been conveyed directly to  
3 you that are in the exhibits. And that is not -- I think  
4 that's going to actually make it much more difficult for  
5 us to present our case.

6 THE COURT: I'm not connecting those dots. I  
7 mean, I think I agree with you that there's a lot of  
8 information in the exhibits that I have not absorbed yet.  
9 And I'm obviously not going to get a chance to absorb it  
10 all between now and the close of the case because I'm  
11 going to be busy taking evidence. So when would I absorb  
12 it?

13 MR. FRANKEL: During our closing argument. I  
14 mean, you pointed out that you wanted counsel to, you  
15 know, take -- it was not really appropriate to read it  
16 through various witnesses.

17 THE COURT: Yeah.

18 MR. FRANKEL: So during closing argument, I do  
19 planned to say, Look at finding of fact -- look at  
20 paragraph J on this page, here's what it says. And then  
21 look at Exhibit whatever and go through it piece by piece  
22 by piece. I'm going to build my edifice up.

23 And my concern is if the other parties are  
24 going to take more than a couple days to submit their  
25 findings of facts, conclusions of law, there's going to

1 be a huge gap in time between the last witness and  
2 closing argument. And I would like to be able to tie it  
3 altogether in the closing argument at the conclusion of  
4 trial.

5 THE COURT: So basically your argument is the  
6 delay? Okay.

7 MR. FRANKEL: I think that's part of it, yeah.

8 THE COURT: All right. I understand. All  
9 right. Well, going back to -- I got a little sidetracked  
10 there. We were talking about the Higashi motion.

11 Mr. Schulmeister or Ms. Akagi, I assume you  
12 want to file something in writing to that? And if so,  
13 when could you have it ready? Or is this more  
14 Mr. Wynhoff?

15 MR. SCHULMEISTER: On that one, I was going to  
16 defer to the State's position on that. We weren't  
17 planning to file anything.

18 THE COURT: Okay. Thank you.

19 Mr. Wynhoff, ball's in your court.

20 MR. WYNHOFF: Close of business Wednesday,  
21 Your Honor?

22 THE COURT: Okay. All right.

23 MR. WYNHOFF: Or Your Honor, let's just say  
24 Wednesday. My young people love to stay here till  
25 midnight. It will be close of business if I have to sign



1 it.

2 THE COURT: Thank you, Ms. Goldman.

3 MS. GOLDMAN: Thanks, Judge.

4 THE COURT: I don't think one day delay is  
5 unreasonable so I'm going to grant that request.

6 All right. And Mr. Rowe, obviously if you  
7 want to file anything, please have it in tomorrow as  
8 well.

9 MR. ROWE: Thank you, Your Honor.

10 THE COURT: All right. All right. So I think  
11 we're -- I think the order of the defense case is  
12 Alexander & Baldwin is going first; is that right?

13 MR. SCHULMEISTER: Yes.

14 THE COURT: Okay. You ready to go with the  
15 witness?

16 MR. SCHULMEISTER: Just about. But there is a  
17 scheduling issue I wanted to bring up.

18 THE COURT: Sure. Go ahead.

19 MR. SCHULMEISTER: I didn't realize that we  
20 were going to get so -- we were going to start so late  
21 this morning with Ms. Ching. And my second witness,  
22 Mr. Volner, is not going to be available after 3:30. So  
23 I was wondering if we could arrange to call him at 1:00  
24 even if we're not done with Ms. Ching. I'm sure we'll  
25 finish him off if we call him by 1 o'clock.

1 THE COURT: It seems fine with the Court.  
2 Anybody have a problem with that? I see no objection, so  
3 okay. That's the plan, Mr. Schulmeister. That's fine.

4 MR. SCHULMEISTER: Okay. Thank you.

5 THE COURT: Sure.

6 MR. SCHULMEISTER: Okay. So we call Meredith  
7 Ching then.

8 THE COURT: Thank you.

9 Can you hear me, Ms. Ching?

10 THE WITNESS: I can, Your Honor.

11 THE COURT: All right. Are you ready to go?

12 THE WITNESS: I am.

13 THE COURT: All right. You're still under  
14 oath.

15 Mr. Schulmeister, go ahead.

16

17 MEREDITH CHING,

18 Called as a witness by A&B,

19 having been previously duly sworn,

20 was examined and testified as follows:

21

22 DIRECT EXAMINATION

23 BY MR. SCHULMEISTER:

24 Q Okay. Ms. Ching, I'd like to -- to go back  
25 and pick up the chronology from Mr. Frankel's direct when

1 he was asking you during your early years with Alexander  
2 & Baldwin, starting in I believe it was 1982; is that  
3 right?

4 A Yes.

5 Q And one of your responsibilities was dealing  
6 with the -- the East Maui water issues from -- basically  
7 from the time you started; is that right?

8 A Yes.

9 Q Okay. And there were long-term water leases  
10 that had gone on for a long time, the last of which  
11 expired in 1986; is that right?

12 A That's right.

13 Q Now, did A&B make any efforts to acquire a  
14 long-term lease at or about the time the last lease  
15 expired in 1986?

16 A Yes. We had entered into discussions with the  
17 State about being able to go on to a long-term lease  
18 after 1986 so that there was no break in leases. And as  
19 I recall, the State initiated an application for the  
20 Board to issue a long-term lease in 1985.

21 Q And when -- but it wasn't until -- I'm sorry.  
22 So then what happened after that generally? Just --

23 A With the State's request for a lease? It  
24 proceeded some and then there was a bunch of litigation,  
25 and eventually that effort wasn't pursued by the State

1       anymore, which is what prompted us to apply it for  
2       ourselves in 2001.

3           Q        So between 19 -- whenever it was that that  
4       process terminated without a long-term lease being issued  
5       until 1981, Alexander & Baldwin and East -- EMI had to  
6       process annual renewable permits; is that right? Or  
7       annual permits?

8           A        Annual RP's until 2001, when we applied for  
9       the long-term lease.

10          Q        Okay. And I don't know if we've defined this  
11       before, but when we say RP's we're talking about  
12       revocable permits; is that right?

13          A        Yes.

14          Q        So moving forward to 2001 -- and if you want  
15       to -- I'll direct your attention to Exhibit J-1. J-1.

16          A        Thank you. Okay.

17          Q        And J-1, which -- is this a letter that you're  
18       involved in preparing to initiate the long-term lease  
19       process?

20          A        Sorry. J-1 is a revocable permit.

21          Q        Hold on for a second. Okay. Could you look  
22       at J-5 please.

23          A        I got it.

24          Q        All right. You recognize J-5?

25          A        I do.

1           Q           And is this the letter that initiated the  
2 process, the current process that's still going on?

3           A           Yes. This is the -- the request for the State  
4 to issue a long-term lease at public auction.

5           Q           Now, could you explain, you know, how it came  
6 about or what prompted this letter request in May of  
7 2001?

8           A           Well, again, our last long-term lease had  
9 expired in 1986, and we wanted to get back our long-term  
10 leases so that we could start make some really strategic  
11 decisions about our agricultural operation, HC&S, which  
12 at that time employed about a thousand Maui residents.  
13 And when the 1985 request that was initiated by the State  
14 didn't go anywhere, we decided to initiate our own  
15 request in 2001.

16          Q           Okay. And now, with regard to the issue of  
17 whether an environmental impact statement should be  
18 prepared, there's a reference in J-5 to bidders preparing  
19 it. Do you see that?

20          A           Yes.

21          Q           And why was that included in this letter?

22                   THE COURT: I'm sorry. Where in the letter?  
23 I'd like to follow along.

24                   MR. SCHULMEISTER: I think we're on page 2.

25                   THE COURT: All right. All bidders? The part

1 by EIS?

2 MR. SCHULMEISTER: Yes.

3 THE COURT: Okay. Got it. Go ahead.

4 THE WITNESS: So there was -- to comply with  
5 Chapter 343, there had been some discussion before  
6 whether an environmental assessment or environmental  
7 impact statement was needed. And we just wanted to make  
8 sure that the process was followed, that whatever bidder  
9 and whatever proposed use of this water needed to do an  
10 EIS.

11 BY MR. SCHULMEISTER:

12 Q Now, at this time A&B was expecting to be a  
13 bidder; correct? I mean, that was the purpose of  
14 initiating the process?

15 A Yes.

16 Q And so A&B was proposing that as a bidder, it  
17 would prepare an Environmental Impact Statement; is that  
18 right?

19 A Yes. We made that explicit, that we would be  
20 willing to do an EIS.

21 Q Now, at that time did you have any idea what  
22 that would cost?

23 A Yes. We had interviewed some engineering  
24 firms, and the cost estimate we got back was \$2 million.

25 Q All right. And so from the very beginning,

1 A&B was prepared to commit to invest that to do the EIS;  
2 is that right?

3 A Yes. So that we could move the lease process  
4 along.

5 Q So why -- I mean -- all right. Now, besides  
6 offering to fund the Environmental Impact Statement, was  
7 there any other commitment that A&B made to fund other  
8 research to assist the Board in fulfilling its duties  
9 with respect to the lease application?

10 MR. FRANKEL: Objection. Relevance given the  
11 date.

12 THE COURT: That's pretty vague. Could you  
13 rephrase with a reference point?

14 BY MR. SCHULMEISTER:

15 Q Yeah. The question is whether besides  
16 offering to expend an estimated 2 million back in 2001 to  
17 go ahead with the Environmental Impact Statement, whether  
18 there was any other funding that A&B committed to do to  
19 assist with the research needed to commence the lease  
20 process.

21 THE COURT: I'm sorry. Ms. Ching, you can go  
22 ahead and answer.

23 THE WITNESS: Oh, I'm sorry. I didn't know  
24 that I could answer yet. I'm sorry. Yes. We had  
25 commissioned a cultural landscape study. At that time

1 traditional and cultural gathering rights were kind of a  
2 hot issue, and we knew that that would be an issue of  
3 scrutiny given the watershed area. So we commissioned a  
4 consultant to do a cultural study.

5 BY MR. SCHULMEISTER:

6 Q Okay. And in fact, was that study done?

7 A Yes, it was.

8 Q Okay. Could you refer to Exhibit AB-165, 166,  
9 and 167.

10 THE COURT: These are not in evidence; right?

11 MR. SCHULMEISTER: Correct.

12 THE WITNESS: Okay. I have them in front of  
13 me.

14 BY MR. SCHULMEISTER:

15 Q Do you recognize these exhibits?

16 A Yes. This is what we call the Kepa Maly  
17 Study, and it was the cultural landscape study.

18 Q Now, had anybody ordered you -- had the Board  
19 ordered you to do this?

20 A No, not at all.

21 MR. SCHULMEISTER: Your Honor, I would ask  
22 that Exhibits AB-165, 166, and 167 be received in  
23 evidence.

24 MR. FRANKEL: Objection, Your Honor. Hearsay,  
25 lacks foundation, relevance.



1 THE COURT: Okay. Mr. Schulmeister, if you  
2 could connect the dots a little bit.

3 MR. SCHULMEISTER: Yes. Throughout this case  
4 the Sierra Club has argued repeatedly that A&B has  
5 benefited from the delay from the time the lease was  
6 applied for to date and sat on its hands, did nothing to  
7 advance the process, etc. So I think it's relevant to  
8 point out the things A&B did to advance the process,  
9 including expending funds that were not required to be  
10 spent. So that's the relevance, Your Honor.

11 THE COURT: Okay. These -- what did you refer  
12 to this as, Ms. Ching?

13 THE WITNESS: It's the Cultural Landscape  
14 Study.

15 THE COURT: So Mr. Schulmeister, is this --  
16 was this part of what went to the Board?

17 MR. SCHULMEISTER: Yeah. The Board -- it was  
18 to the Board, and it also shows up in the contested case  
19 hearing testimony submitted by Native Hawaiian Legal  
20 Corporation before the Water Commission. It was a  
21 document that was relied on widely in the consideration  
22 of the -- the lease application and the interim instream  
23 flow standards.

24 THE COURT: So Mr. Frankel's shaking his head  
25 no. So there's some kind of a disconnect here.

1 Mr. Frankel, go ahead.

2 MR. FRANKEL: Your Honor, there's no evidence  
3 that this study was given to the Board of Land and  
4 Natural Resources. That testimony has not been elicited  
5 from the witness. But I'm also going to object on  
6 hearsay grounds and -- yeah. It's pure hearsay at this  
7 point.

8 THE COURT: All right. Mr. Wynhoff, you want  
9 to be heard on this?

10 MR. WYNHOFF: Well, I do, Your Honor. Thank  
11 you. I would like to comment on the hearsay grounds as I  
12 don't think it's being offered to prove the truth of the  
13 matter. So I think that's the issue with respect to  
14 that. Thank you, Your Honor.

15 THE COURT: Mr. Rowe.

16 MR. ROWE: I would agree with Mr. Wynhoff  
17 regarding the hearsay objection.

18 THE COURT: All right. I would like to hear  
19 more testimony on whether this was given to the Board as  
20 part of its determinations before I make a decision. So  
21 if you can ask this witness, we'll see where it goes.

22 BY MR. SCHULMEISTER:

23 Q Ms. Ching, do you know whether this study was  
24 made available to the Board of Land and Natural  
25 Resources?

1                   MR. FRANKEL:  Objection, Your Honor.  Lacks  
2                   foundation, personal knowledge required.

3                   THE COURT:  He asked her if she knows, so she  
4                   can answer.

5                   THE WITNESS:  My recollection is a little  
6                   vague, but that there was a proceeding that the Board of  
7                   Land and Natural Resources held, and they called Kepa  
8                   Maly as a testifier or witness or something.  So I  
9                   believe so.

10                  THE COURT:  And for the record, what's your  
11                  reference to Kepa Maly?

12                  THE WITNESS:  Kepa Maly is the consultant who  
13                  did this cultural landscape.  If I can elaborate on it  
14                  more, what he looked at was Native Hawaiian and  
15                  traditional practices as it related to water uses in the  
16                  East Maui area.  And it included oral histories with a  
17                  number of individuals who lived in the East Maui  
18                  watershed.

19                  THE COURT:  And do you know which Board  
20                  proceeding it was where this information was conveyed?

21                  THE WITNESS:  I can't recall the detail.  
22                  Sorry.

23                  THE COURT:  All right.  Well, the Court  
24                  would -- the Court will admit these three exhibits but  
25                  for a very limited purpose based on the record to date.

1 That limited purpose is simply that A&B was doing other  
2 studies and making financial commitments to do these  
3 studies. But where that leads is unknown at this point.  
4 So I'm not willing based on this record to say this  
5 information was given to the Board. But maybe that can  
6 be established later.

7 All right. You can go ahead,  
8 Mr. Schulmeister.

9 BY MR. SCHULMEISTER:

10 Q Okay.

11 THE COURT: I'm sorry. To make the record  
12 clear, Exhibits AB-165, 166, and 167 are admitted for the  
13 limited purpose of showing efforts by A&B at this time.  
14 And that's without prejudice to a further showing. And  
15 then the documents could perhaps be used for other  
16 purposes. Go ahead.

17 (Exhibits AB-165, AB-167, and AB-167 were  
18 received in evidence.)

19 BY MR. SCHULMEISTER:

20 Q Do you recall how much A&B expended to fund  
21 this study?

22 A My memory is that it's about \$60,000 back in  
23 2001.

24 Q Okay. Now, when A&B submitted the long-term  
25 lease application, that's what I'm going to refer to as

1 G-5, which is the letter to request initiation actually  
2 of the auction, and offered to prepare an environmental  
3 impact statement, did A&B want this to become a 20-year  
4 extended process?

5 A No, not by any means.

6 Q And why not?

7 A 'Cause we needed the certainty of a long-term  
8 lease -- water lease at that time to make strategic  
9 decisions about HC&S, our sugar operation. It was  
10 starting to get to a very difficult time, and we needed  
11 to think about making fairly large investments in the  
12 operation to keep it going. And so you can't do big  
13 investments based on a one-year permit.

14 Q And did these permits also have a 30-day  
15 termination provision?

16 A Yeah. It could be taken away at any time with  
17 30 days' notice.

18 Q So there -- they had a term of one year,  
19 but -- but they could be revoked on 30 days' notice; is  
20 that right?

21 A That's correct.

22 Q And -- and that was the uncertainty A&B had  
23 been operating under from 1986 all the way till 2000,  
24 2001?

25 A Yes.

1           Q           And -- and at some point it was decided to  
2           make another attempt to try and get more certainty?  
3           That's what led to the application?

4           A           Right. We had been working on the 1985  
5           request to issue lease for a number of years in those  
6           interim years. And then when that, as I said, just went  
7           by the wayside, we applied ourselves in 2001 to start the  
8           process again.

9           Q           Now, has there been any benefit to A&B as a  
10          result of this long-term lease process getting drawn out  
11          and extended for nearly 20 years now?

12          A           None whatsoever. We spent a lot of internal  
13          resources and a lot of money fighting all the challenges  
14          along the way. We weren't able to make really big  
15          investments in HC&S when they needed it the most. So no,  
16          I can't think of any benefit to A&B.

17          Q           So why has it taken so long?

18          A           Endless challenges and litigation. I think I  
19          counted no less than ten regulatory court filings between  
20          the time we initiated the lease in 2001 and now. For  
21          example, the interim instream flow standard decision was  
22          made in 2008 and 2010, completed all 27. Contested case  
23          hearing was filed, and the final decision didn't come out  
24          until 2018, ten years later. So it was a good decision,  
25          but it takes time. And that's why it's taken this long.

1           Q           Now, was there also a contested case requested  
2           by the Board of Land and Natural Resources shortly after  
3           the lease application was submitted?

4           A           Yes. And that's still pending, it's my  
5           understanding.

6           Q           Could you refer to Exhibit AB-3 please.

7                       MR. WYNHOFF: May we hear the number again,  
8           Your Honor? I missed that. I'm sorry.

9                       MR. SCHULMEISTER: AB-3.

10                      MR. WYNHOFF: Thank you, Your Honor.

11                      THE WITNESS: Okay. I have it.

12                      THE COURT: That's already in. AB-3.

13                      MR. SCHULMEISTER: Right.

14           BY MR. SCHULMEISTER:

15           Q           All right. AB-3 purports to be a May 23rd,  
16           2001 letter to the Board of Land and Natural Resources on  
17           the letterhead of the Native Hawaiian Legal Corporation.  
18           And in the Re. line on the first page, it says, Request  
19           for hearing in a contested case. And then it goes on to  
20           describe -- as referring to, quote, discussion on long-  
21           term disposition of water licenses and issuance of  
22           interim revocable permits to Alexander & Baldwin, Inc.,  
23           and East Maui Irrigation Company, Limited. And then it  
24           goes on to discuss the licensed area. Is that right?

25                      MR. FRANKEL: Objection, Your Honor, if we're

1 going to be reading documents like that.

2 THE COURT: Yeah. Let's try to stay away from  
3 that, Mr. Schulmeister. Sustained. I know you're trying  
4 to save time, but it's a proper objection.

5 THE WITNESS: Am I supposed to answer? Sorry.

6 THE COURT: No answer necessary at this point.  
7 Thank you.

8 THE WITNESS: Okay. Thank you.

9 BY MR. SCHULMEISTER:

10 Q Let me just ask you. Do you recall this  
11 letter having been sent to request a contested case  
12 hearing regarding the revocable permits and the long-term  
13 lease application?

14 A Yes.

15 Q All right. And do you recall whether one of  
16 the objections that was made in this letter was to -- to  
17 whether the bidder should be the one who prepares the  
18 environmental impact statement?

19 A Yes, I remember.

20 Q Okay. And do you recall that Maui Tomorrow  
21 Foundation separately also asked for a contested case  
22 hearing?

23 A Yes, I do.

24 Q And also objected to the bidder preparing the  
25 environmental impact statement?



1 A Yes. They also objected.

2 Q Right. And I think you mentioned that the  
3 contested case hearing that was requested back in 2001 is  
4 still pending before the Board of Land and Natural  
5 Resources; is that right?

6 A That's my understanding.

7 Q Now, after the contested case hearing was  
8 requested -- by the way, I think what we probably left  
9 out was do you recall that the Board granted the request  
10 for a contested case hearing?

11 A Yes, they did.

12 Q And that's why it's still pending; right?

13 A Yes.

14 Q Because it hasn't otherwise been completed?

15 A Correct.

16 Q After that did you also become aware of  
17 interim -- of petitions being filed by the clients of the  
18 Native Hawaiian Legal Corporation to amend the interim  
19 instream flow standards for a number of streams in the  
20 East Maui area?

21 A Yes. They filed a petition for 27 streams.

22 Q And were the discussions that took place  
23 between A&B and the attorneys representing the Board and  
24 Native Hawaiian Legal Corporation about how to go forward  
25 from that point in terms of getting the streams studied

1 so that the interim instream flow standards could be  
2 amended?

3 MR. FRANKEL: Objection. Hearsay.

4 THE COURT: What's the purpose of the  
5 question?

6 MR. SCHULMEISTER: I'm asking her whether she  
7 remembers there being discussions about how -- what the  
8 path forward would be here. That's the point.

9 THE COURT: You can answer the question yes or  
10 no without saying what the conversation was yet.

11 THE WITNESS: Yes.

12 BY MR. SCHULMEISTER:

13 Q Now, so while the contested case hearing was  
14 pending, did A&B contribute financially to the  
15 preparation of any environmental studies to facilitate  
16 the review by the Water Commission of the petitions to  
17 amend the interim instream flow standard?

18 A Yes, there was a USGS study proposed that  
19 would have -- between the Water Commission and USGS, and  
20 we helped to fund that study.

21 Q And do you recall what the financial  
22 contribution A&B made to that study was?

23 A \$75,000.

24 Q Okay. And could you look at Exhibit AB-161.

25 THE COURT: That one's not in evidence

1 according to the Court's notes.

2 MR. SCHULMEISTER: Is there another version  
3 that is in evidence? Sorry, Your Honor, but I -- I seem  
4 to recall that there may be another version that is in  
5 evidence. So let me see if I can find it.

6 THE COURT: That's fine. You may take a  
7 minute. No rush. We've also only got 15 minutes till  
8 lunch break. So if you want to move on, do something  
9 else, and then circle back to this after lunch, that's  
10 fine too.

11 MR. SCHULMEISTER: Your Honor, I think I'm  
12 going to ask the witness to look at the exhibit. And I  
13 would like to note that this is an exhibit that we  
14 requested judicial notice of to the extent it's not  
15 already stipulated. It's one of the exhibits to the  
16 Water Commission decision. But I'm just going to ask the  
17 witness a couple questions about it.

18 MR. FRANKEL: Excuse me. Which exhibit number  
19 are we on?

20 THE COURT: AB-161.

21 MR. FRANKEL: Well, I'm not -- it's not clear  
22 to me. Is he moving to introduce this exhibit?

23 THE COURT: Not yet. He's going to ask some  
24 questions.

25 MR. SCHULMEISTER: You know, let me -- I know

1 this is -- this is marked separately. I'll come back to  
2 it. Okay?

3 THE COURT: That's fine.

4 MR. SCHULMEISTER: It looks like AB-161 is  
5 just an excerpt from it, not the entire study. So let me  
6 just move on.

7 BY MR. SCHULMEISTER:

8 Q All right. Ms. Ching, do you recall there  
9 coming a time during the litigation that there was a  
10 question about whether or not an environmental impact  
11 statement was required and that issue went to decision  
12 before Judge Hifo?

13 A Yes, I remember that.

14 Q And -- and then after that the -- the  
15 contested case hearing that was going on before the Board  
16 was returned to the Board for consideration of whether or  
17 not some interim measures should be taken pending the  
18 outcome of the interim instream flow standard and the  
19 preparation of an environmental impact statement?

20 A Yes.

21 Q I'd like to direct your attention to Exhibit  
22 AB-7.

23 THE COURT: It's not in evidence yet per the  
24 Court's notes.

25 MR. SCHULMEISTER: Okay.

1 THE WITNESS: Okay.

2 BY MR. SCHULMEISTER:

3 Q All right. Do you recognize Exhibit AB-7?

4 A Yes.

5 Q And -- and what do you recall about this?

6 A That we had a hearings officer that looked  
7 into some interim measures, and I'm not going to remember  
8 this completely, but that there were releases ordered on  
9 Waiakamilo Stream.

10 Q Okay. And findings of fact, conclusions of  
11 law, and decision and order were entered by the BLNR?

12 A Yes.

13 MR. SCHULMEISTER: Okay. This one is also  
14 subject of our request for judicial notice. This is a  
15 file-stamped copy of a Board findings of fact,  
16 conclusions of law, decision and order in the contested  
17 case hearing that's still pending that applies to both  
18 the long-term lease application and the revocable  
19 permits. I don't think there's any question about  
20 authenticity. I would like to move that you receive it  
21 into evidence?

22 THE COURT: Mr. Frankel?

23 MR. FRANKEL: I object, and I need to explain  
24 a little bit why. I don't know if the witness needs to  
25 be here for that.

1 THE COURT: Well, if you think there's an  
2 issue, then we should temporarily excuse the witness.

3 So Ms. Ching, if you could please step  
4 outside.

5 THE WITNESS: Sure.

6 THE COURT: It's a normal process. It's not  
7 anything for you in particular.

8 (Witness stepped away.)

9 THE COURT: All right. Go ahead.

10 MR. FRANKEL: So Your Honor, this is a  
11 recommendation from a hearings officer. If I'm getting  
12 my -- I'm sorry. Are we on AB-6 or AB-7?

13 THE COURT: AB-7.

14 MR. FRANKEL: I'm sorry. My -- it's just --  
15 I'm sorry. I messed up. But our objection is relevance,  
16 it's outdated, and the Sierra Club is not a party to  
17 that.

18 THE COURT: What is the relevance again,  
19 Mr. Schulmeister? I didn't quite catch it during your  
20 first comments.

21 MR. SCHULMEISTER: This is a decision made by  
22 the Board of Land and Natural Resources in a contested  
23 case that's still pending before the Board that relates  
24 to both the long-term lease application and the revocable  
25 permits, which are still in holdover status, which, you

1 know, this decision addressed. It is part of the  
2 procedural history of this matter.

3 Again, there has been allegations made that  
4 A&B and the Board have sat on their hands for years,  
5 decades, you know, in terms of doing environmental impact  
6 statement, doing studies, etc., etc. This is part of the  
7 history that shows what was in fact going on. Parties  
8 were not sitting on their hands. There was litigation  
9 going on. The Board was addressing it. And the subject  
10 of both the pendency of the interim instream flow  
11 standards and the need to do the environmental impact  
12 statement is specifically addressed in this decision. I  
13 believe it's an important part of the record, Your Honor.

14 THE COURT: Okay. And is there a specific  
15 connection between this document and the two revocable  
16 permits at issue in this case?

17 MR. SCHULMEISTER: Actually there's four  
18 revocable permits at issue.

19 THE COURT: I'm sorry. I misspoke.

20 MR. SCHULMEISTER: The two years, you mean?

21 THE COURT: I meant the two years.

22 MR. SCHULMEISTER: Well, yes. I believe there  
23 is because the -- you know, again, the -- one of the main  
24 issues in this case is whether or not the Board breached  
25 its public trust duties by not having engaged in more

1 activity in the nature of the scrutiny of the instream  
2 flow standards, the environmental impact, etc., and yet  
3 this is part of a long record that shows what a daunting  
4 challenge it has been for the parties to complete both  
5 the interim instream flow standards and the environmental  
6 impact statement for the long-term lease.

7 And you know, the plaintiffs are arguing that  
8 somehow this all should have been compressed into a  
9 one-month review for an annual permit that terminable on  
10 30 days' notice. This is definitely probative of whether  
11 the type of conduct that the Sierra Club is alleging  
12 should have taken place would have been practicable in  
13 the context of a one-year permit. It's directly related  
14 to these streams, these interim instream flow standards,  
15 and the environmental impact statement that is currently  
16 in process. So I believe it's very important to the  
17 context, Your Honor.

18 THE COURT: Mr. Frankel?

19 MR. FRANKEL: Yes, Your Honor. So this is a  
20 dated document that talks about, you know, the kind of  
21 jobs HC&S was offering back then. We all know sugar had  
22 shut down. So much of the document contains -- in fact,  
23 all of the document is irrelevant at this point. The  
24 issue in this case -- I'm not saying the historical  
25 context is not relevant. But the relevant decision in



1 this case are the Board's decisions in 2018 and 2019.

2 The factual -- (indiscernible) -- on the  
3 ground had altered radically since 2007 dramatically.  
4 And that includes the amount of water that was being  
5 diverted, the amount of jobs affected, the amount of land  
6 under cultivation. None of the facts that were found  
7 back in 2007 are applicable today.

8 Finally, Mr. Schulmeister says this document  
9 is important regarding how much time things are going to  
10 take. Well, this document doesn't say anything of the  
11 sort. This document does not address how long it would  
12 take or how difficult it would be for the Board of Land  
13 and Natural Resources to simply say, hey, you guys can't  
14 have any more water until you tell us how much you're  
15 wasting, or you gotta -- there needs to be some level of  
16 protection for these 13 streams, or these diversion  
17 structures needs to be removed by a certain date. This  
18 document is not relevant to any of those issues.

19 THE COURT: Thank you.

20 Mr. Wynhoff.

21 MR. WYNHOFF: Your Honor, I think that this  
22 document forms an important part of the case. I agree  
23 with Mr. Schulmeister. But I also would like to add that  
24 this matter is -- as we repeatedly said, this matter has  
25 been in front of the Board for 20 years, and the argument

1 that Mr. Frankel's trying to make that they don't know  
2 about this and they need to do more -- I think they  
3 clearly need to take into account the fact that it's not  
4 just these two meetings. The Board -- my client has been  
5 working on this for two decades. And the Court needs to  
6 know that it's directly relevant to the argument that  
7 Mr. Frankel is directly making. So I think this evidence  
8 is very important and needs to come in.

9 THE COURT: Mr. Rowe?

10 MR. ROWE: I'd agree with the statements made  
11 by the State.

12 THE COURT: All right. So AB-7 is admitted  
13 over objection. But it's -- again, it's very a limited  
14 purpose at this point. It's to provide, you know,  
15 context and history. I'm not yet willing to make a leap  
16 that this was somehow considered by the Board as part of  
17 its decisions in 2018 and 2019. I don't think that's  
18 been established yet.

19 All right. So we've only got five minutes  
20 before lunch. I think instead of bringing Ms. Ching back  
21 in, let's just call it a morning. Let's go off record.

22 (Exhibit AB-7 was received in evidence.)

23 (A recess was taken.)

24 THE COURT: We're on record. FTR on?

25 THE BAILIFF: Yes.

1 THE COURT: Thank you. I see all counsel  
2 present.

3 Ready to go, Mr. Schulmeister? I'm sorry.  
4 You're muted.

5 MR. SCHULMEISTER: I think the witness is  
6 there but hasn't been called into the conference room  
7 yet.

8 MR. FRANKEL: Because I was -- I was going  
9 to -- I was going to ask for an offer of proof. I've  
10 submitted a memo to the Court regarding Mr. Volner's  
11 testimony.

12 THE COURT: Could you give us a brief offer of  
13 proof, Mr. Schulmeister?

14 MR. SCHULMEISTER: Yeah. Mr. Volner is the  
15 former manager of HC&S. He was the plantation manager  
16 for a number of years, including testifying in a number  
17 of proceedings before the Water Commission and meetings  
18 with the Water Commission pertaining to the instream flow  
19 standards. He was a witness to the contested case  
20 hearing that led to the June 20th decision and order.

21 And I expect to have him testify about some of  
22 the data that's referred to in the decision and order in  
23 terms of ditch deliveries and what not, to explain it,  
24 and also to comment -- explain -- he was a witness that  
25 testified regarding the calculations -- the estimate of

1 the 22.7 percent system loss you'll be hearing a lot  
2 about. So he can also explain that.

3 THE COURT: All right.

4 MR. FRANKEL: Your Honor.

5 THE COURT: Yes.

6 MR. FRANKEL: It would be inappropriate for  
7 him to testify as to most of those matters because he is  
8 not a designated expert. So he cannot talk about the  
9 data and other such calculations he made. No expert  
10 report was supplied by A&B. And as far as the other  
11 information he wants to provide, it's not relevant to  
12 this proceeding. Whatever he testified to (a) to the  
13 Water Commission is not relevant to this proceeding and  
14 (b) whatever he testified to pertain to conditions which  
15 no longer exist when sugar operations ceased in 2016.

16 THE COURT: I didn't understand  
17 Mr. Schulmeister to say he's going to rehash all of this  
18 testimony. I understood Mr. Schulmeister to say he's  
19 going to testify about some of the data and some of the  
20 calculations, which sound like they're within his  
21 personal knowledge.

22 But Mr. Schulmeister, if you can address the  
23 issue of expert testimony?

24 MR. SCHULMEISTER: Yeah. I'm not asking him  
25 for opinions. I'm going to be asking for his personal

1 knowledge. He performed calculations, and he can explain  
2 them.

3 MR. FRANKEL: Your Honor, performing  
4 calculations is a function of an expert, particularly the  
5 kind of calculation he's talking about here. The Water  
6 Commission rendered a decision. It has a number in it.  
7 22.7 percent is I believe the number that Mr. Wynhoff  
8 cited in his argument before. I don't know if that's  
9 exactly right. But assuming it is, that's what the Water  
10 Commission determined. Anything Mr. Volner testifies to  
11 about that is expert testimony. It's not appropriate.

12 THE COURT: Okay. Well, Mr. Wynhoff, you want  
13 to be heard?

14 MR. WYNHOFF: Your Honor, I guess my -- my  
15 point is I really find it extraordinary that -- okay.  
16 Let me cut the editorial. We're here to find out whether  
17 the Board did the right thing and if not, what is the  
18 right thing to do. And it just seems to me that evidence  
19 that talks about the issues with respect to system loss,  
20 obviously that's something that came up in plaintiff's  
21 case, and I don't understand how we would not be  
22 allowed -- how or why we would not be allowed to put in  
23 evidence rebutting the exact same issue that Mr. Frankel  
24 put on testimony about. Thank you.

25 THE COURT: Mr. Rowe?

1                   MR. ROWE: I have nothing, Your Honor, to  
2                   comment on this.

3                   THE COURT: All right. Court's ruling is I'm  
4                   going to allow the testimony. But if I start hearing  
5                   what sounds like expert opinions that should have been  
6                   disclosed just because of their nature or their content,  
7                   then I'm going to entertain a motion to strike, which  
8                   I'll either grant or deny. If I deny it, I'd probably  
9                   give -- I shouldn't say I'd probably because I don't want  
10                  to prejudge this. But I would consider giving  
11                  Mr. Frankel an opportunity to bring in rebuttal expert  
12                  testimony, even if that involves a delay in the trial.

13                  I mean, I want to get all the information out,  
14                  but not at the prejudice of somebody's ability to receive  
15                  a fair trial. So I'm going to be as expansive as  
16                  possible while also protecting everybody's right to be  
17                  fully heard.

18                  So Mr. Schulmeister, go ahead.

19                  MR. SCHULMEISTER: Could we have Mr. Volner  
20                  brought into the room? I'm sorry. Is Rick there? I  
21                  don't see him.

22                  MR. ROWE: My secretary's grabbing him.

23                  THE CLERK: If I could swear in the witness  
24                  now. Could you raise your right hand please. You may  
25                  remain seated. Do you solemnly swear or affirm that the

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

4 THE WITNESS: I do.

5 THE CLERK: Thank you.

6 THE COURT: Mr. Volner, good afternoon. This  
7 is Judge Crabtree speaking. Could you please tell us  
8 your full name and then spell it so our court reporter  
9 gets it correctly.

10 THE WITNESS: Sure. Good afternoon. My name  
11 is Rick W. Volner, Jr. Rick; middle initial W; last name  
12 Volner, V like Victor, o-l, N as in Nancy, e-r, Junior.

13 THE COURT: Thank you.

14 Mr. Schulmeister, please go ahead.

15

16 RICK W. VOLNER, JR.,

17 Called as a witness by A&B,

18 having been first duly sworn,

19 was examined and testified as follows:

20

21 DIRECT EXAMINATION

22 BY MR. SCHULMEISTER:

23 Q Good afternoon, Mr. Volner. I may  
24 occasionally lapse into referring to you as Rick. I hope  
25 that's not going to offend anybody. Is it going to

1 offend you, Mr. Volner?

2 A No, it's not.

3 Q Could you give us a little background where  
4 you're from and what your education and work history is.

5 A Sure. I was born and raised here on Maui,  
6 attended the University of Hawaii at Manoa. Graduated  
7 with a Mechanical Engineering degree in 1997. I started  
8 working at HC&S shortly after graduation from U.H. first  
9 as an agricultural engineer and then moved on to become a  
10 farm manager, senior vice president of agriculture, and  
11 ultimately plantation general manager from 2011 to 2016.

12 Q Okay. So you were the final plantation  
13 manager for HC&S; is that right?

14 A The final sugar cane plantation general  
15 manager. And then once the plantation closed, general  
16 manager of diversified agriculture until early 2018.

17 Q Okay. So while you were a manager of HC&S,  
18 did your responsibilities include overseeing irrigation?

19 A Yes, yes, they did. Irrigation as well as  
20 East Maui Irrigation.

21 Q Okay. And East Maui Irrigation, you're  
22 referring to the EMI ditch system?

23 A That's correct.

24 Q All right. So the -- the folks who ran EMI,  
25 they reported to you?



1           A           Yes. As plantation general manager, EMI  
2           reported directly to the general manager.

3           Q           Okay. And while you were with HC&S, were you  
4           involved in various proceedings before the Water  
5           Commission and Water Commission meetings regarding the  
6           interim instream flow standards for streams in the East  
7           Maui ditch system?

8                       MR. FRANKEL: Objection, Your Honor.  
9           Relevance.

10                      THE COURT: Overruled. You may answer, sir.

11                      THE WITNESS: Yes, I was.

12           BY MR. SCHULMEISTER:

13           Q           Okay. And are you -- are you generally  
14           familiar with the East Maui ditch system?

15           A           Yes, I am.

16           Q           All right. Now, with regard to water that was  
17           collected by the EMI system and delivered to HC&S, how  
18           did HC&S keep track of and record the amount of surface  
19           water that was imported from the East Maui streams?

20                      THE COURT: Could we have a time reference  
21           please?

22           BY MR. SCHULMEISTER:

23           Q           During the time that you were manager and  
24           before, when you were vice president, etc., while you  
25           were at HC&S. In other words, I'm asking you to the

1 extent of your personal knowledge.

2 A The water gauging was done by continuous  
3 gauging that was installed along various points along the  
4 East Maui collection system along the major ditches at  
5 various points such as Honopou and Maliko.

6 Q Okay. And when the totals were put together  
7 in terms of how much was being delivered from East Maui,  
8 what was the geographical point in which the deliveries  
9 were recorded and totalled?

10 THE COURT: I don't understand the question.  
11 Please rephrase.

12 BY MR. SCHULMEISTER:

13 Q Water imported from East Maui was conveyed  
14 over some system before it reached HC&S; is that right?

15 A Yes.

16 Q And at some point HC&S recorded what was being  
17 imported from East Maui at some point on the ground?

18 A We did. We recorded data at the four major  
19 ditches that entered the plantation at Maliko Gulch.

20 Q Okay. And where is Maliko Gulch relative to  
21 the licensed areas?

22 A It's about 4 1/2 miles west of the eastern  
23 boundary -- I'm sorry -- of the western boundary of the  
24 licensed area. So about 4 1/2 miles west of the Honopou  
25 Stream area.

1 Q Okay. Now, are you familiar with the June 20,  
2 2018 decision and order of the Water Commission?

3 A I am.

4 Q I'd like to have you refer to Exhibit J-14 at  
5 Bates stamped pages 000040 through 000042.

6 THE COURT: So 40 to 42 --

7 MR. SCHULMEISTER: Right.

8 THE COURT: -- without the zeros?

9 MR. SCHULMEISTER: I added in the zeros to  
10 make clear it was Bates stamped pages versus in the  
11 middle of the page that don't have the Bates stamp.

12 THE COURT: Understood. I just wasn't sure.

13 THE WITNESS: Okay.

14 BY MR. SCHULMEISTER:

15 Q Do you have that available?

16 A Yes, I do.

17 Q All right. Now, the streams that are listed  
18 on that page and the next two pages -- are you familiar  
19 with those streams?

20 A Generally.

21 Q Okay. If you look at the streams that are  
22 listed on page 40 all the way down, Nahiku licensed area,  
23 Keanae licensed area, Honomanu licensed area and it  
24 continues to the next page, number of streams in the  
25 Huelo lease area and then continues on page 42 down to

1 No. 42, which is Lilikoi Gulch. Do you see all those?

2 A Yes, I do.

3 Q Are those streams east of Maliko Gulch?

4 MR. FRANKEL: Objection. Vague.

5 THE COURT: I think he means are all those  
6 streams east of Maliko Gulch?

7 MR. SCHULMEISTER: Yes. That's what I mean.

8 BY MR. SCHULMEISTER:

9 Q Are all those streams east of Maliko Gulch?

10 A Yes, they are.

11 Q Okay. And so the extent the East Maui ditch  
12 system collects water from those streams and it's  
13 conveyed to HC&S, would that all be captured in the gauge  
14 readings that HC&S takes at Maliko Gulch?

15 A Yes, they would.

16 Q Now, on page 41, if you look down at the  
17 bottom of the page, there's a paragraph 59 and it says,  
18 Additional streams between Honopou Stream and Maliko  
19 Gulch. And it says, See Exhibit C-1 and Exhibit C-33.  
20 Do you see that reference?

21 A Yes, I do.

22 Q Now, do you know what Exhibit C-1 is?

23 A If I recall correctly, I believe C-1 was the  
24 East Maui Irrigation system map from Nahiku to Maliko.

25 Q Okay. Could you take a look at Exhibit AB-1

1 please.

2 THE COURT: So this is not in evidence per the  
3 Court's notes.

4 MR. SCHULMEISTER: Yes. Although I would note  
5 for the Court that this is a subject of the request for  
6 judicial notice and it is referred to as Exhibit 1 to the  
7 Water Commission decision.

8 THE COURT: Got it.

9 BY MR. SCHULMEISTER:

10 Q Mr. Volner, do you have AB-1 up?

11 A Yes, I do.

12 Q Do you recognize this?

13 A Yes. This is the East Maui ditch system map,  
14 you know, that we had hanging up in many of our offices  
15 and refer to, you know, quite often.

16 Q And this is what was referred to as Exhibit  
17 C-1 to the Water Commission decision?

18 A Yes.

19 MR. SCHULMEISTER: Okay. I would like to move  
20 to have AB-1 received in evidence.

21 THE COURT: Mr. Frankel?

22 MR. FRANKEL: Your Honor, brief voir dire?

23 THE COURT: No. You can make your argument  
24 though.

25 MR. FRANKEL: All right. Objection, Your

1 Honor, based on a number of grounds. First the --  
2 there's no evidence that this exhibit was ever attached  
3 to the Water Commission's order. And Mr. Schulmeister  
4 knows that. Secondly this witness has not testified, nor  
5 has any witness been able to testify how this map was  
6 created, what the source of information was that's  
7 conveyed in the map, how the information in the map there  
8 was calculated. If they -- it's not an appropriate --  
9 the adequate foundation has not been laid. This map is  
10 hearsay, contains hearsay. Adequate foundation has not  
11 been laid.

12 THE COURT: All right. Mr. Wynhoff?

13 MR. WYNHOFF: Seems to me, Your Honor, that  
14 this is -- just like Mr. Frankel's photographs, the  
15 witness either did or can testify that this is a true and  
16 accurate depiction of an area that's the subject of this  
17 lawsuit, and it's a true and accurate depiction of this  
18 and that. I won't go into it. It should come in for the  
19 same reason -- (inaudible) -- should come in.

20 THE COURT: Mr. Rowe?

21 MR. ROWE: Thank you, Your Honor. I would  
22 agree with the statements made by Mr. Wynhoff and  
23 additionally, you know, support the position that this  
24 was part of what was considered by the Commission on  
25 Water Resources Management and went before them during

1 that contested case hearing.

2 THE COURT: Two questions to you,  
3 Mr. Schulmeister. How do I know that this was part of  
4 the CWRM decision? Obviously Mr. Volner is not some kind  
5 of custodian of records, so I don't think he can lay the  
6 foundation.

7 And then second, what's -- what do you intend  
8 to offer it for? I mean, if it's a demonstrative aid  
9 type of thing, that's a whole different analysis. But if  
10 you're actually going to be, you know, relying on this  
11 map to prove things substantively, then that's a whole  
12 different situation.

13 MR. SCHULMEISTER: Okay, Your Honor. Actually  
14 the -- the main purpose is demonstrative actually, to  
15 just -- to show general locations of things relative to  
16 other things. But as far as the Water Commission  
17 attaching it to its decision, it is in fact -- I mean,  
18 it's referred to -- I can't remember where right now, but  
19 it is actually referenced in the decision as being  
20 attached as Exhibit 1 to the decision. And it's  
21 downloaded from the Commission website as being Exhibit 1  
22 to the decision. So I believe our request for judicial  
23 notice has the information, the URL number, etc. So it  
24 is a public record. It's published on the Commission  
25 website as being Exhibit 1, part of the Water

1 Commission's decision. I think just as a public record.  
2 And as an attachment to the Water Commission's decision  
3 alone, it should come in.

4 But I -- but yeah. The main purpose is to  
5 refer -- it just makes it easier for people to explain  
6 where things are in relation to other things if you have  
7 a map like this to refer to.

8 THE COURT: Okay. You say it's on the  
9 Commission website but is it on the Commission website in  
10 connection with their D&O?

11 MR. SCHULMEISTER: Yes.

12 THE COURT: Thank you. Mr. Frankel.

13 MR. FRANKEL: That's not entirely accurate,  
14 Your Honor. As Mr. Schulmeister knows, in May of this  
15 year, maybe it was late April, I got an email from Trisha  
16 Akagi, asking whether the Sierra Club would stipulate  
17 this exhibit into evidence for the purposes of a motion  
18 for summary judgment. I responded that that exhibit was  
19 not physically attached to the exhibit. And I produced  
20 for all the parties an email that the Water Commission  
21 sent the original decision, the original decision that  
22 went out with the order. The order that went out, a map  
23 was not attached. That email included -- was addressed  
24 to Mr. Schulmeister, Linda Chow for the State, Mr. Rowe.  
25 There was no map attached.



1           The Water Commission put it up on its website  
2    after I raised this issue.  And Mr. Wynhoff can -- Linda  
3    Chow can better testify to this.  That's when it went up.  
4    It was never put up until just a couple months ago.  So  
5    that is not -- is it on the website?  Yes.  Was it  
6    attached to the decision?  No.

7           THE COURT:  Is it referenced?

8           MR. FRANKEL:  It's referenced.

9           THE COURT:  Is there any ambiguity?

10          MR. FRANKEL:  It is referenced.

11          THE COURT:  Is there any ambiguity that the  
12    reference is to this map as opposed to some other map?

13          MR. FRANKEL:  I don't believe so, Your Honor,  
14    but it was not attached.

15                 I don't have a problem with it being used  
16    demonstratively.  In fact, I offered to stipulate this  
17    into evidence if all the references to private water  
18    percentages were taken out.  Alexander & Baldwin refused  
19    to go along with that stipulation, so I'm objecting.  And  
20    there's no basis for them to put into evidence  
21    information that there's no foundation for.  There's no  
22    such thing as private water.  The calculations -- there's  
23    no basis for their calculations.

24          THE COURT:  When you say the calculations,  
25    you're referring to some numbers in here that I can't see

1       apparently?

2                   MR. FRANKEL:  So under each -- each licensed  
3       area is in sort of bigger letters.  And under that  
4       there's general lease numbers, an expiration date, and  
5       then under that, government water and then private water  
6       with percentages.  That is what is particularly troubling  
7       about this exhibit.  There's no basis for any of that  
8       information.  This witness cannot testify as to the basis  
9       of that.  He did not create those numbers.  And if they  
10      want to use it as a demonstrative exhibit, I'm fine.  But  
11      take out those references.  And with PDF technology,  
12      that's very easy to do.

13                   THE COURT:  I'm -- I've expanded -- just for  
14      the record, the Court has expanded the size of the  
15      document to try and understand better the numbers that  
16      Mr. Frankel is referring to.  So far I haven't found any.

17                   MR. FRANKEL:  It's in the yellow.

18                   THE COURT:  Ah, okay.  That's a good clue.  
19      Hang on.  Let me go look in the yellow.

20                   MR. FRANKEL:  And it's probably towards the --

21                   THE COURT:  Now I see it.  Like GL3578  
22      underneath Huelo license?

23                   MR. FRANKEL:  Yes.

24                   THE COURT:  And then government water, 64.49  
25      percent; private water, 35.51 percent?  Those are the

1 numbers you're contesting?

2 MR. FRANKEL: Yes, Your Honor.

3 THE COURT: Okay. Any other numbers besides  
4 those?

5 MR. FRANKEL: Well, each licensed area has  
6 their own numbers. So under Honomanu -- I should spell  
7 that for the court reporter. H-o-n-o-m-a-n-u. And then  
8 the next area, the Keanae licensed area, K-e-a-n-a-e.  
9 And the last area, the Nahiku license, N-a-h-i-k-u.

10 THE COURT: All right. So assuming just for  
11 the sake of discussion that this map is referenced in the  
12 CWRM, Mr. Schulmeister, what's -- are you going to ask  
13 this witness to comment on these numbers that  
14 Mr. Frankel's talking about, or are you just going to  
15 have him explain to me what the general lay of the land  
16 is and using this as a demonstrative aid?

17 MR. SCHULMEISTER: The latter.

18 THE COURT: All right. The Court's going to  
19 permit that. I think given the fact that everyone seems  
20 to agree that this map is referenced in the CWRM order,  
21 Court's going to allow Mr. Schulmeister to use it as a  
22 demonstrative aid with this witness. But the Court is  
23 not going to accept, at least at this point based on this  
24 record, any data or calculations that appear in the  
25 document. Go ahead.

1 (Exhibit AB-1 was received in evidence.)

2 BY MR. SCHULMEISTER:

3 Q Okay. So Mr. Volner, does this map, like most  
4 maps, have east on the right side and west on the left  
5 side?

6 A Yes. That's correct.

7 Q All right. So if you're going to track the  
8 direction that the water is being conveyed, it would be  
9 from right to left?

10 A Right to left.

11 Q And is the ditch system -- are there pumps  
12 along this system or is it gravity flow?

13 A The East Maui system up to Maliko Gulch, it's  
14 entirely gravity flow.

15 Q Okay. Now, could you describe -- or I don't  
16 know if it's possible to point -- but could you describe  
17 where Maliko Gulch is on this map?

18 A Maliko Gulch is generally to the left of the  
19 farthest most left orange parcels. So you can see that  
20 it enters into the ocean towards the bottom. It's  
21 actually labeled as Maliko Bay. So that's the outlet of  
22 the gulch. You can follow that up or down on the page.

23 Q All right. And in all the streams that I've  
24 asked you about that are listed in the D&O, they're all  
25 to the east of Maliko Gulch?

1           A           That is correct.

2           Q           And any water collected by the EMI ditch  
3           system and conveyed towards -- to HC&S would have to  
4           cross Maliko Gulch at some point; is that right?

5           A           Yes.

6           Q           And that's where HC&S had its ditch gauges to  
7           record the total amount of surface water being delivered  
8           to HC&S from the East Maui ditch system; is that right?

9           A           Yes.

10                   THE COURT:   Where are those four gauges on  
11           this map?

12                   THE WITNESS:  There are -- there's four gauges  
13           at four different elevations.  I don't believe they're  
14           actually marked on the map.  But it's at the four points  
15           of the four major ditches cross Maliko Gulch.  So the  
16           Haiku ditch, the Lowrie ditch, New Hamakua, and the  
17           Waialua.

18                   THE COURT:  Got it.  All right.  Thank you.

19           BY MR. SCHULMEISTER:

20           Q           If we can put that aside for now.  Could you  
21           refer now to Exhibit AB-125.

22                   THE COURT:  Per the Court's notes, that's not  
23           in evidence yet.

24           BY MR. SCHULMEISTER:

25           Q           Can you let me know when you have it up, Rick?

1           A           I have it up now.

2           Q           Okay. Do you recognize what's been marked as  
3 AB-125?

4           A           I do.

5           Q           And just what is it?

6           A           It's a general summary of ditch deliveries,  
7 East Maui ditch deliveries to the plantation beginning in  
8 1925. I believe this one is until 2014. Partial year of  
9 2014, by month, and then annualized in the last column.

10          Q           Okay. And do you know where the data in this  
11 exhibit came from?

12          A           Yes. So the monthly totals are a summation of  
13 the continuous gauging stations for each of those months  
14 that was either downloaded or wirelessly transmitted to  
15 our collection sites. And historically those were  
16 actually read on, you know, circular graph charts, but in  
17 recent years, again, wirelessly conveyed to our  
18 collection sites from continuous gauging stations.

19          Q           And these are the -- the ones at Maliko Gulch?

20          A           That is correct. The ones at Maliko Gulch.

21          Q           And was -- do you know if this was submitted  
22 on behalf of HC&S as Exhibit C-34 in the Water Commission  
23 case that resulted in the June 20th, 2018 decision and  
24 order?

25          A           Yes, it was.

1 MR. SCHULMEISTER: Okay. At this time I'd  
2 like to move AB-125 into evidence.

3 MR. FRANKEL: Objection, Your Honor.  
4 Relevance, lacks foundation, personal knowledge, and it's  
5 hearsay.

6 THE COURT: So my question, Mr. Schulmeister,  
7 is for the periods when the witness was head of the  
8 plantation, and that's one category. So what about this  
9 historic data? What's the foundation for that?

10 BY MR. SCHULMEISTER:

11 Q All right. Mr. Volner, are you familiar with  
12 how the historical data regarding ditch deliveries was  
13 maintained by A&B, HC&S and EMI?

14 A Yes, I am. Like I explained, the technology  
15 that was used and, you know, summarized the annual basis  
16 was a little -- not as high tech as in the recent years,  
17 but you know, similar process. Continuous recorder. And  
18 we utilized that data and, you know, looking for trends  
19 both, you know, from a weather pattern and from ditch  
20 delivery patterns. So we actually used this historical  
21 data quite a bit.

22 Q And the historical data that wasn't collected  
23 wirelessly -- was some kind of hard copy records  
24 maintained by EMI and HC&S?

25 A Yes, it was.

1 Q And was this particular exhibit -- did that --  
2 is this a printout from an Excel file?

3 A Yes, I believe so.

4 Q And is that an Excel file that you had access  
5 to and worked with by your plantation manager?

6 A Yes. Between the operations at East Maui  
7 Irrigation and our administrative offices at HC&S, we  
8 kept this file up to date.

9 Q And the records that were the basis for the  
10 earlier years, did those continue to exist or did they  
11 continue to exist when you were at HC&S?

12 A Yes. They existed in the East Maui Irrigation  
13 office vault.

14 Q And that's in Pa`ia?

15 A Yes, in Pa`ia.

16 Q And so those hard copies continue to be  
17 maintained to your knowledge till the present day; is  
18 that right?

19 A As far as I know.

20 MR. SCHULMEISTER: All right. Again, I would  
21 move Exhibit AB-125 into evidence.

22 THE COURT: Are you offering it as a business  
23 record?

24 MR. SCHULMEISTER: As a business record?

25 THE COURT: Let me back up. I assume you're



1 offering it for its truth, or am I wrong?

2 MR. SCHULMEISTER: I'm offering it for two  
3 purposes. I mean, for one thing, this is an exhibit to  
4 the Water Commission's decision; right? So this is the  
5 data that -- that the Water Commission referred to and  
6 relied upon in its decision. And the main point here is  
7 that this data was -- came from gauges in Maliko Gulch.  
8 It includes all of the petitioned streams as well as the  
9 non-petitioned streams. I mean, that's the purpose --  
10 the main purpose for which it is being submitted. And so  
11 it's a public record. You can find it on the Water  
12 Commission website as an exhibit in this contested case  
13 proceeding.

14 And so I believe that, you know, it is a basis  
15 for the decision, and I think it's a basis for anybody to  
16 discuss whether the decision can be relied upon in  
17 relation to the non-petitioned streams.

18 THE COURT: I hear you on all that. But  
19 that's a different issue on whether you're offering it  
20 for its truth. I mean, people can rely on all kinds of  
21 things. It may or may not be true. It may or may not be  
22 accurate.

23 MR. SCHULMEISTER: I think I'm offering it for  
24 its truth as well as for all those other reasons.

25 THE COURT: All right. But you're not

1 offering it as a business record; right? 'Cause I don't  
2 think you've laid that foundation. You're obviously not  
3 offering it as prior recollection recorded, 'cause this  
4 is not off his personal knowledge. I'm trying to think  
5 of what other exception --

6 MR. SCHULMEISTER: Well, let me ask a few  
7 more. Let me work on the business record exception if  
8 you grant me a minute or two.

9 THE COURT: All right.

10 BY MR. SCHULMEISTER:

11 Q Mr. Volner -- Mr. Volner, the Excel  
12 spreadsheet -- is that a document that was prepared in  
13 the regular course of the business of HC&S?

14 A Yes, it was.

15 Q Was it maintained with the data that was  
16 recorded as a regular practice of HC&S business activity?

17 A Yes, it was. And it was updated, you know, as  
18 soon as new data was available.

19 Q And I mean, this is a printout from an Excel  
20 file which I think you've already indicated stored on the  
21 servers of HC&S and A&B?

22 A Yes, that's correct.

23 Q And when you printed this document in order to  
24 submit it as an exhibit, did you retrieve it from those  
25 servers?

1           A           Yes, I did.

2           Q           Is it a regular part -- was it a regular part  
3 of HC&S activity to keep and maintain records of this  
4 type?

5           A           Yes.

6           Q           And was any of the data or this document  
7 altered or modified in any way since the date it was  
8 prepared?

9           A           Not to my knowledge.

10           MR. SCHULMEISTER: Okay. I would ask that it  
11 be received in evidence, including as a business record.

12           THE COURT: Mr. Frankel?

13           MR. FRANKEL: Thank you, Your Honor. Same  
14 objections. Relevance, personal knowledge, foundation,  
15 hearsay.

16                   I want to point out three other things. One  
17 is there's no units in this -- in this thing. We have no  
18 idea what the units are. Secondly, there were no Excel  
19 spreadsheets back in 19 whatever -- 1955, 1925. In fact,  
20 I'll even go so far as to say in 1985, there were no  
21 Excel spreadsheets. I don't even know if they had  
22 computers at HC&S back then.

23                   The business records exception is for data  
24 collected at or -- at or near the time of the actual  
25 event. And simply because they've produced something,

1     you know, in one year, that's not how that -- that's not  
2     how the business record exception works. So for all  
3     those reasons, Your Honor, we object.

4             THE COURT: Mr. Wynhoff, anything from you?

5             MR. WYNHOFF: Your Honor, I would -- I think  
6     that the foundation has been laid for a business record  
7     simply on its own. And then I would also suggest that  
8     it's very clear that A&B has kept and continued to keep  
9     records for a hundred years, so it also qualifies as a  
10    summary. And I do think this should be admitted, Your  
11    Honor.

12            THE COURT: All right. The Court does not  
13    agree that an adequate foundation has been laid as a  
14    business record. The Court will allow Exhibit AB-125 at  
15    this time for the limited purpose that it was attached as  
16    an exhibit to the CWRM order. But as far as for the  
17    specific truth of anything in there, no. Not yet. Yes,  
18    Mr. Frankel?

19            MR. FRANKEL: I don't believe they've  
20    testified that this exhibit was attached to the order.  
21    All they said was it was presented and it was not  
22    attached to the order, this particular one.

23            THE COURT: I might have gotten that wrong.  
24    Oh, yeah. Submitted as Exhibit C-34. Hang on.

25            So Mr. Schulmeister, which is it?

1           MR. SCHULMEISTER: It is -- it was submitted  
2 and received by the Water Commission as Exhibit C-34.  
3 And it could be downloaded from the Commission website as  
4 an exhibit in the contested case hearing that led to the  
5 decision and order.

6           THE COURT: But it was not -- but it was not a  
7 part of their order; right? It was just received and a  
8 part of what they looked at?

9           MR. SCHULMEISTER: Well, but it's referenced  
10 throughout the findings of fact. So it's not just that  
11 it was submitted. The decision and order, findings of  
12 facts makes references to it. So it is referred to in  
13 findings of facts. I'd also like to add that under Rule  
14 803(a)(6) on exceptions, regularly conducted activity  
15 includes reports, records, data compilations in any form,  
16 etc., made in the course of a regularly conducted  
17 activity at or near the time of the accident, etc., and  
18 as shown by the testimony or of a custodian or other  
19 qualified witness unless the sources of information or  
20 other circumstances indicate lack of trustworthiness.

21           So I respectfully take exception to the  
22 Court's comment that we have not complied with the  
23 foundation for a business record for this document.

24           THE COURT: That's fine. All right. So the  
25 Court again will allow AB-125 for the limited purpose of

1 showing it was received by -- submitted to and received  
2 by CWRM as part of its deliberative process. But as far  
3 as establishing the truth of anything in this document,  
4 that has not happened yet. But that's without prejudice.

5 (Exhibit AB-125 was received in evidence.)

6 MR. SCHULMEISTER: Okay.

7 BY MR. SCHULMEISTER:

8 Q All right. Mr. Volner, do you know if the  
9 Water Commission ever asked USGS, United States  
10 Geological Survey, to evaluate system losses in the EMI  
11 ditch system?

12 MR. FRANKEL: Objection. Lack speculation,  
13 lacks foundation.

14 THE COURT: I'll allow it.

15 THE WITNESS: Yes. I don't recall the exact  
16 meeting or correspondence that the USGS was engaged, but  
17 I do recall the USGS visiting East Maui Irrigation,  
18 working with our East Maui Irrigation staff, conducting  
19 various seepage runs, and then finally producing a report  
20 sometime in 2012, which I think was ultimately shared in  
21 2013 with the Water Commission.

22 BY MR. SCHULMEISTER:

23 Q Okay. Do you still have Exhibit J-14 handy?  
24 If you do, well, I'd like you to -- refer you to the  
25 Bates stamped page 212.

1           A           Okay.

2           Q           You see there's a number of findings there  
3 with regard to losses and then EMI, beginning on  
4 paragraph 715? You see that?

5           A           Yes.

6           Q           Okay. And there's a reference there to USGS  
7 having conducted a field study of EMI ditch system. You  
8 see that?

9           A           Yes, I do.

10          Q           Did you believe that's the same study that you  
11 recall USGS having conducted in coming out to EMI?

12          A           Yes.

13                   THE COURT: I think he said yes.

14                   MR. SCHULMEISTER: Oh, I'm sorry. I did not  
15 hear that.

16                   THE COURT: Did you say yes, Mr. Volner?

17                   THE WITNESS: I did, yes.

18 BY MR. SCHULMEISTER:

19          Q           Rick, I told you you had to project. Do you  
20 remember that?

21          A           I will.

22          Q           Will you do that hence forth?

23          A           I will try my best.

24                   THE COURT: Forthwith.

25                   MR. SCHULMEISTER: All right.

1 BY MR. SCHULMEISTER:

2 Q On Bates stamped page 214, Finding No. 723,  
3 the last sentence -- well, let's see. It refers to the  
4 fact that because there's both open ditches and tunnels  
5 in the EMI ditch system, it not only has -- not only  
6 incurred seepage losses but also gains from ground water;  
7 you see that?

8 A Yes.

9 Q Is that consistent with your understanding?  
10 In other words, both gains and loses water at different  
11 sections of the system?

12 A That's consistent with my understanding, yes.

13 Q And at the end it says, At low flows the USGS  
14 studies results show that losses are greater than gains,  
15 but at higher flows, gains are greater than losses?

16 A Yes.

17 THE COURT: So Mr. Schulmeister, we're getting  
18 back to this problem where we're having witnesses just  
19 read from exhibits. I'm more interested in -- I think  
20 Mr. Volner's been in that territory for a long time. I'm  
21 definitely interested in his personal knowledge, but with  
22 respect, I do not need him to read passages from  
23 documents to me that are already in evidence.

24 MR. SCHULMEISTER: Okay. So let's move on  
25 then.



1 BY MR. SCHULMEISTER:

2 Q This study related to the EMI ditch system  
3 east of Maliko Gulch; is that right?

4 A That is correct.

5 Q Now, have you been -- have you -- do you have  
6 any knowledge of any effort to determine or estimate  
7 system losses on the HC&S side of the system? So west of  
8 Maliko Gulch?

9 A Yes, I do. Prior to the 2010 Water Commission  
10 meetings, I believe where they discussed the petitions,  
11 we did quite a bit of work with the Water Commission  
12 staff to better understand system losses west of Maliko  
13 or in the actual HC&S plantation area. Majority of that  
14 work centered around reservoirs in trying to understand  
15 the seepage loss from reservoirs.

16 Q Now, HC&S has reservoirs or -- let me --  
17 before HC&S, the plantation area, the 30,000 acres had a  
18 number of reservoirs; is that right?

19 A Over 40 earthen reservoirs.

20 Q And how were they used?

21 A Generally used as surge -- again, the ditch  
22 flows would generally come up in the evening hours at  
23 night and generally used to kind of battle the surge of  
24 the water coming in, and then it would be distributed the  
25 next morning based on irrigation needs. But also longer

1 term storage for a number of different reasons. You  
2 know, especially in a wet period, you know, being able to  
3 store additional water to be able to use in a slightly  
4 dryer period.

5 Q Okay. And were these reservoirs all lined or  
6 unlined?

7 A Majority of them, the vast majority of them,  
8 were unlined. There were only a handful that had either  
9 an HDPE, high density polyethylene lining, or a concrete  
10 lining. But the vast majority were unlined.

11 Q And how long had these reservoirs been in  
12 existence?

13 A To my knowledge, almost all of them were in  
14 existence from the very beginning of farming operations,  
15 so prior to the early 1900s on the HC&S plantation.

16 Q Why did this become an issue with Water  
17 Commission staff prior to the May 2010 Water Commission  
18 meeting that you referred to?

19 MR. FRANKEL: Objection. Speculation, lacks  
20 foundation.

21 THE COURT: I'll allow it. Go ahead.

22 THE WITNESS: In our discussions with the CWRM  
23 staff, it became apparent that those were probably the  
24 source of, you know, the largest amount of seepage loss  
25 simply because they were unlined and they were -- you

1 know, the rest of the system, including the drip  
2 irrigation system was actually very solid and probably  
3 didn't present itself for any seepage losses or any large  
4 amounts of losses.

5 BY MR. SCHULMEISTER:

6 Q Okay. So what sort of information did the  
7 staff ask for regarding the reservoirs and seepage losses  
8 prior to the 2010 meeting?

9 MR. FRANKEL: Objection. Hearsay, relevance.

10 THE COURT: The question is what did the staff  
11 ask him for, so I'll allow it.

12 THE WITNESS: The staff asked us directly for  
13 any seepage records, seepage tables, anything that  
14 historically had been done to understand seepage in the  
15 ditch system and the reservoirs on HC&S plantation areas,  
16 and then of course, you know, whether data, any type of  
17 evaporation data, anything that they could better  
18 understand losses from the system.

19 BY MR. SCHULMEISTER:

20 Q Did they also ask for what the cost would be  
21 to line?

22 A They did ask high level estimates for lining  
23 different types of materials, including concrete and  
24 polyethylene. We also took a very high level look at  
25 even closing various reservoirs to see if that would

1 reduce the seepage losses in the system.

2 Q And now, did this end up becoming a subject  
3 that was discussed at the May 2010 Water Commission  
4 meeting?

5 A Yes. I believe it was included in the staff  
6 submittal. There was various discussion in the submittal  
7 and the various parties' presentations, including HC&S's  
8 presentation. There was discussion regarding the seepage  
9 loss and the estimates.

10 Q And where does the water go, the seep -- the  
11 water that seeps from the reservoirs, where does it go?

12 MR. FRANKEL: Objection. Calls for  
13 speculation, lacks foundation.

14 THE COURT: Yeah. I mean, if you could lay a  
15 bit more of a foundation on what his personal knowledge  
16 is based on.

17 BY MR. SCHULMEISTER:

18 Q Mr. Volner, are there a number of irrigation  
19 wells on the HC&S plantation?

20 A Yes. There are a number of ground water wells  
21 that were used to support irrigation on the plantation.

22 Q Was that potable water or brackish water?

23 A It was not potable water.

24 MR. FRANKEL: Objection.

25 THE COURT: I'm sorry. Mr. Frankel, go ahead.

1           MR. FRANKEL:  Objection.  Lacks foundation.  
2   Starting to creep into expert testimony.

3           MR. SCHULMEISTER:  Plantation manager's  
4   knowledge of whether water is potable or brackish.  
5   Doesn't have to be an expert to know that.

6           THE COURT:  I agree.  I'll allow it.  Go  
7   ahead.

8           THE WITNESS:  They were non-potable brackish  
9   agricultural wells.

10  BY MR. SCHULMEISTER:

11         Q         And -- and as the plantation manager, did you  
12   ever go down one of these wells to see where it was  
13   drawing the water from?

14         A         Sure.  I've been down in every single one of  
15   the wells.

16         Q         And -- and what did you see?  Where does the  
17   water come from?

18         A         The underlying ground water aquifer that  
19   basically underlines the entire plantation.

20         Q         Okay.  And do you know where the water that  
21   seeps from the reservoirs goes?

22         A         Basically it contributes to that ground water  
23   aquifer.

24         Q         Okay.  And so the extent -- was that ever the  
25   subject of discussion with the Water Commission staff?

1 In other words, you can line the reservoir, but then  
2 you're going to lose the seepage into the aquifer?

3 MR. FRANKEL: Objection. Leading.

4 THE COURT: Sustained.

5 BY MR. SCHULMEISTER:

6 Q Did you ever discuss the issue of recharge of  
7 the aquifer with the Water Commission staff?

8 A Yes, we did on a number of occasions,  
9 especially since our annual ground water pumping and our  
10 historical ground water pumping significantly exceeded  
11 the sustainable yield that was published by CWRM.

12 THE COURT: Mr. Schulmeister, we've been going  
13 over 50 minutes, so time for a break. We'll take a break  
14 of slightly over 10 minutes, so see you at five minutes  
15 after 2:00. We're in recess.

16 (A recess was taken.)

17 THE COURT: We're back on record. FTR on.  
18 One thing before we get started, I just wanted to say the  
19 sound quality here today has been excellent. So whatever  
20 tweaking or anything that anyone or everyone did, thank  
21 you very much. It makes a difference. So appreciate the  
22 efforts.

23 All right. Go ahead, Mr. Schulmeister.

24 MR. WYNHOFF: Thank you, Melissa.

25 BY MR. SCHULMEISTER:

1 Q Mr. Volner, could you look at AB-137.

2 THE COURT: This is not in evidence per the  
3 Court's notes.

4 BY MR. SCHULMEISTER:

5 Q Do you recognize Exhibit AB-137?

6 A Yes, I do. It's a graphical representation of  
7 the same data we looked at previously.

8 Q When you say the same data you looked at  
9 previously, you're referring to Exhibit AB-125?

10 A That's correct.

11 Q And so this basically is a result of Excel  
12 being able to portray the data either graphically or  
13 numerically?

14 A That is correct.

15 Q Okay. Now, so looking at the years that are  
16 shown on AB-137, well, actually at the top of AB-137,  
17 there is a reference to the unit. Total gallons per  
18 year; is that right?

19 A Yes. It says total gallons per year and then  
20 on the left axis, it says million gallons.

21 Q Okay. And was this to your recollection also  
22 presented as an exhibit in the Water Commission contested  
23 case hearing?

24 A Yes, it was.

25 Q C-124?

1           A           Yes.

2           Q           Okay.  And since the years are laid out on the  
3 bottom there -- well, let me just -- first let me ask  
4 that Exhibit AB-137 be received in evidence.

5                   THE COURT:  For what purpose?

6           MR. SCHULMEISTER:  It's the same purpose as  
7 AB-125.

8                   THE COURT:  Right.  So limited to it being an  
9 exhibit in the CWRM proceeding?

10           MR. SCHULMEISTER:  Well, I'm offering it for  
11 both purposes.  Also for the truth of the matter  
12 asserted.

13                   THE COURT:  Okay.  Mr. Frankel?  You're muted.

14           MR. FRANKEL:  Sorry, Your Honor.  I have a lot  
15 of objections.  Objection based on relevance again,  
16 hearsay, lack of foundation.

17                   THE COURT:  Mr. Wynhoff?

18           MR. WYNHOFF:  I support that this comes in,  
19 Your Honor, in evidence.

20                   THE COURT:  Mr. Rowe?

21           MR. ROWE:  I have no objection to this being  
22 entered into evidence, Your Honor.

23                   THE COURT:  The Court's making the same  
24 ruling.  The Court's not willing to accept it for the  
25 truth of the matter that's contained therein.  That's



1 without prejudice. But the Court will admit it at this  
2 time for the limited purpose of it being an exhibit to  
3 the CWRM proceedings.

4 Go ahead, Mr. Schulmeister.

5 BY MR. SCHULMEISTER:

6 Q All right. So looking at AB-137, the  
7 horizontal axis, that's where the years are shown;  
8 correct?

9 A Yes.

10 Q So could you -- and this goes through the year  
11 looks like 2013; is that right?

12 A Yes. I believe 2014 was only a partial year  
13 on the -- on the table. The graph was cut off at 2013.

14 THE COURT: Wait. Hold on. I'm missing  
15 something 'cause mine starts at 1925. We're talking  
16 about AB-137?

17 MR. SCHULMEISTER: Yes. It starts at 1925 and  
18 it goes to 2013.

19 THE COURT: Right. But I thought you were  
20 talking about 1913. No?

21 MR. SCHULMEISTER: No. 2013.

22 THE COURT: Ah, my mistake. Sorry. Go ahead.

23 BY MR. SCHULMEISTER:

24 Q Okay. Mr. Volner, could you identify the  
25 years for which you do have personal knowledge of how

1 this data was recorded and stored and entered into the  
2 spreadsheet at HC&S?

3 A From -- I would say from Year 2000 on, I was  
4 intimately involved with EMI and then the farm as well as  
5 irrigation.

6 Q Including the collection and -- of this data  
7 and the recording of this data?

8 A Yes.

9 MR. SCHULMEISTER: Okay. So at this point I  
10 would ask that at least the years -- the data from the  
11 Year 2004 be admitted, not only as having been presented  
12 to the Water Commission, but also for the truth of the  
13 data.

14 THE COURT: Mr. Wynhoff?

15 MR. WYNHOFF: Join and support. Join and  
16 support.

17 THE COURT: Mr. Rowe?

18 MR. ROWE: I have no objection, Your Honor.

19 THE COURT: Mr. Frankel?

20 MR. FRANKEL: I continue to fail to see the  
21 relevance of the information. He hasn't testified that  
22 he provided it to the Board of Land and Natural  
23 Resources. I don't -- I don't think adequate  
24 foundation's been laid. I'll leave it at that.

25 THE COURT: The objection is sustained. I

1 don't think an -- for the record, I don't think an  
2 adequate foundation has been laid for a business record  
3 or other exception. That's without prejudice.

4 BY MR. SCHULMEISTER:

5 Q Mr. Volner, did you do any work on quantifying  
6 system losses at HC&S for purposes of the contested case  
7 hearing that was held before Dr. Miike that led to the  
8 June 20, 2018 decision and order?

9 A Yes. I along with our team did a lot of  
10 analyses of data, including actual irrigation data,  
11 comparing it to incoming ditch deliveries from EMI as  
12 well as ground water that was pumped and, you know,  
13 various other uses of the water, and then looked at what  
14 was left over to see what the various system losses would  
15 be.

16 Q Okay. Did you look at -- could you look at  
17 AB-142 please.

18 THE COURT: Just for clarification, this is  
19 about system loss for HC&S, not EMI generally; right?

20 MR. SCHULMEISTER: Correct.

21 THE WITNESS: That is correct.

22 THE COURT: Thank you. I just wanted to make  
23 sure I was in the right zip code. Go ahead. AB-142 is  
24 not in evidence yet.

25 THE WITNESS: I have it up.

1 BY MR. SCHULMEISTER:

2 Q So do you have AB-142, Rick?

3 A Yes.

4 Q You recognize this document?

5 A Yes, I do. I put this together.

6 Q And it has a number at the bottom, C-137. Do  
7 you recall whether this was submitted as an exhibit to  
8 Dr. Miike during the hearing as HC&S Exhibit C-137?

9 A It was submitted.

10 MR. SCHULMEISTER: Okay. I'd like to move  
11 C-137 into evidence.

12 THE COURT: For truth as well as for it being  
13 an exhibit?

14 MR. SCHULMEISTER: Yes.

15 THE COURT: And your foundation is just he,  
16 quote, put it together, closed quote? I don't think -- I  
17 don't think that cuts it, Mr. Schulmeister.

18 MR. SCHULMEISTER: Okay. All right. Let  
19 me -- well, let me first add that at a minimum, this is  
20 again part of our judicial notice. It is available on  
21 the CWRM website as Exhibit C-137 to the decision, and it  
22 is referenced in the findings of facts to the decision.  
23 So I would ask at minimum it be submitted as a business  
24 record and a report -- (indiscernible) -- as far as it's  
25 authentic based on its availability.

1 I can go further into the foundation for the  
2 document. I think at a minimum it should be admitted for  
3 that purpose.

4 THE COURT: Similar to my other rulings, I  
5 will allow it right now for the limited purpose that it  
6 was an exhibit to the CWRM proceeding.

7 Hold on. I'll get to you in just a second,  
8 Mr. Wynhoff.

9 But that's as far as I'm willing to go based  
10 on this record right now. That's without prejudice.

11 Yes, Mr. Wynhoff? Go ahead.

12 MR. WYNHOFF: Your Honor, I think there may be  
13 some confusion, and I can certainly confirm that I was  
14 confused. We are talking about trial Exhibit AB-142?

15 THE COURT: Yes, sir.

16 MR. WYNHOFF: I heard a bunch of 137's and  
17 just a minute ago we were talking about AB-137. But I  
18 understand, Your Honor, we're talking about AB-142.  
19 Thank you, Your Honor.

20 THE COURT: Yes. Trial Exhibit AB-142 and  
21 Exhibit C-137 to the D&O.

22 MR. WYNHOFF: Thank you, Your Honor.

23 THE COURT: Yes.

24 BY MR. SCHULMEISTER:

25 Q Mr. Volner, could you walk us through Exhibit

1 AB-142 and explain how you put it together?

2 MR. FRANKEL: Objection, Your Honor. Now  
3 we're getting into expert opinion.

4 THE COURT: That's a really interesting issue.  
5 You know, it's like -- sort of like a treating doctor in  
6 a medical malpractice case or a personal injury case as  
7 opposed to a retained expert coming in offering opinions  
8 based on all kinds of things outside the usual scope of  
9 their work. I mean, it doesn't automatically convert to  
10 an expert witness subject to expert disclosure deadlines  
11 just because you have a technical job. You know, you're  
12 allowed to testify about your -- your daily activities  
13 and your work product and your efforts and your -- all  
14 that, the same way -- whether you're a trained engineer  
15 or a, you know, a refuse worker. You're just talking  
16 about your daily job without offering, quote, expert  
17 opinions, closed quote, as defined by the rules of  
18 evidence.

19 So I'm not yet convinced that this witness had  
20 to do an expert witness disclosure report, as long as he  
21 stays within the work that he was doing as part of his  
22 job.

23 MR. FRANKEL: Your Honor, this is prepared for  
24 a quasi-judicial proceeding and, therefore, I think that  
25 it does cross the line. It was not prepared in the

1 ordinary course of his work. It was prepared  
2 specifically for a quasi-judicial proceeding. And --

3 THE COURT: That's not a bad point, but I'm  
4 going to stick with allowing it. But that's separate  
5 from admitting that exhibit at this time, which I'm not  
6 willing to do. And he needs to testify without referring  
7 to it before it comes into evidence.

8 So if you want him to discuss his process to  
9 lay a foundation for this exhibit, fine, but not by  
10 referring to it.

11 BY MR. SCHULMEISTER:

12 Q All right. Mr. Volner, please do not look at  
13 the exhibit for my next few questions. Could you explain  
14 the process you went through in putting together the  
15 information that is in Exhibit AB-142 but without looking  
16 at it please.

17 A So as we were looking at trying to estimate or  
18 actually find a better number for seepage and basically  
19 system losses in total, which encompass seepage as well  
20 as well as evaporation, we decided to take a checkbook  
21 approach. So look at all of the incoming water into the  
22 system, all of the outgoing water from the system, and  
23 the difference would be the system losses.

24 And so we had access to data. Again, the  
25 incoming ditch deliveries to the HC&S Plantation at

1 Maliko Gulch, ground water pumping, which our records  
2 that we kept during the normal course of business both to  
3 manage the agricultural operation but also to report to  
4 CWRM. These were all registered ground water wells, what  
5 the annual pumpage was from each of these wells. And  
6 then we had our irrigation records for each of our  
7 individual field units that captured the quantity of time  
8 that an irrigation system ran, which we could then  
9 calculate how much water was utilized in irrigation for  
10 each of those units.

11 We did that over the course of a six-year  
12 period. That had relatively stable ground water pumping.  
13 The plantation acreage was relatively stable. We didn't  
14 have large amounts of acreage being fallowed or new  
15 acreage coming in. And the ditch flows from East Maui  
16 were on average what we had experienced over the last,  
17 you know, 15 to 20 years and included a low year as well  
18 as what would be considered a high year. And so we felt  
19 very comfortable that, you know, that represented  
20 relatively well what our incoming, outgoing, and thus our  
21 system losses could be interpreted as.

22 MR. SCHULMEISTER: Okay. All right. At this  
23 point I would again like to move Exhibit C-137 into  
24 evidence not just for the limited purpose of it being an  
25 exhibit to the Water Commission hearing, but also for the



1 truth of the content.

2 THE COURT: Mr. Frankel?

3 MR. FRANKEL: Objection. Relevance,  
4 foundation, hearsay.

5 THE COURT: Mr. Wynhoff?

6 MR. WYNHOFF: We support it coming in, Your  
7 Honor. No more to add.

8 THE COURT: Very well. I still don't think  
9 you've exactly hit the bull's eye on a business records  
10 foundation, so your request is denied without prejudice.

11 MR. SCHULMEISTER: Well, I am at least going  
12 to -- since it is in for the purpose it was relied upon  
13 by -- or it was considered by the Water Commission, I  
14 would like to at least ask the witness to identify what  
15 the percentage that this exercise identified as the  
16 percentage of system loss.

17 THE COURT: If you're just offering for that's  
18 the number they gave the Water Commission, okay, but not  
19 for its truth. Not yet.

20 MR. SCHULMEISTER: I understand. I want to  
21 tie it to the 22.7 percent in the Water Commission  
22 decision. That number didn't come out of the air. It  
23 came out from somewhere, and that's what I'm trying to  
24 establish.

25 THE COURT: Okay. With that understanding,

1 the witness can testify to that.

2 THE WITNESS: So the daily -- the daily loss  
3 attributed to system losses was 41.6 million gallons per  
4 day, which I believe came out to 22.7 percent.

5 BY MR. SCHULMEISTER:

6 Q So could you now look at AB-143. Do you have  
7 that up, Rick?

8 A Yes, I do.

9 Q And you recognize Exhibit AB-143?

10 A I do. It's a seepage loss chart for  
11 irrigation delivery systems from I believe the National  
12 Conservation Services Engineering Handbook.

13 Q Is that a -- do you know who publishes that?

14 A National Resource Conservation Services, NRCS.

15 Q Okay. And was that -- was it -- do you  
16 recognize this as having been submitted as HC&S Exhibit  
17 C-138 in the Water Commission proceeding?

18 A Yes, I do.

19 Q And was this -- well, was this also consultive  
20 by you and HC&S when analyzing what HC&S's system losses  
21 were?

22 A After we conducted the exercise, the  
23 accounting exercise, the inflows and the outflows in  
24 determining what the estimated system losses were, we  
25 used this as a -- as a check to see if we were within

1       what would be the expected norms based on the type of  
2       material the ditch systems are made out of as well as the  
3       type of material that the earthen reservoirs were made  
4       out of.

5           Q           Okay. And then could you -- at this time I'd  
6       like to move Exhibit AB-143 into evidence.

7           THE COURT: For what purpose?

8           MR. SCHULMEISTER: First that it was submitted  
9       to the Water Commission and received as an exhibit, which  
10      is downloadable from their website with regard to the  
11      contested case hearing as HC&S C-138. So at a minimum  
12      for that limited purpose. And it's also a copy from a  
13      publication as indicated by the witness.

14          THE COURT: Are you --

15          MR. SCHULMEISTER: National engineering  
16      handbook.

17          THE COURT: Are you offering that piece for  
18      its truth?

19          MR. SCHULMEISTER: Yes. It's a publication by  
20      a national engineering handbook, which is a government  
21      agency? Well, that's my motion, Your Honor.

22          THE COURT: Okay. Mr. Wynhoff?

23          MR. WYNHOFF: No objection, Your Honor.  
24      Support.

25          THE COURT: Mr. Rowe?

1 MR. ROWE: No objection, Your Honor.

2 THE COURT: Mr. Frankel?

3 MR. FRANKEL: Plenty objections, Your Honor.

4 This is one page. Not even a cover of this document. I  
5 don't even -- the authenticity is not there. It's not  
6 relevant. It's hearsay, lacks foundation. There's no  
7 grounds for this document to be admitted into evidence.

8 THE COURT: Sustained. But the Court will  
9 allow it for the limited purpose that it was an exhibit  
10 submitted to CWRM, but not for its truth.

11 (Exhibit AB-143 was received in evidence.)

12 BY MR. SCHULMEISTER:

13 Q All right. Could you refer now to Exhibit  
14 AB-144.

15 MR. WYNHOFF: Could you repeat the number  
16 again, Your Honor? I'm sorry. I missed it.

17 THE COURT: That's fine. It's AB-144.

18 MR. WYNHOFF: Thank you, Your Honor.

19 THE COURT: Yes, sir.

20 THE WITNESS: I have it up, Mr. Schulmeister.

21 BY MR. SCHULMEISTER:

22 Q Okay. Do you recognize this document?

23 A Yes. This is a document I worked with members  
24 of our water distribution staff in creating.

25 Q Okay. And does this also relate to the

1 question of system loss?

2 A Yes. This was our attempt to estimate based  
3 on the engineering handbook data what could be expected  
4 from our system.

5 Q Okay. So what could be expected based on  
6 published data about infiltration through different  
7 materials? Is that -- did I get that correct?

8 A It's seepage loss rates based on different  
9 material building types. And there's also I believe  
10 evaporation estimation as well. Surface evaporation.

11 Q Was this a completely independent exercise  
12 from what you described as the checkbook budget exercise  
13 that was based on accounting for all the inputs and  
14 outputs of irrigation water at HC&S?

15 A Yes. This was a completely separate exercise.

16 Q And what was the purpose of the exercise  
17 again?

18 A Ultimately it was to determine what an  
19 expected range of losses, system losses, would be; but  
20 then also at the end to compare it to what was calculated  
21 based on our inflow, outflow analysis.

22 Q Okay. And in order to do this calculation,  
23 was it necessary to use data on the -- the area of the  
24 reservoirs and the ditches? The surface area of the  
25 reservoirs and the ditches?

1           A           Yes. It was necessary to calculate all of the  
2 surface areas for both the ditches and reservoirs.

3           Q           And then to input the type of material that  
4 the surface area consisted of?

5           A           Yes. Under the columns -- on the first table,  
6 under the columns low seepage loss factor and high  
7 seepage loss factor, those were the ranges for both the  
8 ditches and the reservoirs based on the type of  
9 underlying material.

10                   MR. FRANKEL: Move to strike, Your Honor.  
11 He's reading the exhibit. It has not been admitted into  
12 evidence yet.

13                   THE COURT: Sustained.

14                   MR. SCHULMEISTER: I'd like to move that C-139  
15 be received in evidence: And again, this -- not C-139.  
16 AB-144. C-139 to the Water Commission proceeding.

17                   THE COURT: Okay.

18                   MR. FRANKEL: Objection, Your Honor.

19                   THE COURT: Again, I need to make the record.  
20 Is this both for its truth and for the limited purpose of  
21 it being an exhibit to the CWRM?

22                   MR. SCHULMEISTER: Yes. I am offering it for  
23 both purposes.

24                   THE COURT: All right. Mr. Wynhoff?

25                   MR. WYNHOFF: No objection, Your Honor.

1 THE COURT: Mr. Rowe?

2 MR. ROWE: No objection, Your Honor.

3 THE COURT: Mr. Frankel?

4 MR. FRANKEL: Objection. Relevance, hearsay,  
5 lacks foundation.

6 THE COURT: Sustained.

7 MR. SCHULMEISTER: Is it admitted for the  
8 limited purpose of the last two exhibits, AB-142 and 143?

9 THE COURT: Yes, sir. It is allowed for that  
10 purpose, but not for its truth.

11 (Exhibit AB-144 was received in evidence.)

12 MR. SCHULMEISTER: Okay.

13 BY MR. SCHULMEISTER:

14 Q All right. So given the different materials  
15 that were present in the ditches as opposed to the  
16 reservoirs, where -- where is most -- where is most of  
17 the seepage expected to occur?

18 MR. FRANKEL: Objection, Your Honor. Now  
19 we're definitely into expert opinion territory.

20 THE COURT: Mr. Schulmeister?

21 MR. SCHULMEISTER: He's already testified  
22 about the -- his knowledge of the reservoirs and the  
23 ditches. He's already testified that the ditches were  
24 mostly lined. So I'm just asking him to reconfirm what  
25 he's really already testified to based on his personal

1 knowledge as a manager of the plantation.

2 THE COURT: Mr. Wynhoff?

3 MR. WYNHOFF: No objection or position, Your  
4 Honor.

5 THE COURT: Mr. Rowe?

6 MR. ROWE: No objection, Your Honor.

7 THE COURT: All right. The objection that  
8 this is expert testimony and should have been disclosed  
9 is overruled. You may answer.

10 THE WITNESS: Can you repeat the question  
11 please.

12 BY MR. SCHULMEISTER:

13 Q Given the difference in materials between the  
14 surface area of the ditches versus the surface area of  
15 the reservoirs, where is most of the seepage occurring?

16 A The majority of the seepage loss, and system  
17 losses is occurring due to reservoir seepage.

18 Q Okay. Okay. So if you go back to Exhibit  
19 AB-142.

20 A Okay.

21 Q So Column G. That's the column for annual  
22 seepage evaporation. And this line is system losses;  
23 correct?

24 MR. FRANKEL: Objection. That is not -- this  
25 exhibit has been admitted for a very limited purpose, and



1       that's not the purpose how Mr. Schulmeister is using it  
2       now.

3                   THE COURT: I tend to agree, Mr. Schulmeister.  
4       It sounds like you're trying to get that number in for  
5       its truth.

6                   MR. SCHULMEISTER: You know, the Water  
7       Commission cited this number in its findings. I think  
8       I'm entitled to show where the number came from in an  
9       exhibit, from a witness who sponsored the exhibit. And  
10      if everyone wants to think that the Water Commission  
11      finding was false, that's a different question. I'm  
12      establishing exactly where that number came from. And I  
13      think that that is very relevant, particularly if what  
14      the Sierra Club is saying is that the Board should not  
15      have relied on what the Water Commission did. So whether  
16      it's reliable or not, then maybe that's an open question.  
17      But I'm certainly entitled to show where the number came  
18      from.

19                  THE COURT: You've already -- you've already  
20      done that because I allowed it for the limited purpose  
21      that this was part of the CWRM exhibit.

22                  MR. SCHULMEISTER: Okay.

23                  THE COURT: But you're asking for something  
24      different. You're asking for its truth, and I'm telling  
25      you under the Hawaii Rules of Evidence, I'm ruling you

1 have not laid a foundation for that.

2 MR. SCHULMEISTER: All right. The --

3 MR. FRANKEL: Your Honor, I -- I'd like to  
4 make Mr. Schulmeister's life a little bit easier. The  
5 Sierra Club is not challenging the particular finding of  
6 fact that the Water Commission made about the 22.7  
7 percent amount that's being lost. We're not challenging  
8 that finding. And so it doesn't really matter to us.

9 I'm not exactly sure why it matters to A&B to  
10 show that the Water Commission had a solid basis to reach  
11 the conclusion it did. It made that conclusion. And I  
12 don't think, you know, we are claiming in our case that  
13 there is too much system loss and we're also claiming  
14 that Board of Land and Natural Resources didn't do  
15 certain things, but we're not claiming the Water  
16 Commission's findings regarding seepage loss are  
17 somehow -- we're not challenging that.

18 THE COURT: Okay. Noted.

19 MR. SCHULMEISTER: I'm ready to move on.

20 THE COURT: All right. Go ahead.

21 BY MR. SCHULMEISTER:

22 Q All right. What's your current employment,  
23 Mr. Volner?

24 A I'm the general manager for Maui operations  
25 for HC&D. Integrated aggregate and ready-mix producer.

1 Q And where -- where do you -- where do you  
2 work? I mean, where is that on Maui?

3 A So our quarry, Maui operations are centrally  
4 located at the Camp 10 facility off of Haleakala Highway,  
5 which is on land owned by Alexander & Baldwin.

6 Q And is that in Puunene?

7 A Yeah. Would be considered Puunene.

8 Q Is that in the vicinity of where the sugar  
9 mill used to be, the HC&S sugar mill?

10 A Generally. It's 2 miles away.

11 Q And does -- does that operation receive water  
12 from EMI ditch system?

13 A That operation has historically and continues  
14 to receive water from the East Maui Irrigation system;  
15 that is correct.

16 Q Okay. So HC&D is an end user currently and  
17 has been for a long time with water from the East Maui  
18 ditch system; is that right?

19 A That is correct.

20 Q And what is that water used for?

21 A It's used in the batching of concrete, dust  
22 control, and generally for standby fire control.

23 Q And what's the range of amounts that HC&D  
24 currently uses of East Maui ditch water -- East Maui  
25 ditch water?

1           A           Between 15 and 25,000 gallons per day.

2           Q           That's for all of the purposes that you  
3 described?

4           A           It's the summation of all of the purposes,  
5 yes.

6                   MR. SCHULMEISTER: Okay. Okay. I have no  
7 further questions.

8                   THE COURT: All right. Thank you.

9                   Mr. Wynhoff.

10                  MR. WYNHOFF: Thank you, Your Honor.

11

12

CROSS-EXAMINATION

13 BY MR. WYNHOFF:

14           Q           Mr. Volner -- hold on. Mr. Volner, can I ask  
15 you to please look at Exhibit AB -- (inaudible)?

16                   THE COURT: I'm sorry. We had a bit of a  
17 gargle there. What exhibit?

18                   MR. WYNHOFF: AB-137.

19                   THE COURT: Thank you.

20                   THE WITNESS: Okay.

21 BY MR. WYNHOFF:

22           Q           So what I wanted to ask you about this was --  
23 I want to make sure that I understand the units. I'm a  
24 really unit guy. U-n-i-t. And the vertical graph we're  
25 talking about it says million gallons; right? You see

1 that?

2 A Yes, I do.

3 MR. FRANKEL: So this is not in -- it's only  
4 in evidence for a very limited purpose. I'm not sure --

5 THE COURT: If you have an objection, state  
6 it. Otherwise don't interrupt.

7 MR. FRANKEL: Objection. Not received in  
8 evidence for the purpose that it appears to being used  
9 for.

10 THE COURT: Okay. Well, we're not quite there  
11 yet. But yes, we're on alert. Go ahead, Mr. Wynhoff.

12 MR. WYNHOFF: Thank you, Your Honor.

13 BY MR. WYNHOFF:

14 Q So -- okay. So the very bottom figure says  
15 10,000; right? You see that, Mr. Volner?

16 A Yes, I do.

17 Q And that means it's 10,000 million gallons;  
18 right?

19 A That's correct. Or 10 billion gallons.

20 Q Okay. And then my other question about  
21 this -- I think I'm staying within the parameter. At the  
22 top it says that's total gallons per year; right?

23 A That's correct. Total gallons per year.

24 Q So my only other question about this is most  
25 of the trial we've been talking about million gallons per

1 day. Can you help us understand how you would go from  
2 millions of gallons per year to millions of gallons per  
3 day? Is that something that you know?

4 A In our normal analysis of data, we would take  
5 the million gallons per year divided by 365.5 to come up  
6 with a million gallons per day.

7 Q Thank you. Would you please look at -- oh,  
8 no. I guess so my question was -- my next question is,  
9 you were talking about reservoirs. And I wanted to ask  
10 you questions relating to reservoirs. So -- and it does  
11 kind of relate to this idea of millions of gallons per  
12 day. (Indiscernible).

13 THE COURT: Time out. Time out. Mr. Wynhoff,  
14 time out. I'm sorry. We're having our first kind of  
15 tech interruption of the day. We're getting some gargle  
16 and feedback, so I'm not sure what's causing that. But  
17 give it another try. Thank you.

18 MR. WYNHOFF: I'm going to try to move closer  
19 to my cell. From farther away, I'm hearing it myself,  
20 Your Honor, thank you.

21 THE COURT: Thank you.

22 MR. WYNHOFF: Thank you, Your Honor.

23 BY MR. WYNHOFF:

24 Q Mr. Volner, when you're talking about -- you  
25 were talking about the flow, I take it that the flow that

1 you measured at the ditches varies from day to day, for  
2 example? Am I right about that?

3 A Yes. It varies from day to day, hour to hour  
4 sometimes.

5 Q Sure. You might get more flow if it's a rainy  
6 day and less flow if it hasn't rained for a while? Would  
7 that be fair?

8 A That would be correct.

9 Q And then so what I -- with respect to these  
10 reservoirs, are they -- do they constitute some way to  
11 more or less even out the flow?

12 A They were definitely used prior to drip  
13 irrigation more as surge basins, you know, to control the  
14 flow of water at night and then to use them in fertile  
15 irrigation throughout the daytime hours. Once the  
16 plantation was converted to drip irrigation, we had a  
17 means to now irrigate 24 hours a day. So they still  
18 serve that purpose to try and regulate the flows from  
19 incoming East Maui. But you know, they generally held,  
20 you know, varying amounts of water, depending on what  
21 areas of the farm were being irrigated.

22 Q Would it be fair to say -- and please correct  
23 me if I'm wrong. Would it be fair to say that the  
24 reservoirs as a whole might tend to go up when it's rainy  
25 and more water is coming through the ditch?

1           A           That would definitely be correct.

2                       MR. WYNHOFF: Thank you, Mr. Volner.

3                       Thank you, Your Honor. I don't have any other  
4 questions for this witness.

5                       THE COURT: All right. Mr. Rowe?

6                       MR. ROWE: Thank you, Your Honor. Can I have  
7 the witness look at J-14? Exhibit J-14?

8                       THE WITNESS: Okay.

9

10   CROSS-EXAMINATION

11 BY MR. ROWE:

12           Q           And will you please scroll to page 38 of the  
13 document, which is -- (indiscernible)?

14                       THE COURT: Did you say page 30, 3-0?

15                       MR. ROWE: 3-8, Your Honor. 38.

16                       THE COURT: 38. Got you.

17 BY MR. ROWE:

18           Q           If you look at the paragraph marked 52.

19           A           Okay.

20           Q           Under that do you see where it says, Exhibit  
21 C-1, comma, attached?

22           A           I do.

23           Q           And that C-1, just to confirm, that is what  
24 you had identified earlier as Exhibit AB-1?

25           A           Yes, it was.



1 MR. ROWE: Okay. Thank you, Your Honor.

2 Nothing further.

3 THE COURT: Thank you. Mr. Frankel.

4 MR. FRANKEL: Really quick, Your Honor.

5 THE COURT: Time out. We've been going 45  
6 minutes, so do we take a break now or you will only be a  
7 few minutes?

8 MR. FRANKEL: I'll be fast.

9 THE COURT: All right.

10

11

CROSS-EXAMINATION

12 BY MR. FRANKEL:

13 Q Mr. Volner, about four or five of the  
14 reservoirs of Central Maui are lined; correct?

15 A I believe there's four reservoirs that were  
16 lined on the East Maui -- that side of the plantation;  
17 that's correct.

18 Q And there's approximately 36 that are not  
19 lined; is that correct?

20 A Roughly.

21 Q And unlined reservoirs lose water through  
22 seepage, you testified to; right?

23 A That is correct.

24 Q And you believe that it would cost  
25 approximately \$43 million to line all the unlined

1 reservoirs; is that right?

2 A I believe that's the financial analysis we did  
3 prior to the May 2010 meeting.

4 Q And \$43 million is less than \$62 million,  
5 isn't it?

6 MR. SCHULMEISTER: Let me object to that  
7 question as being irrelevant.

8 THE COURT: Well, it's snarky. Let's move on.

9 MR. FRANKEL: It's highly relevant, Your  
10 Honor. It may be snarky, but it's highly relevant.

11 BY MR. FRANKEL:

12 Q Mr. Volner, Mr. Schulmeister had you look at a  
13 lot of exhibits. Do you know -- did you provide any of  
14 those exhibits to the Board of Land and Natural  
15 Resources?

16 A I'm not sure. Majority of those were provided  
17 to Commission on Water Resource Management through the  
18 various contested cases.

19 Q But as you testify, you cannot say that you  
20 provided them to the Board of Land and Natural Resources,  
21 can you?

22 A Not specifically.

23 MR. FRANKEL: No further questions, Your  
24 Honor.

25 THE COURT: All right. Thank you.

1 Mr. Schulmeister, again, break now or --

2 MR. SCHULMEISTER: I have no further  
3 questions.

4 THE COURT: Thank you.

5 Mr. Wynhoff?

6 MR. WYNHOFF: Your Honor, I'm just going to  
7 say no further questions. But if I might respectfully  
8 say that typically I think we were going to have Mr. Rowe  
9 go second. But with great respect, in any event, I have  
10 no questions.

11 THE COURT: I'm sorry. I forgot the batting  
12 order. Mr. Rowe, go ahead.

13 MR. ROWE: Thank you, Your Honor. I actually  
14 think that we had decided that I was going to go third on  
15 days when I had someone testifying with me.

16 THE COURT: Ah, that's right. I should have  
17 known that. Thank you for reminding me.

18 MR. WYNHOFF: Thank you. Sorry.

19 MR. ROWE: In any case, I have no further  
20 questions.

21 THE COURT: All right. So everyone's done;  
22 right? All right. No one has any more questions.

23 All right. Thank you very much, Mr. Volner.  
24 Your testimony is pau. You're excused.

25 We'll take our break. Break will be about 12

1 minutes. So see you all back here at about 3 p.m. We're  
2 in recess.

3 (A recess was taken.)

4 THE COURT: We're back on record. FTR is on.  
5 Counsel all appear to be present. All right. We just  
6 finished Mr. Volner.

7 Who's next, Mr. Schulmeister?

8 MR. SCHULMEISTER: We're going to continue now  
9 with the examination of Meredith Ching.

10 THE COURT: All right. Thank you. Welcome  
11 back, Ms. Ching. Can you hear me all right?

12 THE WITNESS: I can hear you, Your Honor.

13 THE COURT: All right. You're still under  
14 oath. Go ahead.

15

16 MEREDITH CHING,

17 Called as a witness by A&B,

18 having been previously duly sworn,

19 was examined and testified as follows:

20

21 DIRECT EXAMINATION

22 BY MR. SCHULMEISTER:

23 Q Ms. Ching, could you refer to Exhibit S-5,  
24 which is that's State Exhibit No. 5.

25 THE COURT: I do not believe that is in

1 evidence.

2 THE WITNESS: Okay. I've got it.

3 BY MR. SCHULMEISTER:

4 Q And do you recognize this document?

5 A Yes, I do.

6 Q What is it?

7 A This is a study that was cosponsored by the  
8 USGS and the Water Commission that we contributed funding  
9 to to look at the East Maui streams and the effect on  
10 habitat availability of the diversions. So I think -- I  
11 can't remember -- 2003-ish time frame.

12 Q Okay. Is that the one you referred to earlier  
13 as -- did you say the amount that you contributed to this  
14 study?

15 A Yeah. We contributed \$75,000, and it was a  
16 three-year study.

17 MR. SCHULMEISTER: Okay. And okay. I'd like  
18 to move Exhibit -- State's Exhibit S-5 into evidence.

19 THE COURT: Purpose?

20 MR. SCHULMEISTER: The purpose is to show that  
21 A&B -- well, actually the purpose of the study --  
22 Mr. Frankel -- I'd be surprised if he objects. This is  
23 where the 64 percent of base flow comes from that he's  
24 been arguing about. This study is the basis for that.  
25 But it was referred to in the Water Commission decision.

1 It was cosponsored by the Water Commission and the Board  
2 of Land and Natural Resources. It is part of the history  
3 of this case.

4 THE COURT: Okay. So you're offering it as  
5 part of the history of the case and to show the 64  
6 percent of base flow statistic. Anything else?

7 MR. SCHULMEISTER: No, Your Honor. And that  
8 A&B contributed to this.

9 THE COURT: All right. All right. Let's see.  
10 Let's start with Mr. Frankel.

11 MR. FRANKEL: Your Honor, we object. Hearsay,  
12 lacks foundation. I think one of the most pertinent or  
13 interesting objectionable points is Reuben Wolff, who's  
14 one of the authors of this study, I believe, works for  
15 DLNR now and he could have been called as a witness. To  
16 present his work like this is hearsay.

17 THE COURT: Thank you. Mr. Wynhoff?

18 MR. WYNHOFF: (Indiscernible) -- hearsay  
19 objection, Your Honor, as a government record. I support  
20 the admission of this exhibit.

21 THE COURT: Mr. Rowe?

22 MR. ROWE: I have no objection, Your Honor.

23 THE COURT: All right. So are you offering it  
24 as a public record? I mean, I don't want to have to  
25 guess which rules I need for you to comply with.

1 MR. SCHULMEISTER: I will certainly include  
2 that as a basis for offering it as a public record. This  
3 is a report -- right on the first page it says it's put  
4 out by the United States Geologic Survey. It's prepared  
5 in cooperation with the State of Hawaii Department of  
6 Land and Natural Resources Commission on Water Resource  
7 Management, and with further reference to the County of  
8 Maui having been a cosponsor of this study.

9 THE COURT: Understood.

10 MR. SCHULMEISTER: I can point to the page  
11 number, if you want.

12 THE COURT: Understood. But under Rule  
13 803(8)(C), the fact that it's a government report is not  
14 the only criteria. The good news is if you can meet the  
15 criteria, then it's not hearsay under rule 803.

16 MR. SCHULMEISTER: I'm sorry. Which  
17 subsection did you cite?

18 THE COURT: Sure. 803(8), then capital C as  
19 in Charlie.

20 MR. SCHULMEISTER: Okay. So is the Court  
21 going to rule?

22 THE COURT: Well, okay. I'll take it  
23 piecemeal. As a public record, the objection is  
24 sustained. The proper foundation for that has not been  
25 put in the record. For the limited purpose that it's an

1 exhibit to -- this was a CWRM exhibit; right? I'm not  
2 even sure of that right now.

3 MR. SCHULMEISTER: Well, it was --

4 THE COURT: So I --

5 MR. SCHULMEISTER: I mean, certainly the --

6 THE COURT: I mean, I will allow it -- sorry  
7 to talk over you. Go ahead.

8 MR. SCHULMEISTER: I think our AB-161 is what  
9 was downloaded from the Water Commission site as the --  
10 an excerpt of this between the cover page was received in  
11 evidence in the Water Commission case. It was also  
12 referred to in the Commission -- on page 3 of the page  
13 14, paragraph 4 is referred to. This study is referred  
14 to as part of the background.

15 THE COURT: Does anything in this report get  
16 us anywhere that's not part of the CWRM findings?

17 MR. SCHULMEISTER: I think that the -- the 64  
18 percent of base flow originates from this. I don't think  
19 I'm going to be using this exhibit to argue anything  
20 differently than what has been argued with regard to the  
21 64 percent of base flow as being the H90 number that, you  
22 know, various people have testified is the criteria for,  
23 you know, viable habitat.

24 The point I'm trying to make here by putting  
25 this in and the testimony that I elicited from Ms. Ching



1 was that this was early in the process and this was  
2 something where A&B was cooperating with and actually  
3 contributed money to get this work done. And this is to  
4 rebut the arguments that had been made that A&B was  
5 sitting on its hands, that the Board of Land and Natural  
6 Resources was sitting on its hands when in fact this work  
7 was being done and contributed to financially by both the  
8 Department of Land and Natural Resources and A&B and the  
9 County of Maui to facilitate the preparation or the  
10 issuance of interim instream flow standard. So that's  
11 the purpose for which it's being offered.

12 THE COURT: All right. Understood. I'm going  
13 to interpret that as not for its truth. You're basically  
14 saying A&B did this work, was making efforts to  
15 contribute to the discussion, was contributing  
16 substantial amounts of money to the discussion. I think  
17 it's admissible for all that. To the extent it's  
18 relevant, I'm going to allow it.

19 You want to make any additional record,  
20 Mr. Frankel?

21 MR. FRANKEL: That's fine, Your Honor.

22 THE COURT: All right. All right. So for the  
23 record, S-5 is admitted for the limited purpose stated by  
24 the Court and not for the truth of its contents. That  
25 ruling is without prejudice. It's based on the state of

1 the record at this time.

2 (Exhibit S-5 was received in evidence.)

3 BY MR. SCHULMEISTER:

4 Q Okay. I'd like to continue.

5 A Please go ahead.

6 Q All right. I think earlier I had been asking  
7 you about Exhibit AB-7, which was the Board of Land and  
8 Natural Resources March 23rd, 2007 findings of facts,  
9 conclusions of law, etc., in the contested case hearing  
10 related to the lease and RP's.

11 Could you get Exhibit AB-7 up in front of you  
12 please.

13 A I have it.

14 Q Okay. Now I'm going to have to admit here  
15 that in my advanced age, I do not remember what happened  
16 with my motion to admit this exhibit. This was granted?  
17 Okay.

18 All right. So what I'd like to direct your  
19 attention to is the statement on page 6. Not page 6.  
20 Excuse me. Page 2. All right. The bottom of page 2  
21 there's a sentence -- I'll just read it.

22 MR. FRANKEL: Objection.

23 THE COURT: It's in evidence for a limited  
24 purpose. I'll allow him to read the section he wants to  
25 highlight.

1 BY MR. SCHULMEISTER:

2 Q "All parties now concede that an EA (and  
3 potentially an environmental impact statement) ("EIS")  
4 must be prepared, amended IIFS must be determined, and  
5 that this process is likely to take years."

6 Do you see that?

7 A Yes, I do.

8 Q And do you remember being aware in 2007 when  
9 the Board made these findings that that was the case?

10 A Yes, I recall that.

11 Q Okay. And did anybody appeal this decision of  
12 the Board?

13 A No, not to my knowledge.

14 Q And thereafter did the Water Commission take  
15 up the question of the IIFS amendment petitions that had  
16 been filed back in 2001?

17 A Yes. They had been working on it. But in  
18 2008, they bifurcated out the seven or eight taro streams  
19 and made a decision on the first eight priority taro  
20 streams.

21 Q Did anybody appeal those determinations?

22 A No. And then in 2010, they decided on the  
23 remaining 19 petitions.

24 Q Okay. Was that in May 2010?

25 A I believe so.

1 Q Was that at a fairly well-attended meeting at  
2 the Haiku Center on Maui?

3 A Yes.

4 Q And did you attend that meeting?

5 A Yes.

6 Q And it was a very large crowd?

7 A It was a large crowd, yes.

8 Q Very long meeting?

9 A Very long meeting into the night, very  
10 protracted discussion, yes.

11 Q Many members of the public testified?

12 A Yes. A lot.

13 Q Okay. And -- and then did they issue a  
14 determination?

15 A Yes.

16 Q And this related to the other 19 streams; is  
17 that right?

18 A Yes.

19 Q And then what happened?

20 A And then there was a request for a contested  
21 case hearing, which was ultimately denied and then  
22 appealed to court and then granted. And the whole  
23 process started all over again.

24 Q Okay. And when it started all over again, was  
25 it just on the 19 streams?

1           A           No. They decided to do all 27 streams.

2           Q           So even though the eight that had previously  
3           been determined hadn't been appealed, the Water  
4           Commission ended up reopening the eight and considered  
5           them together with the 19; is that right?

6           A           That's correct.

7           Q           And during this entire period, was work being  
8           done on the environmental impact statement? During the  
9           period from 2007 to 2010, was work being done on the  
10          environmental impact statement?

11          A           No. As I had mentioned, we had offered to do  
12          it in 2001, when we applied for the lease, but that was  
13          objected to by Native Hawaiian Legal Corporation and Maui  
14          Tomorrow. And that objection was not withdrawn.

15          Q           Okay. Now, so why didn't A&B just go ahead  
16          and start the EIS, you know, notwithstanding the  
17          objections of Native Hawaiian Legal Corporation and Maui  
18          Tomorrow?

19          A           Well, EIS's are supposed to have the most  
20          updated information possible, and it was unknown to us  
21          how long the objection or the objection process would  
22          last. And it was just very risky to start that expensive  
23          and complicated document in the face of that objection.

24          Q           All right. Could you look at -- well, strike  
25          that. Did Native Hawaiian Legal Corporation eventually

1 withdraw their objection to A&B doing the environmental  
2 impact statement?

3 A Not until 2015. There was I think oral  
4 representations that they would withdraw it, but I think  
5 that wasn't formalized until 2016.

6 Q Okay. And could you refer to Exhibit AB-19  
7 please.

8 A All right. I have it.

9 Q Is this in evidence? All right. Let me -- do  
10 you recognize this document?

11 A Yes, I do.

12 Q And what is it?

13 A It's an order issued by the Board of Land and  
14 Natural Resources ordering A&B to commence the EIS  
15 process beginning with a scope, providing them a scope of  
16 the EIS.

17 MR. SCHULMEISTER: Okay. Is this part of our  
18 request for judicial notice? Yes? All right.

19 So this is a -- okay. I'm going to move  
20 Exhibit AB-19 into evidence.

21 THE COURT: Let me see if there's any  
22 objection before I consider any detailed argument.  
23 Mr. Frankel?

24 MR. FRANKEL: Relevance is the primary  
25 objection. I'll just leave it at that, Your Honor.

1 THE COURT: You object to the authenticity and  
2 accuracy of it?

3 MR. FRANKEL: Well, the accuracy I do, but I  
4 was going to get that as another exhibit. So I'm going  
5 to undermine this later on.

6 THE COURT: Let me ask a more focused  
7 question. There's no stamp on this, so I don't know  
8 where it came from. But --

9 MR. FRANKEL: I'm not -- I'm not going to  
10 fight that, Your Honor.

11 THE COURT: Okay.

12 MR. FRANKEL: That's fine.

13 THE COURT: Mr. Wynhoff, I assume you're not  
14 objecting?

15 MR. WYNHOFF: No objection, Your Honor. No  
16 objection.

17 THE COURT: Okay. Mr. Rowe.

18 MR. ROWE: No objection, Your Honor.

19 THE COURT: All right. The exhibit is -- is  
20 received. The objection as to relevance is overruled.

21 (Exhibit AB-19 was received in evidence.)

22 BY MR. SCHULMEISTER:

23 Q All right. Please look at I believe this is  
24 the first page of Exhibit AB-19, the second paragraph.  
25 There's a reference made to oral arguments that took

1 place on May the 8th of 2015. You see that?

2 A Yes, I do.

3 Q And to the fact that Na Moku agreed to  
4 withdraw its objection to A&B doing an environmental  
5 assessment. You see that?

6 A Yes, I do.

7 Q And then the parties agreed the Board would  
8 defer decision-making on the motion to reconvene the  
9 contested case until there was an opportunity for the  
10 parties to discuss the Carmichael case and the  
11 preparation of environmental assessment? Is that  
12 correct? I'm paraphrasing now.

13 MR. FRANKEL: Objection, Your Honor.

14 THE COURT: Yeah. Say no more.

15 Mr. Schulmeister, I -- we're back to the same old problem  
16 we've had before.

17 MR. SCHULMEISTER: I'll withdraw the question.

18 THE COURT: Okay. Thank you.

19 MR. SCHULMEISTER: I withdraw that.

20 BY MR. SCHULMEISTER:

21 Q Now, once the Na Moku's objection is withdrawn  
22 and the Board directed the preparation of an EIS scope,  
23 did you cause A&B to diligently proceed as directed?

24 A Yes.

25 Q And so what did you do?



1           A           So we started interviewing consultants that  
2           could help us with the EIS, engineering consultants that  
3           could help us with the EIS process, and hired someone to  
4           draft the scope that the BLNR was requesting. So in  
5           June, two months later, we presented a proposed scope of  
6           work to the BLNR for their consideration.

7           Q           Okay. And could you look at AB-21.

8           A           Okay.

9           Q           Do you recognize that document?

10          A           Yes. It's the proposed scope of the EIS.

11          Q           Is this what you're referring to as having  
12          been submitted in response to the -- to BLNR's order  
13          directing the scope be submitted?

14          A           Yes.

15                   MR. SCHULMEISTER: So is this in?

16                   I'd move this Exhibit AB-21 into evidence.

17                   THE COURT: All right. Mr. Frankel?

18                   MR. FRANKEL: Objection, Your Honor. It is  
19          not -- I don't believe it's authentic. If you look at  
20          pages 22 and 24, they're cut-off copies of the document.  
21          I also believe it's not relevant. But it's an incomplete  
22          document, Your Honor.

23                   THE COURT: Hang on. Let me look at 22 and  
24          24.

25                   MR. SCHULMEISTER: You're talking about the

1 Bates stamped page or the pages of the document?

2 MR. FRANKEL: There's no Bates stamps on this  
3 document.

4 THE COURT: Yeah, there are.

5 MR. FRANKEL: Oh.

6 MR. SCHULMEISTER: Oh, oh. Mr. Frankel you're  
7 not looking at the same document that we're looking at?

8 THE COURT: I think he is but without the  
9 Bates stamps on it. 'Cause page -- the document page 22,  
10 which would be Bates 032, is cut off at the bottom, as is  
11 apparently page 24 of the document, which is Bates 034 of  
12 the document. But he's correct that they're cut off.

13 MR. FRANKEL: Yeah. I apologize. It was an  
14 incorrect page reference. I was looking at a different  
15 version of the document. Yeah. That's right.

16 THE COURT: Sorry. I don't recall if this was  
17 a subject of your motion, Mr. Schulmeister, or whether  
18 this was downloaded from somewhere or what. It was two-  
19 puka punched at the top, so I'm wondering if it came out  
20 of your file. Not that I'm asking you to lay the  
21 foundation for it. I'm just noting that it looks like it  
22 came out of a law firm looking kind of file. So unless  
23 there's -- I mean, obviously -- I mean, I don't have  
24 any -- I'm not challenging Ms. Ching's veracity. I'm  
25 just saying she's not the custodian of records for this

1 document, so I don't think she can lay the foundation  
2 for.

3 MR. SCHULMEISTER: Well, it is file stamped  
4 and I think that she did say she recognizes this is the  
5 order that she received from the Board of Land and  
6 Natural Resources.

7 Now, where there's a copying problem compared  
8 to the one that we originally received, I don't know.  
9 But I think we do have a foundation that this is a copy  
10 of an order issued by the Board that the witness has seen  
11 before and received.

12 If we need to double check about a couple of  
13 pages with a little bit of copying issue, I guess we can  
14 do that, and I'm willing to defer any further questions  
15 on this one until that time.

16 THE COURT: Very well.

17 MR. FRANKEL: Your Honor.

18 THE COURT: Yes, Mr. Frankel?

19 MR. FRANKEL: To be clear, AB-21, my copy of  
20 AB-21 is not an order of the Board. It's something that  
21 the Cades law firm submitted to the Board. It's hearsay.  
22 It's not an authentic copy, unless they didn't submit  
23 it -- I don't know. Anyway, you get it.

24 THE COURT: Yeah.

25 MR. FRANKEL: It's just not appropriate.

1 MR. SCHULMEISTER: Okay. I apologize. I  
2 did -- I was leaping ahead. This is the scope that was  
3 submitted. The next exhibit is the order. And I'd be  
4 happy to move to that exhibit and defer any further  
5 questions on this one for now.

6 THE COURT: Okay. Let's do that. But let's  
7 do this too, 'cause I don't want to go the full hour  
8 without a break. So let's take just a five-minute break  
9 to stretch our legs a little bit and then we'll come back  
10 for the last half hour today. We're in recess for five  
11 minutes. Thank you.

12 (A recess was taken.)

13 THE COURT: We're back on record. FTR on. I  
14 see counsel. I see Ms. Ching. Ready to go?

15 Go ahead, Mr. Schulmeister.

16 BY MR. SCHULMEISTER:

17 Q Ms. Ching, will you please look at AB-22.

18 A Okay. I've got it.

19 Q Do you recognize that document?

20 A Yes.

21 Q What is it?

22 A It's the Board of Land and Natural Resources's  
23 approval of the scope of work that we filed in June of  
24 2016.

25 Q Does it include a direction to proceed with

1 the preparation of the environmental impact statement?

2 A Yes. It says A&B and EMI should proceed with  
3 the preparation of an environmental impact statement in  
4 an expeditious manner as possible.

5 Q And was it signed by Suzanne Case?

6 A Yes.

7 MR. SCHULMEISTER: I'd like to move Exhibit  
8 AB-22 into evidence.

9 THE COURT: Mr. Frankel?

10 MR. FRANKEL: I was muted. I said, just  
11 relevance, Your Honor.

12 THE COURT: All right. So relevance is your  
13 only objection?

14 MR. FRANKEL: Yes, Your Honor.

15 THE COURT: All right. Mr. Wynhoff?

16 MR. WYNHOFF: No objection, Your Honor.

17 THE COURT: That got garbled. Please repeat.

18 MR. WYNHOFF: Yes, Your Honor. Thank you. No  
19 objection.

20 THE COURT: Thank you. Mr. Rowe.

21 MR. ROWE: No objection, Your Honor.

22 THE COURT: All right. The relevance  
23 objection is overruled. AB-22 is received.

24 (Exhibit AB-22 was received in evidence.)

25 BY MR. SCHULMEISTER:

1 Q Okay. Did this order specifically relate to  
2 the scope of work that A&B had previously submitted to  
3 the Board on the environmental assessment?

4 A Yes. It approved the scope we had submitted  
5 in June.

6 Q Okay. And was that a limited scope?

7 A I don't know what you mean by limited scope.

8 Q Okay. Had the interim instream flow standards  
9 been determined yet?

10 A No, they hadn't. But I think the Board  
11 recognized that because in their order for us to commence  
12 with the scope of work, they specifically asked us to  
13 break out the portions of the EIS that could be done  
14 before an IIFS decision was made and the portions that  
15 had to wait to be completed after the IIFS decision was  
16 made.

17 Q So -- and is the preparation of an EIS for the  
18 issuance of a long-term lease for this East Maui licensed  
19 area a simple matter?

20 A Not at all.

21 Q Why not?

22 A It's a very large watershed area, a very large  
23 use area. There are multiple analyses that must be done.  
24 So the draft EIS probably speaks for itself. It's a  
25 2,700-page document including all the sub-consultant

1 studies that support the EIS.

2 Q Okay. Could you look at Exhibit AB-34.

3 A All right. I have it.

4 Q Do you recognize that document?

5 A Yes, I recognize it. It's a time line of  
6 lease activity.

7 Q And do you know how this document was  
8 prepared?

9 A Yes. It was prepared by our lead consultant  
10 on the EIS, Wilson Okamoto, under my direction.

11 Q And what was the purpose of directing of this  
12 time line?

13 A This is in the beginning -- I think it was  
14 January 2019, at the beginning of the legislative session  
15 where a bill was being sought to extend the provisions of  
16 Act 126, which enabled you to renew revocable permits  
17 because it was expiring that year. So it was an attempt  
18 to show that nobody was sitting on their hands, that  
19 there was all of this activity going on to move the lease  
20 forward. But unfortunately it couldn't be completed by  
21 2019, when Act 126 expired.

22 Q Now, when you gave instructions to Wilson  
23 Okamoto to prepare this time line, did you personally,  
24 you know, check and verify the dates and the descriptions  
25 that are included in this time line?

1           A           Yes.

2                   MR. SCHULMEISTER:  Okay.  At this time I'd  
3   like to move Exhibit AB-34 into evidence.

4                   MR. FRANKEL:  Objection, Your Honor.  Lacks  
5   foundation, hearsay, irrelevance.

6                   THE COURT:  Mr. Wynhoff?

7                   MR. WYNHOFF:  No objection, Your Honor.

8                   THE COURT:  Mr. Rowe?

9                   MR. ROWE:  No objection, Your Honor.

10                  THE COURT:  All right.  So the objection is  
11   sustained as to the substantive information in the  
12   report.  If you want to just introduce it as a helpful  
13   demonstrative aid, I don't have any problem with that.

14                  MR. SCHULMEISTER:  Well, that is my purpose.

15                  THE COURT:  So that's fine.  But if you really  
16   want, for instance, one of the conclusions shown in this  
17   document as something you're going to be relying on in  
18   your findings of fact, you need to prove it not through  
19   this document.

20                  MR. SCHULMEISTER:  Okay.

21   BY MR. SCHULMEISTER:

22           Q           So let's -- I think we already covered the  
23   first entry where BLNR orders A&B to commence EIS process  
24   April 14th, 2016; is that right?

25           A           Yes.



1 Q All right. And is it your testimony that the  
2 EIS lead consultant interviews and selection took place  
3 from June of 2016 through August of 2016, which is the  
4 green bubble on the bottom of this time line?

5 A Yes.

6 Q Okay. And I hope the Court can take judicial  
7 notice of the date that the governor signed Act 126 into  
8 law on June 27, 2016. But does that comport with your  
9 recollection, Ms. Ching?

10 A Yes.

11 Q And then BLNR approved the EIS scope on July 8  
12 of 2016. Have you verified that fact?

13 A Yes.

14 Q Okay. And the next bullet is -- bubble, I  
15 should say, is EISPN. What does EISPN stand for? EISPN.

16 A Environmental Impact Statement Preparation  
17 Notice.

18 Q Okay. Is that a part of the process that  
19 needs to be undertaken prior to actually being able to  
20 complete an environmental impact statement?

21 A Yes. That's part of the EIS process.

22 Q And the time line indicates that that was  
23 drafted and reviewed in the period from September the  
24 1st, 2016, to January 19th, 2017. Do you have personal  
25 knowledge of that fact?

1           A           Yes.

2                   MR. FRANKEL:  Objection, Your Honor.

3   Relevance.  This whole line of questioning.

4                   THE COURT:  I'm -- is this just a  
5   continuation?  Mr. Schulmeister, is this a continuation  
6   of your effort to show that A&B was trying to accomplish  
7   things rather than just sitting on its hands, is a phrase  
8   we've used a lot?

9                   MR. SCHULMEISTER:  That's a phrase that comes  
10  from Mr. Frankel.  Yes.  I'm trying to rebut the argument  
11  that he has repeatedly made in this case that the Board  
12  of Land and Natural Resources and A&B sat on their hands  
13  for decades, doing nothing to advance the process of the  
14  information, the analysis being done that was needed,  
15  including the preparation of the environmental impact  
16  statement.

17                  THE COURT:  Okay.

18                  MR. SCHULMEISTER:  If he's willing to  
19  stipulate to withdraw that argument, then I'd be happy to  
20  move on.

21                  THE COURT:  I mean, I want you to be able to  
22  make your record, but I will say I think we're pretty  
23  rapidly reaching a point of diminishing returns here.  So  
24  the objection is overruled.

25  BY MR. SCHULMEISTER:

1           Q           All right. All right. Just one final  
2           question on this exhibit. I believe I already asked you  
3           this, but just to be clear, is there anything -- have you  
4           personally checked based on your personal knowledge the  
5           accuracy of the dates and the descriptions on AB-34?

6           A           Yes. I checked it with our consultants. I'm  
7           relying on their expertise as well. But we worked  
8           closely on all of these steps.

9           Q           And by the way, during this period, what was  
10          your responsibility in connection with the preparation of  
11          the environmental impact statement?

12          A           I was a member of a team of people who worked  
13          and continue to work this day to move this EIS along.

14          Q           Do you have weekly meetings?

15          A           We have weekly meetings.

16          Q           How long have you had weekly meetings on this  
17          EIS process?

18          A           Since we started it.

19          Q           All right. Let me direct your attention to  
20          the draft environmental impact statement, J-20.

21          A           Okay.

22          Q           Could you turn to Bates stamp page 000554.

23          A           With the preparers?

24          Q           Yes.

25          A           Yes.

1           Q           Earlier I had asked you if you could -- you  
2           could testify -- off the record I asked you if you could  
3           testify as to those prepares. You weren't sure you could  
4           do it by memory. So is this a list of the consultants  
5           that had been part of this team or working under the lead  
6           consultant on the preparation of the draft environmental  
7           impact statement?

8           A           Yes.

9           Q           And could you explain -- can you go down the  
10          list and explain to the Court why these different  
11          sub-consultants' expertise were required?

12          A           Well, I think they're all requirements of an  
13          environmental impact statement, the type of impacts that  
14          a proposed action would cause.

15                    So going down the list, Akinaka & Associates,  
16          hydrology. They are doing analysis on alternative  
17          sources of water, on whatever plans the County has to  
18          improve its water system. Anything that has to do with  
19          basic hydrology related to either the uses, replacing the  
20          uses of the East Maui stream water.

21                    Cultural Surveys Hawaii, they're doing the  
22          cultural impact statements. And they did an  
23          archeological literature review of the licensed area.  
24          Again, those are requirements of an environmental impact  
25          statement.

1                   Sea Engineering and Marine Research  
2           Consultants together are looking at the marine  
3           environment as streams enter the ocean and the impacts of  
4           more water or less water.

5                   Earthplan did a social impact assessment where  
6           they went out and spoke to various people who were  
7           willing to speak to them -- it wasn't easy -- about their  
8           impressions of the impacts of a proposed water lease on  
9           their interests.

10                   Mason Architects. It's pretty plain. It's  
11           historical structures assessment.

12                   Munekiyo & Hiraga are doing the economic and  
13           fiscal impacts assessment of everything, agriculture,  
14           both in the Central Maui use area as well as the East  
15           Maui licensed area. Impact on Upcountry Maui, if there  
16           was more or less water, just generally all the economic  
17           and fiscal impacts of the proposed action.

18                   Plasch is helping them. Plasch's focus was on  
19           the agricultural side. So Plasch and Munekiyo & Hiraga  
20           worked very closely together with Plasch again  
21           specializing on the agricultural side.

22                   SWCA. They looked at terrestrial flora and  
23           fauna within the licensed area and outside in the use  
24           area.

25                   And Trutta is the study that Parham -- that

1 David Frankel has referred to. They're the ones who  
2 built a model to best analyze the impact of diversions on  
3 habitat unit availability on the diverted streams.

4 Q Okay. Now, so eventually the -- in 2018, as  
5 you've already seen, the Water Commission did issue its  
6 interim instream flow standards flow amendment decision;  
7 right? June 20th of 2018?

8 A Yes.

9 Q So did that then change the level of activity  
10 that was -- and the scope of what was being done on the  
11 environmental impact statement?

12 A Yes. There were a number of these consultants  
13 who couldn't complete their work until they knew how much  
14 water was going to be left in the stream and therefore,  
15 how much water could be allowed to be diverted. Not  
16 would be, but could be the maximum. So as we had scoped  
17 for the Board of Land and Natural Resources, there were  
18 some studies or portions of some studies that could  
19 proceed prior to the IIFS decision. And a lot of the  
20 work had to wait until after the IIFS decision.

21 Q Now I'm going to ask you to look now at  
22 Exhibit AB-35.

23 A Okay. I got it.

24 Q Do you recognize that document?

25 A Yes.

1 Q And what is it?

2 A It's a projected time line for the EIS  
3 process. And I believe this was done also in January of  
4 2019 to help people understand how quickly we might think  
5 we could complete the EIS process and therefore the lease  
6 process. But it's projected.

7 Q Was this also prepared by Wilson Okamoto at  
8 your direction?

9 A Yes.

10 Q And did you -- did you personally verify --  
11 well, these are projected. But did you personally  
12 evaluate the correctness or reasonableness to the extent  
13 you can on prediction in the future?

14 A Yes. So I'm going to correct myself. We did  
15 do a version of this for the legislature in January 2019.  
16 But I see this was an updated version because it has the  
17 actual date that we published the draft EIS, which was in  
18 September of 2019. I think beyond that, it is -- it's  
19 projection, yes.

20 Q And again, this was to help understand what  
21 the -- how this was going to unfold hopefully if  
22 everything went as you expect? Is that fair?

23 A Yes. Without any legal challenges. Because  
24 everybody wants to know how soon can you get revocable  
25 permits onto a lease. And this is to try and project an

1 optimal outcome.

2 MR. SCHULMEISTER: At this time I'd like to  
3 move Exhibit AB-35 into evidence. And it is for the  
4 limited purpose of being a demonstrative or explanation.  
5 Obviously can't prove the truth of future -- things that  
6 happen in the future.

7 THE COURT: Mr. Frankel?

8 MR. FRANKEL: It's not -- I'm not exactly  
9 clear what it's being introduced for. Just in an  
10 abundance of caution, I'll object. Speculation, hearsay,  
11 lacks foundation.

12 THE COURT: Mr. Wynhoff?

13 MR. WYNHOFF: No objection, Your Honor.

14 THE COURT: Mr. Rowe?

15 MR. ROWE: No objection, Your Honor.

16 THE COURT: All right. With the understanding  
17 that it's not being offered for its truth but for the  
18 limited purpose of helping people understand the general  
19 time line, AB-35 is admitted over objection.

20 (Exhibit AB-35 was received in evidence.)

21 BY MR. SCHULMEISTER:

22 Q Okay. Now, did A&B -- strike that. Why  
23 didn't A&B prepare an EIS or EIS type of analysis to  
24 support its request to have the RP's renewed in November  
25 of 2018? In other words, specifically for the purpose of



1 a one-year renewal?

2 MR. FRANKEL: Objection. Relevance.

3 THE COURT: Overruled.

4 THE WITNESS: I think, as you can see from the  
5 draft EIS, it -- type of analyses you do are very complex  
6 and they took a long time to do. That wouldn't be  
7 practical in the face of a one-year permit that can be  
8 revoked with 30 days' notice.

9 BY MR. SCHULMEISTER:

10 Q And same question with regard to the renewal  
11 in 2019. So November 2019, they went to the Board again  
12 for a one-year renewal. Why was there not an EIS done in  
13 connection with that renewal application?

14 A For the same reason. The type of analyses  
15 would take longer than we had if we had the full year  
16 under the permit. It just didn't seem practical for a  
17 one-year permit with 30 days revocable term.

18 Q And would it seem reasonable to invest -- I'm  
19 sorry. How much has A&B spent on the environmental  
20 impact statement preparation process?

21 A We spent \$2 million to date, and we're not  
22 done yet.

23 Q Okay. You think it's reasonable to do a \$2  
24 million analysis for a one-year permit that's revocable  
25 on 30 days' notice?

1 MR. FRANKEL: Objection. Speculation, lacks  
2 foundation.

3 THE COURT: Overruled.

4 THE WITNESS: It seems excessive.

5 MR. SCHULMEISTER: I have no further  
6 questions.

7 THE COURT: All right. So it's five minutes  
8 to 4:00. I'd love to be able to finish Ms. Ching up  
9 today so we don't have to bring her back tomorrow, but  
10 you folks may have more questions than that.  
11 Mr. Frankel, can you give me an estimate?

12 MR. FRANKEL: 11 minutes, Your Honor.

13 THE COURT: Mr. Wynhoff, yes, sir? You have  
14 your hand up. Go ahead.

15 MR. WYNHOFF: I have zero questions, Your  
16 Honor.

17 THE COURT: All right. Mr. Rowe, can you give  
18 me an estimate?

19 MR. ROWE: I estimate zero minutes.

20 THE COURT: Okay. Any way you can cut that to  
21 five minutes, Mr. Frankel?

22 MR. FRANKEL: It's possible. It's possible.

23 THE COURT: I'm going to see where we're at in  
24 five minutes, but I can't just keep going till it's over.  
25 I have to draw the line somewhere. Go ahead.

## 1 CROSS-EXAMINATION

2 BY MR. FRANKEL:

3 Q Ms. Ching, you explained that the Native  
4 Hawaiian Legal Corporation that was representing Na Moku  
5 objected to Alexander & Baldwin preparing the EIS;  
6 correct?

7 A Yes. In 2001.

8 Q They wanted DLNR to prepare it; right?

9 A Yes.

10 Q And you diligently proceeded with the EIS  
11 process once their objection was withdrawn; correct?

12 A Yes.

13 Q And you testified that the withdrawal of the  
14 objection did not occur until 2015; correct?

15 A That was the oral withdrawal they objected,  
16 and it wasn't formalized until 2016.

17 Q And you filed a declaration saying the same  
18 thing with this Court before, haven't you?

19 A I believe so.

20 Q And in fact you signed a declaration saying  
21 the same thing to the Hawaii Supreme Court, didn't you?

22 A I'd have to defer to my lawyer. I believe so.

23 Q And you've said the same thing to legislators?

24 A Yes.

25 Q And you said the same thing to the Board of

1 Land and Natural Resources?

2 A That I don't recall.

3 Q Okay. You've consistently stated that in 2015  
4 or '16 is when the objection was withdrawn; correct?

5 A Yes.

6 Q And after that objection was withdrawn, you  
7 started diligently working on the EIS; correct?

8 A Yes.

9 Q I'd like you to look at AB-9.

10 THE COURT: This is already in evidence  
11 according to the Court's notes.

12 THE WITNESS: Okay.

13 BY MR. FRANKEL:

14 Q Are you there? I'd like -- and this document  
15 written by the Native Hawaiian Legal Corporation on  
16 behalf of Na Moku was sent in January 2014; is that  
17 right?

18 A That's what this says, yes.

19 Q That's at the beginning of 2014. If you look  
20 at the last paragraph, the second to the last complete  
21 sentence of this first page.

22 A Sorry. You lost me. I'm sorry.

23 Q First page. Last paragraph of the first page,  
24 second to the last sentence. Do you see where it says  
25 there, However, despite Na Moku's prior objection to the

1 applicant funding EA process, the law changed and now  
2 places the burden on the applicant for the EA? Do you  
3 see that?

4 A I do see that.

5 Q And did you know that the law changed in 2012  
6 that allowed applicants to prepare EIS's rather than  
7 having agencies prepare them?

8 A I think you brought that up. That's where I  
9 heard it, yeah.

10 Q You're a registered lobbyist, aren't you,  
11 Ms. Ching?

12 A Yes, I am.

13 Q So you follow what happens at the legislature?

14 A I can't follow everything. Sorry.

15 Q All right. Do you see though that this  
16 objection was withdrawn in January 2014? And A&B did not  
17 diligently start the EIS immediately after January 2014,  
18 did it?

19 MR. SCHULMEISTER: I'm going to object to lack  
20 of foundation. He just referred to the document as  
21 having said there was a withdrawal of the objection.  
22 I'm --

23 THE COURT: Well, the question on the table  
24 is, And A&B did not diligently start the EIS immediately  
25 after January 2014, did it?

1                   So you can answer that question.

2                   THE WITNESS: I don't think we believed or  
3 took this to mean that they withdraw their objection. It  
4 doesn't say, We withdraw our objection.

5 BY MR. FRANKEL:

6           Q           Even though it says, the next sentence,  
7 Therefore, it should not be and should never have been a  
8 bar to conduct an EA that Judge Hifo confirmed is  
9 required prior to issuing permits for the diversion?

10          A           Yeah. I don't think we took it as a  
11 withdrawal. And if this was a withdrawal, why did they  
12 say it was a withdrawal in 2015? It's a little  
13 confusing. I don't think it's crystal clear.

14          Q           I see. Okay. Now, you understand, Ms. Ching,  
15 that an EIS looks at a range of alternatives, don't you?

16          A           Yes.

17          Q           And that -- these range of alternatives could  
18 have been looked at long before any IIFS was issued for  
19 these 24, 27 streams, couldn't it have?

20          A           I -- not all of 'em. I'm trying to think --  
21 I'm not sure that they can.

22          Q           Well, if you look at a range of alternatives,  
23 it's the universe of alternatives and you can select  
24 alternatives to look at. And A&B chose not to look at  
25 those alternatives until after the Water Commission

1 issued its decision?

2 A Yes. That's how we were told to scope it.  
3 Plus it definitely sets the stake in the ground. You're  
4 right. There are infinite number of alternatives that  
5 you can look at in an EIS, and we couldn't afford to do  
6 that. We had to pick the most reasonable ones, the most  
7 likely ones. It's like shooting in the dark versus  
8 having a stake in the ground to work around.

9 Q All right. I believe Mr. Schulmeister asked  
10 you about the benefit that A&B has gotten with the lease  
11 process dragging on for years. Do you recall that?

12 A Yes.

13 Q Now, the RP, the revocable permits, were  
14 issued in the Year 2000; correct?

15 A Yes.

16 Q And the contested case hearing request for the  
17 continuation of these revocable permits was made in 2001?

18 A Yes.

19 Q And the contested case hearing has not been  
20 completed yet, has it?

21 A No.

22 Q Or on the revocable permits?

23 A I'll defer to the attorneys on that.

24 Q In the meantime, Alexander & Baldwin has  
25 diverted water from dozens of streams?

1 A Since 2000? Yes.

2 Q And in fact, it's taken -- it took 165 million  
3 gallons of water per day until the Year 2004?

4 MR. SCHULMEISTER: I'm going to object that  
5 this is argumentative. It's not adding anything.

6 THE COURT: Overruled.

7 THE WITNESS: I don't remember the exact  
8 years, but yeah, it was 165 million gallons per day until  
9 a period of time. I think it is 2004 to 2013 where it  
10 was reduced.

11 BY MR. FRANKEL:

12 Q And between 2004 and 2013, Alexander & Baldwin  
13 was getting 126 million gallons a day of water per day on  
14 average?

15 A That sounds right.

16 Q And A&B made millions of dollars of profits  
17 growing sugar between the Year 2000 and 2015, didn't it  
18 cumulatively?

19 A I don't think so. I have to go back and look  
20 at the numbers, but we were losing money in sugar for a  
21 long time. You may be looking at the agricultural  
22 number, which is the publicly reported number for our  
23 performance, and that includes a lot of other things like  
24 our operations on Kauai, hydroelectric power sales on  
25 Kauai. It's not just sugar. Wasn't just HC&S. Sorry.



1           Q           All right.  So it's unclear whether A&B made  
2 millions of dollars growing sugar during that time period  
3 when the RP was in holdover status and the lease  
4 contested case hearing, the RP contested case hearing,  
5 was lingering on.  But in the meantime Alexander &  
6 Baldwin sold its Central Maui land for \$62 million more  
7 than it would have if it had no permit; isn't that right?

8           A           No.  I don't think that's right.

9           Q           Well, that's -- your land was valued at \$62  
10 million with having access to 30 million gallons a day of  
11 water versus not?

12          A           No.  The land was valued at \$62 million more  
13 to be as agriculturally productive as Mahi Pono assumed  
14 when they underwrote the deal and presented us with a  
15 purchase price.  They expected a certain amount of farm  
16 revenues from those lands.

17                   THE COURT:  Okay.  We're -- I'm sorry,  
18 Ms. Ching.  I thought you were done.  Go ahead and finish  
19 your answer.

20                   And then, Mr. Frankel, hold on before you ask  
21 another one.

22                   Go ahead, Ms. Ching.

23                   THE WITNESS:  I was just going to say if at  
24 the end of the day, that land didn't prove to support  
25 that level of agricultural production, that's when the

1 land would be devalued.

2 THE COURT: So it's now five minutes after,  
3 Mr. Frankel. How much more are you looking at?

4 MR. FRANKEL: Probably an equal amount of what  
5 I had just done.

6 THE COURT: We're going to call it a day.  
7 Ms. Ching, can you come back tomorrow morning briefly?

8 THE WITNESS: Sure.

9 THE COURT: All right. Thank you. All right.  
10 So we'll see you all at 9 o'clock tomorrow morning. If  
11 you have any, you know, procedural or housekeeping type  
12 of thing that you want to take up, please inform my clerk  
13 ahead of time. I don't like to walk out at 9 o'clock and  
14 have a laundry list of things that I wasn't expecting to  
15 do. I don't think any of us does. So just keep us all  
16 informed and it will be easier for everybody. All right.  
17 We'll see you at 9 o'clock. Thank you. Have a good  
18 evening, everyone. We're in recess. We're adjourned.

19 (End of proceedings.)

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25

1 STATE OF HAWAII )  
2 )  
3 CITY AND COUNTY OF HONOLULU )  
4 )  
5 \_\_\_\_\_ )

6  
7

8 I, JAMIE S. MIYASATO, an Official Court  
9 Reporter for the First Circuit Court, State of Hawaii, do  
10 hereby certify that the foregoing comprises a full, true,  
11 and correct transcription of my stenographic notes taken  
12 in the above-entitled matter, so transcribed by me to the  
13 best of my ability.

14 Dated this 11th day of August 2019.

15  
16  
17

18 /s/ Jamie S. Miyasato

19  
20

\_\_\_\_\_  
JAMIE S. MIYASATO, CSR #394

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25 sierra club/081120