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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

_____)	
SIERRA CLUB,)	CASE NO. 1CC191000019
)	
Plaintiff,)	
)	
vs.)	
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, et al.,)	
)	
Defendants.)	
_____)	

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE JEFFREY CRABTREE, Judge Presiding, Sixth Division, on Wednesday, August 12, 2020; Further Jury-Waived Trial, Morning Session.

APPEARANCES:
(Via Webex)

DAVID KIMO FRANKEL, ESQ.	For Plaintiff
WILLIAM J. WYNHOFF, ESQ.	For DLNR, BLNR and
MELISSA D. GOLDMAN, ESQ.	Suzanne Case
DAVID SCHULMEISTER, ESQ.	For Alexander & Baldwin
TRISHA H.S.T. AKAGI, ESQ.	and East Maui Irrigation
CALEB P. ROWE, ESQ.	For County of Maui

REPORTED BY:

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

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1 WEDNESDAY, AUGUST 12, 2020 9:00 A.M.

2 --ooOoo--

3 THE COURT: We are now on record. And the
4 FTR is on?

5 THE BAILIFF: Yes.

6 THE COURT: I'm looking at my screen. I see
7 all the attorneys present. I see Ms. Ching is back.
8 We all ready to go? (Pause.) Looks like it.

9 Okay. Mr. Frankel, please --

10 THE BAILIFF: Judge, should we call the
11 case, or no?

12 THE COURT: Okay. Go ahead. (Laughter.)

13 THE BAILIFF: The Circuit Court of the First
14 Circuit is now in session.

15 Calling Case No. 1 on the calendar, Civil
16 No. 19-1-0019, Sierra Club versus Board of Land and
17 Natural Resources, Jury-Waived Trial.

18 Counsel, appearances please, starting with
19 Plaintiff.

20 MR. FRANKEL: This is David Frankel
21 appearing on behalf of Sierra Club, Plaintiff.

22 THE BAILIFF: And A&B?

23 MR. SCHULMEISTER: David Schulmeister and
24 Trisha Akagi on behalf of Alexander & Baldwin and
25 EMI.

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 THE BAILIFF: And State of Hawaii?

2 MR. WYNHOFF: Good morning, Your Honor.

3 William Wynhoff, Melissa Goldman, and Lauren Chun,
4 without the camera on her, deputy attorneys general
5 on behalf of the State of Hawaii. Our client
6 representative chairperson, Suzanne Case, is also
7 present with us this morning.

8 THE COURT: Okay. Thank you. Good morning
9 to you as well.

10 THE BAILIFF: Mr. Rowe.

11 MR. ROWE: Good morning, Your Honor. Deputy
12 Corporation Counsel Caleb Rowe on behalf of the
13 County of Maui.

14 THE COURT: Thank you. Good morning, all.

15 And, again, listening in, according to my
16 screen, we have Marti Townsend, Summer Sylva, and
17 Vince Raboteau. Right, okay.

18 All right. Mr. Frankel, you ready to resume
19 with Ms. Ching?

20 MR. FRANKEL: Yes, Your Honor.

21 THE COURT: All right. Ms. Ching, you're
22 still under oath. Thank you for coming back.

23 Mr. Frankel, go ahead.

24

25

1 MEREDITH CHING,
2 called as a witness by Defendant A&B, having been
3 previously duly sworn, was examined and testified as
4 follows:

5 CONTINUED CROSS-EXAMINATION

6 BY MR. FRANKEL:

7 Q. Ms. Ching, yesterday you testified regarding
8 the efforts that A&B had undertaken to move the lease
9 profits along, you recall that?

10 A. Yes.

11 Q. And you talked about the \$75,000 A&B spent
12 on the USCS study more than a decade ago.

13 A. Yes, the money we contributed toward that
14 study.

15 Q. And you talked about the \$60,000 A&B spent
16 on the cultural study nearly two decades ago.

17 A. Yes.

18 Q. And each report cost A&B less than 10
19 percent of your salary; is that right?

20 MR. SCHULMEISTER: I'm going to object to
21 this as being irrelevant.

22 THE COURT: Sustained.

23 Q. (By Mr. Frankel) Ms. Ching, A&B is worth
24 approximately a billion dollars, right?

25 Approximately.

1 MR. SCHULMEISTER: Object, irrelevant.

2 THE COURT: Mr. Frankel, where are we going?
3 This is not anywhere even close to the very limited
4 re-examination. We're on the third round-up.

5 MR. FRANKEL: Your Honor, it's to give
6 context to -- they wanted us to talk about how much
7 money they spent, and it needs context.

8 THE COURT: Sustained. Please move on.

9 MR. FRANKEL: All right.

10 Q. (By Mr. Frankel) All right. And between
11 the year 2000 and 2017, approximately 2017, A&B paid
12 the State the same amount of money for the four
13 revocable permits each year; is that right?

14 A. I don't recall, but if they were on
15 hold-over status that time, yes.

16 Q. Despite the increase in land values across
17 the state?

18 A. I can't speak to that.

19 Q. Okay. Despite the increase in costs of
20 government operations during that time period?

21 A. Again, I'm not an expert on -- on the costs,
22 those costs.

23 Q. And despite inflation?

24 A. I'm sure there was inflation.

25 Q. Okay. Now, you testified that in 2001, A&B

1 formally asked BLNR for a lease, do you recall that?

2 A. Yes, we submitted an application for --

3 Q. And --

4 A. -- a lease.

5 Q. And in 2001 you made it explicit that A&B
6 would be willing to do EIS?

7 A. Yes.

8 Q. An EIS that could cost \$2 million?

9 A. Yes.

10 Q. No one from BLNR guaranteed A&B that after
11 EIS was completed, the lease would be issued to A&B;
12 is that right?

13 A. Of course not. The lease has to go to
14 public auction --

15 Q. And also --

16 A. -- pursuant to law.

17 Q. And also the EIS has to be completed so that
18 the impacts can be understood; isn't that right?

19 A. Yes.

20 Q. So A&B was willing to risk \$2 million
21 preparing an EIS with no guarantee that it'll get a
22 lease?

23 A. Yes, but there was a -- a clause that
24 whoever won the lease had to pay for the EIS
25 ultimately.

1 Q. Actually, if you look at Exhibit A -- Joint
2 Exhibit 5, that's something you proposed, that's not
3 something that it was left ambiguous and unstated,
4 that's something A&B hoped for. But actually in your
5 application there was no provision guaranteeing that
6 A&B would get that money back, right, you were taking
7 a risk?

8 MR. SCHULMEISTER: Let me object. Vague,
9 ambiguous, compound.

10 THE COURT: Sustained.

11 Q. (By Mr. Frankel) Okay. A&B was willing to
12 take some level of risk in the year 2001 to spend the
13 money to do an EIS; is that right?

14 A. Yes.

15 Q. But A&B did not start the EIS after 2001; is
16 that right?

17 A. No, because there were objections to A&B
18 preparing the EIS.

19 Q. Nor did it start one in 2002?

20 A. There were still objections.

21 Q. In 2003, Judge Hifo issued an order
22 requiring an EIS, do you remember that?

23 A. Yes.

24 Q. But A&B did not start the EIS in 2003?

25 A. No, there were still objections. I think

1 that --

2 Q. Also --

3 A. Sorry.

4 Q. And there are also --

5 MR. SCHULMEISTER: Object to the
6 interruption of the witness's answer.

7 THE COURT: Yeah, I think you're both
8 starting to talk at the same time. So I think it's
9 kind of an unintentional interruption, but let's let
10 the witness finish. Go ahead, Ms. Ching.

11 THE WITNESS: I was just going to say that
12 Judge Hifo's ruling said that an EA or EIS needed to
13 be done, it didn't say who was to do it or -- or
14 what.

15 Q. (By Mr. Frankel) And so A&B did not start
16 the EIS in 2003?

17 A. No, because there were still objections to
18 us preparing it.

19 Q. And there has also -- there are also
20 objections to A&B taking all the water from dozens of
21 streams, but A&B continued to take water from those
22 streams, didn't it?

23 A. We had a revocable permit that allowed us to
24 divert water from certain streams.

25 Q. Even though Na Moku, through its attorneys

1 at the Native Hawaiian Legal Corporation, objected to
2 A&B taking water from the streams, they continued to,
3 and yet --

4 A. To service our plantation, which employed a
5 thousand Maui residents at the time.

6 Q. And yet, when it came to Na Moku's
7 objections through its attorneys to A&B preparing the
8 EIS rather than DLNR, you chose to stand back and
9 honor those objections?

10 A. (Pause.) Can you repeat the question?
11 Sorry.

12 Q. So you acceded or accepted or -- I don't
13 know what the quite -- quite the right word is. You
14 altered A&B's behavior because of the objection
15 raised by Na Moku, but only in the context of who
16 should prepare the EIS; is that right?

17 A. We were trying to pursue the lease process
18 properly, and that was a major step in it, and it was
19 risky to start that kind of undertaking given Na
20 Moku's and Maui Tomorrow's objection to A&B preparing
21 the EIS.

22 Q. So it was risky in 2003, given their
23 objections, but it -- it was too risky in 2003, but
24 it wasn't too risky in 2001, when you said A&B was
25 willing to commit to spend \$2 million to prepare the

1 EIS back then, but by 2003, after Judge Hifo had
2 issued an order, it was too risky, right?

3 A. The changing factor was the objection issued
4 after we said we would pay for the EIS, then the
5 objections came in from Na Moku and from Maui
6 Tomorrow.

7 Q. Okay. And so no EIS was done in 2004 or
8 2005 or even from 2005 to 2012; is that right?

9 A. That's right.

10 Q. And throughout this time, Alexander &
11 Baldwin was diverting more than a hundred million
12 gallons of water daily on average from dozens of East
13 Maui streams; is that right?

14 A. That's correct.

15 Q. Draining them dry?

16 A. That part -- oh, sorry.

17 Q. And --

18 MR. SCHULMEISTER: Argumentative. I'm
19 sorry. Objection, argumentative.

20 THE COURT: Well, draining them dry is
21 pretty vague, but I think your point is taken.

22 MR. FRANKEL: Thank you, Your Honor.

23 Q. (By Mr. Frankel) And you testified
24 yesterday that as to any benefit that A&B may have
25 enjoyed with this lengthy lease process being drawn

1 out was, quote, "none whatsoever," do you recall
2 that?

3 A. Yes.

4 Q. Now, in 2012, the legislature amended
5 Chapter 343 to explicitly allow applicants rather
6 than agencies to prepare EIS, right?

7 A. I learned that from you, yes.

8 Q. And, actually, A&B stepped forward to hire
9 the best lobbyists and lawyers in the state, didn't
10 you?

11 A. That's kind of a strange question. I don't
12 know who the best lobbyists and lawyers are. And,
13 no, our pockets aren't bottomless.

14 Q. I'll return to that question earlier. Is
15 A&B a billion dollar corporation, valued at
16 approximately a billion dollars?

17 A. I'd actually have to look at it now. I
18 don't think its market cap is a billion dollars right
19 now.

20 Q. So maybe after COVID it went down a little
21 bit?

22 A. It went down quite a bit.

23 Q. Okay. So -- but after the legislature
24 changed the law in 2012, A&B did not begin preparing
25 an EIS; is that right?

1 A. That's correct. And --

2 Q. Or in two thousand --

3 A. Sorry, the objections still were on the
4 table.

5 Q. Or in 2013?

6 A. We did not. We didn't start until 2016.

7 Q. And, in fact, as we went through at the end
8 of yesterday, it was January 2014 when Na Moku put
9 their waiver of their objection in writing, but A&B
10 still did not start the EIS in 2014, right?

11 MR. SCHULMEISTER: Objection --

12 THE WITNESS: No.

13 MR. SCHULMEISTER: Objection, assumes facts
14 not in evidence.

15 THE COURT: Hang on. I want to read it.

16 (Pause.) Please rephrase.

17 Q. (By Mr. Frankel) All right. In January of
18 2014, the Native Hawaiian Legal Corporation
19 representing its clients, Na Moku, wrote a letter in
20 which it said despite Na Moku's prior objection to
21 the applicant funding the EA process, the law changed
22 and now places the burden on the applicants of the
23 EA. Do you recall that?

24 A. I recall that you showed me that exhibit
25 yesterday, and that's what the letter said, yes.

1 Q. And that letter is a desperate plea for the
2 Board of Land and Natural Resources to get the EIS
3 process started because water was being diverted. Is
4 that -- is that a fair characterization of that
5 letter that you read yesterday?

6 MR. WYNHOFF: Objection, argumentative.
7 Objection, argumentative.

8 THE COURT: Objection sustained.

9 MR. FRANKEL: Thank you, Your Honor.

10 THE COURT: Mr. Frankel, you can't possibly
11 ask this witness whether a letter like that is a
12 desperate plea on behalf of somebody else. I mean,
13 come on. Let's go.

14 MR. FRANKEL: Understood, Your Honor.

15 Q. (By Mr. Frankel) Now, Ms. Ching, you and
16 Alexander & Baldwin had been resisting the
17 restoration of streams in East Maui for decades,
18 haven't you?

19 A. No, we haven't been resisting the
20 restoration of streams. We were trying to keep a
21 plantation going which was very reliant on water
22 quantities. All the studies showed that it was a
23 direct correlation between amount of irrigation and
24 amount of sugar produced. We were working in an
25 industry where the price of sugar hadn't changed for

1 decades and trying to keep a thousand people employed
2 on that island.

3 Q. In the early 1990s, you served on the Stream
4 Protection Management Task Force, or the SPM Task
5 Force, do you remember that?

6 A. Yes.

7 Q. You served on that task force with Alan
8 Murakami?

9 A. I don't remember all the members, to tell --
10 sorry.

11 Q. Okay. And also on that task force is
12 Marjorie Ziegler, do you remember her?

13 A. I do remember Marjorie, yeah.

14 Q. Do you remember that she was a member -- do
15 you know that she was a member of the Sierra Club?

16 A. Yes.

17 Q. And do you know she died before getting to
18 see most of the East Maui streams restored?

19 MR. SCHULMEISTER: Objection,
20 argumentative --

21 THE COURT: Sustained.

22 MR. SCHULMEISTER: -- irrelevant.

23 THE COURT: Mr. Frankel, really. Get a
24 grip.

25 MR. FRANKEL: Okay.

1 Q. (By Mr. Frankel) Ms. Ching, do you remember
2 you filed a minority report on the task force or a
3 separate individual statement?

4 A. Yes, I did.

5 Q. And you wrote our perspective would be to
6 attempt to reasonably protect the status quo and
7 therefore all existing values into the future. Does
8 that sound familiar?

9 A. Sorry, I don't remember. I remember that I
10 filed one, but I don't remember what I said.

11 Q. Okay. So A&B could've restored stream flows
12 to East Maui in the 1990s? It could have?

13 A. Is this a hypothetical question or...

14 Q. Well, okay. A&B chose not to restore water
15 to streams in the 1990s?

16 A. We believe we were operating under proper
17 permits and regulations that allowed us to divert the
18 water we needed on the plantation to keep it going
19 during a very difficult time.

20 Q. A&B has been fighting to insure that it
21 would not have to restore the water to the streams
22 since at least the 1990s; isn't that right?

23 MR. WYNHOFF: Objection, argumentative, Your
24 Honor. This is all -- we've known this -- I mean
25 argumentative.

1 THE COURT: Overruled. You may answer.

2 THE WITNESS: I feel like you keep stating
3 it in the converse. We weren't fighting against
4 restoring streams. We were fighting to keep a
5 business alive that was important to the island,
6 important to the state, and it needed water. That
7 was one of the basic inputs of the sugar plantation.

8 Q. (By Mr. Frankel) Okay. Do you recognize
9 the effect of that position was that A&B was choosing
10 not to put water back in the streams?

11 A. Can you repeat the question?

12 Q. Do you recognize that in taking that
13 position, A&B was deciding not to put the water back
14 into the streams in East Maui?

15 A. I believe that we tried to work with the
16 taro growers, and in many instances the taro growers
17 had springs that arose beneath our -- our ditches, so
18 they had sources of water that -- we even had
19 measurements. These springs provided water when
20 there was nothing, almost nothing in the ditch, so we
21 tried to help them to utilize those sources of water
22 for their taro growing activities in a more
23 sufficient manner, helping them to clean ditches,
24 auwai. I don't think we were totally blind to their
25 water needs.

1 Q. But, in the meantime, A&B was diverting more
2 than a hundred million gallons a day on average
3 during this whole time period from these streams in
4 East Maui, right?

5 MR. SCHULMEISTER: Objection, argumentative,
6 cumulative.

7 THE COURT: I think she's answered this at
8 least twice. Sustained.

9 MR. FRANKEL: Thank you, Your Honor. I'll
10 move on.

11 Q. (By Mr. Frankel) Yesterday you were asked
12 about the three volumes in the Kepa Maui report, do
13 you remember that?

14 A. Yes.

15 Q. And just for the Court, those exhibits,
16 which I don't believe were entered into evidence,
17 were AB-165, AB-166, and AB-167. The three volumes
18 of that report, does that sound familiar?

19 A. Yes.

20 Q. Did you give a copy of this report to the
21 BLNR in 2019?

22 A. I don't recall.

23 Q. Do you know if anyone from A&B gave it to
24 the BLNR in 2019?

25 A. I don't know.

1 Q. Did you or anyone from A&B give the report
2 to BLNR in 2018?

3 A. I didn't.

4 Q. How about in 2017?

5 A. I didn't.

6 Q. How about 2016?

7 A. I didn't.

8 Q. How about Exhibit AB-7, which are BLNR's
9 findings of fact from 2007, did you give a copy of
10 this report to the Board of Land and Natural
11 Resources in 2019? I'm -- I'm not asking you to look
12 at the exhibit right now. Do you remember
13 Mr. Schulmeister was asking you about findings of
14 fact of Board of Land and Natural Resources entered
15 into in 2007?

16 A. Yes.

17 Q. Did you give a copy of that -- those
18 findings of fact to the BLNR in 2019?

19 A. I did not. I would assume they would have
20 it in their records, part of their history of this --

21 Q. Okay. All right. And do you know if anyone
22 from A&B gave it to BLNR in 2019?

23 A. I don't know.

24 Q. Did you or anyone from A&B give the report
25 to BLNR in 2018?

1 A. Not that I know of.

2 Q. 2017?

3 A. I did not.

4 Q. 2016?

5 A. I did not. Again, I -- I think it's in
6 their own records.

7 Q. Okay. And, in fact, you know that the staff
8 submittal is given to the Board of Land and Natural
9 Resources board members for each board meeting,
10 agenda item, you know that, right?

11 A. Can you repeat the question?

12 Q. Yeah. That was probably poorly worded.

13 Do you know that for each agenda item on the
14 Board of Land and Natural Resources agenda, a staff
15 submittal is provided to members of the board, right?

16 A. Yes, I assume so, because it's posted.

17 Q. And you've seen the staff submittals?

18 A. For which item?

19 Q. Well, as a general matter you've seen that
20 there are staff submittals given to -- presented at
21 each board meeting, haven't you?

22 A. I know that when we go before the board with
23 an item, there's a staff submittal.

24 Q. And the staff submittals you've reviewed for
25 your agenda items generally contain materials that

1 A&B has provided to the department, correct?

2 A. Yes, usually at their request.

3 Q. Sure. And so J-16, which is in evidence, if
4 you want to take a look at that, J-16, Joint Exhibit
5 16.

6 A. Okay. It's a 2018 document.

7 Q. That's right. And have you ever seen this
8 before, the staff submittal?

9 A. Yes.

10 Q. Okay. And it includes a letter from
11 Alexander & Baldwin on pages 19 through 21, doesn't
12 it?

13 A. Hold on. (Pause.) Yes.

14 Q. And it also includes A&B's status report on
15 pages 25 through 27.

16 A. (Pause.) Yes.

17 Q. Okay. And do you recall providing any other
18 written materials to the Board of Land and Natural
19 Resources in 2018?

20 A. Other than what's in this exhibit?

21 Q. Correct.

22 A. No, I think this is what we provided them.

23 Q. All right. And taking -- let's -- we're
24 done with that exhibit. And now let's look at
25 Exhibit J-21, Joint 21, which is also in evidence.

1 A. Okay. I think there's 19 documents.

2 Q. You've seen that before, right?

3 A. Yes.

4 Q. And it includes a letter from you as well on
5 pages 94 and 95.

6 A. (Pause.) Yes.

7 Q. As well as your status report on the next
8 few pages, 96 through 99.

9 A. Yes.

10 Q. And it also includes a letter that was sent
11 to the water commission on pages 123 through 130.

12 A. (Pause.) Yes.

13 Q. And it also includes other additional
14 letters that are sort of related to the general
15 issues starting from page 142. It's really from --
16 well, I guess you signed the -- you signed that as
17 well, page 142 to 148.

18 A. (Pause.) Yes.

19 Q. And then there are additional letters from
20 page a hundred and -- from either you or both you and
21 EMI from page 150 or just quite a few pages after
22 that, does that sound right?

23 A. Can you tell me which letters you're talking
24 about?

25 Q. Well, if you -- you know what, we don't need

1 to -- we don't need to belabor the point.

2 And this -- this staff submittal also
3 included a link to the draft EIS, do you recall that?

4 A. No, but I'm -- I -- I wouldn't be surprised
5 if it did.

6 Q. Okay. Do you recall providing any other
7 written materials to board -- to the Board of Land
8 and Natural Resources for this agenda item in 2019?

9 A. No, I don't.

10 MR. FRANKEL: Thank you. No further
11 questions, Your Honor.

12 THE COURT: All right. One housekeeping
13 matter, Mr. Frankel. During that examination you
14 mentioned that as to AB -- this is an exhibit --
15 AB-165, 166, and 167, you thought they were not in
16 evidence. My unofficial notes show that I allowed
17 them for the limited purpose to show that A&B was
18 making efforts. I'm going to check with the court
19 clerk, 'cause her notes are official, but that's what
20 my notes show.

21 MR. FRANKEL: No, you're -- you're exactly
22 right, Your Honor. From my -- I mean, they're -- I
23 guess they're pseudo evidence -- I don't know how
24 to -- yeah, you're -- the way you said it is -- I was
25 using a shorthand.

1 THE COURT: Okay. Got it. All right. So
2 let's see... try and anticipate our order. Ms. Ching
3 is not on Maui, so that means Mr. Rowe is not the
4 last, right, that's our rule. So I think we do -- I
5 think we do the State first, right?

6 MR. WYNHOFF: I'm happy to -- to tell Your
7 Honor that I don't have any ques-- anymore questions,
8 so the order's fine. Thank you, Your Honor.

9 THE COURT: I'm sorry, we should've done the
10 County first, but it doesn't matter. Okay. Go
11 ahead, Mr. Rowe.

12 MR. ROWE: Thank you, Your Honor. I don't
13 have any further questions for this witness.

14 THE COURT: All right. Back to you,
15 Mr. Schulmeister.

16 MR. SCHULMEISTER: Thank you.

17

18

REDIRECT EXAMINATION

19 BY MR. SCHULMEISTER:

20 Q. We had an issue yesterday with the copy that
21 we had submitted of AB-21, which was -- there was
22 part of the -- a couple of pages were cut off, so we
23 e-mailed everyone. We found a good clean copy with
24 pages not cut off, and it's a color copy, it's a
25 file-stamped copy. So I'm going to ask the witness

1 to look -- and we've marked that as AB-21A, and we've
2 updated our witness list, so I'd like to ask the
3 witness to look at Exhibit AB-21A.

4 THE COURT: All right. Let me first check.
5 Did we get a copy of that?

6 THE BAILIFF: Yes.

7 THE COURT: Yes. Go ahead.

8 THE WITNESS: I have it.

9 Q. (By Mr. Schulmeister) Okay. You know what
10 Exhibit AB-21 is?

11 A. Yes, it's the scope of the EIS that we
12 submitted to the Board of Land and Natural
13 Resources --

14 Q. And --

15 A. -- in order.

16 Q. And when was that?

17 A. June 2016.

18 Q. Okay. And June 9th, 2016, to be specific?

19 A. Oh, sorry. Yes, June 9, 2016.

20 Q. Okay. And if you look at the -- and is
21 there an attachment to the submission?

22 A. The Exhibit A, the scope of services?

23 Q. Yes.

24 A. (Pause.) Yes.

25 Q. And is that the scope that you recall having

1 been prepared and submitted to the Board of Land and
2 Natural Resources on or about June 9th of 2016?

3 A. Yes.

4 MR. SCHULMEISTER: Okay. At this time I'd
5 like to move Exhibit AB-21 into evidence.

6 THE COURT: Okay. For --

7 MR. SCHULMEISTER: 21A.

8 THE COURT: For what purpose?

9 MR. SCHULMEISTER: This is to -- again, it's
10 part of the history of -- of the efforts made,
11 including the efforts to submit an environmental
12 impact statement.

13 THE COURT: All right. I just want to be
14 clear though. But you're not asking the Court to
15 admit it for purposes of the truth of everything in
16 it, correct?

17 MR. SCHULMEISTER: It's hard for me to parse
18 it that way. I mean, it's just a submittal of a
19 scope. I mean, a scope is just a proposal. I don't
20 know what the truth of -- we would be talking about
21 it being for the truth of it, but --

22 THE COURT: I'm sure there are a lot of
23 statements in it, and so my job is to make sure the
24 record's clear on what those statements are being
25 offered for. If you're simply offering them for the

1 purpose that they were attached, okay. If you're
2 going to ask the Court --

3 MR. SCHULMEISTER: Yes.

4 THE COURT: -- to find that they're for its
5 truth, we have to have a deeper discussion about
6 that.

7 MR. SCHULMEISTER: All right. I'm asking
8 for it to be admitted to show that this was submitted
9 to the board on this date, that's -- that's the
10 purpose.

11 THE COURT: Okay. Got it. All right.
12 Mr. Frankel, your position.

13 MR. FRANKEL: So relevance, that's my
14 primary objection. There's a lot of hearsay. The
15 map that we talked about is included in there. So
16 I'm -- I'm very concerned about it being introduced
17 indirectly. So those are -- foundation, hearsay,
18 relevance.

19 THE COURT: All right. Understood.
20 Mr. Wynhoff?

21 MR. WYNHOFF: No objection, Your Honor.

22 THE COURT: Mr. Rowe?

23 MR. ROWE: No objection, Your Honor.

24 THE COURT: So AB-21-A, the revised version
25 from the document that we dealt with yesterday, is

1 admitted, but again for the very limited purpose to
2 show that that document was actually submitted to
3 BLNR. This document is not being accepted by the
4 Court for the truth of any particular matter asserted
5 in it. All right. What's next?

6 (Exhibit AB-21A received in evidence.)

7 Q. (By Mr. Schulmeister) Yes. Now, Ms. Ching,
8 you're familiar generally with the Chapter 343
9 process for environmental impact assessments and
10 environmental impact statements; is that correct?

11 A. Yeah, generally, yes.

12 Q. Okay. And do you have an understanding
13 about what an environmental assessment is as opposed
14 to environmental impact statement?

15 A. Yes, I do.

16 Q. And what is it?

17 A. So it's an initial -- kind of a shorter EIS,
18 an initial assessment that you can draft and develop
19 and propose, and there could be a ruling of a
20 negative declaration, which means you don't need to
21 do a full-blown EIS.

22 Q. Now, at the beginning of this process in two
23 thousand -- I keep on forgetting if it's 2000 or
24 2001, when the application was made -- why was A&B
25 proposing that an EIS be prepared rather than just an

1 EA, environmental assessment?

2 A. We -- we wanted to do the full environmental
3 impact study. We didn't -- we wanted to move it
4 faster, and we didn't think it would -- we needed to
5 do the EA. We just wanted to get right into it. We
6 felt the subject matter at hand deserved the full
7 impact assessment, so we skipped the step of an EA.
8 Voluntarily.

9 MR. SCHULMEISTER: I have no further
10 questions.

11 THE COURT: All right. Thank you.
12 Mr. Frankel?

13 MR. FRANKEL: No further questions
14 necessary, Your Honor. Thank you.

15 THE COURT: Thank you. Mr. Rowe?

16 MR. ROWE: I have no further questions, Your
17 Honor.

18 THE COURT: Mr. Wynhoff.

19 MR. WYNHOFF: Nothing further, Your Honor.
20 Thank you.

21 THE COURT: All right. Ms. Ching, thank
22 you. Your testimony is concluded. You are excused
23 with the Court's thanks.

24 THE WITNESS: Thank you.

25 THE COURT: All right. What's the status on

1 the next witness?

2 MR. SCHULMEISTER: The next witness is Mark
3 Vaught, and he's scheduled to testify on Maui. I
4 assume he's there, but I don't know -- maybe Mr. Rowe
5 can tell me.

6 MR. ROWE: Yes, Your Honor, he's waiting in
7 our -- in our foyer.

8 THE COURT: Okay. Well, it's 9:30. I know
9 we've only been going a half an hour, but why don't
10 we take a break now and then we don't have to
11 interrupt his testimony just after, you know, five
12 minutes or so. So we'll take a... let's see. Let's
13 take an eight-minute break. We'll see you at 20
14 minutes of. All right. We're in recess. Thank you.

15 (Recess taken.)

16 THE COURT: We're back on record. FTR on?

17 THE BAILIFF: Yes.

18 THE COURT: Ready to go. All right.

19 Mr. Schulmeister, your next witness.

20 MR. SCHULMEISTER: Mark Vaught.

21 THE COURT: Thank you. Sir, this is Judge
22 Crabtree speaking. Can you hear me all right?

23 THE WITNESS: Yes, I can. Thank you.

24 THE COURT: Okay. Good morning. Thank you
25 for coming in. Wait a minute --

1 THE WITNESS: Good morning.

2 THE COURT: -- Ms. Goldman has her hand up.
3 Go ahead, Ms. Goldman.

4 MS. GOLDMAN: Pardon the interruption, Your
5 Honor. Just hoping to do a sound check since I'm the
6 one working with this witness.

7 THE COURT: Okay. You're coming through
8 loud and clear right now.

9 MS. GOLDMAN: Very clear?

10 THE COURT: Very clear.

11 MS. GOLDMAN: Okay, great. Thank you.

12 THE COURT: All right. Thank you. All
13 right. So back to you, Mr. Vaught.

14 I'm going to ask you to be sworn in first,
15 so here comes my court clerk to swear you in.

16 (The witness was sworn.)

17 THE COURT: Thank you, Mr. Vaught. This is
18 Judge Crabtree again. Would you please state your
19 full name, and then spell it so our court reporter
20 gets it accurately. Thank you.

21 THE WITNESS: Yes. My name is Mark Vaught,
22 M-A-R-K, last name is V, like in Victor, A-U-G-H-T.

23 THE COURT: Thank you very much, sir.
24 Mr. Schulmeister, go ahead.

25

1 MARK VAUGHT,
2 called as a witness by Defendant A&B, having been
3 first duly sworn, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SCHULMEISTER:

7 Q. Good morning, Mr. Vaught. So could you give
8 us a little background, where you're from, basically
9 your educational background, and just a brief summary
10 of your work history?

11 A. Sure. I was born here on Maui, raised here,
12 grown up in -- grew up in Kihei, moved to Wailuku
13 later on.

14 Went to school here on Maui and then went to
15 University of Hawai'i Hilo, where I received a
16 bachelor's degree in communications.

17 And then after school, came back, had
18 various odd jobs, and then took a job with Hawaiian
19 Commercial and Sugar Company working on their
20 plantation in the irrigation department. Worked
21 there for about six years, and then I was transferred
22 to -- by the company I was transferred to East Maui
23 Irrigation Company, where I've spent the last years
24 of my career, maybe 21 or 22 years of my career.

25 Q. Okay. So about when was it that you started

1 at EMI?

2 A. I would say it was around 19... 1998 or '99.

3 Q. Okay. And what's your current title and
4 responsibilities?

5 A. So my current title is director of water
6 resources for Mahi Pono, which includes overseeing
7 EMI and then also the water resources on the Mahi
8 Pono farm to the west of Maliko Gulch.

9 Q. Okay. And prior to the Mahi Pono
10 acquisition, what was your position at EMI when it
11 was still run by A&B?

12 A. I was the manager of EMI, exclusively the
13 manager of EMI when it was owned by A&B, and that was
14 prior to the shut-down -- or not the shut-down, prior
15 to the acquisition. And then before that I was the
16 operations manager when my former supervisor, Garrett
17 Hew, was our manager. I was just the operations
18 manager and took care of all the field operations.

19 Q. Okay. And field operations at EMI include
20 what at that time?

21 A. You know, collecting water, collecting ditch
22 water, or collecting stream water for our ditches,
23 making sure that we have enough water for our
24 irrigation requirements on the farm, doing
25 maintenance along roads and ditches, and, you know,

1 just land matters as well. You know, with a lot of
2 different properties we had to do, you know, various
3 easements and -- and land leases and such.

4 Q. Okay. So -- so do you still have those
5 responsibilities now that -- you know, after the
6 acquisition?

7 A. Yes, I do.

8 Q. Okay. And -- and are you familiar with how
9 the -- the ditch system is currently managed and
10 operated?

11 A. Yes, I do.

12 Q. Okay. So -- and has that changed since the
13 shut-down of sugar, the way it's managed and
14 operated?

15 A. Yes, it has.

16 Q. Could you just describe briefly how so?

17 A. It's changed considerably since the
18 shut-down of sugar. We don't require nearly as much
19 water for our irrigation, so we divert much less
20 water now than we did in the past.

21 Q. Okay.

22 A. And that involves a lot less -- a lot less
23 of the diversions, but the tendency is to make a
24 little more work, I should say.

25 Q. What do you mean by that?

1 A. Just the level of management, making sure
2 that we are diverting only the amount of water that
3 is necessary for us to -- to meet our requirements
4 for irrigation.

5 Q. And are you familiar with the interim
6 instream flow standards that were established by the
7 water commission in 2018?

8 A. Yes, I am.

9 Q. And is one of your responsibilities to make
10 sure that those are complied with?

11 A. Yes.

12 Q. And do you insure that they are complied
13 with?

14 A. Yes.

15 Q. And how do you do that?

16 A. We've instructed everyone on our teams at
17 EMI, they're all aware of what streams have IIFS
18 settings for them, and they are to make sure that
19 every time they're out, that whenever possible,
20 whatever we can do to make sure that the IIFS is met
21 in all of those streams, then they're instructed to
22 do so. And if something goes wrong or something
23 occurs out in the field, then they're to let us know,
24 we're to come up with a plan to be sure we can comply
25 with the IIFS.

1 Q. Okay. Now, you understand the system very
2 well because you've been out in the field and you're
3 familiar with the gates and the settings and
4 everything else, but for people who haven't seen the
5 system, it's not apparent at all how it's operated.
6 Could you describe a little bit physically how
7 adjustments are made in order to alter how much water
8 is being taken into the system and conveyed to the
9 west?

10 A. Sure. I'll try to paint this picture. So
11 as you can imagine, streams run mauka to makai along
12 the entire eastern boundary of Maui. And our ditches
13 run perpendicular along I guess the gradient that
14 works from east to west all the way to Maliko Gulch,
15 starting at Makapipi and to Maliko. And then we have
16 a system of ditches that run perpendicular to the
17 streams, and where each ditch intersects a stream,
18 wherever we have an intake, there's generally a gate
19 there that opens to the intake, or the intake takes
20 in water directly and then there's a gate that can
21 release that water back into the stream. So if that
22 gate -- if the intake gate is open -- if it has an
23 intake gate, there's a dam, an intake gate, water
24 goes into the intake. If there's no intake gate and
25 there's a grate, for instance, there's a dam and a

1 grate, water would fall in there, but we would have a
2 gate that we could use to release that water if it
3 were necessary. And that's generally how water falls
4 into an intake, and it goes from the intake into the
5 ditch or directly into the ditch.

6 Q. Now, these gates that you've mentioned, both
7 the intakes and the -- the gates where you say you
8 can release, are those sometimes referred to as
9 fluice gates, F-L-U-I-C-E?

10 A. Yes, that's correct.

11 Q. What is a fluice gate?

12 A. A fluice gate is just a steel gate, a
13 physical gate that's on a ditch that we can use to
14 open that up and either release the contents of the
15 ditch, or whatever water went into the intake, we can
16 release that back into the stream.

17 Q. Okay. Now, this opening and closing of
18 these gates, can this be done remotely?

19 A. No, not out in East Maui. They're --
20 physically somebody has to show up to each one of
21 these ditches and manipulate them in order for them
22 to work.

23 Q. And so -- so you have a crew that is
24 responsible for -- for doing that under your
25 supervision?

1 A. Yes, I do.

2 Q. And so if adjustments have to be made,
3 what -- what's entailed, what does the crew have to
4 do?

5 A. They usually go out in teams of two, and
6 they work along the entire ditch system and either
7 physically open or close those gates to make sure
8 that the amount of water -- number one, that the IIFS
9 met its -- is met if there's an IIFS set on that
10 stream; and, number two, if we have enough irrigation
11 water, then that gate is to be closed, but they need
12 to physically go out and manipulate these gates.

13 Q. Okay. So -- and as an example, can you give
14 me an example of how much time that would take? In
15 other words, if you direct a crew or you need to go
16 to this particular diversion and modify it or check
17 it, I mean, how much time does that take? How do
18 they get there?

19 A. So depending on the distance, they all drive
20 four-wheel drive vehicles, company vehicles, they
21 take them up into the watershed. They may have to
22 drive to a specific location, and it may take an
23 hour, an hour and a half to get to any individual
24 location. And they manipulate that gate to make sure
25 that amount of water goes in there, but they have to

1 do that along the stream of intake. So we would send
2 out several crews to go in and manipulate gates to
3 make sure we're just drafting the amount of water
4 that we need and that the rest of it can go
5 downstream and stay in the stream course.

6 Q. Okay. So, generally, as a management
7 objective, do you try to minimize the number of field
8 adjustments that have to be made?

9 A. We try to minimize the amount of field
10 adjustments, yes, but that -- you know, a lot of
11 times that's just mother nature determines what we
12 can or can't do. You know, if she decides it's going
13 to rain, then we need to go out and manipulate the
14 gates so that we're not taking more water -- we're
15 not diverting more water than we need.

16 Q. So -- so if -- I mean, sometimes is the --
17 strike that.

18 Is the weather always predictable?

19 A. No, not at all.

20 Q. Do you have situations where, you know,
21 squalls blow in and -- and water levels rise quickly
22 and it presents a challenge for management?

23 A. Yes, that's correct.

24 Q. So what happens when more water comes in
25 before you can make adjustments to limit the amount

1 of water that comes in, what do you do with it?

2 A. Well, the water -- a lot of it the water
3 ends up going down the stream course, and then for
4 the rest of it we -- for a short period we have to
5 either store it or make sure that it goes somewhere
6 safe until we can get out and make the adjustments
7 that we need to make.

8 Q. Okay. All right. So has there been a
9 change from the time that sugar was being cultivated
10 to the present time in terms of which portions of the
11 license areas the water is principally being diverted
12 from?

13 A. Yes, there's been a significant change in
14 how we operate the system from the time sugar was in
15 operation to now.

16 Q. And could -- and what -- can you describe
17 what the significant change is?

18 A. Significant change is just that when we were
19 in sugar and mass producing sugar and growing sugar
20 cane cross 36,000 acres, sugar cane is a very thirsty
21 crop and so we needed as much water as we could, so
22 we would generally just leave all of the ditch gates,
23 you know, the ones on the intakes open so that we
24 could draw out water to bring across to the sugar
25 plantation. But now, with the limited acres that we

1 are irrigating for now and then the amount of cattle
2 that we do have on the farm, we don't need near as
3 much water, so we try to make sure that the water now
4 is, you know, what we need to carry out our operation
5 as far as irrigation and reservoir and, you know,
6 storage for fires and -- and industrial uses and fire
7 protection. We try to make sure that we have enough
8 water for that, but once we've gotten to that amount,
9 then we let the rest stay in the streams.

10 Q. Now, during sugar, the water was being
11 diverted in this manner that you just described from
12 all four of the license areas; is that right?

13 A. That's correct.

14 Q. What about today?

15 A. Today we mainly focus on diversions in the
16 private land area and in the Huelo license, which is
17 a license that's the furthest west of the four
18 license areas.

19 Q. Okay. So -- so the -- to the extent that
20 the system extends further east all the way to
21 Makapipi, are the diversion intakes in Honomanu,
22 Keanae, Nahiku areas, are those open or closed?

23 A. The intakes are closed. The gates on the
24 streams and on the dams are all open so that the
25 water can stay in the streams of origin.

1 Q. And as far as the compliance with the
2 interim instream flow standards, so that pretty well
3 insures that all the restoration amounts that have
4 been ordered for those license areas are currently
5 being complied with; is that correct?

6 A. That's correct.

7 Q. But the Huelo area -- so the Huelo area
8 is -- as far as the license areas go, that's the area
9 where the current water that's being imported is
10 coming from, there plus a little bit from the -- you
11 mentioned streams west of the license area; is that
12 right?

13 A. Yes.

14 Q. Okay. So -- so would you -- could you
15 estimate like what percentage of total EMI
16 collections are currently coming from the Huelo
17 license area?

18 A. I -- I would say most of it. Most --
19 most -- all of it is coming from the Huelo license
20 area and, like I said, a small portions is coming
21 from the land that is to the -- the west of the
22 license area.

23 Q. Now, are you familiar with the fact that 12
24 of the streams that are in the Huelo license area are
25 streams that the 2018 decision and order did not

1 require any restoration, are you familiar with that?

2 A. Yes.

3 Q. And so are those 12 streams currently being
4 diverted?

5 A. Some of them may be currently -- may
6 currently be diverted, yes, I'm pretty sure they're
7 being diverted.

8 Q. Did -- is water collected from those --
9 well, strike that. Honopou Stream is also in the
10 Huelo license area, correct?

11 THE COURT: Could you spell, please?

12 MR. SCHULMEISTER: H-O-N-O-P-O-U.

13 THE COURT: Thank you.

14 Q. (By Mr. Schulmeister) You can answer it
15 now.

16 A. Yeah, Honopou Stream, yes, is in the Huelo
17 license area.

18 Q. But that's one of the res-- full restoration
19 streams, right?

20 A. Yes, according to the 2018's decision and
21 order, it's slated for -- being slated for full
22 restoration.

23 Q. Okay. And are you diverting water from
24 Honopou Stream currently?

25 A. No, we are not.

1 Q. Okay. And Hanehoi Stream is also in the
2 Huelo license area? That's H-A-N-E-H-O-I.

3 THE COURT: Thank you.

4 THE WITNESS: Yes, that's correct.

5 Q. (By Mr. Schulmeister) And are you -- are
6 you currently diverting from Hanehoi Stream?

7 A. For the most part we are not. We sealed the
8 intakes along Hanehoi Stream, but there are a couple
9 of small -- they're registered intakes, but they
10 technically only operate when there's direct rainfall
11 in the area. Other than that, those aren't the main
12 Hanehoi Stream they contribute. There's small
13 tributaries to Hanehoi Stream, but we have plans to
14 alter those areas to be sure that that stays in the
15 stream of origin as well.

16 Q. Okay. So is it fair to say that most of the
17 water that is currently being diverted from the
18 license areas by EMI is from 12 streams in Huelo that
19 were not ordered to be restored?

20 A. Yes, that's correct.

21 Q. Okay. Now, are you familiar with the way
22 that EMI measures or records the amount of water that
23 it collects from a ditch system?

24 A. Yes, I'm familiar with the -- how we do
25 that.

1 Q. And could you describe that, please?

2 A. Sure. So at locations that were selected
3 long before I started working here, they set up
4 gauging stations that have collection pipes within
5 the main ditch that they measure, or a control
6 section within the ditch that they're measuring, that
7 lead to a station house with a stilling well in it.
8 It's just a collection area that keeps the water --
9 keeps the turbulence very minimal in the water, and
10 all it does is rise and drop with the amount of water
11 that's in there. Within there there's a float system
12 that operates an encoder, they call it a shaft
13 encoder, and the shaft encoder records the height of
14 the water in the stilling well, which is equivalent
15 to the height of the water in the ditch or any
16 control pipe.

17 So once that water's recorded, there's a
18 program that's uploaded into a data logger that's
19 actually physically on scene there, and that data
20 logger records every, I want to say, 10 or 15 minutes
21 the height of the water that's in that stilling well,
22 and they have a record of how much water is passing
23 that area with a rating table that we can refer to,
24 and the data logger transmits information or stores
25 information that we get from it.

1 Q. Okay. And -- and how does the -- is that
2 information recorded and tracked at -- at EMI's
3 office?

4 A. Yes.

5 Q. How?

6 A. So we have the ability to call the stations
7 to make sure -- to check how much water is passing by
8 each one of these stations on any given moment, and
9 then the data logger stores that information. And
10 once a month we go out and retrieve that data, we
11 send somebody out physically to go out and retrieve
12 that data from the site and bring it back to the
13 office, and then we use that information to generate
14 a report that we send to the water commission every
15 month.

16 Q. Okay. Do you also maintain a Excel file
17 that -- on the annual deliveries, total annual
18 deliveries at Maliko Gulch?

19 A. Yes, we update -- we update an Excel file.

20 Q. And that -- and how long has that been going
21 on?

22 A. You know, I'm not a hundred percent sure. I
23 want to say since, like, 1925 I would say, so near a
24 hundred years.

25 Q. The Excel file, I mean, you're talking about

1 the data or you're talking about the Excel file?

2 A. I'm talking about the data, I apologize.

3 We've gone back and entered it into the Excel file,
4 but the Excel file I -- was probably since the early
5 2000s, when Excel was developed.

6 Q. All right. So I'm going to ask you to look
7 at Exhibit... AB-38. AB-38. I see Mr. Rowe
8 waving -- waving his hand.

9 THE COURT: Mr. Rowe, go ahead.

10 MR. ROWE: Yes, sorry. I forgot to mention
11 earlier my assistant Candace Stahl is in the
12 conference room with me assisting with exhibits. I
13 just wanted the Court to be aware.

14 THE COURT: All right. Thank you.

15 THE WITNESS: Okay. I have the exhibit in
16 front of me.

17 Q. (By Mr. Schulmeister) Okay. And what is --
18 do you recognize it?

19 A. Yes, I do. This is a spreadsheet that we
20 keep and we update. We've entered all the data from
21 1925. And we keep this spreadsheet for reference.
22 We continually update it.

23 Q. Okay. Did you cause this spreadsheet to
24 recently be updated?

25 A. Yes.

1 Q. Okay. And so through what date is it now
2 current?

3 A. Through June of 2020.

4 Q. Okay. And is this -- this spreadsheet a
5 record that EMI maintains in the regular course of
6 its business?

7 A. Yes, it is.

8 Q. And the people who make entries in this, is
9 it their job to -- to make these entries?

10 A. It's part of their job, yes.

11 Q. And the data that is input that you
12 mentioned, is that data -- at least since the
13 2000s -- is that data that is generated by the
14 gauging stations that you previously described?

15 A. That's correct.

16 Q. And is there anything that EMI does
17 periodically to validate or calibrate the gauging
18 stations to insure their accuracy?

19 A. So once a month when our employee goes out
20 to retrieve data from the stations, they go back and
21 look at the staff plate, they call it a staff plate.
22 That's just a measuring device that's used that's
23 located in either the well or the ditch. They use
24 the staff plate and then they check the staff plate
25 against the accuracy of the reading in the station

1 house at that moment. If they're off a little bit,
2 then they'll reset it to exactly what the staff plate
3 is reading. And that's for all of our stations, but
4 for the four stations that collect water at Honopou,
5 which is the end of the state water license, we fund
6 a cooperative stream gauging program with the DLNR
7 and the USGS, and the USGS comes out quarterly and
8 they do their own measurements and validate the
9 accuracy of our rating tables.

10 Q. And what is a rating table?

11 A. A rating table is a chart that -- it's
12 basically -- how do I explain it? It's a table that
13 explains at each level on a staff plate how much
14 water you have flowing by at any given moment. So it
15 measures volumes flowing by there at any given
16 moment. This was rated for a million gallons a day.
17 A lot of people deal with cubic feet per second,
18 which is generally what the water commission or the
19 USGS deals with, but we ask for a million gallons per
20 day, that's just -- I guess it's an old plantation
21 practice, I'm not sure. But they measure for
22 accuracy and then they let us know what those -- what
23 their -- what their findings are.

24 Q. When you say "they," you're referring to
25 somebody from the USGS?

1 A. That's correct --

2 Q. United States --

3 A. -- US --

4 Q. United States Geologic Survey?

5 A. Yes, water resources division.

6 MR. SCHULMEISTER: Okay. At this time I'd
7 like to move Exhibit AB-38 into evidence.

8 THE COURT: Mr. Frankel.

9 MR. FRANKEL: (Pause.)

10 THE COURT: I'm sorry, if you said anything,
11 you're muted. I didn't hear anything, Mr. Frankel.

12 MR. FRANKEL: Sorry. I'm going to object
13 based on relevance, hearsay, lack of foundation.
14 Thank you, Your Honor.

15 THE COURT: Okay. And, let's see,
16 Ms. Goldman.

17 MS. GOLDMAN: The State supports entering
18 trial Exhibit AB-38 into evidence under exception --

19 THE COURT: Thank you.

20 MS. GOLDMAN: -- to the hearsay rule.

21 THE COURT: Thank you. Mr. Rowe?

22 MR. ROWE: Your Honor, we support the entry
23 of this exhibit into the record.

24 THE COURT: All right. Thank you. The
25 objection is sustained. I mean, you're close,

1 Mr. Schulmeister, but you're not there yet, I'm
2 sorry. And I wish I could explain my reservation,
3 but I don't think I'm supposed to do that.

4 MR. SCHULMEISTER: Let me ask another
5 question or two.

6 Q. (By Mr. Schulmeister) Mr. Vaught, the --
7 the information, the data that is collected from the
8 gauging stations you'd described and is recorded by
9 EMI, is that the best available information as to
10 what is flowing in the ditches as of the dates that
11 the measurements are taken?

12 A. Yes, that's correct.

13 Q. Okay. I mean, can you think of any other
14 source of information that would be more reliable or
15 more accurate than this?

16 A. Not currently. We're not set up for that.

17 Q. Okay. And -- and the data that's been input
18 in here, and particularly focusing on the data that
19 is reflected in here that was collected and recorded
20 since you started in -- at EMI in the mid 2000s, is
21 that data all input by employees whose job it was to
22 input this data as it was received?

23 A. Yes, it was input by EMI employees who
24 received the data and transcribed it and put it
25 into -- take it from one medium and put it into

1 the -- into the spreadsheet, yes.

2 MR. SCHULMEISTER: Okay, all right. I would
3 again move Exhibit AB-38 into evidence.

4 THE COURT: All right. And the -- I believe
5 the cut-off for when Mr. Vaught was manager was... I
6 don't think I have that in my notes. You said early
7 2000s, but I'd like -- I'd like to calibrate that a
8 little better.

9 Q. (By Mr. Schulmeister) Mr. Vaught, could you
10 identify the date that you worked at -- began working
11 at EMI with any sort of managerial responsibility
12 related to the -- the collection and recording of
13 this data?

14 A. So collection and recording of data, I
15 became the manager in about 2005 or 2006. However,
16 from the day I started, the collection of this data
17 became my responsibility, so I actually physically
18 was the guy who showed up at all of these different
19 sites every month and collected the data from the
20 station, brought it back to the office so that it
21 could be inputted into the sheet, from the day I
22 started. So that was in early 1999, I want to say,
23 probably January 1999 that that became my -- my
24 responsibility.

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

1 Mr. Frankel.

2 MR. FRANKEL: Same objection, relevance,
3 hearsay, lack of foundation. Thank you, Your Honor.

4 THE COURT: Ms. Goldman?

5 MS. GOLDMAN: With this testimony regarding
6 the maintenance of these records in the regular
7 course of business and the recording of data close in
8 time to the information being generated, the State
9 urges admission of AB-38 as best use of evidence
10 under the same hearsay exception we'd mentioned.

11 THE COURT: Thank you. Mr. Rowe?

12 MR. ROWE: Thank you, Your Honor. We'd
13 agree with the State as to admissibility and entry of
14 this into the record.

15 THE COURT: All right. The Court agrees
16 that the additional information has met the criteria
17 for admission as business records, but only for the
18 time period starting January of 1999. So that -- so
19 the information in this chart from January '99
20 forward is received as an exception to the hearsay
21 rule as a business record, but otherwise the data is
22 not yet established, the truth of it is not yet
23 established.

24 Q. (By Mr. Schulmeister) Okay. Mr. Vaught,
25 could you look at Exhibit AB-39, please.

1 A. I have AB-39 in front of me.

2 Q. Okay. Do you recognize AB-39?

3 A. Yes.

4 Q. And what is it?

5 A. It's a table that displays how much water
6 was diverted and delivered through the EMI system
7 from 1925 through the current year 2020.

8 Q. Is there a relationship between Exhibit
9 AB-39 and Exhibit AB-38 that we just were looking at?

10 A. Yes. This was generated based on the
11 numbers that are reflected on the total column on the
12 column to the far right of AB-38.

13 Q. Okay. And was this done with an Excel
14 spreadsheet?

15 A. Was this created using the Excel spreadsheet
16 that we saw earlier --

17 Q. Yes.

18 A. -- is that your question? Yes, this was
19 created using the data that's on the Excel
20 spreadsheet on AB-39. Or AB-38, excuse me.

21 MR. SCHULMEISTER: Okay. So I'm going to
22 move Exhibit AB-39 into evidence.

23 THE COURT: The whole thing or just from
24 January '99 forward?

25 MR. SCHULMEISTER: I'm going to move the

1 whole thing in, but of course I'll accept whatever
2 the Court accepts. I'm going to reserve -- I'm
3 reserving my -- my record. I'm going to ask for the
4 whole thing to be admitted.

5 THE COURT: All right. Understood.
6 Mr. Frankel.

7 MR. FRANKEL: Well, I would have the same
8 objections, but in an effort to attempt to expedite
9 matters, what I'd like to offer is a stipulation that
10 AB-39 be offered in the same terms as AB-38,
11 particularly because it has units in it, which AB-38
12 does not, which I think would help people. But
13 that's an offer that I'm making that I would hope
14 that Mr. Schulmeister would accept.

15 THE COURT: I'm not clear on what the offer
16 is.

17 MR. FRANKEL: That AB-39 be accepted on the
18 same terms that AB-38 was, that the data from
19 January -- well, from 1999 on be admitted into
20 evidence only.

21 THE COURT: Well, Mr. -- I mean, I'll check
22 back with Mr. Schulmeister, but I doubt he's changed
23 his mind from 45 seconds ago. He's asking for the
24 whole thing.

25 MR. FRANKEL: My objections are relevance,

1 foundation, hearsay. Thank you, Your Honor.

2 THE COURT: Okay. All right. Ms. Goldman.

3 MS. GOLDMAN: State supports the admission
4 of AB-39 as simply a different way of presenting the
5 same information that was just substantively admitted
6 from AB-38, Your Honor.

7 THE COURT: Thank you. Mr. Rowe.

8 MR. ROWE: Thank you, Your Honor. The
9 County also supports admission of this into the
10 record.

11 THE COURT: All right. So the Court will
12 admit AB-39, but under the same limitations as AB-38,
13 namely from 1999 forward.

14 (Exhibit AB-39 received in evidence.)

15 Q. (By Mr. Schulmeister) Okay. Mr. Vaught,
16 you mentioned earlier that your responsibilities
17 currently include supervising and managing water
18 resources, both the -- on the EMI side of the system
19 to east of Maliko Gulch, as well as west of Maliko
20 Gulch, where Mahi Pono now is operating its farm; is
21 that right?

22 A. Yes, that's right.

23 Q. Okay. And in that capacity, is it your job
24 to interact with the farm managers to coordinate the
25 delivery of water for their irrigation needs?

1 A. Yes, that's part of my responsibility.

2 Q. Okay. Can you just describe, you know, how
3 that works, how you do that?

4 A. Okay. So basically we have a volume of
5 water, an amount of water flowing through the
6 ditches. Depending on the weather and what the
7 weather's doing at that time, we decide where we're
8 going to send the water. And usually we have
9 farms -- we have irrigation -- we have water resource
10 managers on the farm that help direct the water into
11 the supply ditches, the main supply ditches there, so
12 that they can get to the necessary crops or cattle
13 that they need to get water to and for all of the
14 different responsibilities we have for delivering
15 water.

16 Q. And does your responsibility include
17 managing the use of any reservoirs?

18 A. Yes, yes, it does.

19 Q. And how are the reservoirs managed and used?

20 A. They're -- you know, similarly, if we have
21 water to put into the reservoirs -- in other words
22 the system uses -- an irrigation system on a -- on a
23 particular field may use a certain amount of water.
24 We usually have to send a little bit extra water to
25 make sure that that level is maintained, it's not an

1 exact science. So what we do is we send a little bit
2 of extra water to an area. Anything that goes beyond
3 that is usually put in a reservoir so that we can use
4 it later on, or we keep it for fire protection or any
5 other uses that our res-- our reservoirs are
6 available for. Generally it's irrigation.

7 Q. All right. Now, are there reservoirs --
8 well, how do you track what's in the reservoir?

9 A. We have employees who physically go out and
10 take reservoir readings, make sure that we have --
11 how much water is in each reservoir so they are aware
12 of how much irrigation storage they have.

13 Q. Okay. And -- and you mentioned that water
14 in the reservoirs is also used for some other things?

15 A. Reservoir --

16 Q. Irrigating?

17 A. Yes, so irrigating is one of them, but
18 besides irrigation we have water through certain
19 reservoirs that we maintain water levels for so that
20 we have adequate water for fire protection or
21 industrial uses. For leases we have -- you know,
22 currently we have a tenant on the property that was a
23 carry-over tenant from when Mahi Pono bought the
24 property from A&B, they are currently farming. So
25 sometimes if we don't have adequate supplies, we use

1 our reservoir to supplement the irrigation water that
2 they use. And then, lastly, we, you know, work with
3 the Maui Fire Department, we're very close so we can
4 actually make sure that we have enough water in some
5 of our reservoirs so that if there are fires that
6 occur nearby, they're able to use those reservoirs
7 as -- as water supply for helicopter operations.

8 Q. Okay. Now, is that something new or has
9 that been going on for a long time?

10 A. It's been going on for a long time. Ever
11 since sugar shut down, we don't have our own
12 harvesting crew. So generally when the harvesting
13 crew was there, they would manage fires on the
14 property, which would generally not need the fire
15 department to respond unless it was something that
16 was, you know, larger than they could deal with. But
17 since sugar went out of business, we don't have that
18 department and we don't have that equipment
19 available. So fires on our property that go beyond
20 what we can handle or fires near our property, even
21 off our property, other public or private lands, we
22 try to make sure that there's water in the reservoir
23 so that the fire department has an adequate supply
24 for fire fighting.

25 Q. And how does the fire department use the

1 water?

2 A. So helicopters -- helicopters come in and
3 dip buckets into the reservoirs and then take those
4 out to the scene. And for them they select
5 which res-- we try to use the reservoirs that are on
6 the corners of our property or a little further out
7 so that if it's fire fighting that's off property,
8 the less amount of time they have between the time
9 they dip to the time they drop and the travel between
10 is just more times that they can dip and drop, the
11 more drops they can make just makes them more
12 effective.

13 Q. Okay. Now, was there a fire that involved
14 this sort of fire fighting activity around July 20th
15 of this year?

16 A. I don't know the exact date, but, yes, I
17 know there was a big fire this past year, yes.

18 Q. And how many acres were involved, do you
19 remember?

20 A. On our property, so it was -- it all stemmed
21 from one fire. It was one fire that started up in
22 the Haliimaile area and came down and burned I will
23 say just south of 5,000 acres.

24 Q. And -- and does EMI -- do you and EMI get
25 involved when a fire like that occurs and directly

1 coordinate with the fire department, the County of
2 Maui?

3 A. The EMI does not, but I do in my role as the
4 fire task force leader for Mahi Pono. I -- I get
5 involved directly with the fire department to provide
6 resources and information to them.

7 Q. Okay. What sort of -- could you give me
8 some specifics about the coordination that you --
9 you're describing?

10 A. So we have equipment like bulldozers and
11 loaders that are available for use during brush
12 fires, so I coordinate the use of that. I work with
13 the fire department to find out what resources they
14 need at any given moment, and then I coordinate
15 within our company, they let us know this is what we
16 need in this direction. And then we also have water
17 tankers that are available, three different water
18 trucks that we use to respond as well, and I let --
19 I'll let them know what we have available, and then
20 they let me know where to disburse our equipment.

21 Q. And the water that is used comes from the
22 reservoirs, some of -- some of the reservoirs that
23 you manage; is that right?

24 A. That's correct.

25 Q. And this is water that originates from East

1 Maui?

2 A. Yes, that's correct.

3 Q. Now, what about dust control, is that
4 another use of water that is delivered to the
5 reservoirs?

6 A. Yes. We also use water through our water
7 tankers. We will use water for dust control on the
8 farm.

9 Q. And describe what dust control is and how it
10 is conducted.

11 A. So we -- we have several water tankers, as I
12 mentioned, and they usually go around and fill their
13 tanks through stored reservoir water, which we have
14 standpipes connected to along our roadways. They
15 travel out to the standpipes, they fill the truck,
16 and then they respond to certain areas of fields that
17 excessive dust was blowing, and then they begin to
18 wet down those areas to try to minimize the airborne
19 dust.

20 Q. Has the issue of airborne dust increased
21 since the cessation of sugar cultivation?

22 A. Yes, it has.

23 Q. And -- and so the amount of water that's
24 needed to control dust has increased?

25 A. Since sugar, yes.

1 Q. All right. Have you -- are you familiar
2 with the quarterly reporting requirement of the Board
3 of Land and Natural Resources with regard to the
4 revocable permits that EMI and A&B have with regard
5 to the collection of water from East Maui?

6 A. I'm familiar with the report, yes.

7 Q. Okay. And I'd like you to look -- take a
8 look at Exhibit J-27.

9 A. (Pause.)

10 Q. Do you have that up?

11 A. (Pause.) Yes, I have J-27 in front of me.

12 Q. Okay. Do you recognize it?

13 A. Yes, I do.

14 Q. It looks like it's on East Maui Irrigation
15 Company, LLC letterhead. Is this something that you
16 have some involvement in the preparation of?

17 A. Yes.

18 Q. And is that your signature on the second
19 page?

20 A. Yes, it is.

21 Q. Okay. And then on page 8 there's a Exhibit
22 A with monthly water usage, you see that?

23 A. (Pause.) Yes, I see that.

24 Q. And were you involved in gathering
25 information that was used to complete this table?

1 A. Yes, I was involved.

2 Q. And -- and the same question with regard to
3 Exhibits B -- well, let's look at Exhibit B. Were
4 you also involved in gathering information that was
5 used to collect any of the information on this table?

6 A. I'm sorry, which table?

7 Q. Exhibit B on page 9.

8 A. (Pause.) I'm familiar with the tables.

9 Q. Okay. Do you know where the information
10 came from?

11 A. (Pause.) It comes from our farm -- our farm
12 team and our farm plan.

13 Q. Okay.

14 THE COURT: Mr. Schulmeister, we've been
15 going --

16 Q. (By Mr. Schulmeister) And then what about
17 Exhibit C --

18 THE COURT: Mr. Schulmeister, time out.
19 We've been going 50 minutes, five-oh. Is this a good
20 time for a break or do you want to wrap up any
21 particular area?

22 MR. SCHULMEISTER: Could I just ask one more
23 question on this exhibit and then we could take a
24 break?

25 THE COURT: Sure. Go ahead.

1 Q. (By Mr. Schulmeister) With regard to
2 Exhibit C on page 10, it says CWRM order status
3 update, do you see that?

4 A. I do.

5 Q. All right. Is the information in this table
6 something that you helped to -- to put together?

7 A. No, I did not put this together.

8 Q. Okay. Do you know where it came from?

9 A. I believe this came from the water
10 commission.

11 MR. SCHULMEISTER: All right. I have no
12 further questions for now. We can take a break.

13 THE COURT: Thank you.

14 MR. SCHULMEISTER: I will resume after the
15 break.

16 THE COURT: Got it. Okay. All right.
17 We'll take a 12-minute break, so we'll see you at
18 quarter of. We're in recess.

19 (Recess taken.)

20 THE COURT: We're back on record. FTR on?

21 THE BAILIFF: Yup.

22 THE COURT: Thank you. All right. So just
23 a brief public service announcement. I'm going to
24 have to leave at about five minutes to 12, 'cause I
25 have to be at a meeting that starts promptly at 12,

1 so I think I'm going to break up the -- I'm going to
2 take a break a little sooner than usual to kinda
3 split the remaining time in half. So, I don't know,
4 probably about quarter after or 20 after, somewhere
5 along there, we'll take a break instead of going all
6 the way to like the bottom of the hour.

7 Go ahead, Mr. Schulmeister.

8 Q. (By Mr. Schulmeister) Mr. Vaught, are you
9 familiar with the -- the issue of modification and
10 abandonment of diversion structures in the East Maui
11 ditch system in order to comply with the certain
12 aspects of the water commission's June 2018 decision
13 and order?

14 A. Yes, I'm familiar with that.

15 Q. And how so? I mean, how did -- do you have
16 any responsibilities with regard to that?

17 A. Yes, we -- we'll oversee the modifications
18 necessary within the limits of the permits and the
19 guidance from the water commission to insure the IIFS
20 has met each stream.

21 Q. Okay. Could you -- is that a process -- you
22 said permits, what permits are you referring to?

23 A. So with some of the modifications require
24 permitting or at least investigating to see whether
25 or not permits or permit exemptions can get granted

1 by -- you know, through the commission or the Army
2 Corps or other agencies involved in the modification
3 of these diversions and altering some of the streams.

4 Q. Okay. Could you look at Exhibit AB-36,
5 please?

6 A. (Pause.) Okay. I have -- I have AB-36 in
7 front of me.

8 Q. Okay. Do you recognize this?

9 A. Yes, I do.

10 Q. And what is it?

11 A. This is just a working tool that we use
12 to -- we introduce this to the water commission and
13 we kinda use this as a template to help us conduct
14 the work that we need to in the watershed to comply
15 with the IIFS.

16 Q. So this is a document that you've been
17 involved in the preparation and updating of?

18 A. Yes. This one is specifically for the
19 streams that are -- for full -- are slated for full
20 restoration.

21 MR. SCHULMEISTER: Okay. And the -- I'd
22 like to move Exhibit AB-36 into evidence.

23 THE COURT: All right. Mr. Frankel?

24 MR. FRANKEL: Objection, foundation,
25 hearsay.

1 THE COURT: Hang on. I'm trying to get a
2 little bit of grip on what this document is about.
3 Hold on just a second. (Pause.)

4 Mr. Schulmeister, I'm sorry, I should've
5 asked this before. For what purpose are you offering
6 this document?

7 MR. SCHULMEISTER: I'm offering this
8 document so that -- this is -- this is a document
9 that he uses to keep track of the status of -- of the
10 work that's being done to comply with diversion and
11 modifications that are necessary, and so I wanted to
12 get it into evidence and have him make -- you know,
13 explain what the status is.

14 THE COURT: Okay. But this one is for the
15 taro streams, right, so what's the link there?

16 MR. SCHULMEISTER: Well, the taro streams
17 have been ordered to be restored and there's
18 diversion modifications that are necessary. Hanehoi,
19 for example, that Lucienne de Naie testified about is
20 one of the taro streams, so there's been a lot of
21 evidence about this and whether or not EMI has been
22 diligent in complying, so I -- and there's -- the
23 next exhibit is for the remaining -- is just a
24 broader spreadsheet, AB-37, which I'm going to ask
25 about next, so I was going to take it one step at a

1 time.

2 THE COURT: Okay. So this is strictly about
3 the -- what I'll call the physical diversion
4 structures. We're not talking about water flow in
5 this exhibit, am I right?

6 MR. SCHULMEISTER: That's correct.

7 THE COURT: Okay.

8 MR. SCHULMEISTER: I probably should ask
9 Mr. Vaught that. Actually, I shouldn't answer too
10 quick here.

11 THE COURT: Okay. I'm tracking a little
12 better now. All right. Mr. Frankel, any -- any
13 comments you want to add based on the further
14 discussion that I had with Mr. Schulmeister?

15 MR. FRANKEL: Well, I clearly think it's
16 relevant. I didn't make the relevance objection, but
17 I think it is hearsay, lacks foundation. Thank you.

18 THE COURT: All right. Thank you. All
19 right. Ms. Goldman.

20 MS. GOLDMAN: State's position is that it's
21 admissible as a business record kept in the regular
22 course of business close -- recorded close in time to
23 when the information comes in.

24 THE COURT: Okay. Mr. Rowe.

25 MR. ROWE: Thank you, Your Honor. We

1 support admission of this exhibit.

2 THE COURT: So for now the objection is
3 sustained. I mean, basically all's the witness has
4 said is that this is a working tool that EMI has put
5 together. It doesn't quite check all the boxes.

6 MR. SCHULMEISTER: Okay.

7 Q. (By Mr. Schulmeister) Okay. Mr. Vaught, do
8 you have personal knowledge of the information that
9 is -- has been -- is reflected in Exhibit AB-36?

10 A. Yes, I do.

11 Q. And how did you acquire that personal
12 knowledge?

13 A. I helped create this sheet, and we also --
14 in the general description of work, we refer to that
15 so that we can complete some of our operational
16 modifications to meet the IIFS or with respect to
17 this document in the taro streams for full
18 restoration.

19 Q. Okay. Now, the information that's contained
20 in here includes parcel numbers, owner, latitude,
21 longitude, elevation, you know, diversion, structure
22 type, et cetera. So is this information that was
23 compiled from the records of East Maui Irrigation
24 Company?

25 A. This information I'm -- that information was

1 input by someone else, but I'm sure that those
2 records are -- I mean, we have that information in
3 our records, yes.

4 Q. Okay. And -- and the specific input that
5 you had into this document was what?

6 A. Naming each diversion -- or putting each
7 diversion on the list, and then we have the reference
8 to a corresponding registration number that is within
9 the water commission's submittal, and then at the
10 end, the general description of work, we help create
11 the general description of work based on -- or help
12 create that based on what each individual intake
13 looks like and what it would take to modify that to
14 meet the IIFS.

15 Q. And as the work was being completed, were
16 entries made to reflect the specific work that was
17 being completed?

18 A. Yes.

19 Q. And is that something you had personal
20 knowledge of and was involved in making sure it was
21 entered?

22 A. Yes.

23 Q. And is -- is this document or a version of
24 this document in this format something that you've
25 been regularly sharing with the water commission

1 staff that you are working with in terms of
2 completing these modifications?

3 A. We've shared this document with them
4 originally. And then we work on a very similar
5 document, we utilize a very similar document, almost
6 exactly what this is, and we update that one. And we
7 keep -- we keep the water commission apprised of any
8 work we do as far as completing the diversion
9 modification.

10 Q. And could you look briefly at Exhibit AB-37?

11 A. Yes, I have it in front of me.

12 Q. Is that the other document you were
13 referring to?

14 A. Yes.

15 Q. And this is for the non-- excluding taro
16 streams that were referenced in Exhibit AB-36?

17 A. Yes.

18 Q. All right. And do you have the same sort of
19 involvement and input in the creation and updating of
20 Exhibit AB-37?

21 A. Yes, that's correct.

22 Q. And are AB-36 and AB-37 documents that you
23 regularly use to update the water commission staff on
24 the progress on the modification and abandonment of
25 diversions?

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1 A. Yes, we use the information from these.

2 Q. For reporting? Okay.

3 MR. SCHULMEISTER: Okay. I would move the
4 admission of AB-36 and AB-37 into evidence.

5 THE COURT: I wanted to clarify something.
6 Mr. Vaught testified that some of the information in
7 this document was input by somebody else. That's
8 clearly something that needs to be figured out.

9 Q. (By Mr. Schulmeister) Mr. Vaught, who else
10 has input information into this document?

11 A. Sean O'Keefe.

12 Q. Who's Sean O'Keefe?

13 A. Sean O'Keefe is the environmental affairs
14 director for Alexander & Baldwin and has worked with
15 us for -- on the compliance with this -- with this
16 project.

17 Q. So do you and he coordinate on this?

18 A. Yes.

19 Q. Okay.

20 A. Actually, the physical modifications is
21 myself, but he helps us with compliance.

22 MR. SCHULMEISTER: Okay. All right. At
23 this time I would like to move Exhibit AB-36 and
24 AB-37 into evidence.

25 THE COURT: Well, we're going to do them one

1 at a time. Mr. Schulmeister --

2 MR. SCHULMEISTER: I'd like to move AB--

3 THE COURT: Mr. Schulmeister, I'm sorry, I'm
4 still a little confused. I'm sorry, just... is the
5 main purpose for this exhibit, the last column, the
6 general description of the work, so basically to give
7 the Court a summary of what work has been done and
8 work that has not been done?

9 MR. SCHULMEISTER: Yes, but of course you
10 can only make sense of that by looking at the first
11 column, which is --

12 THE COURT: Agreed. No, agreed, but I'm
13 just trying to segment this 'cause some of the middle
14 columns are very problematic. But the last column
15 and the first column, I'm going to focus on that for
16 a minute.

17 And Mr. Vaught, I thought I heard you say
18 something about the physical description of the work,
19 and I'm going to interpret that to mean the last
20 column here. Would you please describe your role in
21 the content of the last column?

22 THE WITNESS: So I -- I believe you're
23 referring to AB-36, Your Honor?

24 THE COURT: Yes, sir. Thank you.

25 THE WITNESS: Okay. So my role is I -- I'm

1 familiar with the actual physical operation of each
2 of these intakes, the physical makeup and operation
3 and how they work, so I make recommendations to -- on
4 the sheet or I make recommendations along with when I
5 meet with Sean O'Keefe as to the best way to modify
6 these so they can meet the intent of the IIFS and
7 meet all of the required standards, and then he takes
8 that information and he works with the various
9 agencies that may or may not require permitting or
10 exemptions. So I -- I just give him the suggestions
11 on how we're actually going to physically modify the
12 intakes.

13 THE COURT: Okay. So to use an example for
14 Honopou, H-O-N-O-P-O-U, the second row, the last
15 column says concrete over diversion intake grate. I
16 get what that's about. You're basically going to
17 stop the intake grate from grabbing all the water by
18 putting concrete over it, right?

19 THE WITNESS: That's exactly right.

20 THE COURT: Okay. But then up above it it
21 says completed February 19th of 2019. I need to know
22 where that comes from.

23 THE WITNESS: So if you go to the far -- if
24 you look in the left, the second column that's
25 highlighted in green, and that's a particular intake,

1 and if you follow it all the way to the right, that
2 was one of the ones that we completed the diversion
3 work to return and restore the water necessary, so we
4 put completed in there just because that was work
5 that we finished.

6 THE COURT: Okay. Well, I guess that's what
7 I'm asking. It probably seems so basic, but it's
8 something I need to know. How do you know it's
9 completed?

10 THE WITNESS: I direct our crew to -- to do
11 the work, and we document the work, and when they
12 finish it, they tell me it's done, and then we take
13 pictures of it and it's -- it's done. So that's how
14 I know it's completed, our crew lets me know they've
15 completed the modification as to the directions they
16 were given by myself, and they let me know the date
17 they finish it, and then I put completed in that
18 column.

19 THE COURT: Have you personally observed
20 that each of these completed tasks was, in fact,
21 completed or are you relying on what people told you?

22 THE WITNESS: I physically observe them.
23 Although I would rely on them. I trust the crew a
24 hundred percent, but I do physically go out and make
25 sure I've taken a look at these.

1 THE COURT: Oh, yeah, and let me be clear.
2 I didn't mean any kind of inference that you should
3 not trust them, that's not the point of this exercise
4 at all. It's just a rule of evidence about personal
5 knowledge, that's all.

6 THE WITNESS: Understand, Your Honor.

7 THE COURT: All right.

8 THE WITNESS: Thank you for the
9 clarification.

10 THE COURT: All right. All right. Thank
11 you. All right. Mr. Frankel, any further objection?

12 MR. FRANKEL: Your Honor, you know, if -- it
13 would be helpful if he would ask when this document
14 was completed, and if it is clear to all of us that
15 the last column where it doesn't say completed, it
16 hasn't been completed, I'm happy to stipulate it into
17 evidence. But I -- just to expedite things, we get
18 those two things very clear, what year this -- month
19 and year this was produced and whether when it
20 doesn't say completed, it hasn't been completed,
21 then, yeah, I -- I don't have a problem with the
22 document entering into evidence.

23 THE COURT: Well, I'm assuming if it doesn't
24 say completed, it either hasn't been completed or
25 Mr. Schulmeister's not trying to prove that it's been

1 completed. 'Cause I'm only going on where it says
2 completed.

3 So Mr. Schulmeister -- Mr. Schulmeister,
4 if -- are you asking the Court to take anything from
5 this last column other than what's been completed?

6 MR. SCHULMEISTER: Not at the moment, not
7 with this exhibit. I mean, this is -- I'm just
8 asking him about this exhibit.

9 THE COURT: All right. And then Mr. Vaught,
10 when was this document last updated?

11 THE WITNESS: Well, just -- I'm sorry, go
12 ahead.

13 MR. SCHULMEISTER: I mean, when you say the
14 document, I just want to be clear, are we talking
15 about this -- the spreadsheet that this is printed
16 from or this particular print-out?

17 THE COURT: No, we're talking about when was
18 this particular print-out last modified,
19 approximately.

20 THE WITNESS: I'm sorry, Your Honor, I -- I
21 don't know exactly when it was modified -- or when it
22 was updated last, but I do know it wasn't updated too
23 recently. We did some work late last year -- or late
24 last year and early this year that I see is not
25 reflected on here.

1 THE COURT: Okay. All right. Anything
2 further, Mr. Frankel?

3 MR. FRANKEL: Well, I'm going to object
4 based on hearsay, lack of foundation. I think maybe
5 during a break we can come to some sort of
6 stipulation, but I don't think we're quite there yet.

7 THE COURT: All right. Thank you.
8 Ms. Goldman?

9 MS. GOLDMAN: Nothing to add from the State.

10 THE COURT: Thank you. Mr. Rowe.

11 MR. ROWE: I -- I support these exhibits
12 coming into evidence, Your Honor.

13 THE COURT: All right. Court accepts
14 Exhibit AB-36, but for a limited purpose, namely the
15 status of the work done or not done on each stream as
16 shown in the last column that's labeled General
17 Description of Work. So to make it more concrete,
18 the Court will accept the data in this document as a
19 business record. Again, that's limited to the last
20 column. All right. Going forward. Go ahead,
21 Mr. Schulmeister.

22 (Exhibit AB-36 received in evidence.)

23 Q. (By Mr. Schulmeister) Okay. With regard to
24 Exhibit AB-37, Mr. Vaught, this -- this document
25 seems to have a different format in terms of columns

1 and color coding. Could you just briefly describe
2 how this document is different than the one that we
3 just discussed as AB-36?

4 MR. FRANKEL: Objection, Your Honor. It's
5 not in evidence yet.

6 THE COURT: Yeah, he -- it's -- that's a
7 valid point, Mr. Schulmeister. He should not be
8 reviewing the document before it's admitted, unless
9 he's just laying the foundation for it.

10 MR. SCHULMEISTER: Yeah. Well, that's what
11 I'm trying to do, is lay the foundation for it. I
12 mean, I don't know how he could --

13 Q. (By Mr. Schulmeister) Well, you recognize
14 Exhibit AB-37?

15 A. Yes, I do.

16 Q. Okay. And can -- and in general terms can
17 you describe what it is?

18 A. This document refers to the non-taro
19 streams, all the streams that are included in the
20 2018 water commission decision and order for IIFS.
21 This document contains all the streams that were
22 non-taro streams that required modifications to them.

23 Q. And were you -- is this a document that you
24 work with in terms of your responsibilities in terms
25 of complying with the water commission order?

1 A. Yes.

2 Q. And is this a document that you have had
3 input into, and have you input some of the
4 information into this document?

5 A. Yes, I have.

6 Q. And could you describe the extent of the
7 sort of information that you were personally involved
8 in inputting into -- or providing the information for
9 the input into this document?

10 A. The main thing I was involved in was the
11 column modification required to meet IIFS. As I'm
12 familiar with all of the individual intakes that are
13 listed here, I'm able to make recommendations on the
14 best way to meet the IIFS both operationally and I
15 think just for the entire system itself, to make
16 modifications to this to meet the IIFS and, if so, to
17 meet Department of Aquatic Resources recommendations
18 for fish passage.

19 Q. Okay. And is Mr. O'Keefe someone that you
20 coordinate in the preparation of and updating of this
21 document as well as AB-36?

22 A. Yes, that's correct.

23 Q. Okay. And has this document or versions of
24 it periodically been provided to water commission
25 staff and the water commission as permits have been

1 requested from the water commission to modify and
2 abandon various of these diversion structures?

3 A. I'm sure this -- this document was presented
4 to them in discussions, same as the other one was.

5 Q. Okay. And have you attended water
6 commission meetings where this information was
7 provided to the water commission to take action on
8 specific permit requests that EMI made with regard to
9 these modifications?

10 A. I have attended meetings, water commission
11 meetings, where they were taking into consideration
12 granting permits for our modifications.

13 Q. Okay. And is there going to be another
14 commission meeting this month on permit -- on some of
15 these permit applications?

16 A. I don't know that there will be a commission
17 meeting on the actual permit applications. I know
18 there's one coming up soon that's going to involve
19 reporting by the staff on the closures of some of
20 the -- like AB-36, the one that says completed, that
21 information will be provided to the current
22 commissioners so that they're able to see what was --
23 what work was done and so that we can move ahead.

24 MR. SCHULMEISTER: Okay. I'll move Exhibit
25 AB-37 into evidence for the purpose similar to what

1 we submitted AB-36 into evidence.

2 THE COURT: Well, we need to be a little
3 more specific than that. Let me take a stab at it
4 and you tell me if -- what you think. The -- is the
5 main purpose of moving this into evidence to
6 establish the status of the modifications as
7 reflected in the column entitled Modification
8 Required to Meet IIFS, or is there some other part of
9 this document that you're going to be relying on
10 later in the case?

11 MR. SCHULMEISTER: Well, I mean, certainly
12 the -- the column that you referred to, but I think
13 also just to show that EMI is in the process of
14 making an organized and orderly -- a program of
15 addressing the -- the specific diversions and
16 following through on the modifications required to
17 comply with the IIFS.

18 THE COURT: I'm not sure how to interpret
19 that, frankly. So I'm going to stick with my
20 original description of that column entitled
21 Modification Required to Meet IIFS.

22 The -- and Mr. Vaught, similar to the
23 questions I asked you before, do you have personal
24 knowledge of the modifications that -- that are
25 described in that column entitled Modification

1 Required to Meet IIFS? For example -- for example,
2 the very first row for Makapipi, it says loose gate
3 has been completely removed and the intake windows
4 will be sealed with concrete. Is that something you
5 have personal knowledge of, sir?

6 THE WITNESS: Yes, I do.

7 THE COURT: And similar with the other
8 entries in that column, do you have personal
9 knowledge of all of it?

10 THE WITNESS: Yes, I do.

11 THE COURT: All right. Thank you. All
12 right. Mr. Frankel?

13 MR. FRANKEL: Your Honor, as long as the
14 last set of columns, the approvals required, are
15 excluded, we're fine with -- we're willing to
16 stipulate the exhibit into evidence. Just the
17 approval required part he doesn't have personal
18 knowledge of and hasn't testified to, and so that
19 would -- that would be what we would suggest. Other
20 than that, we'll object based on foundation, hearsay,
21 et cetera. Thank you.

22 THE COURT: All right. Understood.
23 Ms. Goldman? Sorry, you're muted.

24 MR. SCHULMEISTER: The camera's going off
25 also. I don't know if it --

1 THE COURT: I think Mr. Frankel just dropped
2 off. I got a weird message that says low bandwidth
3 and then he disappeared.

4 MR. SCHULMEISTER: I can see Mr. Frankel but
5 I can't see Melissa.

6 THE COURT: All right. Well --

7 MR. SCHULMEISTER: I can't see the Court
8 either.

9 THE COURT: That's a good thing.

10 All right. Let's take our -- this is about
11 the time I wanted to take a break anyway, so let's
12 just take a break. We'll go into recess and we'll
13 try and get the text stuff organized. All right.
14 We're in recess.

15 THE BAILIFF: Until what time?

16 THE COURT: Until what time? I'll just
17 stand by. You folks report back when you get the
18 text stuff sorted out, but let's aim for no later
19 than 11:30. All right? Thank you. We're in recess
20 until 11:30, or sooner if we can get everything
21 organized before then. Thank you. We're in recess.

22 MR. FRANKEL: Thank you.

23 (Recess taken.)

24 THE COURT: We are back on record. FTR is
25 on. All right. I think we were... I think we were

1 actually between a question and an answer when the
2 lights went off. So let's -- whoever asked the
3 question, why don't you repeat it.

4 MR. SCHULMEISTER: Well, I assume it was me
5 since I'm doing the questioning. And I actually
6 thought -- I'll withdraw it if there was an
7 unanswered question. I thought we were on the verge
8 of hearing the Court's ruling on my motion to admit
9 Exhibit AB-37.

10 THE COURT: All right. Mr. -- I'm sorry,
11 Mr. Frankel, did you get a chance to say everything
12 you wanted to say about AB-37? I think you're muted.

13 MR. FRANKEL: I'm sorry. I think I had
14 pointed out that we were not -- the approval required
15 columns. There has not been sufficient foundation
16 laid regarding them, but we were willing to accept
17 the remainder of the document into evidence.

18 THE COURT: All right. And -- that's right.
19 I think I was asking Ms. Goldman her position when
20 the lights went out. Go ahead.

21 MS. GOLDMAN: Thank you, Your Honor. The
22 State's position is that the entire Exhibit AB-37
23 should be brought in as evidence. We do believe
24 there has been enough testimony regarding the
25 personal knowledge of Mr. Vaught as to approvals

1 required or at the very least to the approvals that
2 EMI believes are required. Thank you.

3 THE COURT: All right. And for some reason
4 we were getting more -- more echo on that one than
5 we've ever gotten before, so whatever changed, I'm
6 not sure.

7 All right. Mr. Rowe?

8 MR. ROWE: Thank you, Your Honor. We
9 support the admittance of this document into
10 evidence.

11 THE COURT: The Court will allow the
12 admission of Exhibit AB-37, but again on a limited
13 basis. The limited basis is the column entitled
14 Modification Required to Meet IIFS, and of course
15 the -- the stream that that column refers to by
16 looking over to, you know, the left. But the rest of
17 the document with its various characterizations and
18 various things, no adequate foundation has been laid
19 for that, so the Court's not going to rely on that
20 information at least coming from this document based
21 on this record. Thank you. Go ahead.

22 (Exhibit AB-37 received in evidence.)

23 Q. (By Mr. Schulmeister) All right. Now,
24 Mr. Vaught, you -- you have testified a bit about
25 interactions you've had with water commission staff

1 with regard to these diversion modifications; is that
2 right?

3 A. Yes.

4 Q. And could you identify the water commission
5 staff that you communicate with regarding these
6 diversion modifications and the status thereof?

7 A. The main staff members that we communicate
8 with are Rebecca Alakai and Dean Ueno, and then on a
9 limited basis we work with Ayron Strauch, and also
10 we -- we have met with Kaleo Manuel in the past as
11 well.

12 MR. SCHULMEISTER: Okay. Do any of those
13 names need to be spelled?

14 COURT REPORTER: Ayron's last name.

15 THE COURT: Ayron's last name.

16 Q. (By Mr. Schulmeister) Could you spell
17 Ayron's last name, Mark?

18 A. I believe it's S, as in Sam, T-R-A-U-C-H.

19 Q. It it's pronounced Strauch.

20 And do you try to be as responsive to the
21 requests of the staff as possible with regards to
22 what they are requesting or requiring the way of
23 diversion modifications?

24 A. Yes.

25 Q. And do you -- are you as diligent and you

1 acted in good faith in those interactions?

2 A. Yes, absolutely.

3 Q. Okay. All right. I'd like to refer your
4 attention to Exhibit AB-33.

5 A. Okay. I have it up here.

6 Q. Okay. Are you -- do you recognize Exhibit
7 AB-33?

8 A. Yes, I do.

9 Q. Okay. What is it?

10 A. This is the most recent quarterly report to
11 Chair Case and members of the land board in
12 conjunction with our revocable permits.

13 Q. Okay. And is that your signature on the
14 second page?

15 A. Yes, it is.

16 Q. For EMI?

17 A. Yes.

18 Q. Okay. And -- and were you involved in
19 collecting information that is reflected in AB-35 --
20 AB-33?

21 A. Yes, I was.

22 MR. SCHULMEISTER: Okay. I would like to
23 move Exhibit AB-33 into evidence.

24 THE COURT: For what purpose?

25 MR. SCHULMEISTER: This is the report on the

1 RPs that was submitted, the quarterly report.

2 THE COURT: I understand. If you're just
3 ad-- you just want it admitted to show what was
4 submitted, that's fine. If you're asking the Court
5 to accept everything in it as true, we need a
6 different conversation.

7 MR. FRANKEL: Your Honor.

8 THE COURT: Yes, sir.

9 MR. FRANKEL: Sierra Club is willing to
10 stipulate that Exhibit AB-33 into evidence.

11 THE COURT: All right. Thank you. For all
12 purposes?

13 MR. FRANKEL: For all purposes, Your Honor.

14 THE COURT: All right. Ms. Goldman, any
15 objection?

16 MS. GOLDMAN: No objection, Your Honor. The
17 State also would join in any stipulation.

18 THE COURT: Mr. Rowe?

19 MR. ROWE: Thank you, Your Honor. The
20 County would also stipulate this exhibit into
21 evidence.

22 THE COURT: All right. AB-33 is received,
23 no objection.

24 (Exhibit AB-33 received in evidence.)

25 Q. (By Mr. Schulmeister) Okay. Mr. Vaught,

1 could you turn to page 009 of AB-33? Let me know
2 when you're ready.

3 A. Okay. I'm there.

4 Q. All right. So on this page there's an
5 Exhibit A, monthly water usage, which is similar --
6 similar but not identical to the table that was in
7 the previous quarterly report that we looked at,
8 which was Exhibit J-27; is that right?

9 A. Yes.

10 Q. And are you -- you're familiar with the
11 information in this table?

12 A. Yes, I am.

13 Q. Okay. Now, there's a paragraph number 1
14 beneath the table that -- it's -- it appears to
15 correspond to a footnote under the County of Maui DWF
16 column; is that correct?

17 A. Yes.

18 Q. Okay. I want to direct your attention to
19 the sentence -- the second sentence. It says
20 operationally, a minimum of approximately 6 MGD must
21 be reliably conveyed to/made available to the county
22 each and every day so the county has flexibility
23 regarding when to run its plan. I think it might
24 have intended plant, but... depending upon weather
25 conditions, et cetera. Do you see that paragraph?

1 A. Yes, I do.

2 Q. Could you explain why operationally a
3 minimum of approximately 6 MGD must be conveyed to
4 the county every day?

5 MR. FRANKEL: Objection, Your Honor. Lack
6 of foundation, calls for speculation --

7 THE COURT: Sustained.

8 MR. FRANKEL: -- no personal knowledge.

9 Q. (By Mr. Schulmeister) Mr. Vaught, do you
10 know why approximately 6 MGD must be reliably
11 conveyed to the county as described in this
12 paragraph?

13 A. I know that we have been operating off of an
14 agreement with the water department that required us
15 to make available 6 million gallons per day. Whether
16 or not they use the 6 million is completely up to
17 them and their operation, but we need to make
18 available that amount of water there each and every
19 day.

20 Q. And is that what you do?

21 A. Yes.

22 Q. Okay. And to the extent it's not used, what
23 ends up happening to that water?

24 A. If it's not used by the water department,
25 then we use it on our farm.

1 Q. Okay. And -- and it's not used in
2 irrigation of crops. Specifically does it go to the
3 reservoirs?

4 A. Yes.

5 Q. Okay. And there's a statement in footnote 2
6 which is below that, and this is a reference to the
7 next column which says County of Maui ag park; is
8 that right?

9 A. Yes, that's correct.

10 Q. What -- what is -- what is the County of
11 Maui ag park?

12 A. So the county has what they call the county
13 ag park located up in lower Kula that they lease out
14 agricultural plots to farmers from the community to
15 farm, and the county has an agreement. As part of
16 their water agreement we have to make available 1.5
17 million gallons per day so that they can pump that
18 water from our ditch system, they pump it up to their
19 system of reservoirs to make available for their
20 tenants.

21 Q. I mean, have you seen any part of the ag
22 park or the reservoirs that you just mentioned?

23 A. I have seen them, yes.

24 Q. Okay. And -- and so does EMI convey a
25 minimum of approximately 1.5 MGD to be made available

1 to the county for the ag park?

2 A. Mahi Pono does convey the water.

3 Q. Okay. I'd like to talk a little bit about
4 the issue of trash or debris in the license areas.
5 Are you familiar with the condition that the Board of
6 Land and Natural Resources impose on the renewal of
7 the RPs requiring cleanup of trash and debris in the
8 license area?

9 A. Yes, I am familiar with that.

10 Q. Okay. Is that something that has fallen
11 within your area of responsibility?

12 A. Yes, it has.

13 Q. And have you done anything to comply with
14 that condition?

15 A. Yes. We have an EMI. We've spoken to all
16 of our employees about being diligent in their
17 everyday operations of the system and everyday
18 maintenance. If they recognize anything that doesn't
19 belong out there that serves no function to the
20 actual ditch system, that it should be retrieved and
21 brought back to our base yard so we can account for
22 it, as well as notifying us that -- of the location
23 they found it, and, if possible, taking photos.

24 Q. Okay. Now, has this been -- I mean, this
25 condition was not just in the last RP, it was also in

1 a previous one, correct?

2 A. Yes, correct.

3 Q. And I can't remember right now, but perhaps
4 do you remember it was also one prior to that?

5 A. I -- I don't recall. I'm sorry.

6 Q. Okay. But you do recall Lucienne de Naie in
7 particular on behalf of Sierra Club having raised the
8 issue of debris and -- with the Board of Land and
9 Natural Resources?

10 A. Yes. Yes.

11 Q. And do you know -- do you know Ms. De Naie?

12 A. Yes, I do.

13 Q. Okay. And -- and have you had any personal
14 interactions with Ms. De Naie about following through
15 on the concern about trash removal?

16 A. We've spoken about the concern of trash
17 removal before in the past, and if she has noticed
18 anything, she said she would let me know, you know,
19 if -- if she noticed something that was out of place,
20 she would let me know. And we've spoken a couple
21 times in the past about where -- if she knows
22 specifically where some trash is located, if she
23 could point me in that direction, we'd make sure to
24 take care of it.

25 Q. Okay. Now, the -- the approximate size of

1 the -- of the license area is 33,000 acres, does that
2 sound right?

3 A. That sounds right.

4 Q. Okay. And -- and then there's also
5 additional acreage that's part of this system that's
6 not part of the license area, correct?

7 A. Yes, that's correct as well.

8 Q. Ever since this issue has been raised and
9 brought to your attention, have you endeavored to be
10 diligent and conscientious about following through on
11 identifying the locations of the debris or the trash
12 that has been identified by Ms. De Naie and had it
13 removed?

14 A. Yes, I believe so.

15 Q. Okay. And could you look at page 12 of
16 Exhibit AB-33?

17 A. Yes.

18 Q. Pages 12 and 13, there's some photos there.
19 Do you know what these photos are?

20 A. Yes, they're of trash and various debris
21 that we -- that our employees had located in the
22 watershed and extracted and brought back to our base
23 yard. These photos are of the trash as they lay in
24 our base yard preparing to be disposed of properly.

25 Q. Okay. Now, did you accompany Sierra Club

1 members and Mike Kido on a site visit in February of
2 this year in portions of the East Maui watershed?

3 A. Yes, I did.

4 Q. And on that particular -- and that took --
5 that was several days over a course of a week; is
6 that right?

7 A. Yes, that's correct.

8 Q. And did you assist the representative --
9 that included Mr. Frankel, right, he was there?

10 A. Yes, Mr. Frankel was present.

11 Q. And did you give them access to the areas
12 they wanted to see and help them to make sure they
13 safely could navigate them?

14 A. Yes, I did. I believe I did.

15 Q. And on that particular -- during that week,
16 were there any items observed or pointed out to you,
17 a pipe or broken pipe or things like that that Sierra
18 Club wanted to have removed?

19 A. They didn't specifically point things out
20 directly to me. I know that they probably observed
21 some things and possibly took some photos and may
22 bring those out later on today or another time, but
23 they were present. And I know that I did actually
24 point out some material that we had alongside the
25 road. I called Mr. Frankel's attention to -- to let

1 him know it was on the side of Puohokamoa Stream
2 right alongside the road and showed him some -- some
3 old beams that were there that we pulled out of the
4 stream, but they -- we couldn't fit them in the
5 trailer to take 'em back, we still had to go back and
6 cut them up and load them to take them back to the
7 shop. But I did point that out to him, that the
8 reason they were there was we pulled them out of the
9 stream, but we didn't have the room for them.

10 Q. Okay. And either on -- during that week or
11 thereafter, did you cause EMI crews to go back and
12 pull anything out of those areas that were observed
13 on the site visit?

14 A. Yes, to whatever we saw on the site visit
15 that we saw, we made sure that they went back to go
16 out and -- and take other material. And as a matter
17 of fact, on one of the other sites that we went to
18 East Wailuaiki, it was at the top of the road, and we
19 were going to head in towards East Wailuaiki, our
20 crew was -- had just come out of that area, and they
21 had a whole bunch of 4-inch pipe loaded on the back
22 of their truck that they were taking out that was
23 part of an intake system way back that we no longer
24 used that was left there for many, many years, and
25 they had that on the truck, and they were taking it

1 out. And I believe one of the passengers,
2 Mr. Frankel's passengers, took photographs of the
3 pipe in the back of the truck.

4 THE COURT: Mr. Vaught, could you please
5 spell the name of that area or stream that you just
6 mentioned?

7 THE WITNESS: Sure. East Wailuaiki,
8 W-A-I-L-U-A-I-K-I.

9 THE COURT: Thank you.

10 Q. (By Mr. Schulmeister) Okay. Could you look
11 at Exhibit 57?

12 A. Okay.

13 Q. Okay. I'm just -- do you recognize anything
14 in this picture?

15 THE COURT: I must have the wrong exhibit.
16 I'm not seeing a picture. What exhibit did you ask
17 for?

18 MR. SCHULMEISTER: It's 57. It's one of
19 Plaintiff's exhibits.

20 THE COURT: Oh, Plaintiff's. All right.
21 Sorry. Okay. All right. Go ahead. (Pause.) Go
22 ahead, Mr. Vaught.

23 THE WITNESS: We're still moving the
24 exhibit.

25 THE COURT: All right. Sorry.

1 (Pause in proceedings.)

2 MR. ROWE: Sorry, we had pulled up the wrong
3 one, Your Honor.

4 THE COURT: While they're pulling that up,
5 Mr. Schulmeister, I've got about five minutes left,
6 just FYI.

7 MR. SCHULMEISTER: Okay.

8 THE WITNESS: Yes, we have that up.

9 Q. (By Mr. Schulmeister) All right. Do you --
10 do you know what this photograph depicts, what this
11 is?

12 A. This is an old pipe that used to run through
13 our ditch system near the intake.

14 Q. Was this something that you observed in
15 February of this year on the site visit?

16 A. I'm sure it was something that was -- that
17 was observed on the site visit, yes. It's probably
18 when this photograph was taken.

19 Q. And has it since been removed?

20 A. I don't -- I don't believe so. Not this
21 particular one from Hoolawa.

22 Q. Is there plan to remove it?

23 A. I need to make sure that it's not part of
24 our intake systems with respect to the ditch gate,
25 but if it does serve no purpose, then there'll

1 absolutely be plans to remove it.

2 Q. Okay.

3 MS. GOLDMAN: Your Honor, Ms. Goldman for
4 the State. May I just ask for clarification? What
5 was the last -- were we still on 57 or were we on a
6 different photo? Thank you.

7 THE COURT: I thought we were on Plaintiff's
8 57.

9 MS. GOLDMAN: Thank you, Your Honor.

10 THE COURT: All right.

11 MS. GOLDMAN: Just double checking.

12 THE COURT: Okay. That's fine.

13 Q. (By Mr. Schulmeister) All right. I'm going
14 to ask you to look at Exhibit AB-63.

15 A. Okay. AB-63. I have it in front of me.

16 Q. Okay. This is a multiple-page exhibit, all
17 of which includes photographs. Are you familiar with
18 this -- these photographs?

19 A. Yes, I am.

20 Q. And -- and what do these photographs show?

21 A. Various trash and debris that we collected
22 throughout the watershed and deposited. These
23 pictures are of that stuff in our base yard waiting
24 to be documented so that we could have them disposed
25 of properly.

1 Q. And has this all been collected --

2 MR. SCHULMEISTER: Well, let me move Exhibit
3 60... 63 into evidence.

4 THE COURT: Could we have a time frame on
5 when the picture was taken, please? Approximate.

6 THE WITNESS: This photograph was probably
7 taken within the last 6 to 12 months.

8 THE COURT: All right. Thank you.
9 Mr. Frankel?

10 MR. FRANKEL: My only objection, which may
11 not count, is whether it's cumulative, whether these
12 are the same photos that were in that second
13 quarterly report. If they're not -- if it's not
14 cumulative, I have no objection.

15 THE COURT: Some of them look very similar,
16 and I'll just have to sort that out later, but I
17 understand your point. All right. Ms. Goldman?

18 MS. GOLDMAN: Thank you, Your Honor. We
19 would join the motion to admit this evidence.

20 THE COURT: Thank you. Mr. Rowe.

21 MR. ROWE: Thank you, Your Honor. We'd have
22 no objection to admitting this into evidence.

23 THE COURT: All right. AB-63 is admitted,
24 no objection. Well, over the cumulative objection.
25 And the Court will sort out any sort of duplicate

1 piles of trash or rubbish. Thank you. Go ahead.

2 (Exhibit AB-63 received in evidence.)

3 MR. SCHULMEISTER: Your Honor, I'm ready to
4 move to another area, and I know we're five to the
5 hour, so this would be a good time to break if that's
6 what the Court would like to do.

7 THE COURT: Okay. All right. We'll break
8 now. So we're in recess.

9 (Recess taken at 11:55 a.m.)

10 --ooOoo--

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PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 STATE OF HAWAII)
)
 2)
)
 3 CITY & COUNTY OF HONOLULU)
)
 4 _____)

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7 I, MILANI BALLESTEROS, a Certified Shorthand
 8 Reporter in the State of Hawaii, do hereby certify
 9 that the foregoing pages 1 - 104 inclusive, comprise
 10 a full, true, and correct transcript of the
 11 proceedings had on Wednesday, August 12, 2020 in
 12 connection with the above-entitled cause.

13 DATED: August 12, 2020

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

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