

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

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

10 TRANSCRIPT OF PROCEEDINGS

11 before the Honorable Jeffrey P. Crabtree, Judge, Sixth
12 Division, presiding, on August 12, 2020.
P.M. Session.

13 JURY-WAIVED TRIAL.

14 APPEARANCES:
15 (via Webex)

| | | |
|----|---------------------------|------------------------|
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| 17 | WILLIAM J. WYNHOFF, ESQ. | For DLNR, BLNR, and |
| | LAUREN K. CHUN, ESQ. | Suzanne Case |
| 18 | MELISSA D. GOLDMAN, ESQ. | |
| | Deputies Attorney General | |
| 19 | DAVID SCHULMEISTER, ESQ. | For Alexander & |
| 20 | TRISHA H.S.T. Akagi, ESQ. | Baldwin, Inc. and East |
| | | Maui Irrigation |
| 21 | | Company, LLC |
| 22 | CALEB P. ROWE, ESQ. | For County of Maui |

23 REPORTED BY
24 Sharon Hulihee, RPR, CSR 306
25 Official Court Reporter
State of Hawaii

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1 August 12, 2020.

2 P.M. Session.

3 THE COURT: All right. We are off record.

4 (Off the record discussion.)

5 THE COURT: All right. We are now on record.

6 Mr. Vaught has re-entered the room. Can you hear me

7 clearly, Mr. Vaught?

8 THE WITNESS: Yes, your honor, I can.

9 THE COURT: Okay. Thank you. So I remind
10 you you're still under oath. We're not going to swear up
11 in again but you're still under oath. All right?

12 THE WITNESS: Yes. Thank you.

13 THE COURT: Okay. All right. Mr.

14 Schulmeister, please go ahead.

15

16 MARK VAUGHT,

17 called as a witness by Alexander &
18 Baldwin, having been previously sworn,
19 was examined and testified as follows:

20

21 CONTINUED DIRECT EXAMINATION

22 BY MR. SCHULMEISTER:

23 Q. Okay. Mr. Vaught, could you look at Exhibits
24 AB-60, 61 and 62.

25 You have them now?

- 1 A. Yes.
- 2 Q. You know, starting with AB-61, do you know
3 what this is?
- 4 A. AB-61 or 60?
- 5 Q. I'm sorry. 60.
- 6 A. Yes. This is a fire -- looks like it's a
7 fire on our property.
- 8 Q. Okay. And did you take this photo?
- 9 A. I didn't take this photo, no.
- 10 Q. But you've seen this photo before?
- 11 A. Yes.
- 12 Q. You know where it came from?
- 13 A. It came from the fire department.
- 14 Q. Okay. And did you ask some -- for any photos
15 of -- they had of a recent fire?
- 16 A. Yes.
- 17 Q. Is this representative of how it looks when
18 you have been witnessing brush fire on your property?
- 19 A. Yes, it is.
- 20 MR. SCHULMEISTER: Okay. I'd like to move
21 Exhibit AB-60 into evidence.
- 22 THE COURT: Any objections?
- 23 MR. FRANKEL: Yeah, objection. Lacks
24 foundation, your honor.
- 25 THE COURT: Yeah. Right now we don't have

1 any idea from the record on when, where, so you do need to
2 tighten up a little bit, unless you're just offering it as
3 an illustration of what a fire on Maui looks like.

4 MR. SCHULMEISTER: Well, a fire specifically
5 on their property looks like.

6 THE COURT: Okay.

7 MR. SCHULMEISTER: That's really all I'm
8 offering it for, that this is representative of what it
9 looks like, and he's seen this before.

10 THE COURT: All right. As long as we're not
11 trying to associate this with any particular fire, that's
12 fine. All right. How about Ms. Goldman?

13 MS. GOLDMAN: No objection from the State.

14 THE COURT: Thank you. Mr. Rowe?

15 MR. ROWE: No objection, your honor.

16 THE COURT: All right. Exhibit AB-60. 60 is
17 admitted.

18 MR. FRANKEL: Your honor, for the limited
19 purpose, right?

20 THE COURT: For the limited purpose the court
21 put on the record, yes. Thank you.

22 (Exhibit AB-60 was received
23 in evidence.)

24 BY MR. SCHULMEISTER:

25 Q. Could you look at AB-61. So do you know what

- 1 -- have you seen AB-61 before?
- 2 A. Yes, I have.
- 3 Q. And do you know what it is?
- 4 A. This is a helicopter operation during a fire,
5 a recent fire, I believe, in the gulch. That helicopter
6 operation was going on while they -- while they were
7 taking water from one of our reservoirs.
- 8 Q. Okay. Did you take this photo?
- 9 A. I did not.
- 10 Q. Is this a photo that you acquired?
- 11 A. Yes, it is.
- 12 Q. And where did you get it?
- 13 A. Fire department.
- 14 Q. Okay. Is this -- but you recognize the area
15 that's depicted in this photo?
- 16 A. I believe -- I'm not a hundred percent sure
17 but I believe this might be Hailimaile Gulch, Kailua Gulch
18 they call it.
- 19 Q. And have you witnessed helicopter operations
20 like this on Mahi Pono's property?
- 21 A. Yes, I have.
- 22 MR. SCHULMEISTER: Okay. I move Exhibit
23 AB-61 into evidence.
- 24 THE COURT: Mr. Frankel?
- 25 MR. FRANKEL: Lacks foundation.

1 THE COURT: Ms. Goldman?

2 MS. GOLDMAN: Nothing from the State.

3 THE COURT: Mr. Rowe?

4 MR. ROWE: No objection, your honor.

5 THE COURT: All right. The court will admit

6 Exhibit AB-61 just to illustrate the -- how the

7 helicopters gather water from the reservoir. Thank you.

8 (Exhibit AB-61 was received
9 in evidence.)

10 BY MR. SCHULMEISTER:

11 Q. Okay. Actually I don't -- I'd also ask you
12 to look at AB-62. And is that another photograph, Mr.
13 Vaughn -- I mean, Mr. -- Mr. Vaught, excuse me.

14 A. Yes.

15 Q. Is it another photo that you acquired from
16 the fire department?

17 A. Yes, it is.

18 Q. And do you recognize the area depicted in
19 this photograph?

20 A. I don't recognize this specific area but it
21 looks familiar.

22 Q. Okay. And is there a helicopter in this
23 photo?

24 A. Yes.

25 Q. Okay. And is this -- is this representative

1 of what you've seen when fires are being fought in the
2 area of Mahi Pono's property with water -- the helicopter
3 drops from the reservoirs?

4 A. Yes, this is -- this is familiar to me and
5 there is what it looks like when helicopters are dropping
6 water on fires.

7 MR. SCHULMEISTER: Okay. I move Exhibit
8 AB-62 into evidence.

9 THE COURT: Mr. Frankel. Mr. Frankel?

10 MR. FRANKEL: Lacks foundation.

11 THE COURT: Ms. Goldman?

12 MS. GOLDMAN: Nothing from the State, your
13 honor.

14 THE COURT: Mr. Rowe?

15 MR. ROWE: No objection, your honor.

16 THE COURT: The court will admit AB-62 into
17 evidence just to illustrate helicopter dropping water on a
18 fire.

19 (Exhibit AB-62 was received
20 in evidence.)

21 BY MR. SCHULMEISTER:

22 Q. Okay. Mr. Vaught, do you recall any
23 situations where you received a call from Lucienne de Naie
24 complaining about water, having a flash flood or something
25 of that nature having occurred on Hanehoi Stream?

1 A. I don't recall it being a phone call but I do
2 remember direct contact with her either at some public
3 meeting or some public event that we had contact and she
4 made -- she -- she told me what -- what you're referring
5 to.

6 Q. And what did she say?

7 A. She -- she was saying that, if -- if -- if
8 I'm not mistaken, it's -- the event was -- could have been
9 the time we went out and we did a field visit in East Maui
10 prior to or during the last year 2019 legislative session
11 and we had several of the representatives and I think it
12 was the House Finance Committee, or one of their
13 committees, I'm not sure, and they were talking about East
14 Maui, they wanted to get a little more familiar with it,
15 and I remember specifically -- I remember specifically
16 them bringing some legislators over. And she brought up
17 the story to one of them, saying that the lack of
18 communication that we had with them was illustrated by the
19 fact that there was, on a sunny day there was a giant
20 torrent of brown water that came down through Hanehoi
21 Stream, and she said several of the residents that lived
22 below were using the stream for recreation and just
23 swimming and that the torrent almost, according to her,
24 washed them into the ocean. And she said that if we were
25 going to do something operationally upstream that was

1 going to make -- that had that kind of effect on the
2 downstream we should have notified them. That's what --
3 that's basically what her story was.

4 Q. Okay. Now, has -- did EMI do something
5 operationally upstream on Hanehoi that would have been
6 responsible for that sort of release of water?

7 A. So with her description I have to say no. I
8 -- I don't believe there was anything that we did that
9 would cause that. I -- I -- I certainly think it's very
10 possible that could have happened but that would have been
11 a Mother Nature call and not an EMI call and there was
12 nothing that we could do. We don't have the physical
13 capability on that particular stream to release that
14 amount of water that would cause that sort of reaction, I
15 guess, downstream.

16 Q. Now when you say a Mother Nature sort of
17 event, what do you mean by that?

18 A. It might have been nice and sunny where --
19 where, you know, down at lower Hanehoi where they lived
20 below the highway but, you know, if it's further up in the
21 hills and, you know, there's a -- a downfall -- a downpour
22 further upstream, you know, that would cause an amount of
23 water to get loose, an amount of water, that kind of
24 volume to get loose, I've absolutely seen that happen, but
25 that -- again, I don't make it rain. That's something

1 that Mother Nature did and it -- it did happen. So I'm --
2 I'm -- I'm sure she's just saying what happened. I just
3 don't believe that EMI was responsible for that.

4 Q. Now there's something specific about the
5 structures on Hanehoi that leads you to believe that that
6 could not have resulted from anything EMI did?

7 A. Yes. I -- and I think she's familiar with
8 some of the larger sluice gates that we have along the
9 streams but she's also probably familiar with some of the
10 larger dump gates that we do operate in situations where
11 we need to shut the ditch completely in a location and let
12 that water run downstream and that would cause a situation
13 like this. However, none of those facilities exist on
14 Hanehoi Stream.

15 Q. So if water came down as far as where she
16 says the residents were using the stream below the
17 diversions, where would that water have come from?

18 A. The amount of water that she was talking
19 about would have to come from rainfall further up in the
20 hills.

21 Q. Within that watershed?

22 A. It's possible, yes. I wasn't down where she
23 was that day and -- or where her residents were so I -- I
24 can't describe to you the amount of water that was down
25 there, but she said it was fast. And the amount of water

1 that it would take to wash whole human beings down a
2 stream is more than we have the capability of, you know,
3 opening a gate and sending that amount of water down.

4 Q. Okay. Now earlier you testified that
5 currently EMI is bringing water principally from the Huelo
6 area and actually within the -- from the 12 streams in the
7 Huelo license area that are not restoration streams under
8 the Water Commission decision; is that right?

9 A. Yes.

10 Q. And -- and in the last month or two and to
11 date, I mean, how have the -- how has the weather affected
12 the amount of water that EMI has been importing?

13 A. The weather has -- has been very dry so
14 available water in the streams is not how it used to be,
15 it's not optimal for us. In other words, it's just been
16 pretty -- pretty dry. We're not able to divert as much
17 water as we need to.

18 Q. Okay. Now, if you were not able to divert
19 from the 12 streams that we referred to, in other words,
20 if you were ordered to stop taking anything from those
21 streams, how would that impact your ability to import
22 water to meet the needs that you're currently meeting with
23 EMI water?

24 A. So if we continue to comply with the IIFS and
25 we couldn't use water from those 12 streams, it would be

1 very difficult to get water, the amount of water that we
2 need. In other words, that -- those 12 streams are pretty
3 vital right now to what we have on the farms, to what
4 we're using on the farms.

5 Q. Now, and you mentioned earlier that you --
6 you are managing water resources on both sides of Maliko
7 Gulch both on the collection side and the distribution
8 side from Mahi Pono; is that right?

9 A. Yes, that's correct.

10 Q. And so in your communication with the farm
11 managers about what their planting schedules are?

12 A. Yes, that's correct.

13 Q. And irrigation schedules?

14 A. Yes.

15 Q. And is EMI bringing in any more water than is
16 needed currently?

17 A. We don't believe so. We -- we just bring in
18 the amount of the water currently that we need for
19 irrigation and storage and whatever else. Now the County
20 takes a large portion of the, you know, of the Wailoa
21 water up on the top. We have to make that available to
22 them and it just depends on what months. I noticed in the
23 dryer months the County tends to draw a little more water
24 there and in the winter months a little less. But, you
25 know, making sure that there's enough water there for the

1 County so that the residents have access to water, that's
2 kind of one of the things that's at the top of our list.

3 Q. And -- and are there, you know, future
4 plantings that are planned which would increase irrigation
5 demand for Mahi Pono?

6 A. Yes.

7 Q. And if water from the 12 streams would not be
8 available, what impact would that have on those planting
9 plans?

10 A. It may cause us to suspend or divert planting
11 plans in certain areas but for the most part it would
12 cause us to suspend planting plans.

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

15 THE COURT: Thank you. Mr. Frankel?

16 MR. FRANKEL: I'm not sure if I'm next. I
17 think you have to go through all the defendants first,
18 right?

19 THE COURT: Okay. We can do it that way.
20 Let's see. Since he's there with Mr. Rowe, then Mr.
21 Wynhoff, you mind -- I'm sorry, Ms. Goldman, you mind
22 going next?

23

24 CROSS EXAMINATION

25 BY MS. GOLDMAN:

1 Q. No problem, your honor.

2 Good afternoon, Mr. Vaught. My name's
3 Melissa Goldman. I'm one of the attorneys representing
4 the State today and I have a few questions for you
5 regarding -- let's start with the overall ditch system.
6 How many ditches run through the license areas at issue in
7 this case, if you know?

8 A. Yeah. I'd say we're talking about four main
9 ditches running through the license area.

10 Q. Okay. And what are those four main ditches?

11 A. The Koolau Ditch, which originates in
12 Makapipi, and then delivers to a stream called Alo, and
13 then turns into Wailoa at that point, so that's one -- I
14 apologize.

15 THE COURT: Wait. Time out.

16 MS. GOLDMAN: Oh.

17 THE COURT: Could you -- time out. Please
18 spell. Please spell as you go. Thank you, Mr. Vaught.

19 THE WITNESS: Sure. So the Koolau Ditch,
20 K-O-O-L-A-U. And the Koolau Ditch turns into the Wailoa
21 Ditch, which is W-A-I-L-O-A, and that -- that's the ditch
22 that's in the highest elevation. And then they come down
23 -- we have the Spreckels Ditch which turns into or starts
24 with the Spreckels which turns into what we call Manuel
25 Luis which also turns into another ditch. There's the New

1 Hamakua Ditch. I'm sorry. That's with New Hamakua. New
2 Hamakua -- Hamakua, H-A-M-A-K-U-A.

3 BY MS. GOLDMAN:

4 Q. May I ask you, would it assist in your
5 testimony if you were able to refer to a map while
6 testifying?

7 A. It would make it easier for you all to
8 understand I think.

9 Q. That's fair. Okay. May I ask you to please
10 call up what's been marked as State's Exhibit 75. It's a
11 large file so it may take a while to load.

12 A. Okay. I have it.

13 Q. Okay. Thank you. What is it, Mr. Vaught?

14 A. It's -- looks like a representation of East
15 Maui.

16 Q. Okay. And, let's see, let's orient -- orient
17 the court. Which -- which direction are we looking right
18 now, where are you looking?

19 MR. FRANKEL: Objection, your honor. This is
20 not in evidence.

21 THE COURT: Sustained. Lay a foundation to
22 get it in before we start learning from it.

23 MR. FRANKEL: And, your honor, there are
24 other exhibits that are in evidence already, if you want
25 to -- we're using it to help people.

1 THE COURT: That's up to Ms. Goldman.

2 MS. GOLDMAN: Okay. That's fair. Fair.

3 This was just going to be for demonstrative purposes only
4 but why don't I choose one that's already in evidence.
5 That would just make things easier.

6 MR. SCHULMEISTER: You might want to consider
7 AB-1.

8 BY MS. GOLDMAN:

9 Q. I was actually going to go with -- checking
10 to make sure it's in. Okay. Let's bring up AB-1. Again
11 for demonstrative purposes only.

12 THE COURT: Got it.

13 MS. GOLDMAN: Okay. Okay.

14 BY MR. SCHULMEISTER:

15 Q. Okay. Okay. Thank you, Mr. Vaught.

16 So which direction, I guess, which directions
17 are we looking at right now? Can you just orient us? I'm
18 sorry. Scratch that. Can you orient us to the ditches
19 that you were just describing, where they are?

20 A. Okay. So if you look to the right of the
21 map, if you're looking at the same map I'm looking at,
22 look right, it says Nahiku License. So if you see Nahiku
23 License, you're going to see a stream along there called
24 Makapipi Stream, M-A-K-A-P-I-P-I.

25 Q. Okay.

1 A. That is the beginning of the Koolau Ditch and
2 the diversion system in that area and that would be the
3 first ditch that I talked about, Koolau, and that one goes
4 from right to left.

5 Q. When you -- I'm sorry.

6 A. Sure. Go ahead.

7 Q. You finish -- oh. Just to clarify, which way
8 does the -- which direction is the water flowing in the
9 ditch?

10 A. So it's --

11 Q. Is it going from the left to right or other
12 way?

13 A. This photo it's going to go from right to
14 left. On land it goes from east to west, yes.

15 Q. Okay. Thank you. And let's see. So this
16 broad -- we're speaking, we're talking about four main
17 ditches. Just broadly speaking, how would you identify
18 them on this map?

19 A. So on this map, like I said the Koolau Ditch
20 turns into the Wailoa Ditch. That would be one.

21 Q. Okay. And where would that ditch be on this
22 map?

23 A. Okay. It would be furthest, or the highest
24 elevation which would be closest to the bottom if you're
25 looking at the map. If you're looking at the top of the

1 map. I apologize. Go ahead.

2 Q. Okay. So earlier you testified water runs
3 mauka to makai. So the Wailoa Ditch is the highest
4 elevation ditch, correct?

5 A. Yes, correct.

6 Q. In this area. And there are no higher
7 elevation ditches in this license area, correct?

8 A. Correct. There are -- I shouldn't say there
9 aren't any ditches but there are no main ditches. There
10 may be small -- I know there were a few way back, that
11 there were small collection tunnels and stuff that were
12 located but they were short and they're not considered a
13 main ditch.

14 Q. Okay. Okay. You can put this exhibit to the
15 side, if you'd like. I just want to -- let's talk about
16 the ditches for a second. What does the ditches look like
17 when you're on the ground looking at them?

18 A. So they basically look like irrigation
19 canals. They are -- some of them are concrete lined and
20 some of them are lined with old rock that was cut by, you
21 know, old -- old ditch men, harnessed, if you will. They
22 lined the ditches with rock. And some of them are bare
23 dirt, they're -- they're lined, just they're unlined, bare
24 dirt ditches, but for the most part, you know, there's --
25 there -- you can see them. They just look like irrigation

1 canals.

2 Q. Okay. And how deep are they, would you say?
3 You said you -- you said you'd probably fit in one. Are
4 they taller than you? Are they taller than you when you
5 stand inside?

6 A. No, no. The ditches are -- they range in
7 depth from -- some of them are six feet deep, some of them
8 are three feet deep, and they just have varying depths and
9 widths.

10 Q. And I know we talked a lot about intakes and
11 diversions and we haven't talked about what those terms
12 mean. Can you explain to the court what an intake is
13 please?

14 A. Sure. An intake is a structure that was
15 built, it's manmade, and it's built to take stream water
16 in from the stream. So let me take a step back. If you
17 have a stream, like I said, the flow of the stream runs
18 mauka to makai, the ditch system runs east to west. So
19 they intersect. The ditch intercepts water from the
20 stream.

21 There could be several different types of
22 intakes. There are a few that are just graded intakes
23 that -- that they're right on the stream that stream water
24 just falls directly into, but many of them are not and
25 include a dam structure which was built inside of the

1 stream that would cause stream levels to rise above a
2 certain level. And that stream water rising would then go
3 into like an intake structure, which is just basically
4 almost like a hole with some kind of a trash over it or
5 grate over it that allow this water to spill into that,
6 that ultimately end up in the ditch.

7 Q. Thank you. And these intake structures you
8 -- I think you mentioned that they're manmade, right?

9 A. Yes.

10 Q. Are they always -- do they always involve
11 materials that were not naturally occurring in the stream
12 bed, in other words, are they always made out of something
13 like concrete, cement, etcetera?

14 A. Almost always, yes.

15 Q. Isn't it possible for an intake to have no
16 structure at all?

17 A. Yes, it is.

18 Q. Can you explain that a little bit further
19 please?

20 A. We have some areas of the ditch system where
21 the ditch system is open and you just have a naturally
22 occurring area where water flows down a hill or something
23 that the ditch would intercept and that water would
24 actually drop directly into the ditch with no physical
25 structure there to assist it.

1 Q. Okay. Okay. So aside from modification to
2 create conductivity for biota, you know, the court
3 reviewed a photograph of a black pipe kind of a thing,
4 aside from that, do any of the A&B or EMI intake have
5 pipes from the stream into the ditch?

6 A. Yeah, some of them do.

7 Q. Okay. And to your knowledge are there other
8 diversions in the license area that are not operated by
9 A&B/EMI?

10 A. I couldn't tell you. I don't believe so.
11 None that operate on our ditches. If -- if they do, they
12 operate on someone else's system but not on ours.

13 Q. And by someone else's system, do you -- by
14 that, do you mean that it would be just a diversion from
15 the stream that does not go into the ditch, right?

16 A. Yes, that's correct.

17 Q. Okay.

18 THE COURT: I'm sorry. I need to take a
19 pause.

20 (Court addressed the court reporter.)

21 THE COURT: All right. Back on record. Go
22 ahead.

23 BY MS. GOLDMAN:

24 Q. Thank you, your honor.

25 Mr. Vaught, you mentioned the type of gauging

1 system that can measure how much water is for a -- in a
2 particular portion of a particular stream at a given time.
3 That was called a spilling well, I think, right?

4 MR. SCHULMEISTER: Let me object. I think
5 that that mischaracterizes his testimony.

6 MS. GOLDMAN: Okay. I'll withdraw --

7 THE COURT: Let --

8 MS. GOLDMAN: Oh. Pardon me. I guess the
9 judge should rule.

10 THE COURT: I'm going to let him go ahead.
11 I'm sure -- I think I know where this is going. I'm sure
12 the witness can sort it out. So go ahead.

13 BY MS. GOLDMAN:

14 Q. Okay. So perhaps I'm a little confused.
15 Could you explain again what a -- what -- you mentioned a
16 spilling well is why I'm asking. What is -- what is that?

17 A. Okay. So none of our gauges are located on
18 streams. We don't have the ability to gauge the streams.
19 We gauge water that's in the ditch itself. And attached
20 to the ditch is a pipe that runs into a gauging station
21 which has a spilling well located in it but those are all
22 from the ditches and not from the streams. I think you
23 mentioned gauging a stream.

24 Q. I see. I see. Thank you for correcting me.
25 So you testified -- I'm sorry. Spilling water, is that

1 S-P-I-L-L-I-N-G, spilling?

2 A. Yes, it is.

3 Q. Okay. And so how -- how does such a
4 contraption work to tell -- what is it measuring exactly?

5 A. Okay. Basically a spilling well is a
6 structure located off of the ditch. When I say spilling,
7 it just spills the water so that you don't have turbulence
8 in the water which causes either a float, or a transducer,
9 to read water levels that are fluctuating rapidly so it
10 still goes on so that the water rises slowly and drops
11 slowly within the well. That's what the pipe contraption
12 and the spilling well do.

13 Within that spilling well we have, like I
14 said, for -- for our gauging stations we have a float
15 system that's connected to that optical encoder with the
16 weight on the end of it. Every time that water rises, it
17 lifts that float, and that float mechanically takes a
18 piece of tape over an encoder and cause the encoder to
19 spin. And it basically sends the height of the water
20 right down to like a hundredth of an inch, sends that
21 information into a data logger in which our consultants or
22 engineers who we purchase this for, they program that
23 specific water level into that data logger, that program
24 into that data logger. And that -- basically that data
25 logger is, I guess it would be like taking the information

1 from the encoder and interpreting it a certain way and
2 giving you a value which -- so you're measuring height but
3 it's basically flow height. And they measure that control
4 section of the actual -- of the actual ditch, so that
5 control section. So a section in the ditch, a weir, or a
6 constant where you have generally an amount of water
7 that's a control section, I'm sorry, and I -- I don't know
8 how to better explain it, kind of lost here, but it --
9 it's hard to say but -- so the control section is where
10 you can control the measurement of water.

11 And then they come up with -- they come up
12 with a rating table saying that if you have one inch of
13 water flowing by here at this velocity, 'cause they
14 measure all of that, if you have an inch of water flowing
15 by here you have X amount of water, a -- a million gallons
16 per day. If you have a foot of water you now have twenty
17 million gallons per day. If you have one point one feet
18 you have twenty-two million gallons per day. So that's it
19 -- that's how it works. It just tells you the height of
20 the water flowing in the ditch and that correlates to a
21 specific number of millions of gallons per day flowing
22 beyond that point.

23 I hope I didn't confuse you.

24 Q. Thank you. I -- probably more information
25 than most of us can absorb. But it's very helpful. Thank

1 you.

2 So from what you described it sounds like
3 there's sort of a high tech gauging and -- or high tech
4 recording and transmitting of information. But it sounded
5 like the spilling well itself or the spilling is measuring
6 the height of the water, is not necessarily based on
7 technology. So my question is, to your knowledge, is that
8 something that was used prior to the technology that could
9 transmit the information to you right away?

10 A. Absolutely. It's been used since long before
11 I got there, the spilling wells and the height of the
12 water, and it -- it was used in a similar way but it
13 wasn't as high tech and digital and electronic as it is
14 now.

15 Q. All right. Okay. Thank you for that. Okay.
16 So turning your attention to controlling the amount of
17 water that's being diverted at any given time. You
18 discussed a team of individuals physically manipulating
19 the structures. So let me ask you, how do you know when
20 it's time to do that? How do you know it's time to go
21 tweak one of these structures?

22 A. So we -- we figure on about how much water we
23 need on a daily basis, so what would be an adequate amount
24 of water on a daily basis to support our farm, our agri --
25 our diversified ag program, our channel, the County, the

1 ag park, you know, industrial uses. All of that come into
2 play. We -- there -- there's an amount of water that we
3 would be, I guess, optimum for that. And we try to set
4 ourselves up for that amount of water.

5 If there's an increase, so if there's a
6 rainfall, the intakes that we have are going to take more
7 water than -- than we should take. More water will go
8 into the ditch. So if we set it at 24 million gallons per
9 day, which is around what we set, 24, 25 million gallons
10 per day, if there's more water than that, in order to keep
11 the stream water in the streams of origin we have to
12 physically go out to each one of these intakes and
13 throttle down gates so that we're able to leave that water
14 in those streams. And if --

15 Q. And -- oh.

16 A. Go ahead.

17 Q. Pardon me.

18 A. No, sure. Go ahead.

19 Q. I didn't mean to cut you off if you were --
20 had anything else.

21 A. No. I'm just going to say that the hard part
22 is setting the -- so that you have the right amount of
23 water coming in. Once you set them it's up to Mother
24 Nature. When it stops raining and then there's no more
25 water coming in, you have to actually physically go out

1 there and start to manipulate the gates again so there's
2 more water coming in to make up for the shortfall that
3 you're getting when you put the gates down.

4 Q. So is it -- is it like you're just looking at
5 the weather report and if it rains then, you know, you
6 have to send someone out there, or is there something else
7 that goes into it?

8 A. So as you know, our weather reports aren't
9 necessarily the most accurate all the time, no offense to
10 anyone who's into weather but -- there are good
11 meteorologists but sometimes they're not as accurate, so a
12 lot of times for us it has to do with us looking at the
13 weather conditions, not just on a computer or on the news
14 but, you know, being out there, seeing what the weather
15 conditions are and then planning ahead if we can.

16 Q. I see. And so how -- how do you determine
17 which gate you're going to open or close when this
18 happens? Let's say it's raining up in the mountains in
19 Huelo license area. How do you decide where to go and
20 which ones to open?

21 A. We just start nearest -- we usually start at
22 -- we go up this place called Lupi Road, which is right at
23 the end of the Huelo license almost and we work our way
24 back from there through Hoolawa Stream, Puneawa Stream,
25 not Puneawa Stream, but Hoolawa Stream and working our way

1 back towards, you know, Waipio, and other streams along
2 the Kailua Stream, some of the major streams, Huelo.

3 Q. Okay.

4 Did we need to stop and spell any of those,
5 your honor? There were like four that were mentioned,
6 that's why.

7 THE REPORTER: Hoolawa Stream? After Punewa.

8 THE COURT: After, is it Puneawa, after that
9 one?

10 THE WITNESS: I made a mistake. Puneawa was
11 on the other side. I said Hoolawa. H-O-O-L-A-W-A. And
12 then we went back, yeah, and I said Waipio, W-A-I-P-I-O.
13 And I mentioned Kailua, K-A-I-L-U-A, after that.

14 MS. GOLDMAN: Okay.

15 THE COURT: Thank you.

16 BY MS. GOLDMAN:

17 Q. Thank you. And so how quickly can your team
18 respond and make these adjustments?

19 A. They usually would be out there, I mean, if
20 -- depending upon what time it starts to rain they can,
21 you know, wherever they're located, they can be out there
22 within a couple of hours. So by the time it starts, the
23 rain starts to affect the ditch, by that time we generally
24 have people in the area to make those adjustments. If it
25 happens overnight, we usually make it first thing in the

1 morning.

2 Q. Okay.

3 A. Like we know that we have a plan that it's
4 going to start raining over the weekend, then we'll try to
5 preset what we can, and if we need to, we'll come out on
6 the weekend and make the adjustments.

7 Q. I see. So how often is your team making
8 these adjustments?

9 A. So it depends on the weather, completely
10 weather dependent. I -- I would say like probably once a
11 week. For now it's dry so we just -- whatever the rain
12 gives us is whatever the rain gives us. But as soon as it
13 starts raining we'll have to go out and make adjustments.
14 And then as soon as the rain stops and starts to let off,
15 we have to go back out and make adjustments, it starts
16 raining again, so you can see it's a little difficult at
17 times.

18 Q. Yes. It sounds like a lot.

19 How long does it take to get to each of these
20 sites where you would be manipulating a gate?

21 A. If -- depending upon where you go along the
22 system it can take anywhere from, you know, 45 minutes to
23 two hours to reach one of the sites.

24 Q. And do you -- do you favor the diversion
25 located at certain ditches or is it mostly convenience and

1 location as you -- as you project them?

2 A. It's mainly the diversions on the Wailoa
3 Ditch up on the top are the easiest ones. They're easier
4 to get to, they're easier to manipulate, and they make the
5 most impact on the ditch system and the stream.

6 Q. And what do you mean by that, they make the
7 most impact on the ditch system and the stream?

8 A. Because it's the furthest stream -- like it's
9 the highest in elevation, it's the first ditch to capture
10 water. And because it's our largest ditch, considerably
11 larger than the others, the intakes are a little larger so
12 the amount of water going into them is larger amounts. So
13 as we're able to throttle those back it makes a bigger
14 difference on how much water goes in.

15 Q. I see. Okay. And --

16 THE COURT: If you -- Ms. Goldman, if you're
17 moving to a new area, we have been going 50 minutes so
18 it's about time for a break. So if you want to just ask
19 one question to, you know, wrap up, that's fine too.

20 MS. GOLDMAN: Actually I was just going to a
21 new area so this is a good timing.

22 THE COURT: All right. We'll take a 10-
23 minute break and resume at two o'clock. We're in recess.
24 Thank you.

25 (A recess was taken.)

1 THE COURT: All right. We are back on
2 record. FTR?

3 THE LAW CLERK: Yes.

4 THE COURT: Thank you. Please go ahead.

5 BY MS. GOLDMAN:

6 Q. Thank you, your honor.

7 Okay. Mr. Vaught, before we took that break
8 you had explained to us, I believe you explained that the
9 Wailoa Ditch is the biggest one. Could you just expand on
10 that a little? Why, do you know?

11 A. I -- I don't really know. I would think that
12 in theory it was the highest elevation ditch so that it
13 would be first to receive water, and then the higher
14 elevations are just because of the amount of water that
15 you want to disburse on the farm. The higher elevation --
16 you want -- water obviously flows from upper levels to
17 lower levels and not in the opposite direction, so the
18 higher level you can keep the majority of the water, the
19 more valuable it becomes to you. Does that makes sense?

20 Q. So -- maybe I can follow up on that. So
21 would you characterize the system as gravity fed?

22 A. Yes. I apologize.

23 Q. Rather than --

24 A. I should have made that clear early on. Yes.

25 Q. Okay. And -- oh, and we were asking -- I

1 asked you about how long it takes to get some of -- some
2 of these different sites if you, like (indiscernible) --
3 THE REPORTER: Sorry, what was --
4 MS. GOLDMAN: -- ask you --
5 THE COURT: Sorry. We got an echo going on.
6 Someone needs to mute.
7 THE REPORTER: Could she repeat the question?
8 THE COURT: Do we have any --
9 THE LAW CLERK: Everybody's on mute.
10 THE COURT: No one's calling in.
11 THE LAW CLERK: Someone's calling in.
12 Everybody's on computer.
13 THE REPORTER: Something happened.
14 THE COURT: All right. We're getting some
15 kind of a feedback. Ms. Goldman, you need to recite the
16 question please.
17 MS. GOLDMAN: Okay.
18 MR. ROWE: Your honor, if it's a technical
19 matter, might we ask that Mr. Schulmeister mute and see if
20 that's helpful?
21 THE COURT: He is muted.
22 MR. ROWE: Oh, I'm sorry. It didn't appear
23 that way from here.
24 MR. WYNHOFF: Thank you, your honor. Thank
25 you, Mr. Schulmeister.

1 MS. GOLDMAN: Thanks, everyone. Please -- is
2 this any better?

3 THE COURT: Yes.

4 BY MS. GOLDMAN:

5 Q. Sound wise? Okay. Thank you.

6 Okay. So the question was -- we asked you
7 before how long it takes to get to a particular intake
8 structure if your team is going to manipulate them. What
9 I didn't ask was how long could a whole trip take to go
10 out and open and close gates and whatever.

11 A. It -- take the entire day.

12 Q. Okay. And you testified that on average you
13 think maybe once a week this happens. Was that right?

14 A. Yes.

15 Q. Okay. Does it sometimes happen more
16 frequently than that?

17 A. Yes, it can happen more frequently than that.

18 Q. Okay. Thank you. I'd like to move -- call
19 your attention to the amount of water that the system is
20 capable of capturing. So, if you know, there's been some
21 discussion here that some of the streams are being drained
22 dry. What would you say to that characterization?

23 A. I would say that that's very possible that in
24 the past a lot of the streams were drained completely dry.
25 I -- I would say that that's possible. I'm sure that that

1 has occurred in the past.

2 Q. When you say in the past, are you referring
3 to sugar cane time or like last year?

4 A. Sugar cane.

5 Q. Okay. So, if you know, are any of -- are
6 EMI's diversion structures capable of capturing 100
7 percent of base flow?

8 A. Some of them are, yes.

9 Q. What does that mean?

10 A. It means that the base flow, whatever is in
11 the stream itself, whatever water's available in the
12 stream, some of the intakes have the potential to take all
13 of that flow, to divert all of that flow until it gets to
14 a certain point where there's too much water for the
15 intake to -- to handle.

16 Q. Okay. So does 100 percent of base flow, does
17 that mean the same thing as 100 percent of all water?

18 A. I'm sure those are technical terms. My
19 understanding would be yes.

20 Q. Okay. Sorry. In other words -- that's fine.
21 Are there times that -- are there times that water
22 bypasses the ditches?

23 A. Yes, there are times.

24 Q. And -- okay. And what would be a reason for
25 that?

1 A. If it's manually bypassed it would be because
2 we already have the amount of water that we need in the
3 ditch. If it's passing by the ditch because there's been
4 a huge rainfall event and there's just so much water in
5 the stream that the intake can't handle all of it and,
6 again, we have as much as we need, the rest of it goes by
7 the intake.

8 Q. Okay. What is a freshet, F-R-E--

9 A. To my knowledge --

10 Q. -- S-H-E-T, I believe?

11 A. To my knowledge a freshet is a sudden rain
12 event that -- that causes the stream levels to rise
13 relatively quickly.

14 Q. So on a stream where intake is capable of
15 taking 100 percent of base well, does the freshet always
16 get captured into the ditch system?

17 A. Generally, not always, no. Freshet is an
18 amount of water probably little more than, in my
19 understanding, it's a little more than, you know, what our
20 -- what our intake is designed to capture.

21 Q. Okay. Okay. Calling your attention to --
22 oh. Hawaii streams are flashy, right?

23 A. Yes, very much so.

24 Q. What does that mean?

25 A. It just means that they're flashy in the

1 sense that the water can rise or drop relatively quickly
2 depending upon rainfall events in the upland areas
3 upstream of, you know, wherever you are. So flashy
4 meaning, you know, one day it could just be nice and dry
5 and literally within a half an hour you could have a
6 torrent, a flow, running through that stream.

7 Q. So sometimes there could be like 10 times
8 base flow, right?

9 A. Yes.

10 Q. What is a gaining stream, to your knowledge?

11 A. To my knowledge, a gaining stream is a stream
12 that if you measure certain points in the stream from
13 upstream to downstream, you measure certain points, at
14 certain points -- at the lower points you're actually
15 going to measure an amount of water that's greater than
16 the -- the amount you measured at the upland point. So
17 the -- the flow -- it's the volume in the stream. It
18 gains water as it goes down stream.

19 Q. I see. So, is it possible, is it possible to
20 have a gaining stream that might be dry mauka or might
21 have a dry portion mauka that still has water as you go
22 further makai?

23 A. Yes. That's very possible.

24 Q. Okay. And, let's see, just -- just one
25 question about the consequences of, I guess, about the

1 maintenance of the ditch system. What is your
2 understanding of what would happen if the ditches went
3 dry, if there was no water in the ditches?

4 A. It -- there would be devastating effect for
5 the Kamole Water Treatment Plant for the Department of
6 Water Supply. It would be devastating effects for the
7 Mahi Pono farm. I'm sure --

8 Q. So it isn't -- oh, I'm sorry.

9 A. Go ahead. Go ahead please.

10 Q. So in addition to effects, those kind of
11 effects --

12 MR. FRANKEL: Your honor, I'm sorry. I was
13 on mute. I move to strike as nonresponsive and lacks
14 foundation.

15 THE COURT: You mean --

16 MR. FRANKEL: That question was regarding the
17 ditch.

18 THE COURT: You mean that the lack of water
19 would impact the treatment plant?

20 MR. FRANKEL: Yeah. Yeah. The question was
21 about the ditch itself, impact on the ditch.

22 THE COURT: Well, the question was way
23 broader than that. You know, water, what would happen, I
24 think, was the question. So --

25 MR. FRANKEL: Well, the Department -- but

1 there's a part to that question -- there's about two
2 sentences prefaced to the question.

3 THE COURT: All right. Could you -- could
4 you revisit that area please, Ms. Goldman. I'm not going
5 to strike it.

6 MS. GOLDMAN: Yes.

7 THE COURT: I'm not going to strike it but I
8 do think it needs clarification.

9 BY MS. GOLDMAN:

10 Q. Thank you, your honor.

11 So, Mr. Vaught, it sounds like what you were
12 describing were impacts to the end user, right, or impacts
13 to the -- there could be an impact on people who use the
14 water, right?

15 A. Yes.

16 Q. Can there also be an impact on the physical
17 ditch itself?

18 A. I'm sure that, you know, like anything else
19 that's left alone, you know, I'm -- I'm sure there could
20 be degradation and other things occurring that would cause
21 disrepair, I suppose.

22 Q. Okay. And just while we're on the subject of
23 end users, would it be possible for A&B/EMI to give water
24 only for domestic use or only for agriculture out of the
25 system, in other words, are there separate pipes, there's

1 like a domestic pipe and an ag pipe?

2 MR. FRANKEL: Objection to the first part of
3 the question, your honor, in terms of speculation, calling
4 for expert opinion. In terms of the second part of the
5 question, we're fine, I don't have an objection.

6 THE COURT: Overruled. You can answer.

7 BY MS. GOLDMAN:

8 Q. You can answer, Mr. Vaught.

9 A. The system is not currently set up to deliver
10 the water only for domestic uses or only for agricultural
11 uses.

12 Q. So are there places in the system where water
13 for those two purposes might be co-mingled inside of one
14 pipe?

15 A. Yes.

16 Q. Okay. Just briefly, turning to the matter of
17 removal of diversion structures. So for the streams that
18 have been totally restored, why haven't you removed the
19 diversion structures?

20 A. The removal of the diversion structures to my
21 understanding would require a higher level of permitting
22 for complete restoration of the natural stream course, and
23 would require a much higher level of permitting and could
24 certainly delay any processes that we have working on the
25 system with regard to compliance with the IIFS.

1 Q. And isn't it true that the infrastructure
2 needs to stay in place so that if there's a drought in the
3 future it can be used?

4 MR. FRANKEL: Objection. Calls for
5 speculation. Lacks foundation. Leading.

6 THE COURT: Sustained. Sustained as to
7 leading.

8 MS. GOLDMAN: Thank you, your honor. I just
9 -- okay.

10 THE COURT: You're muted.

11 MS. GOLDMAN: Your honor, just to clarify, I
12 believe our position is that this is a cross-examination
13 and so I would be -- I would like to be able to lead the
14 witness as one would during cross-examination. I -- I
15 just want to clarify the court's ruling.

16 THE COURT: I understand your point. I
17 understand your point but I don't think this is an adverse
18 witness to you.

19 MS. GOLDMAN: Okay. Thank you, your honor.

20 THE COURT: All right.

21 BY MS. GOLDMAN:

22 Q. Okay. So what kind of process do you have to
23 go through in order to modify a diversion?

24 A. So we have to establish what -- the location
25 of it, whether it's in the stream or on the stream versus

1 off of the stream course. And then we have to work
2 through the Water Commission to get approval to make any
3 type of modification and that may trigger, the scope of
4 the modification may trigger greater levels of permitting
5 through the Army Corps for -- for permit process, flood
6 plain -- flood plain permit, operation, so forth. There's
7 just -- it just depends. That's the process we go
8 through. We evaluate each one, each intake, see what the
9 scope of work is going to take and then try to obtain the
10 necessary approvals.

11 Q. Okay. So calling your attention to the draft
12 work plan that Mr. Schulmeister was asking you about.
13 That was AB -- oh, I'm sorry, strike that please. Calling
14 your attention to the -- actually, located at AB-33 which
15 has been admitted into evidence, at 196 to 201.

16 MR. FRANKEL: I'm sorry. Which --

17 THE COURT: AB-33, page 196.

18 MR. FRANKEL: Okay.

19 BY MS. GOLDMAN:

20 Q. Okay.

21 A. Okay. I have AB-33.

22 Q. So --

23 MR. FRANKEL: Your honor, and for the
24 parties, to make everybody's life easier, if you look at
25 Exhibit J-21 which is in evidence, page 161, that's what

1 you want to look at. It's already in evidence. It's a
2 more recent information thing. Can we just cut to the
3 chase?

4 THE COURT: Ms. --

5 MS. GOLDMAN: Well, AB-33 is also in
6 evidence.

7 MR. FRANKEL: Okay. All right.

8 THE COURT: Ms. Goldman -- Ms. Goldman --

9 MS. GOLDMAN: Whatever.

10 THE COURT: -- gets to do it the way she
11 wants to do it.

12 MR. FRANKEL: All right. All right.

13 BY MS. GOLDMAN:

14 Q. I appreciate the point though, Mr. Frankel.
15 And thank you, your honor.

16 Okay. So with respect to trial Exhibit
17 AB-33, at 196, if no approvals are required for
18 modification of a diversion, why would that be?

19 A. I apologize. I'm looking -- where are we
20 now? I'm on AB-33?

21 Q. At 196.

22 MR. WYNHOFF: I'm not sure 196.

23 THE COURT: Your Excel spreadsheet on the --

24 THE WITNESS: Got you.

25 THE COURT: For the restoration one -- no,

1 the IIF -- the IIFS ones.

2 THE WITNESS: Yeah. Got you. Thank you.
3 Thank you for your patience.

4 THE COURT: No problem.

5 BY MS. GOLDMAN:

6 Q. Okay. So when it says no approvals required,
7 why would that be?

8 A. Because it was evaluated and discussed with
9 the Water Commission and our compliance person and they
10 realized that to make the modifications that we have
11 listed in here we would -- it wouldn't require a -- a
12 permit or an approval from a specific agency.

13 Q. Okay. And do modifications have to be made
14 in every instance or are some capable of not being
15 modified?

16 MR. FRANKEL: Objection. Vague. Passive
17 voice.

18 THE COURT: Sustained.

19 BY MS. GOLDMAN:

20 Q. Are there diversion structures that do not
21 need to be modified in order to comply with whatever EMI
22 believed needs to be complied with?

23 MR. FRANKEL: Objection. Vague. Calls for
24 speculation.

25 THE COURT: Sustained.

1 MR. FRANKEL: Lack of foundation.

2 MS. GOLDMAN: I'll strike that question, your
3 honor. That was very broad.

4 THE COURT: Also, just a small point. Just a
5 small point. When -- we don't strike questions. We
6 withdraw them. Only -- the court reporter really doesn't
7 like it when people say "strike that."

8 MS. GOLDMAN: Okay. Withdrawn.

9 THE COURT: Okay.

10 MS. GOLDMAN: Apologies.

11 THE COURT: No problem.

12 MR. WYNHOFF: If I interject, you now know
13 that. Thank you.

14 BY MS. GOLDMAN:

15 Q. Okay. On this spreadsheet there is a column
16 that says Diversion Type - Major or Minor. What does that
17 mean?

18 A. That generally refers to the size of -- the
19 size of the diversion and the complexity of its
20 construction.

21 Q. And the diversion ID number, I noticed that
22 they had letters before them. What do those letters
23 correspond to?

24 A. So when we registered all of these diversions
25 in 1985, I believe, or '86 when they were all registered

1 with the Water Commission, each diversion had to have a
2 number associated with it. So if you'll notice, the ones
3 with the letters, all of them have letters, and the letter
4 corresponds with the specific ditch that it's going into.
5 So if you see K-1, let's say at the top, that's working
6 from east to west, that would be the Makapipi intake. K-1
7 would be Koolau Ditch, first intake.

8 Q. Okay. So this says NH and then a number.
9 Where would it be from?

10 A. New -- the New Hamakua ditch. New Hamakua.
11 So if there's a small letter, like there's a letter and
12 then a number with a small letter, that's usually a minor
13 intake.

14 Q. Okay. Okay. And to your knowledge -- sorry.
15 Just a moment please. Oh. Of the modifications that are
16 not yet completed, are modifications in fact underway?

17 A. We're prepared for -- the ones that are
18 completed are through. The ones that aren't we are
19 working on, like the taro stream ones, we're working on
20 BMP plan to work through the Department and Health Clean
21 Water Branch so that we're able to come up with a plan to
22 implement best management practices that are satisfactory
23 to the State while we perform the closures on these other
24 intakes.

25 Q. So would it be fair to say that the process

1 is underway on those?

2 A. Yeah.

3 Q. Okay. Calling your attention to the
4 compliance or status report. What are those? Do you know
5 what I mean when I refer to that?

6 A. Compliance or status report?

7 Q. Yes.

8 A. I'm going to assume that's just a status of
9 the work that we're working on for the intake closures.

10 Q. Okay. So in this same Exhibit AB-33, if you
11 could turn to page 158 please.

12 I'm sorry. Page 161.

13 A. 151?

14 MR. ROWE: 61.

15 BY MS. GOLDMAN:

16 Q. 161.

17 A. Sorry.

18 Q. No problem.

19 MR. SCHULMEISTER: I'm sorry. I didn't get
20 the page number.

21 BY MS. GOLDMAN:

22 Q. 161.

23 A. Okay.

24 Q. Do you recognize that signature?

25 A. I do.

1 Q. Whose signature is that?

2 A. Looks like mine.

3 Q. And what -- and what is the document that
4 this signature is on? Tell us -- tell us what this
5 document is please. It begins on page 158 if that's
6 helpful.

7 A. Yeah. It's a compliance report.

8 Q. Okay. And did you draft this report?

9 A. I helped draft this report, yes.

10 Q. I see it was transmitted via email. Were you
11 the one who transmitted it?

12 A. I don't recall if I had transmitted it or if
13 they were transmitted for me. I believe I transmit it
14 though.

15 Q. Okay. And -- okay. Okay. Changing topics a
16 little bit. I just want to talk to you about what's been
17 characterized as trash, debris, rubbish, etcetera, in the
18 license area. So members of the community -- you
19 testified that members of the community have given you
20 pictures of rubbish before, right?

21 A. They directed me, yes.

22 Q. Okay. And you mentioned earlier that you
23 have a standard operating procedure, I believe is what you
24 said, for dealing with it when something like that is
25 reported. Can you please explain?

1 A. Yes. So we always -- what's happened in the
2 past is if we recognize that there's trash, or if we're
3 notified that there's stuff up in the watershed, in the
4 past we would go up, evaluate what it's going to take to
5 get -- get it out, get it out of the stream or out of the
6 bushes or off of the road, load it onto a truck, a
7 trailer, a vehicle of some sort to take it back to our
8 base yard where we could document it, it was removed. And
9 then -- now what we told them, and this is very recently,
10 if they see stuff strewn about, take a photo of it, remove
11 it, and take another photo of it being taken out.

12 Q. Okay. Okay. And what is the East Maui
13 Revocable Permit Committee?

14 A. So one of the -- one of the requirements that
15 was added to the revocable permit was to convene a
16 committee of people who were directly impacted, I guess,
17 by the revocable permit and that would -- think would be
18 good for them to be involved in quarterly meetings to find
19 out what has happened, what's occurred up to that point as
20 far as, you know, what kind of work has been done or so
21 forth. I know that it includes someone from Na Moku, Na
22 Moku Aupuni O Koolau Hui which --

23 THE REPORTER: I'm sorry. Which --

24 THE COURT: Whoa.

25 THE WITNESS: Apologies. Apologies.

1 THE COURT: We'll just go with Na Moku for
2 short. Thanks.

3 THE WITNESS: Okay. Na Moku. A member from
4 Na Moku, someone from OHA, the County Department of Water
5 Supply, and the Maui Farm Bureau, I believe, as well as
6 Mahi Pono/East Maui Irrigation.

7 THE REPORTER: So that the --

8 MS. GOLDMAN: So you --

9 THE COURT: All right. All right, Ms.
10 Goldman. Time out. Sorry. Yes?

11 THE REPORTER: So he said it the first time
12 so I need the whole spelling.

13 THE COURT: Oh, okay. Our court reporter is
14 absolutely right. Since he said the whole word out loud
15 we need to make it part of the record, so go ahead.
16 That's -- I should have known that. I apologize. So
17 let's go ahead and spell the whole thing.

18 BY MS. GOLDMAN:

19 Q. Mr. Vaught, if you would.

20 A. Okay. N-as in Nancy -A, M as in Mike -O-K-U
21 A-U-P-U-N-I -- oh, excuse me, I'm sorry. If I don't write
22 it down, I'm not going to say it correctly, I apologize.

23 MR. ROWE: Your honor, may I hand the witness
24 a piece of paper?

25 THE COURT: Sure.

1 THE WITNESS: I apologize. I wasn't prepared
2 for this.

3 THE COURT: No problem.

4 BY MS. GOLDMAN:

5 Q. We appreciate it, Mr. Vaught.

6 A. So N-A M-O-K-U A-U-P-U-N-I, then the letter
7 O, then K-O-O-L-A-U, and then H-U-I.

8 THE COURT: Thank you.

9 THE WITNESS: Thank you. Apologies again.

10 THE COURT: No reason to apologize.

11 BY MS. GOLDMAN:

12 Q. Okay. Mr. Vaught, calling your attention to
13 AB-33 which we already looked at, it's in evidence, at
14 page 194.

15 A. Okay.

16 Q. Do you recognize this document?

17 A. Yes.

18 Q. Okay. Can you describe it please for the
19 court and for the record?

20 A. A meeting -- a meeting summary of what was
21 discussed at one of our meetings.

22 Q. Okay. What was the date of that meeting?

23 A. March 12, 2019.

24 Q. And how often do you have meetings of this
25 committee?

1 A. I was gonna have this -- these meetings
2 quarterly but COVID has changed that a little bit.

3 Q. And is such a meeting summary like this, is
4 it provided to anyone else or is it just for your internal
5 records?

6 A. It's for internal records but we use it to
7 show proof that we convened a meeting to meet the
8 requirements set forth in the revocable permit.

9 Q. Okay. And, in fact, it's in one of your
10 status reports which is AB-30, right?

11 A. Yes.

12 MS. GOLDMAN: Right. Okay. Okay. Your
13 honor, may I ask just a moment to confer with co-counsel
14 just make sure I haven't missed anything?

15 THE COURT: Yes.

16 MS. GOLDMAN: Thank you.

17 Thank you, your honor. No further questions
18 from the State for this witness at this time.

19 THE COURT: Thank you. All right. So I
20 guess we're going to Mr. Rowe next and saving Mr. Frankel
21 for last, is that the plan? Mr. Rowe, do you have any
22 questions?

23 MR. ROWE: Your honor, there's no questions
24 for this witness.

25 THE COURT: All right. Mr. Frankel.

1 You're muted.

2

3

CROSS EXAMINATION

4 BY MR. FRANKEL:

5 Q. I'm never going to get that right.

6 If you could take a look at Exhibit J-21
7 please. And this might save us all a lot of heartache.
8 Are you there?

9 A. Yes. I -- I just -- I have it now.

10 Q. Okay. I don't know if you've ever -- have
11 you ever seen this staff submittal before?

12 A. I've seen -- I don't recall if I've seen this
13 exact staff submittal but I'm pretty sure I have.

14 Q. Okay. Well, you know, this is something that
15 was given to the Board of Land & Natural Resources prior
16 to its decision-making this past year, 2019. And if you
17 go to page 161 of this document you'll see a spreadsheet
18 that is similar to the one that Mr. Schulmeister was
19 talking to you about, AB-36 and AB-37, but this one has a
20 more current date of September 26, 2019. Do you see that
21 there on page 161 of Exhibit J-21?

22 A. I see the exhibit date -- I mean, I see the
23 exhibit, yes, and the exhibit date being September 26,
24 yes.

25 Q. So this is a more recent version of a

1 document that you were talking about with Mr.
2 Schulmeister, AB-36 and 37, right?

3 A. Yes, that's what it looks like.

4 Q. And Ms. Goldman was just talking to you about
5 AB-33 which, actually, approximately 120 pages of it are
6 just a reproduction of this entire J-21 staff submittal,
7 right? Is that -- I mean, is that -- does that seem
8 possible?

9 A. It's possible, yes.

10 Q. Okay. So the most important thing is this is
11 what the Board of Land & Natural Resources had in front of
12 it when it was making its decision in 2019 and you
13 reported on what diversion structures had been completed
14 and which ones had not, correct?

15 A. I believe so, yes.

16 Q. How difficult would it have been, Mr. Vaught,
17 for you to include a -- and I know the type is really
18 small, what-have-you, but to have put dates in here about
19 when certain things were completed and when things were
20 anticipated to be completed?

21 A. I suppose that could have been added.

22 Q. Did the Board of Land & Natural Resources or
23 the Department of Land & Natural Resources ever ask you to
24 do that?

25 A. They never asked me directly to do that.

1 Q. Okay. Thank you. Now, I want to talk to you
2 about three particular streams and three -- and the
3 diversions on these streams. I want to first start with
4 -- and I'm not -- we're not going to look at the exhibit
5 right now. I want to show you a different exhibit, but we
6 may need to return to this one if necessary. But I would
7 like you to take a look at Exhibit J-23.

8 A. Okay.

9 Q. Now, I don't know if you saw -- see the cover
10 page, but if you go down to page 7 of this document, what
11 the Division of Aquatic Resources calls report card, have
12 you ever seen anything like that before?

13 A. I don't recall seeing this.

14 Q. Okay. All right. Well, on Puohokamo Stream
15 if the Division of Aquatic Resources recommended --

16 THE REPORTER: Sorry.

17 THE COURT: Sorry. Spell? Wait. Just so
18 you know -- just so you know, we often have different
19 court reporters not only by day but by morning and
20 afternoon so you can't just assume that our current court
21 reporter has been through this drill before. Okay. Thank
22 you.

23 BY MR. FRANKEL:

24 Q. I'm not assuming. I'm just being stupid.
25 The stream is P-U-O-H-O-K-A-M-O-A. So Pumahaku -- Puomoka

1 -- it is late -- Puohokamoa Stream. And if the Division
2 of Aquatic Resources recommended a V notch on the Manuel
3 Luis ditch, is that something that you folks have done on
4 this stream?

5 A. No.

6 MR. SCHULMEISTER: I'm going to object to the
7 form of the question as a hypothetical.

8 THE COURT: Overruled. You can answer.

9 THE WITNESS: No, that's not something we
10 have done on that stream.

11 BY MR. FRANKEL:

12 Q. And would you do so if somebody from the
13 Department of Land & Natural Resources asked you to do so?

14 A. If I acquired the necessary permits for it,
15 then I would do so, if that's what they told us to do.

16 Q. And would you agree with the statement,
17 Division of Aquatic Resources, that V notches on the dams
18 would be relatively simple at these spots?

19 A. I think that's a pretty accurate statement.
20 I think they would be somewhat simple.

21 Q. But to date EMI has not done so, correct?

22 A. That's correct.

23 Q. Okay. The next stream I'd like to talk to
24 you about is Waiohuk Stream, and that is spelled
25 W-A-I-O-H-U-E. You're -- obviously you're familiar with

1 Waiohue Stream, right?

2 A. Yes, I am.

3 Q. And if the Division of Aquatic Resources
4 recommended a simple modification of K-13, does that --
5 does that sound familiar to you, you know what diversion
6 that is, K-13?

7 A. I -- I don't know offhand what K-13 is. I --
8 I'm assuming it's the 13th division along the Koolau Ditch
9 but I can't tell you exactly what stream it's on.

10 Q. And when you took Lucienne de Naie and Mike
11 Kido and the Sierra Club's counsel on the site visit to
12 Waiohue Stream, was that in the area of K-13 you think?

13 A. It's possible.

14 Q. If you could take a look at page 11 of this
15 document, Exhibit J-23.

16 A. Okay.

17 Q. So does that -- does that look more familiar
18 to you, does that help you get an idea of what we're
19 talking about?

20 A. I know what we're talking about. I just
21 wasn't sure it was actually K-13, counsel.

22 Q. Okay. That's fine. And if modification of
23 K-13 intake into Koolau Ditch could involve digging of a
24 channel to lower the elevation, overflow water to go down
25 the right bank, is that something that could be done?

1 A. With the proper permitting, yes.

2 Q. And would that be relatively simple?

3 A. I wouldn't say relatively simple. I -- I
4 don't know right offhand if that would require us, you
5 know, to get equipment to that location or, you know, how
6 big of a channel they'd like us to dig, but if -- it's
7 something that could be done, yes.

8 Q. Has anyone from the Department of Land &
9 Natural Resources asked you to do that?

10 A. I don't recall anyone asking me to do that.

11 Q. But if they did ask you to do it, you would
12 do it, wouldn't you?

13 A. If the proper approvals could be obtained.

14 Q. Right. And actually, you know, we're going
15 to return to Waiohue Stream a little later on. But for
16 now, for a little while you guys had a black pipe
17 installed in this area to allow for some connectivity, do
18 you remember that?

19 A. Yes, I do.

20 Q. Is that pipe still in use?

21 A. Not to my knowledge.

22 Q. It's not needed because what you did was a
23 sluice gate, correct?

24 A. We sealed the intake gate. We closed the
25 intake gate which would cause all the water to go out back

1 into the stream course, right, and no longer into the
2 diversion.

3 Q. So that pipe is no longer necessary, that
4 black pipe?

5 A. Yes, that's correct.

6 Q. Okay. Now I want to ask you about diversion
7 structure on Hanawi Stream, which I believe is
8 H-A-N-A-W-I, and then --

9 THE COURT: Let me -- I'm sorry. I apologize
10 for interrupting but I just noticed since you're moving to
11 a new area, it's time. We're actually a few minutes past
12 the time for a break. So we'll take a recess now and for
13 nine minutes. Please return at three o'clock. Thank you.

14 (A recess was taken.)

15 THE COURT: All right. Back on record. All
16 right. So we've got an hour left so I will take a break a
17 little quicker than usual but it'll be a brief one.

18 Okay. Go ahead.

19 BY MR. FRANKEL:

20 Q. Mr. Vaught, I think we were talking about
21 Hanawi Stream, and I may have misspelt it before the break
22 so let me be clear. It's H-A-N-A-W-i with a kahako. I
23 might have said okina. I'm getting a little delirious.
24 So you're familiar with Hanawi Stream, right?

25 A. Yes, I am.

1 Q. So back in April 2010, this document J-23, on
2 page 12 of the document, Division of Aquatic Resources
3 wrote: "The only modification would be to the K-4 intake
4 into Koolau Ditch to provide for animal passage and reduce
5 entrainment of newly hatched larvae at the diversion site.
6 This would involve a V notch on the dam right wall right
7 bank."

8 Have you guys -- has EMI done that?

9 A. No, we have not.

10 Q. If the Department of Land & Natural Resources
11 or the Board of Land & Natural Resources asked you to do
12 that, would you do that?

13 A. If the necessary approvals could be obtained,
14 yes.

15 Q. Switching gears. So we don't need Exhibit
16 J-23 anymore, and I don't believe we need Exhibit J --
17 well, who knows what we'll need. But switching gears. Is
18 EMI still diverting water from Puolua, P-U-O-L-U-A,
19 tributary?

20 A. Yes, we are.

21 Q. And you know that Alexander & Baldwin sent
22 out a press release in April 2016 in which it announced
23 that it would be permanently fully restoring water to the
24 stream, right?

25 A. Yes.

1 Q. All right. Thank you. Ms. Goldman was
2 asking you about the ditches and you said that Wailoa
3 Ditch is the highest ditch within the revocable permit
4 area; is that right?

5 A. It's the highest main ditch. I did say that
6 there were other smaller tunnels that transmit water.

7 Q. Sure. And then I want to talk about above
8 the revocable permit area, even higher elevation, the
9 County has some ditches above the Wailoa Ditch; isn't that
10 right?

11 A. They do not have any ditches located there.
12 They have a pipeline and a flume.

13 Q. The upper and lower Waikamoi flumes?

14 A. Yes.

15 Q. Okay. Thank you. Back in -- when this
16 lawsuit was filed in 2019, East Maui Irrigation was taking
17 water from some streams and putting that extra water into
18 Hoolawa Stream, wasn't it?

19 A. The way the ditch is set up to operate there
20 was water, excess water was coming down Hoolawa Stream,
21 that is correct.

22 Q. And that excess water came from other streams
23 further to the east, wasn't it?

24 A. Yes, that's correct.

25 Q. And you put a stop to that because of the

1 Sierra Club's complaint, right?

2 A. Put a stop to that because of the Sierra
3 Club's complaint and because it was the right thing to do.

4 Q. Thank you. Thank you. Mr. Schulmeister
5 asked you about the dust control that's necessary. Can
6 you tell us on average how much water do you use for dust
7 control per day?

8 A. I -- I'm not sure. I couldn't answer that.

9 Q. Can you give us an order of magnitude, is it
10 thousands of gallons, tens of thousands of gallons, or
11 millions of gallons?

12 A. It's tens of thousands of gallons probably.

13 Q. Tens of thousands. So it's not a lot of
14 water?

15 A. Correct. Depending upon, yeah, what the
16 order of magnitude is.

17 Q. That's a good point. Good point. And has
18 the Board of Land & Natural Resources or the Department of
19 Land & Natural Resources ever asked you this question
20 about how much water was used for dust control?

21 A. No, they have not.

22 Q. Thank you. You know, you talked about the
23 5,000 acres that burned I think you said in July. Do you
24 remember that?

25 A. Yes.

1 Q. Was that a relatively big fire?

2 A. Yes.

3 Q. And how much water was used to fight that
4 fire?

5 A. I don't know.

6 Q. Okay. And has the Department of Land &
7 Natural Resources or the Board of Land & Natural Resources
8 ever asked you how much water is required on average
9 throughout a year to fight a fire, to fight all the fires?

10 A. No, they never have. There are years that
11 there are no fires and then there are years that there are
12 several fires.

13 Q. Sure. I understand that. Do you have any
14 sense of magnitude, similar to my question about dust
15 control, there's a big fire like the one in July, takes
16 thousands of gallons, tens of thousands of gallons,
17 millions of gallons, or tens of millions of gallons of
18 water to fight?

19 A. I'm sorry, I couldn't begin to answer that.
20 I don't know.

21 Q. Okay. That's fair. That's fair. You know
22 that revocable permit committee that Ms. Goldman was
23 asking you about?

24 A. Yes.

25 Q. Did you know a suggestion to form that

1 committee came from Lucienne de Naie?

2 A. I believe I was in the room when she made
3 that suggestion.

4 Q. But the Sierra Club was not -- was not
5 included in this committee, was it?

6 A. Doesn't appear to be.

7 Q. Thank you. Now, I'm sorry, I'm getting a
8 little tired and I missed it. What is your job title at
9 Mahi Pono?

10 A. Water -- Director of Water Resources.

11 Q. And now Mahi Pono gets water from East Maui
12 streams, right?

13 A. Yes.

14 Q. And it also gets water from an area referred
15 to as Na Wai'Eha, correct?

16 A. Yes.

17 Q. And the streams there are located in Central
18 Maui, right?

19 A. Yes.

20 Q. And diversion of water from those streams
21 have also been controversial, hasn't it?

22 A. Yes.

23 Q. But there was a settlement or there's been a
24 settlement of some of those disputes in the last year or
25 so, right?

1 MR. SCHULMEISTER: I'm going to object to
2 this as irrelevant. Beyond the scope of direct.

3 THE COURT: What -- what is the relevance?

4 MR. SCHULMEISTER: I --

5 THE COURT: Well, see where this is going
6 first before we have any rulings. Go ahead, Mr. Frankel.

7 MR. FRANKEL: So you want me to repeat the
8 question or you want me to ask --

9 THE COURT: No. I'm asking you to connect
10 the dots for me. Why do we want to spend time going into
11 this question?

12 MR. FRANKEL: I'm just going to get to -- I
13 have two more questions on this topic which is how much
14 water Mahi Pono is budgeting for use -- how much water per
15 acre Mahi Pono is budgeting for use from those streams.

16 MR. SCHULMEISTER: Okay. These are streams
17 that are beyond the -- this is from West Maui and irrigate
18 different fields, nothing that's at issue in this case, so
19 I would say it's irrelevant.

20 THE COURT: Mr. Frankel, is there any -- in
21 terms of these numbers we've been talking about for 10
22 days now, I've always assumed those numbers are from the
23 East Maui watershed. Are you now implying that no, some
24 of that water comes from Central Maui? No?

25 MR. FRANKEL: No, your honor. And I'm -- I'm

1 sorry. I'm not -- you know, I'm doing the shorthand to
2 get to a really quick point. There are other fields,
3 water from other streams, and I'm not -- I don't want to
4 mix the two up. What I -- the one common element that I
5 want to reach is that Mr. Vaught talked about how much
6 water is needed for farming, and he knows how much water
7 per acre is being used from those streams in Central Maui,
8 and I want to compare that to what's being used in these
9 other fields which are adjacent to, not -- not -- they're
10 -- they're slightly separate elevations, etcetera, but I
11 want -- I think it's highly relevant.

12 THE COURT: I'm not -- it sounds like we're
13 going to dive down a rabbit hole. I'm sustaining the
14 objection.

15 BY MR. FRANKEL:

16 Q. Let me try this. Mr. Vaught, has Mahi Pono
17 agreed to limit its use of stream water from Central Maui
18 streams to 2,500 gallons per acre?

19 MR. SCHULMEISTER: I'm going to object on the
20 grounds of this is irrelevant. He's inquiring into a
21 settlement agreement leading to a different area of the
22 plantation. Doesn't involve East Maui.

23 THE COURT: Yeah. I'm sustaining the
24 objection and for relevance and also I guess under a 403,
25 404 type of analysis. I really feel like we're opening a

1 door here that could lead to all kinds of additional
2 questions and back and forth and I just don't see the
3 value compared to the amount of time it might take up.
4 Sustained.

5 MR. FRANKEL: All right, your honor. All
6 right. I was just going to ask that one question on the
7 one topic but I'll move on.

8 THE COURT: Yeah, but we don't know what it's
9 going to lead to.

10 BY MR. FRANKEL:

11 Q. In the first quarter of 2020 fewer than three
12 million gallons of East Maui stream water was used for
13 agriculture, right?

14 A. That's possible.

15 Q. And that might be based on the status report
16 for the first quarter that you submitted to the Board of
17 Land & Natural Resources, does that make sense, sound
18 familiar?

19 A. Yes.

20 Q. But Mahi Pono said it was going to use six
21 times more than that per day when it testified before the
22 Board of Land & Natural Resources in October, didn't it?

23 A. Yes.

24 Q. And Mahi Pono has an agricultural plan that
25 doesn't rely on water from the revocable permit area, does

1 it?

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

3 Q. You haven't seen an agricultural -- a farm
4 plan that Mahi Pono developed that doesn't rely on any
5 water from the revocable permit area?

6 A. I haven't seen that plan if -- if there is
7 one.

8 Q. You haven't had a chance to look at the Draft
9 EIS that's out?

10 A. I looked at the Draft EIS but not every page
11 through the Draft EIS.

12 Q. All right. That's fine. Now the Water
13 Commission determined that it was reasonable for 22.7
14 percent of the water taken from East Maui streams to be
15 lost due to seepage, evaporation and other system losses,
16 right?

17 A. I suppose.

18 Q. Okay. Well --

19 MS. GOLDMAN: Your honor -- objection, your
20 honor. The State would object to this line of questioning
21 as it's outside the scope of direct.

22 THE COURT: Overruled. Go ahead.

23 BY MR. FRANKEL:

24 Q. So I think he already answered. I'm moving
25 to the next question which is in the first quarter of 2020

1 EMI reported system losses of 6.31 million gallons per day
2 on average, right?

3 A. If that's what's in the report, then yes.

4 Q. Why don't you take a look at Exhibit J-27.

5 A. Okay. I have it in front of me.

6 Q. And that's something you helped prepare,
7 right?

8 A. I provided some of the information, yes.

9 Q. And you signed it too, right?

10 A. Yes, I did.

11 Q. Okay. So looking at, I believe it's page 8
12 of this document, there's a table there.

13 A. Yes.

14 Q. And, in fact, the third column is system
15 losses, 22.7 percent as cited in CWRM's D and O; do you
16 see that?

17 A. Yes.

18 Q. So for the quarterly -- quarterly average was
19 6.31 million gallons a day, right, at the bottom?

20 A. Yes.

21 Q. And then -- but the column at the end
22 includes reservoir/fire protection/evaporation/dust
23 control/hydroelectric. Let's talk about that last column
24 for a little bit. Evaporation is part of the system loss,
25 isn't it?

1 A. It could be. I -- I didn't -- I wasn't part
2 of the group that determined the 22.7 system losses but I
3 would assume that evaporation would be part of that.

4 Q. Okay. And we just established that dust
5 control is a pretty insignificant amount of this total.
6 You know, the quarterly average is 16.4 million gallons a
7 day and dust control is in the order of tens of thousands
8 of gallons, right?

9 A. Yes.

10 Q. So we're looking at the other uses as being
11 more -- bigger consumptive uses, except where does the
12 water go after flowing through hydroelectric plant?

13 A. For irrigation.

14 Q. Okay. So anyone measuring -- so I just --
15 for anybody reading this document, you report how much is
16 used for irrigation for diversified agriculture in the
17 third to last column. You see it says Diversified
18 Agriculture?

19 A. Yes.

20 Q. So -- so in the category -- if -- after it
21 goes to the hydroelectric plant, is anyone -- how do you
22 measure that water's use? I mean, it's used for
23 irrigation. Are you measuring that anywhere or you -- I
24 don't -- I just -- something doesn't add up.

25 A. Water that goes through the hydroelectric

1 plant is gauged more like -- not necessarily gauged but
2 there's a certain amount of water that would run through
3 the plant that generate a certain amount of energy, and
4 when that much energy is being generated, then we know
5 more or less how much water is passing through the plant.

6 Q. Okay. But then the water is going to go
7 somewhere after that. And so is that accounted for in
8 this chart?

9 A. I would think so, yes.

10 Q. So where is -- where does -- I mean, are you
11 -- there's a sum total on the very left-hand side of the
12 quarterly average, 27.79, and if you add all those numbers
13 at the bottom, wouldn't they -- to the right of that,
14 wouldn't they equal 27.79?

15 A. Yes.

16 Q. So is any of the water in the category
17 reservoir/fire protection/evaporation/dust control/
18 hydroelectric being used for irrigation?

19 A. Yes.

20 Q. And how much of it?

21 A. I don't know.

22 Q. Has the Board of Land & Natural Resources or
23 the Department of Land & Natural Resources ever asked you?

24 A. No, they have not.

25 Q. So for them to determine if the water is

1 being used in a reasonable and beneficial manner, would
2 you be able to provide that information to them in terms
3 of how much of this water is actually being used for
4 irrigation separate and apart from the 2.5 million
5 gallons?

6 A. Can you please ask that question again?

7 Q. Yeah, I don't know -- I don't know if I can.
8 Let me try. So in this last category, what I call
9 amorphous category, are you able to provide to the Board
10 the information as to how much of this category is
11 actually being used for irrigation?

12 A. I think we would be able to, yes.

13 Q. And you think that -- that's more than --
14 that's going to be -- you have to add that to the 2.5
15 million gallons that you currently have in the third to
16 last column titled Diversified Agriculture?

17 A. Yes.

18 Q. Okay. So if the Board asked you for that
19 information, you'll provide that information?

20 A. If the Board asked me for the information, I
21 would provide the information.

22 Q. But so far it has not, has it?

23 A. No.

24 Q. Thank you.

25 THE COURT: I have one -- one thing I want to

1 clarify before you move on. Mr. Vaught, this
2 hydroelectric issue you're talking about, when the --
3 after the water runs through the, what I'll call the
4 facility, whatever it is, where does it physically go?
5 Does it go into a reservoir, does it go straight to a
6 ditch, it goes to a field, or what happens to it? It must
7 go somewhere?

8 THE WITNESS: It goes directly into a ditch
9 that runs along the entire farm, or a large portion of our
10 farm all the way across, and then we're able to use the
11 water that comes out of the hydroelectric plant, we're
12 able to use it, either put it into reservoirs or to send
13 it along for irrigating fields.

14 THE COURT: Okay. While we're talking about
15 reservoirs, I'm not looking for any real precision, sir,
16 I'm just trying to get an order of magnitude. If you just
17 talk about the reservoirs that are there near the
18 agricultural land, how much storage capacity is there, and
19 let's call it in terms of days, so in other words, if the
20 ditches suddenly went dry and all's you had to work with
21 was the water in your reservoir, you know, near the ag
22 lands, how long would that last, a day or two or three
23 weeks or what?

24 THE WITNESS: It's dependent upon the level
25 of the reservoir, which ditch it actually supplies. So --

1 but if we filled all the reservoirs, it might last us a
2 week. I mean, so right now the amount of acres that we
3 have planted, it would -- it may last us a little longer
4 than that. You know, it depends on the seepage rate in
5 each of the reservoirs and, you know, whatever water comes
6 out or goes in. But for the most part, you know, all I
7 would say is maybe a week. That's just a really, really
8 rough estimate but --

9 THE COURT: That's --

10 THE WITNESS: I guess we have 10 acres now.

11 THE COURT: Yeah, that's exactly what I was
12 looking for, just a vague idea. So a week is exactly what
13 I needed. Thank you.

14 All right. Sorry for interrupting, Mr.
15 Frankel. Go ahead.

16 MR. FRANKEL: That's right. And, your honor,
17 there was actually a couple of findings of fact from the
18 Water Commission that get to your question as well.

19 THE COURT: Okay.

20 BY MR. FRANKEL:

21 Q. And maybe we'll point that to -- point it out
22 to you in closing.

23 So now switching gears. Mr. Vaught, if the
24 revocable permits were invalidated by the court but the
25 court authorized delivery of water to Maui County, would

1 EMI continue delivery of water to the County?

2 MR. SCHULMEISTER: I'm going to object to
3 this question. Calling for speculation and lack of
4 foundation. It -- it'd be up to him and he would know.

5 THE COURT: He can explain that. You may
6 answer to the best you can, sir.

7 THE WITNESS: Yes. We could still deliver
8 water to the County.

9 BY MR. FRANKEL:

10 Q. And even if the water delivery agreement is
11 no longer in effect, EMI is not going to stop providing
12 water to the County, right?

13 MR. SCHULMEISTER: Objection. Calling for
14 speculation. There's no foundation. This is something
15 that he would have the authority to decide.

16 THE COURT: I'll allow it. You can answer.

17 THE WITNESS: I believe we would still
18 deliver water to the counties.

19 BY MR. FRANKEL:

20 Q. Thank you. Thank you, Mr. Vaught. I want to
21 turn to -- my last topic is topic of trash. And you --
22 I'd like to turn your attention to AB-63, and I don't know
23 if it's going to be possible on your computer there, I'm
24 also going to want to look at AB-33 kind of at the same
25 time, I don't know if it's possible, but we can go through

1 one at a time. But, first of all, AB-63.

2 A. Okay. I have AB-63 pulled up.

3 Q. So I want to give you an opportunity to
4 consider this a little more carefully. When do you think
5 these photos were taken?

6 A. I -- I don't know exactly when they were
7 taken. Months ago perhaps. Or maybe -- I know some of
8 them were maybe even longer than that.

9 Q. Let's -- okay. So maybe some in 2020 and
10 some in 2019. Is that -- is that a fair --

11 A. That would be fair.

12 Q. But nothing in 2018, right?

13 A. In 2018 I would say some of them were
14 possibly -- let me see what photos they'd be. The ones
15 with the large steel parts.

16 Q. Well, you know, maybe to make it a little
17 easier, there is some overlap. If we look at AB-33, page
18 12 of that, the Bates stamp page 12, which is the number
19 at the very bottom. I guess what I'm trying to figure out
20 is whether the photographs in AB-33, and there's some
21 duplicates with the other photos, but were all these taken
22 from the second quarter of 2020 or some of them were from
23 the first quarter or some of them are from 2019?

24 A. Some of them are but we added to the piles.
25 Any time we added to the piles we wanted to take

1 additional photos to document that we added to the piles.

2 Q. Okay. So just to be clear then, these
3 photographs that are in AB-33, they represent not just an
4 amount of trash taken out in one quarter but trash and
5 garbage, however you want to characterize it, taken out
6 over several quarters, correct?

7 A. That's correct.

8 Q. Okay. Now, how long has this trash been on
9 public land? It wasn't on the public land for just the
10 past year, was it?

11 A. No, I don't believe so.

12 Q. It was there for years and years, right?

13 A. Yes, I'm assuming so.

14 Q. And if the Board of Land & Natural Resources
15 asked you for the first time to start removing the trash
16 in two thousand and -- I can't remember if it's seventeen
17 or eighteen now, this trash had been there and remained
18 until you removed it more recently, correct?

19 A. Correct.

20 Q. Now are there still old pipes and other
21 debris within the area covered by the revocable permits?

22 A. Oh, I'm sure, yes.

23 Q. I'd like you to take a look at Exhibit 67 --
24 65, I'm sorry. Sierra Club's Exhibit 67.

25 A. Okay.

- 1 Q. You recognize Exhibit 67 as Waiohue Stream
2 and the waterfall there, little pool?
- 3 A. Yes.
- 4 Q. Okay. Now if you could turn to Exhibit 65.
5 Sierra Club Exhibit 65.
- 6 A. Yes.
- 7 Q. You've seen that pipe there before, right?
- 8 A. Yes.
- 9 Q. Is that pipe still there today, you think?
- 10 A. I would think it's probably still there.
- 11 Q. But it's no longer in use, right, because of
12 what you did with the gates and how the water's flowing
13 over, right?
- 14 A. That's correct.
- 15 Q. Has anyone at DLNR or the BLNR asked you to
16 get rid of it?
- 17 A. Not specifically, no.
- 18 Q. Would it be possible to remove it within the
19 next few months?
- 20 A. Yes.
- 21 Q. Okay. Mr. -- Mr. Vaught, if A&B and Mahi
22 Pono provided EMI more money in your budget to hire more
23 staff and to get more equipment, more of those really cool
24 ATV little things, four-wheel guys, could EMI more quickly
25 get rid of trash that remains in and next to streams on

1 public land in East Maui?

2 A. That's difficult to answer just because if I
3 tell someone who's newly hired to head out to Puohokamoa
4 Stream and do this, he's not going to know where to go if
5 he's not familiar. So just say it would speed things up,
6 it may not, you know, we'd have to account for the
7 training process and getting familiar with the area and
8 what we do.

9 Q. Sure. It would take time. But if you have a
10 larger budget with more equipment and more personnel,
11 taking into consideration the significant time to orient
12 staff 'cause it's a complicated system, if you had more
13 staff you'd be able to get rid of more of the trash more
14 quickly over a period of a year or two, right?

15 A. It's possible.

16 MR. FRANKEL: Thank you.

17 THE COURT: All right.

18 MR. FRANKEL: I have no further questions,
19 your honor.

20 THE COURT: Okay. Good timing 'cause we'll
21 take our last break of the day. Just six minutes so
22 please return at 25 of 4:00. Thank you. We're in recess.

23 (A recess was taken.)

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

25 THE LAW CLERK: Yes.

1 THE COURT: All right. Mr. Frankel just
2 finished. So Ms. Goldman?

3 MS. GOLDMAN: Thank you, your honor. I
4 believe Mr. Schulmeister would be next.

5 THE COURT: Okay. Mr. Schulmeister.

6 MS. GOLDMAN: Although we're happy -- thank
7 you.

8

9

REDIRECT EXAMINATION

10 BY MR. SCHULMEISTER:

11 Q. Yes. Mr. Vaught, I just want to briefly
12 revisit the question about Puolua Stream, P-O -- I'm
13 sorry, P-U-O-L-U-A, which is in the Huelo area near
14 Hanehoi Stream, is that right?

15 A. Yes, that's correct.

16 Q. Is that a tributary of Hanehoi Stream?

17 A. Yes, it does feed into Hanehoi Stream below
18 the highway.

19 Q. Okay. And the question was asked whether you
20 -- whether EMI has continued to divert water from that
21 stream even though it's a full restoration stream. You
22 remember that?

23 A. Yes, I remember the question.

24 Q. Okay. And is there a reason why the
25 diversion of water from Puolua Stream has not been

1 completely stopped?

2 A. It's because of the way the water flows into
3 the ditch that it's a significant construction project
4 taking place in the stream that's going to require a much
5 higher level of permitting and construction.

6 Q. So -- and has that level of permitting been
7 completed?

8 A. No, it has not.

9 Q. And what makes it require a higher level of
10 permitting and construction?

11 A. It would be altering, basically altering a
12 stream, and going actually into the stream and
13 constructing in the actual stream, so doing any work in
14 the stream is going to trigger a bunch of different
15 permits.

16 Q. Is that because the ditch where it crosses
17 the stream there is actually in the stream bed?

18 A. Yes, that's correct.

19 Q. And so water in the ditch coming from east
20 comes through that part of the ditch within the stream bed
21 itself and then continues further west, is that right?

22 A. Yes, that's correct.

23 Q. And the water above -- is that the Lowrie
24 Ditch?

25 A. Yes, that's the Lowrie Ditch.

1 Q. And so above the Lowrie Ditch the stream
2 comes and then the ditch is just -- it's just right in the
3 stream bed itself?

4 A. Yes.

5 Q. So say you didn't have to block the water
6 looking over past the ditch somehow, you had to do
7 something where you don't interfere with the ability of
8 the ditch to transfer water from east to west, is that
9 right?

10 A. Yes, that's correct.

11 Q. And that's what makes it a challenge?

12 A. Yes.

13 Q. Okay. And has that been the subject of
14 extensive interaction with Dean Ueno of the Service Water
15 Branch, the Water Commission, and other members of the
16 Water Commission in terms of how to best deal with that
17 particular challenge?

18 A. Yes.

19 Q. Okay. It's not because EMI wants to just
20 complete -- continue to divert water from that stream?

21 A. That's correct. It's -- it's not because we
22 don't want to but it's because it's very difficult to do
23 under the current circumstances. We do pass some water
24 over the ditch on the side but the -- that's a temporary
25 setup and --

1 Q. And during dry weather is there much water in
2 Puolua Stream above the Lowrie Ditch?

3 A. Not very much during dry weather, no.

4 Q. Is it sometimes naturally dry in the Lowrie
5 Ditch?

6 A. I've never seen it dry but I'm -- I'm sure
7 it's possible.

8 Q. But the amount of water, when you say it's
9 relatively -- when you say it's dry, it's not too much
10 water, could you estimate, could you put an order of
11 magnitude of what we're talking about?

12 A. Little more than a faucet, I suppose. You
13 know, when I say when it's dry, I've seen a little bit of
14 water in there but, again, I haven't seen it in its driest
15 point. You know, I haven't driven out there in -- when it
16 hasn't rained for two months.

17 Q. So maybe close to a million gallons per day
18 when it's not raining, right?

19 A. Correct.

20 Q. Something more in the order of tens of
21 thousands of gallons per day, thousands of gallons per
22 day?

23 A. Possible, yeah.

24 Q. Okay. You mentioned something like a faucet.
25 You mean like a -- like a hose bib in a house, that kind

1 of a faucet?

2 A. Yeah, maybe a couple of those.

3 Q. Yeah. Okay. Now could you return again to
4 Exhibit S-65. Do you have that handy?

5 A. You say which one?

6 Q. This is -- I'm sorry, not S-65. Plaintiff's
7 65, so just 65. It's the photo of the black pipe at
8 Waiohue. W-A-I-O-H-U-E. Do you have that up?

9 A. Yes.

10 Q. Now when people talk about rubbish and
11 debris, is this what comes to mind, a pipe like this that
12 was installed for a different purpose but it's not broken
13 or anything?

14 A. It doesn't immediately come to mind, no,
15 because we installed it to serve a function, and it did
16 serve a function up to a certain point, and then the 2018
17 IIFS, DLNR caused us to alter the intake tunnel and kind
18 of made this pipe obsolete.

19 Q. All right. But it's not broken or creating a
20 safety hazard or anything like that, is that right?

21 A. Yes, that's correct.

22 Q. All right. Now, could you return to Exhibit
23 AB-33.

24 A. Okay. Got it.

25 Q. All right. And then -- and for -- this is

1 the June, I'm sorry, the second quarterly report from EMI,
2 the cover letter dated July 24th, 2020, is that right?

3 A. Yes.

4 Q. All right. Turning to page 006, Bates stamp
5 page 006.

6 A. Okay.

7 Q. Under paragraph 1, lower case A, there's a
8 discussion that refers to some of the information that's
9 later collected in Exhibit A which is later in the
10 exhibit. You see that?

11 A. Yes.

12 Q. And after -- it's about the middle of the
13 page where it says, Exhibit A, it says, "This table also
14 includes an estimated 22.7 percent system loss which is
15 consistent with the hearings officer's amended," etcetera.
16 You see that?

17 A. Yes.

18 Q. Now, the 22 point -- so if you look -- if we
19 turn to Exhibit A which is on page 9, 009, that's the
20 third column, correct?

21 A. Yes.

22 Q. So this 22.7 percent, is that a measured
23 number or is that a calculated number?

24 A. I -- I don't know. I'm not familiar with how
25 they arrived at that number.

1 Q. Okay. Well, 22.7 percent from the Decision
2 and Order, that was 22.7 percent of a larger number,
3 right?

4 MR. FRANKEL: Objection. Lacks foundation.

5 THE COURT: I'm -- did you say of a larger
6 number? Of course it was. What do you mean?

7 MR. SCHULMEISTER: Right. Well, my question
8 is what the larger number is.

9 THE COURT: Oh, okay.

10 MR. SCHULMEISTER: Well, let me withdraw the
11 question. Let me withdraw the question.

12 THE COURT: Thank you.

13 BY MR. SCHULMEISTER:

14 Q. All right. Are any -- have you done anything
15 -- is there a way that you know of to directly measure
16 system losses as opposed to estimating them?

17 A. Directly measure them accurately, I -- I
18 don't know. I'm sure there's probably a way.

19 Q. But you haven't done that, right?

20 A. No, I haven't done that.

21 Q. And the column on the right, let's go back to
22 page 006. The next sentence after the last one that I --
23 well, let -- you see where there's a reference to the
24 CCHMA13-01 number?

25 A. Yes.

1 Q. The next sentence says: "However, please
2 note that the 22.7 percent figure was derived from the
3 Central Maui fields to ensure full sugar cultivation and a
4 larger amount of water was being imported." Is that true?

5 MR. FRANKEL: Objection.

6 THE COURT: I'm sorry. What?

7 MR. FRANKEL: Objection.

8 THE COURT: Oh, I'm sorry.

9 MR. FRANKEL: We're not supposed to be --
10 we're not supposed to be reading these things. He's just
11 reading it to make an argument. The witness is --

12 THE COURT: I understand. And now he's
13 asking if the witness agrees. So I'm going to allow it.

14 MR. FRANKEL: Okay.

15 THE COURT: Go ahead, Mr. Vaught. The
16 question is do you agree with the statement that Mr.
17 Schulmeister read out of the exhibit?

18 THE WITNESS: Yes.

19 BY MR. SCHULMEISTER:

20 Q. Okay. And the next sentence talks about
21 "Since much of the system loss represents seepage from
22 reservoirs and the reservoirs continue to be filled for
23 fire protection, the total percentage of seepage loss
24 currently being experienced is greater than 22.7 percent
25 with the difference being captured in the last column."

1 You -- do you agree with that?

2 A. Yes.

3 Q. Okay. So when we look at Exhibit A on page 9
4 there is also seepage loss in the last column, correct?

5 A. Yes.

6 MR. SCHULMEISTER: I have no further
7 questions.

8 THE COURT: All right. Ms. Goldman, your
9 turn.

10 MS. GOLDMAN: Thank you, your honor.

11 THE COURT: Ma'am, I'm going to note we've
12 got 12 minutes left. It would be nice to finish Mr.
13 Vaught today so he doesn't have to come back tomorrow.

14 MR. SCHULMEISTER: Thank you, your honor.

15

16 RECROSS EXAMINATION

17 BY MS. GOLDMAN:

18 Q. Understood.

19 Mr. Vaught, just because something is not
20 incurring to you, does that make it trash?

21 A. No, not necessarily.

22 Q. Okay. I wanted to clarify a point regarding
23 -- a point that you -- a question that you answered
24 previously where you said that water from the reservoirs
25 could possibly serve the County of Maui for a week if

1 they're full. Do you remember saying that?

2 A. No.

3 MR. SCHULMEISTER: Excuse me. I think that

4 --

5 THE COURT: That mischaracterized his answer.

6 MS. GOLDMAN: But --

7 THE COURT: Just ask a question instead of
8 the big lead up please. Thank you.

9 BY MS. GOLDMAN:

10 Q. Could you please clarify -- clarify what you
11 meant when you said that?

12 A. What I meant -- what I meant was the
13 reservoirs on the farm could support the farm activity but
14 not -- but couldn't support the County.

15 Q. And are all of the reservoirs full right now?

16 A. No. No, they are not.

17 Q. And, lastly, I asked you previously about
18 whether you would be able to separate delivery of water
19 for just domestic use or just agriculture. What was your
20 response to that?

21 A. No, the --

22 THE COURT: No, no. Ms. Goldman, please.

23 MS. GOLDMAN: No.

24 THE COURT: That's just an inappropriate
25 question, especially when we're on the clock. He already

1 --

2 MS. GOLDMAN: Okay.

3 THE COURT: He already answered it. You

4 don't ask him again.

5 MS. GOLDMAN: Well --

6 A VOICE: (Indiscernible).

7 THE REPORTER: Sorry.

8 MS. GOLDMAN: Yeah.

9 THE REPORTER: Was that Mr. Schulmeister who

10 was speaking?

11 THE COURT: Sorry. Time out.

12 THE REPORTER: Who's that -- somebody was

13 talking right after you said --

14 THE COURT: That was Mr. Wynhoff in the

15 background.

16 THE REPORTER: Oh.

17 THE COURT: Something he suggested. They

18 weren't questions. They were just comments between him

19 and Ms. Goldman.

20 THE REPORTER: Okay, sorry.

21 THE COURT: You can just put indiscernible

22 chatter in the background or something like that.

23 THE REPORTER: Thank you.

24 BY MS. GOLDMAN:

25 Q. Thank you, your honor.

1 With respect to delivery of types of water,
2 did you tell something different to Mr. Frankel than you
3 told me when I asked about it?

4 MR. FRANKEL: Objection. That's what the
5 evidence is.

6 THE COURT: So you're asking him to say now
7 whether he's given a different answer before? I mean, the
8 record is the record. Please. Just --

9 MS. GOLDMAN: Your honor, I would like him to
10 explain why he gave a different answer, which will be
11 reflected in the record of the transcript.

12 THE COURT: Ask him a question.

13 MS. GOLDMAN: Okay.

14 THE COURT: If you want to know why, ask him
15 why.

16 BY MS. GOLDMAN:

17 Q. Sure.

18 So why can't you separate the water just for
19 delivery for domestic purposes?

20 A. We -- the same ditch that feeds our fields
21 feeds the water department. The separation would happen
22 at the water department's intake.

23 Q. So how could you possibly continue to serve
24 the County of Maui and not also divert water for other
25 purposes as you told Mr. Frankel?

1 A. I'm sorry. Could you ask the question again
2 please?

3 THE COURT: I don't understand it either.

4 BY MS. GOLDMAN:

5 Q. How would it be possible if you were -- okay.
6 If you were only allowed to provide water for domestic
7 usage, how would it be possible to do that?

8 A. The only way I could think of would be to
9 divert only the amount of water that the County needed and
10 --

11 Q. But your -- I apologize.

12 A. Go ahead. I'm --

13 Q. Okay. So if you're forced to stop water for
14 the fields, can you continue to give water to the County?

15 A. I suppose we could.

16 Q. Can you explain how that's physically
17 possible?

18 A. The County would have to request a certain
19 amount of water for the -- for domestic purposes and for
20 the water treatment for -- and for the ag park,
21 agricultural park, and only that amount of water would
22 then be diverted and delivered across, but that would be
23 highly inefficient.

24 MS. GOLDMAN: Okay. Thank you. That's --
25 that will be all from the State at this time.

1 THE COURT: Mr. Rowe?

2

3 CROSS EXAMINATION

4 BY MR. ROWE:

5 Q. Thank you, your honor.

6 Do you recall being asked if EMI would
7 continue domestic delivery to the County of Maui if the
8 revocable permits were invalidated by Mr. Frankel?

9 A. I recall him asking me that.

10 Q. Okay. Is that ultimately your personal
11 decision?

12 A. No. That's not my personal decision.

13 Q. Whose decision would that be?

14 A. That would be decision that would come from
15 my supervisors. They are the people that direct our
16 company.

17 MR. ROWE: Thank you, your honor. Nothing
18 further.

19 THE COURT: Mr. Schulmeister? I'm sorry.

20 MR. SCHULMEISTER: No further questions.

21 THE COURT: Sorry. Mr. Frankel's turn,
22 sorry.

23

24 RECROSS EXAMINATION

25 BY MR. FRANKEL:

1 Q. So, Mr. Vaught, who's the head of EMI?

2 A. I am.

3 Q. Okay. All right. Great. The pipe we looked
4 at on Waiohue Stream, Mr. Schulmeister asked you if it was
5 broken, but it's not connected to anything now, is it?

6 A. No. It was never connected to anything.

7 Q. It lets -- it was to let water pass over the
8 diversion when -- at an interim measure to allow some
9 level of connectivity a few years ago, right?

10 A. That's correct.

11 Q. Thank you. So, you know, your first and
12 second quarterly reports that you provided to the Board of
13 Land & Natural Resources had that table we looked at a
14 couple times. In terms of the water used for irrigation,
15 is that a calculated amount or is that an amount somebody
16 on Mahi Pono/EMI staff has told you that's the amount of
17 water that's used to irrigate the field?

18 A. That's an amount of water that we calculated
19 that we used.

20 Q. How is that calculation derived?

21 A. We know more or less how much water each
22 individual field is operating and we calculate the amount
23 of hours that we operate each irrigation system and add up
24 the totals for -- weekly totals and then that's how we do
25 -- that's how we come up with that number.

1 Q. And could you break that down by field and be
2 able to provide that to the Board of Land & Natural
3 Resources in your quarterly report? Is it possible?

4 A. It's very difficult but it -- it's possible.

5 Q. Great. And now -- so here's what I don't
6 understand. If you -- after you're done for that one
7 column that has diversified agriculture and it comes up
8 with a total, how -- but you also said some of the water
9 in the reservoirs is used for irrigation. Is that number
10 that you see, irrigation, in the column that talks about
11 diversified agricultural needs, isn't that calculation --
12 it's already in there, right?

13 A. Yes, some of it is, I suppose.

14 Q. All of it is.

15 A. Okay.

16 Q. I mean, I don't -- I don't know. But you've
17 explained how you come up with the figure by looking at
18 all your fields and measuring what the crop needs and you
19 come up with this total. So that's the total use for
20 agriculture. So this other big category that says
21 reservoir/hydroelectric/dust control/evaporation, that
22 water isn't -- in that quarterly, that wasn't used for
23 irrigation separately, right?

24 A. Some of it could have been but some of it was
25 also, I mean, I -- I suppose not.

1 Q. It's really confusing, isn't it?

2 A. Yes.

3 Q. Do you think you guys can do a better job of
4 providing a really clear picture to the Board of Land &
5 Natural Resources and the Department of Land & Natural
6 Resources?

7 A. I suppose we could.

8 Q. Okay. Two just -- I know we're at 4:00, yes,
9 your honor, just a couple more questions. So the Puolua
10 Stream, it intersects the Lowrie Ditch, is there a
11 diversion further upstream from there, the Puolua Stream?

12 A. I believe there is, yes.

13 Q. So that might explain the reason there's a
14 trickle, a faucet worth of water that Mr. Schulmeister --
15 you were describing to Mr. Schulmeister?

16 A. Sure.

17 Q. Okay. And now if you folks decided you were
18 going to abandon the Lowrie Ditch, would it be much easier
19 to restore stream flow to Puolua Stream in terms of work
20 that needs to be done?

21 A. If we were gonna abandon the Lowrie Ditch?
22 If we abandon the Lowrie Ditch, would it make it easier to
23 restore Puolua Stream? Not necessarily. The same permits
24 would still have to be put in place.

25 Q. From an engineering perspective, would it be

1 easier?

2 A. Say that again?

3 Q. From a technical or engineering or work
4 perspective, would it be easier?

5 A. Might be a little easier but not
6 considerably. We'd still have to do construction work
7 there to make sure that the stream course remain in the
8 stream course.

9 MR. FRANKEL: Okay. No further questions,
10 your honor.

11 THE COURT: Thank you. Mr. Schulmeister,
12 back to you.

13 If you're talking, you're muted.

14

15 FURTHER REDIRECT EXAMINATION

16 BY MR. SCHULMEISTER:

17 Q. Okay. I'm sorry. I just wanted to say that
18 I was looking at the map to decide whether I have another
19 question here.

20 Could you just take a look at AB-1?

21 MR. FRANKEL: Your honor, I'm going to
22 object. This has -- this has not been admitted for the
23 truth of the matter therein. It's really inappropriate
24 the question that's about to be asked. He can ask from
25 his memory but he should not be looking at an exhibit

1 that's not in evidence. He's really going to -- he's
2 using it for a different purpose.

3 THE COURT: We'll see. I'll entertain a
4 motion to strike depending on what the question and the
5 answer is.

6 BY MR. SCHULMEISTER:

7 Q. Do you have AB-1 up, Mark, real shortly?

8 A. Okay.

9 Q. Maybe you can help me find Hanehoi Stream on
10 here.

11 A. My apologies.

12 THE COURT: While he's looking for it, can
13 you spell it?

14 MR. SCHULMEISTER: H-A-N-E-H-O-I.

15 THE COURT: Thank you.

16 THE WITNESS: Okay. Kind of fuzzy on my map
17 but, I mean, I know more or less -- I know where it is.

18 BY MR. SCHULMEISTER:

19 Q. Okay. So maybe you can give us a couple
20 landmarks on the map to look for it so we can find it.

21 A. Okay. Hanehoi Stream would be -- if you look
22 all the way down makai you see Waipio Bay.

23 THE COURT: Okay. Got it.

24 THE WITNESS: It would be to the right of
25 Waipio Bay. To the right of Waipio. And the bottom you

1 see where Hanehoi Stream drop into -- you'll see is a -- a
2 couple of yellow parcels there, state parcels at the
3 bottom. And if you follow that curvy line mauka, that
4 would be Hanehoi Stream.

5 BY MR. SCHULMEISTER:

6 Q. Okay. So can you tell from here where the
7 Puolua tributary would be on the map?

8 A. Puolua would be immediately left of that.

9 Q. Okay. Is that the one that crosses Haiku and
10 then going mauka and crosses Lowrie?

11 A. I -- I cannot tell. This map is a little bit
12 fuzzy but I'm -- if that's what your map says, then yes.

13 Q. Are you looking at it on the computer?

14 A. Yes, I am.

15 Q. Can we -- can you zoom it? Zoom in.

16 A. Yeah, the more I zoom, the fuzzier it gets.

17 Q. Oh, okay. All right. Let me just ask you
18 this. I mean, how sure are you that the Puolua Stream
19 goes all the way up to the Wailoa Ditch?

20 A. I'm not a hundred percent sure.

21 MR. SCHULMEISTER: Okay. No further
22 questions.

23 THE COURT: MS. Goldman, your turn.

24 MS. GOLDMAN: No questions from the State for
25 this witness, your honor. No further questions.

1 THE COURT: All right. Thank you. Mr. Rowe?

2

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RE CROSS EXAMINATION

4 BY MR. ROWE:

5 Q. Thank you, your honor. Very quickly.

6 Is EMI independently owned or is it owned as
7 a subsidiary of another company?

8 A. It's owned as a subsidiary or a -- currently
9 is a joint venture with two other companies.

10 Q. So when you refer to having to -- it being a
11 decision of your supervisors I think you said, is that who
12 you're referring to?

13 A. Yes.

14 MR. ROWE: Thank you. No further questions,
15 your honor.

16 THE COURT: All right. Did the court
17 reporter catch -- he said joint venture with who?

18 THE REPORTER: "With two other companies."

19 THE COURT: What?

20 THE REPORTER: "Two other companies."

21 THE COURT: "Two other companies." Is that
22 what you said, sir, two other companies?

23 THE WITNESS: Yes, that's correct.

24 THE COURT: Okay. What are the two other
25 companies?

1 THE WITNESS: Alexander & Baldwin and Mahi
2 Pono, LLC.

3 THE COURT: Okay. Thank you.
4 All right. So anything further from you, Mr.
5 Rowe?

6 MR. ROWE: Oh, sorry, your honor. That was
7 my only question.

8 THE COURT: All right. Mr. Frankel.

9 MR. FRANKEL: No, thank you.

10 THE COURT: Mr. Schulmeister, back to you.

11 MR. SCHULMEISTER: No more questions.

12 THE COURT: Ms. Goldman?

13 MS. GOLDMAN: No more questions from the
14 State.

15 THE COURT: All right. I think that
16 completes the roster as far as anyone who's -- hasn't
17 asked a new question. Mr. Rowe, you were the last one to
18 ask a question, right?

19 MR. ROWE: Yes, and I have nothing further.

20 THE COURT: Okay. Mr. Frankel?

21 MR. FRANKEL: I'm done. Done.

22 THE COURT: Okay. Done. All right. So
23 good. Thank you, everyone, for finishing soon after 4:00.
24 So, Mr. Vaught, I'm sorry, Mr. Vaught doesn't need to come
25 back tomorrow.

1 So, sir, your testimony is finished and you
2 are excused with the thanks of the court. Thank you.

3 THE WITNESS: Thank you, your honor.

4 (The witness is excused.)

5 THE COURT: All right. Let's just -- do we
6 need to do anything else on record or can we go off?

7 MR. WYNHOFF: Off record, your honor.

8 MR. SCHULMEISTER: We can go off.

9 MR. WYNHOFF: I --

10 THE COURT: I don't see anyone with their
11 hand up so I'm going to assume --

12 THE LAW CLERK: Mr. Rowe actually had his
13 hand up. Mr. Rowe actually had his hand up.

14 THE COURT: Oh, Mr. Rowe did. I'm sorry. Go
15 ahead.

16 MR. ROWE: I'm not sure if it has to be on
17 the record, your honor. It was just going to be regarding
18 the County's order of witnesses.

19 THE COURT: That doesn't need to be on
20 record.

21 All right. Let's go off record and thank our
22 court reporter. You are also excused for the day.

23 (Thereupon, proceedings adjourned.)

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STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU)
_____)

I, Sharon Hulihee, RPR, CSR 306, an Official Court Reporter for the First Circuit Court, State of Hawaii, hereby certify that the foregoing comprises a full, true and correct transcription of my stenographic notes taken in the above-entitled cause.

Dated this 12th day of August, 2020.

OFFICIAL COURT REPORTER

/s/Sharon Hulihee
SHARON HULIHEE, RPR, CSR 306