

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

_____	)	
SIERRA CLUB,	)	
	)	
	)	
Plaintiff,	)	
v.	)	Civil No.
	)	19-1-0019-01 (JPC)
BOARD OF LAND AND NATURAL	)	
RESOURCES, DEPARTMENT OF LAND AND	)	
NATURAL RESOURCES, SUZANNE CASE in	)	
her official capacity as Chairperson)	)	
of the Board of land and natural	)	
Resources, ALEXANDER AND BALDWIN,	)	
INC., EAST MAUI IRRIGATION COMPANY,	)	
LLC and COUNTY OF MAUI,	)	
	)	
Defendants.	)	
_____	)	

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JEFFREY P. CRABTREE Judge, Sixth Division, presiding, on Thursday, August 13, 2020.

FURTHER JURY-WAIVED TRIAL

APPEARANCES:

DAVID FRANKEL, ESQ.  
For the Plaintiff

DAVID SCHULMEISTER, ESQ.  
TRISHA AKAGI, ESQ.  
For Alexander and Baldwin and EMI, LLC

WILLIAM WYNHOFF, ESQ.  
For the State of Hawaii

REPORTED BY:  
NIKKI BEAVER CHEANG, CRR, CSR-340  
OFFICIAL COURT REPORTER  
STATE OF HAWAI'I

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1                   \* \* \* P R O C E E D I N G S \* \* \*

2 Thursday, August 13, 2020, with Judge Crabtree 9:03 A.M.

3

4                   THE COURT: We're now on record. FTR on?  
5 Please call the case.

6                   THE BAILIFF: The Circuit Court of the  
7 First Circuit -- woops, the Circuit Court of First  
8 Circuit, State of Hawaii, is now in session.

9                   Calling case No. 1 on the calendar, Civil  
10 No. 19-1-0019, Sierra Club versus Board of Land and  
11 Natural Resources, jury-waived trial.

12                   Counsel, appearances, please, starting with  
13 Mr. Frankel for the plaintiffs.

14                   MR. FRANKEL: Good morning, Your Honor  
15 David Frankel here for the Sierra Club, and appearing  
16 virtually with me today is Marti Townsend of the Sierra  
17 Club. Thank you.

18                   THE COURT: Good morning. I don't see  
19 Ms. Townsend, is she going to be on video or listening.

20                   MR. FRANKEL: I think she's listening  
21 mostly, Your Honor.

22                   THE COURT: Okay. Welcome, Ms. Townsend.

23                   MS. TOWNSEND: Good morning.

24                   THE BAILIFF: And A&B.

25                   THE COURT: Go ahead, Mr. Schulmeister.

1                   MR. SCHULMEISTER: Good morning, Your Honor  
2 and counsel. David Schulmeister and Trisha Akagi for  
3 defendants Alexander and Baldwin and East Maui  
4 Irrigation Company.

5                   THE COURT: Thank you.

6                   THE BAILIFF: And State of Hawaii.

7                   MR. WYNHOFF: Good, everybody. Bill  
8 Wynhoff, and at the moment Lauren Chun listening, Deputy  
9 Attorneys General on behalf of the State of Hawaii.

10                   Ms. Goldman is not in the room right now,  
11 and when she comes in, I'll try to remember to  
12 supplement that for the record, and also our Chairperson  
13 Ms. Case is with us today.

14                   THE COURT: Good morning. Welcome, Chair  
15 Case and, Ms. Chun, good morning to you as well.

16                   All right. How about the County of Maui?

17                   MR. ROWE: Good morning, Your Honor.  
18 Deputy Corporation Counsel Caleb Rowe on behalf of the  
19 County of Maui. In here I have my assistant, Candace  
20 Stahl who's going to help me with exhibits, and Grant  
21 Nakama who is the first witness testifying today.

22                   THE WITNESS: Good morning, Your Honor.

23                   THE COURT: Thank you, good morning.

24                   All right. So I also see on my screen, I  
25 believe we have some other folks listening in. I see a

1 phone attributed to Ms. Summer Sylva and to Trisha Akagi  
2 and to Vince Raboteau.

3 All right. Is everyone ready to go?  
4 Great. Let's swear in the witness, please.

5 THE CLERK: You may remain seated, just  
6 raise your right hand, and I will swear you in.

7 You do solemnly swear or affirm that the  
8 testimony you're about to give will be the truth, the  
9 whole truth and nothing but the truth? If so, please  
10 respond by saying "I do."

11 THE WITNESS: I do.

12 THE CLERK: Thank you.

13 THE COURT: All right. Good morning, sir.  
14 This is Judge Crabtree speaking, asking you to please  
15 state your full name and then spell it so our court  
16 reporter over here on Oahu can get the spelling right.  
17 Thank you.

18 THE WITNESS: Good morning, Your Honor. My  
19 name is Grant Nakama representing Mahi Pono. Spelling,  
20 G-r-a-n-t, Last name, N as in Nancy, a-k-a, M as in  
21 Mary, A.

22 THE COURT: Thank you very much.

23 All right. So I believe this is A&B's  
24 witness; right?

25 MR. SCHULMEISTER: That's correct,

1 Your Honor.

2 THE COURT: All right. Take it away.

3

4 GRANT NAKAMA

5 called as a witness, having been first duly sworn, was  
6 examined and testified as follows:

7

8 DIRECT EXAMINATION

9

10 BY MR. SCHULMEISTER:

11 Q. Morning, Mr. Nakama. Given the virtual  
12 nature of this trial and the mask wearing and the audio  
13 and all that, I'd just like to ask you as much as  
14 possible to speak, to project as clearly and as  
15 distinctly as you can when you speak so that everyone  
16 can hear you. So with that in mind, let me go ahead and  
17 proceed with my examination.

18 Could you give everyone a little background  
19 about where you're from, what your educational and work  
20 history is, just briefly, sort of an overview.

21 A. Sure. Currently my position with Mahi Pono  
22 is vice president of operations, born and raised on  
23 Maui, graduated from Maui High School. Um, bachelor and  
24 master degrees from UH Manoa, business administration.  
25 Previous work experience --

1 THE COURT: Time out, time out, Mr. Nakama.  
2 You're doing something that's very common, so don't take  
3 this as a criticism, a lot of people do this when  
4 they're testifying especially at the beginning.

5 You're speaking way too fast, okay.  
6 So just slow it down a little bit, and that will give  
7 our court reporter a better chance at keeping up with  
8 you.

9 So I think we're okay through Maui High  
10 School, but after that, if you could start over again.

11

12 A. (By the witness) So I received my  
13 bachelors and master degrees in business administration  
14 from the University of Hawaii at Manoa.

15 My previous work experience started with  
16 the County of Maui as a property tax appraiser and  
17 supervisor, and from there I worked for Maui Land and  
18 Pineapple before ending up with Mahi Pono.

19

20 BY MR. SCHULMEISTER:

21 Q. Mr. Nakama, can you, you've indicated your  
22 position with Mahi Pono, could you give a summary of  
23 what your responsibilities in that position are.

24 A. I presently take care of the coordination  
25 of business functions for the company, including land

1 management, lease negotiations and management, contract  
2 negotiations and management, as well as the coordination  
3 of governmental affairs, sales, marketing, basically the  
4 non-farming functions of the company.

5 Q. Okay. Does that include interfacing with  
6 the government regarding the RPs, the State of Hawaii  
7 regarding the RPs?

8 A. It does. So --

9 Q. And just --

10 A. I'd be the primary point of contact for the  
11 revocable permits for Mahi Pono, as well as the  
12 on-the-ground representative for the EIS process.

13 Q. The last thing you said, I'm sorry, the  
14 what process?

15 A. The EIS.

16 Q. Okay. Environmental impact statement?

17 A. Correct, sorry.

18 Q. Okay.

19 THE COURT: Mr. Nakama, here's another  
20 suggestion. You're occasionally kind of rocking back  
21 and forth, and that creates issues with the microphone.  
22 It's very helpful if you can stay kind of the same  
23 distance from the microphone at all times, okay.

24 So I know that's not easy, we all like to  
25 move around while we're talking, just do the best you

1 can to stay the same distance from that microphone  
2 that's in front of you. Thank you.

3 THE WITNESS: Will do. Thank you.

4

5 BY MR. SCHULMEISTER:

6 Q. Okay. Now you mentioned that your  
7 responsibilities including various things and you said,  
8 except the farming operations.

9 Do you have responsibilities that require  
10 you to coordinate with the farming operations of Mahi  
11 Pono?

12 A. I do. Um, so once the crops come in from  
13 the field, as well as the planning of the initial  
14 planting of the crops, I'm involved in that process as  
15 well, because that process is also market-driven and  
16 sale driven.

17 But once the crop is grown and it's brought  
18 into the processing facility, I help coordinate that  
19 process, as far as processing, packaging, distribution,  
20 as well as sales.

21 Q. Okay. Now, you mentioned that one of your  
22 responsibilities has been interfacing with those who are  
23 responsible for the preparation of then environmental  
24 impact statement, did I get that right?

25 A. That's correct.

1 Q. And could you describe what has been your  
2 involvement in the environmental impact statement  
3 preparation process?

4 A. I've been involved with review of the  
5 document, as well as the review of report submitted by  
6 sub-consultants. Each individual appendices of the EIS,  
7 as far as review process, I represented Mahi Pono in  
8 that review process, through all of the appendices, as  
9 well as the actual body of the EIS itself.

10 Q. Okay. So are you familiar with Mahi Pono's  
11 farming plan?

12 A. I am.

13 Q. Okay. And could you just give a high-level  
14 overview of what that plan consists of.

15 A. Sure. So Mahi Pono east Maui fields  
16 consist of about 30,000 plantable acres. That acreage  
17 is broken down into seven categories in the EIS. So  
18 those categories are: Orchard crops, row crops,  
19 tropical fruits, community farm, a potential solar  
20 project and pasture.

21 THE COURT: I'm sorry, we're having a  
22 little bit of difficulty getting everything that you're  
23 saying over here right now.

24 Mr. Rowe, it's been working pretty well up  
25 until now, do you know what's different?

1 THE BAILIFF: His mask, take his mask off.

2 MR. ROWE: I advised him maybe taking his  
3 mask off.

4 THE COURT: All right. Okay, let's try  
5 that and see how it works.

6 Are you personally okay with not wearing a  
7 mask for a while, Mr. Nakama, there in that room?

8 THE WITNESS: Yeah, no problem.

9 THE COURT: I don't want to ask you to do  
10 anything you're not comfortable with from a health  
11 perspective. You okay?

12 THE WITNESS: Understood. I'm okay, yes.

13 THE COURT: If you change your mind on  
14 that, just speak up and let us know.

15 All right, and I'm asking you to please  
16 repeat your last answer, I'm sorry, but please repeat  
17 the whole answer.

18 A. (By the witness) Okay. So in the EIS, the  
19 farm plan is broken up into seven categories, which  
20 consists of: Orchard crops, row crops, such as onions  
21 and potatoes, tropical fruits, a community farm, a solar  
22 project -- potential solar project and pasture.

23 And I'm sorry, one more category is cover  
24 crops, cover crops and energy crops. So that's seven  
25 total categories in the EIS.

1           The acreage for these crops are listed in  
2 the EIS, but I can go over them here if that's required.

3

4 BY MR. SCHULMEISTER:

5           Q.       For now, let me just ask you another  
6 question.  Actually, could you have Exhibit J-20 brought  
7 up, and when you get it up, then I'll point you to a  
8 page.  Well, actually, if everybody else is bringing it  
9 up, I'm going to start with page 26, which is 00026,  
10 part of the executive summary.

11          A.       Okay.

12          Q.       All right.  So in the executive summary on  
13 page, Bates stamp page 26, which I think bottom center  
14 of the page, below the last paragraph, contains a  
15 general description of the Mahi Pono plan to farm in  
16 central Maui, is that fair?

17          A.       That is fair.

18          Q.       And all right, were you involved in  
19 providing this information to the preparers of the draft  
20 environmental impact statement?

21          A.       I was.

22          Q.       Okay.  And one of the things that is talked  
23 about here is the number of jobs that are projected to  
24 be created by the Mahi Pono farm plan; is that right?

25          A.       That's correct.

1 Q. Could you talk a little bit about that.

2 A. Sure. So these numbers are independently  
3 reached by an independent ag economist named Bruce  
4 Flash (phonetic).

5 He studied what we're proposing, as far as  
6 acreage and time frame, and he projected that at  
7 pre-build out, we would have approximately 790 direct  
8 employees, that build-out would occur at 2020, and  
9 we're -- I mean, 2030, and we're slowly ramping up to  
10 that point. As of right now we have about 200 current  
11 employees.

12 Q. Okay. So currently, um, you have about 200  
13 employees. Could you provide some job categories or  
14 descriptions of, you know, what kind of jobs those are.

15 A. Sure. That consists of office and  
16 management staff, um, equipment operators, uh, field  
17 labor, processing plant employees, mechanics, that's  
18 pretty much the general categories for our employees.

19 Q. Okay. Now, um, so how far along is Mahi  
20 Pono in terms of rolling out its farming plan?

21 A. We're progressing nicely, um, we've just  
22 recently planted, in the first six months of this year,  
23 approximately 700 acres of orchard crops, consisting of  
24 citrus and coffee.

25 We've also planted about 230 acres of row

1 crops, consisting mostly of potatoes and onions.

2 25 acres of papaya. Um, we're generally  
3 moving along, um, obviously COVID and that entire  
4 situation had an impact on our business, as well as our  
5 progress, but we are pushing ahead.

6 Q. Okay. So could you comment a little bit  
7 about what sort of impact did the COVID situation has  
8 had on your progress?

9 A. Primarily the accommodations that we have  
10 to put into place in order to ensure employee safety,  
11 that's obviously one thing.

12 Um, the second thing is the shipping times  
13 for materials that are required to implement the farm  
14 plan have been pushed back, and material availability  
15 has suffered as a result.

16 This includes things like irrigation, which  
17 we are heavily dependent on. Obviously we cannot plant  
18 crops until our irrigation infrastructure is in, um,  
19 crop input such as fertilizers have also been delayed on  
20 shipping.

21 And as a whole, those things have impacted  
22 our business to the point where it has had an effect on  
23 our planting schedule.

24 Q. Okay. Has any of those impacts from the  
25 COVID crisis forced Mahi Pono to lay off any employees?

1           A.       No, we have not laid off any employees due  
2 to COVID.

3           Q.       Okay. Has it delayed planting?

4           A.       Yes, it has.

5           Q.       Okay.

6           A.       Um --

7           Q.       And --

8           A.       It has.

9           Q.       Now, you were involved in appearing at the  
10 Board of Land and Natural Resources meeting in November  
11 of 2019 and October of -- I'm sorry, November of 2018  
12 and October of 2019 in connection with obtaining  
13 renewals of the RPs; is that right?

14          A.       I actually did not appear in the November  
15 2018 hearing, but I did appear as a representative of  
16 Mahi Pono in the October 2019 DLNR hearing.

17          Q.       Okay. Thank you for that correction.

18                    So now for the 2020 RP, do you recall there  
19 being some discussion at the board meeting about what  
20 sort of cap should be placed on the amount of water that  
21 EMI would be able to deliver so as to not impact or be a  
22 detriment to the Mahi Pono farm plan?

23          A.       I do remember a cap being discussed at the  
24 meeting.

25          Q.       All right. And I think you advocated that

1 there was originally a recommendation from staff for a  
2 cap of, I can't remember what it was, it was 30 or  
3 35 MGD, and then you advocated to the board that it  
4 should be raised to give you some more comfort; is that  
5 right?

6 A. That's correct, not only comfort, but those  
7 were directly tied to our planting projections at the  
8 time in October 2019.

9 Q. Now, currently the 45 MGD was the cap that  
10 was ultimately imposed; is that right?

11 A. That's correct, and that's a 12-month  
12 average over the course of 2020.

13 Q. And but so far, the deliveries haven't  
14 needed to be as high as 30 or 45 MGD; correct?

15 A. Correct.

16 Q. So has your forecast irrigation demand  
17 ended up so far through the current date being less than  
18 what you had previously forecast?

19 A. Yes, even less, and um, you know, again  
20 that's due to the planting delays caused by COVID.

21 We do have additional planting scheduled  
22 from this point, um, that should be in the ground before  
23 the end of the year, so I wouldn't say that the past six  
24 months have been -- is a good indicator of what we would  
25 expect at the end of the year, but generally speaking,

1 yes, we are lower than our initial projections from a  
2 water delivery standpoint.

3 Q. Okay. Now, so given where Mahi Pono is now  
4 in the plan, and you know, having factored in the delays  
5 that you've described, could you update what Mahi Pono's  
6 forecasting in terms of water demands from east Maui  
7 through the end of the year?

8 MR. FRANKEL: Objection, lacks foundation,  
9 calls for speculation, uh, to the extent it's calling  
10 for expert testimony, it's not appropriate.

11 THE COURT: Okay. Overruled. You may  
12 answer.

13 A. (By the witness) So our internal  
14 projections for water delivery by the end of the year  
15 has been revised downward from an original 56 million  
16 gallons, which was the projection at the October 2019  
17 BLNR hearing, that number has been revised down to a new  
18 number of approximately 43 million gallons per day by  
19 the end of 2020.

20 Q. Can you explain the components of that  
21 projection.

22 A. Sure. Um, right now we're, you know,  
23 diverting approximately 25 million gallons per day over  
24 the first six months of the year.

25 You know, we planted a lot of new trees

1 since that point, and as of July or August, from now  
2 until the end of the year we will plant an additional  
3 1600 acres of orchard crops, consisting of approximately  
4 an 80 point split between citrus and coffee. We'll also  
5 plant about 120 more acres in row crops so that  
6 would increase the water demand.

7           There's also the component of having to  
8 provide the County with 6 million gallons of available  
9 water per day, as well as the Kuma ag park of 6 million  
10 gallons per day.

11           So our ag operation is the biggest  
12 component of that expected projection, combined with the  
13 County's needs and system lock and fire and reservoir  
14 capacities and maintain those capacities.

15           THE COURT: I'm sorry, I need a little bit  
16 of clarification right now. So when you said you went  
17 from 56 MGD down to 43, that includes what you're  
18 supplying to the City and the ag park; right?

19           THE WITNESS: That's correct, Your Honor.

20           THE COURT: Got it.

21           Sorry for interrupting. Go ahead,  
22 Mr. Schulmeister.

23           MR. SCHULMEISTER: No problem.

24           (Continued on the next page.)

25

1 BY MR. SCHULMEISTER:

2 Q. And to accommodate the schedule of  
3 increased plantings, is Mahi Pono planning to increase  
4 its labor force?

5 A. We are, um, you know, I can't necessarily  
6 project out a number by the end of the year. We are  
7 currently at 220 currently and, again, at full  
8 build-out, we expect to have around 800 to a thousand  
9 employees total. So as we progress along that point,  
10 we'll increase our workforce accordingly.

11 Q. Now, what was the potential impact of this  
12 plan be if a cap of no more than 25 million gallons per  
13 day is imposed on total water deliveries from EMI  
14 through the end of 2020?

15 MR. FRANKEL: Objection, Your Honor, calls  
16 for expert testimony, speculation --

17 THE COURT: Overruled. You may answer,  
18 sir.

19 A. (By the witness) If a cap of 25 million  
20 gallons were implemented, that would have a high  
21 detrimental impact on the expansion of our farming  
22 operations. You know, it would make it very difficult  
23 to expand our crops.

24 The remaining acreage set to be planted  
25 through the remainder of 2020 would probably have to be

1 put on hold, and long-term, it would have a very  
2 negative impact on our progression to the eventual full  
3 development of our farm plan as proposed in the EIS.

4 Q. If the -- okay.

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

7 THE COURT: All right. Thank you. So,  
8 what's our order for this witness? We going to do the  
9 State first and then Mr. Rowe and then Mr. Frankel, or  
10 are we doing, that's generally what we've been doing;  
11 right?

12 Okay. Not hearing any objection to that.  
13 So, Mr. Wynhoff, you or Ms. Goldman ready  
14 to go?

15 MR. WYNHOFF: Yeah, Your Honor, no  
16 questions for this witness. Thank you.

17 THE COURT: All right. Thank you,  
18 Mr. Rowe.

19 MR. ROWE: I have no questions for this  
20 witness either, Your Honor.

21 THE COURT: All right. Mr. Frankel.

22 MR. FRANKEL: Thank you, Your Honor.

23 (Continued on the next page.)

24

25

1 CROSS-EXAMINATION

2

3 BY MR. FRANKEL:

4 Q. Mr. Nakama, do you recall you testified at  
5 the Board of Land and Natural Resources meeting in  
6 October of 2019; is that right?

7 A. That's correct.

8 Q. And at that time COVID was not an issue; is  
9 that right?

10 A. Correct.

11 Q. And is it fair to say COVID was not an  
12 issue here in Hawaii in December of 2019?

13 A. I think that it was, but it was definitely  
14 not as big an issue as it is right now.

15 Q. All right. So do you recall at that Board  
16 of Land and Natural Resources meeting in 2019 telling  
17 the Board that you would enter the year, the year 2020,  
18 using approximately 34 million gallons of water per day,  
19 that's total for everything: Irrigation, the County, et  
20 cetera, do you recall that?

21 A. I do recall that.

22 Q. But, in fact, entering the year, that's not  
23 what you were taking from East Maui Water is it?

24 A. No, that was not.

25 Q. In fact, in January, the whole month of

1 January, when you entered the year of 2020, you took 30  
2 million gallons a day; right?

3 A. I'm not sure exactly how much we took in  
4 the first month of January, but that doesn't sound far  
5 off, but let me clarify.

6 The projection that we presented to the  
7 October -- to the BLNR in October 2019, included our  
8 obligation to provide the County with up to 6 million  
9 gallons per day for the water treatment facility, as  
10 well as 1.5 million to the Kula ag park.

11 The actual usage numbers for those two  
12 facilities may vary and are likely to be lower than  
13 those obligations, but we have to, I guess, have that  
14 amount ready if in case the County needs it.

15 Q. But if a County doesn't --

16 A. I'm sorry, go ahead.

17 Q. But if the County does not need that water,  
18 you folks use that for irrigation; right?

19 A. It either ends up being used for irrigation  
20 or used for fire protection in reservoirs.

21 Q. All right. If you could take a look at  
22 Exhibit J-27.

23 A. Okay. It's up.

24 Q. And if you could turn to the page 8, and  
25 when I say page 8, I mean the number at the very bottom

1 of the page, so there's a bunch of zeros and an 8 there.

2 A. Okay. I have it up.

3 Q. Did you play any part in producing the  
4 information that's in the table at the top of that page?

5 A. I had a part in compiling the data and  
6 presenting it in this report for the Board's review.

7 Q. Okay. So I have some questions about that.  
8 Um, you see that there is a category at the very end  
9 titled, Reservoir Fire Protection Evaporation, Dust  
10 Control, Hydroelectric; do you see that?

11 A. I do.

12 Q. And where does the water go after it's used  
13 by the hydroelectric plant?

14 A. It either enters our ditch system or ends  
15 up in the reservoir for fire protection and, um,  
16 irrigation reserve.

17 Q. Irrigation reserve, but not irrigation  
18 itself?

19 A. It depends on how that is used, if the  
20 reserve is used, it's used as irrigation.

21 Q. Well, so I'm trying to get a handle on this  
22 chart and information in it, in terms of how much water  
23 Mahi Pono used in the first quarter of 2020. There's a  
24 column there, the third to last column titled,  
25 Diversified Agriculture, do you see that?

1           A.       I do.

2           Q.       Bottom the quarterly average is 2.5 million  
3 gallons a day, do you see that?

4           A.       Yes.

5           Q.       Is Mahi Pono using more than 2.5 million  
6 gallons a day for agriculture -- for irrigating  
7 agriculture?

8           A.       For irrigating agriculture, no we are not.

9           Q.       So none of that water that's in the final  
10 column there is being used to irrigate crops on Mahi  
11 Pono's land?

12          A.       That is correct.

13          Q.       So in terms of the end use of that 16.44  
14 million gallons of water, you have not supplied  
15 information to the Department or Board of Land and  
16 Natural Resources in terms of how that 16.44 million  
17 gallons a day are actually used?

18          A.       No, that information is not being provided,  
19 no, yeah, it is not.

20          Q.       And, in fact, some of that 16.44 million  
21 gallons a day of water is lost; correct?

22          A.       Correct, but you thinking loss, loss can be  
23 evaporation with the irrigation system or seepage, but  
24 those are the components of that.

25          Q.       Well, when you say that evaporation water

1 re-enters the system, you mean the global system of our  
2 water, but doesn't re-enter the EMI ditch system or  
3 enter the irrigation system in some sort; right?

4 A. That's correct.

5 Q. And do you know of the 16.44 million  
6 gallons a day on average, do you know how much of that  
7 is lost through seepage, evaporation or any other way,  
8 do you know?

9 A. No, I do not.

10 Q. Does anybody at Mahi Pono?

11 A. I don't believe so, that was never directly  
12 measured to my knowledge.

13 Q. And I'm sorry if I'm repeating myself, did  
14 the Board of Land and Natural Resources or the  
15 Department of Land and Natural Resources ever ask you to  
16 break this down to let them know how much of this is  
17 lost?

18 A. No, that was never a requirement of the  
19 conditions of the RP.

20 Q. Okay. Now, if you folks lined your  
21 reservoirs, and covered them, would there be less water  
22 loss?

23 A. There would be less ground water recharge  
24 through seepage from those reservoirs, correct.

25 Q. And there would be less loss through

1 evaporation as well?

2 A. If we line the reservoirs, I'm not sure if  
3 there would be less evaporation loss.

4 Q. But if you covered them?

5 A. I would imagine so, but I'm not an expert  
6 on evaporation.

7 Q. Okay. And could you tell us for that third  
8 to last column of Diversified Agriculture, the amount of  
9 water used for irrigation, who in Mahi Pono came up with  
10 those numbers?

11 A. Those numbers came from individual fields  
12 that have individual meters, um, for the water that  
13 enters each particular field that's being used.

14 Q. And did you -- are you the one who added  
15 those numbers up?

16 A. No, those are just added to the table. Um,  
17 there were meter readings -- separate meter readings  
18 that were compiled by our field staff entered into us to  
19 basically enter into the table.

20 Q. Okay, but you weren't the one who added up  
21 those numbers, somebody in your staff did; right?

22 A. Correct.

23 Q. Okay. Now, has Mahi Pono disclosed how  
24 much water was needed for each crop per acre for 2020 to  
25 the Board of Land and Natural Resources or the

1 Department of Land and Natural Resources?

2 A. I'm not sure if that was in my testimony.  
3 That is available.

4 Q. Um, have you felt, if it wasn't in your  
5 testimony, is there any other time that you provided --  
6 we have a copy of your testimony by the way, is there  
7 any other time that you would have provided the  
8 information to the Board of Land and Natural Resources?

9 A. For crop watering per acre, is that the  
10 figure you're asking for?

11 Q. Yes.

12 A. That is not currently provided in the  
13 formal quarterly reports to the board. That is not to  
14 say I haven't provided that testimony at the October  
15 hearing, I'm just unsure if I did or didn't.

16 Q. All right, and if we could turn to the next  
17 page of J-27, which is page 9.

18 A. Okay. I have it up.

19 Q. Would it be difficult for Mahi Pono in the  
20 first, the table that's larger at the top, Primary  
21 Ag Water Users, do you see that?

22 A. I do.

23 Q. Would it be difficult to add a column that  
24 let people know how many acres were cultivated in each  
25 of these fields?

1           A.       No, that is something we could add.

2           Q.       And could you also add another column  
3 there, the font might have to get smaller, but could you  
4 add another column there that also included information,  
5 how many gallons per acre each of these cultivated crops  
6 require?

7           A.       Yeah, I think that would be a function of  
8 how much water's being fed to the crops divided by the  
9 total planted acres.

10                   Obviously, you know, it's -- there is some  
11 acreage that isn't planted in each field, and that's  
12 just a function of crop rotation, and you know, general  
13 farming practices. They don't plant all of your acreage  
14 at once.

15                   Um, that said, yes, that's something we  
16 could -- it would be difficult, but that's something we  
17 may be able to provide --

18           Q.       And --

19           A.       -- in giving you a plantable acre.

20           Q.       Understood, understood. And has the Board  
21 of Land and Natural Resources or the Department of Land  
22 and Natural Resources ever asked you to provide that  
23 information?

24           A.       No, it has not.

25           Q.       Okay. Now, in 2019, you had 500 acres of

1 sweet potato, 60 acres of red and white potatoes, 40  
2 acres of citrus, 500 acre sorghum grass, and 6,500 acres  
3 of irrigated pasture, does that sound right?

4 A. Irrigated pasture number is incorrect. Um,  
5 maybe that was a projection from the end of year 2020,  
6 um, that has not been planted due to our  
7 prioritization of row crops and our citrus and coffee  
8 plantings.

9 So our pasture, none of our pasture acreage  
10 has been irrigated, that has been fenced for the most  
11 part, but the rest of the numbers seem like that may  
12 have been accurate.

13 Q. Okay. So I would like you to take a look  
14 at Exhibit J-21.

15 A. Okay. It's up.

16 Q. And I'd like you to turn to page 96 of this  
17 document. So the page 96 here was prepared by Alexander  
18 and Baldwin not Mahi Pono; is that correct?

19 A. That is correct. Mahi Pono had a lot of  
20 input into this, but it was not ultimately prepared by  
21 us.

22 Q. So again on page 96 there, if you look at  
23 the second italicized paragraph that says, starts with,  
24 The current need, do you see that?

25 A. I do.

1 Q. Now, a number of sentences are strung  
2 together to paint a picture, and I want to ask you  
3 whether it paints an accurate picture or an inaccurate  
4 picture.

5 So the first sentence says:

6 The current need for water from the East  
7 Maui water stream average is approximately 27 million  
8 gallons per day, and then it goes on, then the next  
9 sentence it says, This water, water from the East Maui  
10 streams is being used, and then it skips, then it talks  
11 about a bunch of the uses, and new sentence begins.

12 And so far -- so far these agriculture uses  
13 include over 500 acres of sweet potato, 60 acres of red  
14 and white potato, 40 acres of citrus, over 500 acres of  
15 sorghum grass for cattle feed, and 6,500 acres of  
16 irrigated pasture.

17 So that sentence there is misleading to the  
18 Board, isn't it?

19 A. I'm not sure what the irrigated pasture  
20 acreage was at that time. I do know we do not have any  
21 as of right now.

22 Q. Well did you have any irrigated pasture in  
23 2019?

24 A. I'm not sure.

25 Q. Did you have 6,500 acres of irrigated

1 pasteur in September of 2019?

2 A. I'm not sure, I don't believe so.

3 Q. So this information may have been a little  
4 bit misleading to the Board of Land and Natural  
5 Resources?

6 A. I'm not sure if that number was accurate at  
7 the time, so I can't really say if it was misleading or  
8 not.

9 Q. All right.

10 THE COURT: If you're moving to a new area,  
11 we could take a break now if you've only got a few  
12 minutes, then that's fine, too.

13 MR. FRANKEL: Your Honor, I can honestly  
14 say, I'm moving to a new area. I'm going slowly.  
15 Taking a break now would be fantastic.

16 THE COURT: Let's take a break now.

17 11 -- we'll take an 11-minute break. I'll  
18 see you at 5 minutes of. We'll be in recess.

19 (Recess taken.)

20 (Reconvened at 9:55 a.m.)

21 THE COURT: Back on record.

22 FTR on?

23 THE BAILIFF: Yes.

24 THE COURT: So before we start, our court  
25 reporter would like a clarification. There's been

1 several references to ag park, and she believes it was  
2 Kula ag park, but she wants to get clarification on  
3 that.

4 I believe that's correct. Everyone in  
5 agreement, Kula ag park? Everyone's nodding their head  
6 yes, all right. Thank you.

7 Go ahead, Mr. Frankel.

8 You're muted.

9 MR. SCHULMEISTER: When you make the same  
10 mistake, it's called perseveration. It's a form of  
11 brain damage. I learned that in a case long time ago.

12 THE COURT: All right. Let's move forward.

13

14 BY MR. FRANKEL:

15 Q. Mr. Nakama, had Mahi Pono disclosed to the  
16 Department of Land and Natural Resources or the Board of  
17 Land and Natural Resources the degree to which the crops  
18 that are already growing or will be growing are  
19 self-tolerant?

20 A. No, we have not disclosed that.

21 Q. Has anyone at the Department of Land and  
22 Natural Resources or the Board of Land and Natural  
23 Resources asked about the self-tolerance of the crops  
24 growing or proposed to be grown?

25 A. I don't believe so.

1 Q. Did the Department of Land and Natural  
2 Resources or the Board of Land and Natural Resources ask  
3 Mahi Pono for evidence that the ground water would be  
4 too brackish for any of the proposed crops?

5 A. I don't believe so.

6 Q. All right. Now, Mahi Pono has an  
7 agriculture plan or farm plan that does not rely on  
8 water from the revocable permit area; correct?

9 A. I'm sorry, can you repeat the question.

10 Q. Sure. Mahi Pono has an agriculture plan or  
11 farm plan that does not rely on water from the revocable  
12 permit area?

13 A. If you're referring to our farm plan for  
14 our west Maui fields?

15 Q. (Shakes head.) I am not.

16 A. I'm unsure of what you're referring to.

17 Q. You said you had input, you've been  
18 reviewing both the appendices and the main body of the  
19 draft EIS; right?

20 A. Correct.

21 Q. So I don't want to get into great detail,  
22 but if you could look at Exhibit J-20, and we're going  
23 to go to page --

24 A. Are you referring to the Moniz farm plan  
25 what we do in the event we did not secure a long-term

1 lease from the state?

2 Q. Yes.

3 A. Yes, I am familiar with that. Sorry about  
4 that.

5 Q. And so if you did not get water from the  
6 land that is encompassed by these revocable permits, you  
7 could still do some farming on Mahi Pono's land;  
8 correct?

9 A. You could.

10 Q. And, in fact, that could still create 390  
11 direct jobs working for Mahi Pono; correct?

12 A. That was the ag economist forecast;  
13 correct.

14 Q. And that's more than you have employed  
15 today?

16 A. That is more than we have employed today.

17 Q. And, Mr. Nakama, is it your understanding,  
18 based on the draft EIS and other things you've done in  
19 your work with Mahi Pono, that orchard crops require  
20 more water than row crops?

21 A. That is my understanding.

22 Q. And orchard trees require about 5 to 12  
23 years to reach maturity?

24 A. I believe that's also correct.

25 Q. And I should ask, as far as Mahi Pono's

1 concerned, coffee is considered an orchard crop; right?

2 A. That is how it's categorized in the EIS;  
3 correct.

4 Q. And does the -- does coffee require as much  
5 matter as citrus does?

6 A. I'm not sure.

7 Q. Okay. Now, A&B has not sold its revocable  
8 permits to Mahi Pono; right?

9 A. Sold? I'm sorry? Is that right?

10 Q. Right.

11 A. No, it has not.

12 Q. And Alexander and Baldwin did not guarantee  
13 to Mahi Pono that BLNR would renew their revocable  
14 permits; right?

15 A. I'm not sure.

16 Q. Okay. Did Alexander and Baldwin guarantee  
17 that the Board of Land and Natural Resources would give  
18 Mahi Pono any water at all?

19 A. I'm not sure, not directly to me, no.

20 Q. Okay. So Mahi Pono assumed a risk that it  
21 would be able to get water from East Maui currently and  
22 into the future; right?

23 A. I'm not sure based on my questions about  
24 the previous question that you had.

25 Q. Okay. Is there any guarantee that Mahi

1 Pono will get a lease, a long-term lease for the water  
2 from central Maui?

3 A. Is there a guarantee? Was that your  
4 question?

5 Q. (Nods head.)

6 A. There is no guarantee.

7 Q. Nevertheless, Mahi Pono's been planting  
8 orchard trees that require 5 to 12 years to reach full  
9 maturity; right?

10 A. Correct.

11 Q. And Mahi Pono could be planting row crops,  
12 which require less water, that don't take so long to  
13 mature in order to protect its investment, couldn't it?

14 A. There's a multitude of things that go into,  
15 I guess, judging an investment, so I cannot really  
16 comment on that because there's a lot of factors  
17 involved.

18 As far as row crops versus orchard crops,  
19 we are planting row crops, both onions and potatoes have  
20 been planted in significant amounts, so I don't think  
21 it's a function of choosing one over the other, we. Are  
22 planting both, though.

23 Q. But you have far more acres covered in  
24 orchard crops than row crops currently; correct?

25 A. Currently, yes, but row crops are being

1 rotated on a significant amount of land. But to answer  
2 your original question, yes, there is more orchard crops  
3 than row crops.

4 Q. Thank you. And you're planting to plant  
5 more acreage in orchard crops this year; correct?

6 A. Correct, as well as row crops.

7 MR. FRANKEL: Thank you.

8 No further questions, Your Honor.

9 THE COURT: All right. Mr. Schulmeister,  
10 back to you. I'm sorry, we didn't do, yeah, Mr. Rowe I  
11 asked you before; right?

12 MR. ROWE: You did, Your Honor.

13 THE COURT: Okay. Mr. Schulmeister, back  
14 to you.

15 MR. SCHULMEISTER: I have no further  
16 questions.

17 THE COURT: All right. Thank you.

18 Mr. Wynhoff.

19 MR. WYNHOFF: You know, just give me a  
20 second, I do have a couple of cross based on  
21 Mr. Frankel's if I may, not long.

22 THE COURT: Okay. Go ahead.

23 (Continued on the next page.)

24

25

1 CROSS-EXAMINATION

2

3 BY MR. WYNHOFF:

4 Q. So, Mr. Nakama, is it -- is it -- is it  
5 fair to say that if there's less seepage, then the  
6 ground water would end up being more brackish, is that  
7 how it works?

8 A. I believe that is how it works. That's how  
9 it's been explained to me.

10 Q. Is there an unlimited amount of ground  
11 water, as far as you know?

12 A. I'm sorry, can you please repeat your  
13 question.

14 Q. Is there an unlimited amount of ground  
15 water as far as you know?

16 MR. FRANKEL: Objection, lacks foundation.

17 THE COURT: Overruled.

18 A. (By the witness) As far as I know, no,  
19 ground water is finite, it's limited.

20

21 BY MR. WYNHOFF:

22 Q. Are you surprised to hear the questions  
23 that suggest that Sierra Club ought to -- well, never  
24 mind. I'll withdraw the question.

25 MR. WYNHOFF: Thank you, Your Honor. I'm

1 done.

2 THE COURT: Thank you.

3 I think I knew where that one was going to  
4 end up.

5 MR. WYNHOFF: I think we all did,  
6 Your Honor. Thank you.

7 THE COURT: Mr. Rowe, your turn.

8 MR. ROWE: I have no questions for this  
9 witness, Your Honor.

10 THE COURT: All right. Mr. Frankel.

11 MR. FRANKEL: Nothing further, Your Honor.  
12 Thank you.

13 THE COURT: All right. That concludes your  
14 testimony, Mr. Nakama. Thank you very much. You're  
15 excused.

16 All right. What's next?

17 MR. ROWE: Your Honor, I asked Mr. Baz to  
18 be here at 10:30, I didn't think Mr. Nakama would be  
19 quite so quick. He should be available, he's just not  
20 here yet.

21 THE COURT: That's fine.

22 Is there anything we can do between now and  
23 10:30, any motions or other discussions or planning or  
24 anything else?

25 Otherwise we can just take a break for 25

1 minutes and wait for Mr. Baz to arrive. I don't think I  
2 want to start Chair Case just for 20 minutes.

3 MR. WYNHOFF: I agree, Your Honor. Thank  
4 you.

5 MR. FRANKEL: My understanding is A&B, EMI  
6 are not calling anymore witnesses, so do they rest now?

7 THE COURT: That's a fair question.

8 MR. SCHULMEISTER: Yeah, I think we have  
9 some pending requests to admit additional documents.

10 THE COURT: Right.

11 MR. SCHULMEISTER: So I guess subject to  
12 that, we don't have any further witnesses we plan to  
13 call at this time.

14 THE COURT: All right. Mr. Wynhoff, you  
15 have your hand up. Go ahead.

16 MR. WYNHOFF: Thank you, Your Honor.

17 So as of right now, I think Ms. Case is  
18 away and listening, but right now I have told her and  
19 asked her to just be here at 1:00, that seems like  
20 that's probably going to work I think, huh?

21 THE COURT: I think so. We might have a  
22 little bit of a break, but that's okay.

23 MR. WYNHOFF: Or if the Court wants  
24 something different, just give us a little leeway, and I  
25 know this is right at the top of her agenda, even though

1 she's a pretty busy person. Thank you, Your Honor.

2 THE COURT: I'm fine. We can stick to that  
3 time. We don't have to cram every minute of the day  
4 with something.

5 MR. WYNHOFF: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. SCHULMEISTER: That will give  
8 Mr. Frankel time to put a sign on his computer, Remember  
9 to unmute.

10 THE COURT: What goes around comes around,  
11 Mr. Schulmeister.

12 MR. WYNHOFF: Now I can't figure out how to  
13 mute it, so I guess I have to be quiet, okay.

14 THE COURT: All right so question is,  
15 should we stay on record and continue this banter, or  
16 should we argue a motion, or should we just take a  
17 break? Sorry, Mr. Rowe, go ahead.

18 MR. ROWE: Your Honor, I believe that  
19 Mr. Frankel did actually file a motion regarding Sandy  
20 Baz's testimony. I don't know if we were going to do  
21 that before Mr. Baz testified or what Mr. Frankel wanted  
22 to do with that.

23 THE COURT: That's a good suggestion. I  
24 was thinking more of Mr. Schulmeister's motion, since  
25 he's about to rest, but we can do Mr. Baz.

1                   You ready to argue that now, Mr. Frankel,  
2 or you want to take a break to organize your thoughts or  
3 what?

4                   MR. FRANKEL: I don't need a break, but,  
5 Your Honor, I think technically we should take care of  
6 A&B wanting to rest first, and then deal with Mr. Baz,  
7 who is the County's witness. I just think it would be  
8 cleaner, so I think that's what we should be doing.

9                   THE COURT: All right. So is everyone  
10 ready to argue the -- hang on let me get the formal  
11 title of the motion so I don't butcher it.

12                   We have A&B's Motion to Admit Agency  
13 Exhibits and Related Court Pleadings and For Judicial  
14 Notice. That motion was filed August 10th, and  
15 revisiting their motion in limine No. 4 with certainly  
16 some overlap.

17                   Everyone ready to argue? I'm sorry,  
18 Mr. Schulmeister, go ahead.

19                   MR. SCHULMEISTER: Ms. Akagi will be doing  
20 that argument.

21                   THE COURT: Okay. Is everyone ready to  
22 argue that now, or you want to take a few minutes break  
23 to get your papers organized and so forth?

24                   MR. WYNHOFF: I'm ready, Your Honor.

25                   THE COURT: Mr. Frankel?

1 MR. FRANKEL: I'll be ready. I'm getting  
2 there.

3 MR. ROWE: Your Honor, could I have a  
4 couple minutes just to go print something out.

5 THE COURT: Absolutely. How much time you  
6 want?

7 MR. ROWE: Come back at 10:15.

8 THE COURT: That's fine. We'll take a  
9 five-minute recess, everyone. We're off record.

10 MR. ROWE: Thank you, Your Honor.

11 (Recess taken.)

12 (Reconvened at 10:15 a.m.)

13 THE COURT: We are back on record.

14 FTR on?

15 Before we start the argument, I have  
16 something I want to raise with everyone. I was just  
17 looking at my media feed on my phone and see that Hawaii  
18 has 355 new COVID cases. So this is not going in the  
19 right direction right now.

20 I'm not pretending to a health expert, but  
21 I think the trend is worrisome. So I just wanted to  
22 repeat something I said before, which is, I want this  
23 trial to go forward, but not at the risk of anyone's  
24 health.

25 If any of you perceive a situation where

1 you don't think it's safe to continue the way we're  
2 currently operating, speak up, let me know, we'll talk  
3 about it, I'm not sure what I'm going to do, it will  
4 depend, but I'm happy to have that discussion any time.

5 But do not suffer in silence about it, all  
6 right? That's all I'm going to say right now. There's  
7 an open invitation at any time to bring that issue up on  
8 the table.

9 All right. Are we ready to argue the  
10 motion?

11 All right.

12 Ms. Akagi, go ahead.

13 MS. AKAGI: Thank you, Your Honor. How do  
14 you want to handle this? Do you want to handle the  
15 motion separately, or should I address both of them at  
16 the same time?

17 THE COURT: That's really up to you. I'm  
18 comfortable either way, whatever you think works best is  
19 fine with me.

20 MS. AKAGI: Okay. I will handle them both  
21 at the same time then. I'm going to start with the  
22 documents that are identified in our motion in limine  
23 No. 4.

24 So these documents were all exhibits in the  
25 CWRM contested case hearing that culminated in CWRM June

1 2018 decision and order setting IIFS for 27 streams in  
2 the East Maui watershed. I'm not going to reiterate  
3 what we've already stated in our motion, but there are a  
4 couple of exhibits in particular that I want to address.

5 I'm going to talk about AB-128, and AB-133.  
6 AB-128 is the minutes of the May 25th, 2010 CWRM  
7 meeting, and AB-133 is the staff submittal for item C-1  
8 of the agenda for that same meeting.

9 I know that our motion in limine had stated  
10 the admissibility of these documents would be based on  
11 non-hearsay purposes, but these exhibits are also  
12 admissible as an exception to hearsay as a public record  
13 under Rule 803(B) (8) (a) of the Hawaii Rules of Evidence.  
14 They set forth the activities of a public agency.

15 These exhibits are particularly relevant,  
16 because they are, at the meeting on May 25th, 2010, this  
17 was to make recommendations and decide upon IIFS for 19  
18 of the 27 streams that were subject to the IIFS  
19 petition.

20 Now, Mr. Volner had testified during his  
21 testimony that he had attended this meeting. He  
22 testified regarding the information that he had provided  
23 to the CWRM staff prior to this meeting relating to  
24 system losses and seepage, and that was a big topic that  
25 was addressed at this meeting.

1           There was also extensive discussion  
2 regarding the minimum base flow, specifically the 64  
3 percent of median base flow that Mr. Frankel has  
4 repeatedly referred to.

5           There was discussion of DARS recommendation  
6 to spread restoration out geographically to get the  
7 "biggest bang for the buck for habitat restoration", and  
8 there were also recommendations made by the CWRM staff  
9 regarding the level at which IIFS should be set for the  
10 petition streams, and Lucienne de Naie testified on  
11 behalf of Sierra Club at this meeting.

12           So what occurred at this meeting, what CWRM  
13 discussed, the public testimony that was provided is all  
14 directly relevant to issues that are raised and at issue  
15 in this litigation.

16           So in addition for having them admitted for  
17 the purpose that this was information that was available  
18 and part of the CWRM record, they are also admissible as  
19 exceptions to hearsay under 803(B)(8)(a) of the Hawaii  
20 Rules of Evidence.

21           If Your Honor has any questions about the  
22 exhibits addressed in our motion in limine No. 4, I'm  
23 happy to answer them, otherwise I will move on to the  
24 exhibits addressed in our motion to admit agency  
25 exhibits.

1                   THE COURT: Let's actually just deal this  
2 one now because I think there are some differences  
3 between the two motions, and it might help to segregate  
4 the discussion a little bit.

5                   MS. AKAGI: Okay.

6                   THE COURT: I don't have any questions  
7 right now, but I very well may have some later, so go  
8 ahead.

9                   Mr. Wynhoff, you have your hand up, go  
10 ahead.

11                  MR. WYNHOFF: I do, Your Honor. I'm very  
12 sorry that I was behind, but I wonder if I could  
13 understand which specific exhibits Ms. Akagi was  
14 particularly addressing.

15                  I think I know, but I'd really be grateful.

16                  THE COURT: Sure. It was AB-128 and  
17 AB-133.

18                  MR. WYNHOFF: Thank you so much,  
19 Your Honor.

20                  THE COURT: You're welcome.

21                  All right. So let me hear from the State  
22 and the County, and then I'll hear from Mr. Frankel  
23 last.

24                  Mr. Wynhoff.

25                  MR. WYNHOFF: Without my technician here

1 Your Honor, I'm a little slower than usual.

2 With respect to, I know that when Ms. Case  
3 gets here, we were going to introduce a couple of  
4 AB minutes from later on, and I probably, you know --

5 THE COURT: Time out.

6 We missed about half of that. So why don't you try  
7 again.

8 MR. WYNHOFF: Got it. When Ms. Case comes  
9 in, we are going to work on introducing some minutes  
10 from later on.

11 With respect to minutes, again, I don't --  
12 maybe I'm not fully grasping what Mr. Frankel's  
13 objections to these are, but in terms of authenticity, I  
14 don't think there's any issue with authenticity, I think  
15 there's a Rule 901 I believe that deals with that.

16 With respect to hearsay, I echo Ms. Akagi.  
17 We certainly aren't saying that all of the things that  
18 Ms. de Naie and a bunch of other people testified to in  
19 these minutes goes to the truth of what they're saying,  
20 so I don't think it's hearsay in the first place.

21 But even if it is hearsay, then I think it  
22 is bang square, right within the meaning and exact words  
23 of 803(B) (8), which talks about public records, we  
24 talked about this a little bit, Your Honor, the other  
25 day, and I know you are familiar with it, of records,

1 reports, et cetera, setting forth the activities of the  
2 office or agency.

3           And so I don't think we could get any more  
4 setting forth the activities of the office or agencies  
5 other than the minutes of that office or agency. And so  
6 I would just join in certainly with respect to the  
7 motion. Thank you.

8           THE COURT: All right. Understood.

9           Mr. Rowe.

10           MR. ROWE: Yes, Your Honor. I would just  
11 join with Alexander and Baldwin in their motion.

12           THE COURT: Thank you, Mr. Frankel.

13           MR. FRANKEL: Yes, Your Honor. So  
14 exhibit -- I'll treat them separately if I can.

15           AB-128 purports to be the minutes. If you  
16 look at the last page, however, of this document, the  
17 area, well, it's not the last page, second to last page,  
18 there's an area a block respectfully submitted and  
19 approved and submitted that are blank.

20           The Sierra Club has stipulated into  
21 evidence some other Water Commission minutes which is --  
22 where this area's filled in, and I can give you an  
23 example of that, and that's S-43, which has been  
24 stipulated into evidence.

25           That document, at the very end, has the

1 secretary's signature and the deputy director's  
2 signature approved, uh, yeah.

3           So this -- AB-128 is not an authentic copy  
4 of the minutes. So that's the -- that's the primary  
5 problem with 128.

6           But the problem that we have with both  
7 AB-128 and AB-133 is their relevance. No witness has  
8 testified, and no witness will testify that these  
9 documents were provided to the Board of Land and Natural  
10 Resources.

11           You know, I think we all acknowledge the  
12 Water Commission had before it much information when it  
13 made its decision, and we have a copy of that decision.  
14 We do not need all the information or even selected  
15 parts of information which went to the Water Commission.

16           What's relevant is whether the Board of  
17 Land and Natural Resources breached its trust duties,  
18 and these documents do not come anywhere near those  
19 issues. Thank you, Your Honor.

20           THE COURT: All right. So, Ms. Akagi, if  
21 you could first respond to Mr. Frankel's point that this  
22 is unsigned. I mean, how do I know this is what this  
23 purports to be?

24           MS. AKAGI: In our motion we identified the URL  
25 where this exact document can be downloaded from the

1 CWRM web site, and just to be clear, the version that we  
2 have submitted as AB-128 is the version that was  
3 admitted as an exhibit into the CWRM contested case  
4 hearing.

5 THE COURT: All right. So I'm just trying  
6 to put this in context that I'm more familiar with.  
7 Let's say I go through a three- or four-week jury trial,  
8 and there's hundreds of exhibits admitted, hundreds of  
9 exhibits that are not admitted.

10 The jury is given a verdict form that has  
11 seven or eight questions on it, you know, Did X do  
12 whatever to Y? Is there negligence and was there fraud?  
13 And they answer, yes, no, yes, no. Is there's  
14 causation? Yes.

15 Is damages? No.

16 So you get a framework of what they  
17 actually decided, but you have no idea from the verdict  
18 form how they weighed any particular exhibit, whether  
19 they relied on it whatsoever, whether they even looked  
20 at it, whether it was important to them, minor to them,  
21 you know, on and on and on, you get my point.

22 So when I import that context to this  
23 context, the question I'm asking myself is, Okay, all  
24 this information was given to CWRM, along with a ton of  
25 other information.

1           But we have their order, and their order's  
2 going to say, This is what we found, this is what we  
3 didn't find, this is why we're deciding the way we're  
4 deciding, and you can tell from the D&O, presumably,  
5 what CWRM relied on, or thought was important or not  
6 important.

7           So the question is, why do we really need  
8 all these submissions? I mean, I can see why you'd  
9 think it would be nice to have, but in a much more  
10 concrete, granular way, why? Why do I need it? How is  
11 it going to help me, or help the Court make the decision  
12 that it needs to make? Where's it going to go,  
13 especially if there's no proof that BLNR looked at any  
14 of it, let alone CWRM.

15           We know CWRM presumably looked at it if  
16 it's mentioned in the D&O, but I have some real  
17 questions about why we need this, and what it's really  
18 going to add, so if you could address that.

19           MS. AKAGI: Certainly, Your Honor. A key  
20 component of the plaintiff's case is that plaintiff is  
21 challenging some of the decisions that were made by  
22 CWRM, or at the least, arguing that the Board was not  
23 entitled to rely upon CWRM's decision, analysis, et  
24 cetera.

25           And so in order for the Court to determine

1 whether or not it was reasonable for the Board to rely  
2 upon CWRM's decision, it's important to look at CWRM's  
3 decision itself; What did CWRM consider? What was the  
4 basis for its decision? Was the Board entitled to rely  
5 upon CWRM's analysis and conclusions?

6           You know, we maintain that the Board did  
7 not need to duplicate the efforts at that CWRM took, so  
8 it's also important to understand what efforts did CWRM  
9 take in reaching these decisions?

10           We think that this evidence is probative of  
11 that issue. Whether or not we prevail on those  
12 arguments is a different question, but we are entitled  
13 to make our record to establish our argument.

14           THE COURT: Okay, but let's continue that  
15 discussion along, and I see your hand up, Mr. Wynhoff, I  
16 will get to you.

17           Let's say I -- let's say I allow it in, all  
18 right, but it's not mentioned in CWRM's D&O. What am I  
19 to do with that? If you're going to come in and argue  
20 on final argument or in your proposed findings of fact,  
21 Well, Judge, you know Exhibit 128 proves X, Y and Z, but  
22 Exhibit 128 does not appear anywhere in the D&O, I'm  
23 just making this up, I don't know if it's in there or  
24 not, I'm just giving this as an illustration.

25           How could I rely on Exhibit 128 if the

1 D&O doesn't even mention it? Am I supposed to make an  
2 inference that because it was submitted, it must have  
3 been weighed and must have been relied upon even if it's  
4 not in the D&O? That seems like a stretch.

5 MS. AKAGI: Well, Your Honor, if this was  
6 an agency appeal, if the plaintiff was appealing the  
7 decision that CWRM made, the entire record would be  
8 admissible, and the Court would be free to consider  
9 everything that was in the record.

10 So to the extent that plaintiff is  
11 challenging CWRM's decision, we should be able to point  
12 to anything in the record that supports the  
13 reasonableness of CWRM's decision and the reasonableness  
14 of the BLNR's reliance on that decision.

15 THE COURT: Well, if the plaintiffs are in  
16 deed challenging the CWRM's D&O, I hear what you're  
17 saying, and I'll circle back with Mr. Frankel, but right  
18 now I'm not at all sure they are, and I think they've  
19 said they're not, so we'll see if anything's changed on  
20 that.

21 Let's assume for the sake of discussion,  
22 Ms. Akagi, that Mr. Frankel in a few minutes is going to  
23 say, Judge, in no way are we challenging anything in the  
24 CWRM D&O, then how do you connect -- how do you connect  
25 the submissions to CWRM, and make it relevant to BLNR's

1 decision?

2 MS. AKAGI: Well, Your Honor, regardless of  
3 what plaintiff said, I think that the evidence has shown  
4 that plaintiff is challenging CWRM's decision, and I'm  
5 going to give you an example.

6 So, when the plaintiff was questioning  
7 Mr. Higashi, they were asking him about the 64 percent  
8 base flow that DAR had recommended as the minimum amount  
9 of water that was needed to sustain the native aquatic  
10 species in the streams.

11 And then there was a comment or a question  
12 to Mr. Hirokawa about why -- what was the reason that  
13 BLNR felt it was justified to allow less water than was  
14 necessary to support native aquatic species in  
15 connectivity streams, and that's a reference to the  
16 streams that CWRM had identified as "connectivity  
17 streams" and allowed for a 20 percent base flow.

18 So what plaintiff is arguing is that:

19 1. CWRM should have not have set 20  
20 percent base flow for those connectivity streams; and

21 2. That the BLNR should have imposed  
22 stricter conditions than those imposed by CWRM.

23 That is direct challenge to CWRM's decision  
24 and as well as the Board's reliance on what CWRM has  
25 decided and the analysis that CWRM has conducted.

1           THE COURT: All right. And then one more  
2 question before I move on to other counsel.

3           Can you -- can you point me to any specific  
4 parts of AB-128 and AB-133 that you expect to rely on  
5 when arguing to this Court what its finding should be,  
6 because it's quite daunting to look at, just for the  
7 record, I'm looking at AB-128 right now, it's 53 pages  
8 single spaced.

9           That's a lot of information, and I'm trying  
10 to vet it all and the context of allowing it into  
11 evidence is tricky.

12           MS. AKAGI: Okay. I am happy to point you  
13 to a couple of spaces. I'm going to say that this is  
14 not an exclusive list or exhaustive list of everything,  
15 but an example is, there was a lot of discussion about  
16 seepage loss and evaporation.

17           This is an issue that has come up multiple  
18 times throughout a number of witnesses' testimony.  
19 Mr. Volner has specifically testified regarding his  
20 efforts to provide information to CWRM staff to study  
21 the seepage leaks, and where seepage was occurring  
22 within the EMI ditch system, as opposed to on the farm.

23           So if you look at Exhibit AB-133, at pages  
24 5 to 6, there is an analysis of the seepage losses based  
25 on the information that was provided to the CWRM staff,

1 including information that was provided by Mr. Volner.

2 THE COURT: Okay. Thank you. Can you give  
3 me any other examples as specific items in either of  
4 these exhibits?

5 MS. AKAGI: Sure. There was also extensive  
6 discussion throughout the testimony of a number of  
7 witnesses about the 64 percent of median base flow that  
8 DAR had stated was the minimum amount needed to support  
9 native aquatic species.

10 So there is an extensive discussion at the  
11 CWRM meaning, and if you look at AB-128 at pages 8 to  
12 13, you will see the discussion, and a lot of this  
13 testimony is the testimony of Mr. Higashi.

14 THE COURT: Hang on, I'm getting there.

15 (Brief pause.)

16 THE COURT: Okay. So I mean, the obvious  
17 question that's going to come up is, if this basically  
18 deals with opinions by Mr. Higashi, I mean, he's a  
19 witness, and we're not generally supposed to have  
20 somebody testify and be subject to direct and  
21 cross-examination, and then suddenly allow in a whole  
22 bunch of other testimony, "testimony" when he's no  
23 longer available for questioning about it.

24 MS. AKAGI: Understood, Your Honor. The  
25 point is not to contradict or supplement any of the

1 testimony that Mr. Higashi gave or will be giving in  
2 this trial, it's simply to point out the information  
3 that was available to CWRM, the analysis that CWRM had  
4 considered, how that plays into their 2018 decision.

5           And as I have stated earlier, you know,  
6 it's a decision that the plaintiff is challenging, and  
7 we are entitled to show the reasonableness of that  
8 decision, and why the Board was entitled to rely upon  
9 that decision, and why the Board was not required to  
10 duplicate the efforts of CWRM.

11           THE COURT: Does the D&O -- I shouldn't use  
12 so much shorthand 'cause someone reading this transcript  
13 could have questions about it.

14           Does the commission -- or CWRM's D&O,  
15 specific specifically reference either of these exhibits  
16 anywhere?

17           MS. AKAGI: I can't say at the moment.

18           THE COURT: Okay.

19           All right. Thank you for your responses.  
20 I'm going to talk with other counsel.

21           MS. AKAGI: I'm sorry, I'm told by  
22 Mr. Schulmeister that it does.

23           THE COURT: Okay. Can you give me cites to  
24 that.

25           MS. AKAGI: We will work on it if you want

1 to continue on.

2 THE COURT: All right. That's fair.

3 All right.

4 MS. AKAGI: Thank you.

5 THE COURT: All right. Mr. Wynhoff, you've  
6 been patient, thank you. Go ahead.

7 MR. WYNHOFF: My patience was rewarded  
8 because Ms. Akagi covered many of my points, and so I'm  
9 going to be shorter than I intended to be, and again,  
10 the point I'd like to make is this, Your Honor.

11 I also heard Mr. Frankel say that the  
12 Sierra Club did not object to or attack the decision and  
13 order, but, in fact, that's not what happened.

14 For example, I'm looking at, I don't know  
15 if the Court wants to or not, but I'm looking at  
16 Exhibit J-14 on page 267, Bates stamp page 290, it's the  
17 decision and order at the end, orders in section F, for  
18 Frank, I'm just going to paraphrase it.

19 It talks there about full restoration, and  
20 full restoration as the decision and order very clearly  
21 states is that that means all of the water goes back in  
22 the stream. It doesn't mean that all of the diversions  
23 are taken out.

24 But nevertheless, we have repeatedly heard  
25 about the Sierra Club claiming that, gosh, they're

1 walking through the forest and all of the sudden they  
2 come along a diversion, and even though there's water  
3 still flowing, that's really a problem for them because  
4 they really would like to see it in their natural state,  
5 so I think they attack that.

6 And furthermore the other one I'm going to  
7 mention is if you go further down along the same lines  
8 on page 269, here I will quote it 'cause it's short, the  
9 letter I as in igloo:

10 It is intended that diversion structures  
11 need only to be modified to the degree necessary to  
12 accomplish the amended IIFS, and to allow for passage  
13 upstream but only if needed.

14 But I am very certain again that I have  
15 heard over and over again the Sierra Club complaining  
16 that the diversions are not being taken out, and so if,  
17 in fact, I mean, I don't really know what to say.

18 Mr. Frankel has said that they're not  
19 attacking it, and he may say it again, but, you know, to  
20 go off on a hypothetical that they're not attacking it,  
21 when their evidence has certainly gone in that  
22 direction, would be to go astray in my view, Your Honor.  
23 Thank you.

24 THE COURT: Thank you, Mr. Rowe.

25 MR. ROWE: Yes, Your Honor, I would like to

1 just address a question that you asked Ms. Akagi.

2 If you look at the bottom of the AB-128,  
3 which is one of the exhibits that were referenced,  
4 there's a notation of C-91 which is, I believe, what it  
5 was marked as in the contested case hearing.

6 And if you look at Exhibit J-14, which is  
7 the actual decision and order from the contested case,  
8 on page 28 and paragraphs 11 and 12, they mention  
9 Exhibit C-91, and there are references to page numbers  
10 in there.

11 I'm unsure about AB-133, but as far as  
12 AB-128, that is a direct reference to that exhibit in  
13 the CWRM decision and order.

14 THE COURT: Thank you. Hold on second.  
15 Off record.

16 (Off record.)

17 THE COURT: All right. Back on record.  
18 All right, Mr. Frankel, go ahead.

19 MR. FRANKEL: So let me respond, if I can,  
20 and I hope I remember to respond to each thing.

21 The last thing that Mr. Rowe brought up  
22 about C-91 being referenced in the commission decision,  
23 that is in the procedural history section of the order.

24 All that paragraph says is, that's what the  
25 commission did on that day, and by the way, I think if

1 it's not clear to the Court yet, I know it's clear to  
2 all the attorneys in this case, that what happened back  
3 then changed dramatically in 2018.

4           Whatever was decided back in 2010 is -- or  
5 2010 is no longer particularly relevant to the 2018  
6 decision. There's procedural context, but substantively  
7 there's nothing there. So the one thing that Mr. Rowe  
8 cites doesn't make this particular exhibit relevant to  
9 anything.

10           But let's go to the more substantive points  
11 that were raised. I attempted to address this on Monday  
12 when we dealt with the 52 motions to get rid of the  
13 Sierra Club case, and Mr. Wynhoff even said I was very  
14 clear in my six points that I raised.

15           And so, let me attempt, if I wasn't clear  
16 enough then, let me attempt to be more clear now.

17           So the Sierra Club is not challenging the  
18 Water Commission's decision made in 2018. What we are  
19 saying is, and by the way, the Board of Land and Natural  
20 Resources can use, and even depending on how you use the  
21 word rely, rely in part on the decision, absolutely.

22           The point is, there is a different context  
23 in 2019 than there was in 2018, and there are  
24 repeated -- repeated Court decisions which talk about  
25 the Board's independent duty, and I cited -- I cited

1 them to you on Monday, and those include Judge Hifo's  
2 order back in 2003, the reliance for sensible growth  
3 decision, that was just a few months ago, talking about  
4 the continuing duties of public agencies to fulfill  
5 their public trust duty. The Hawaii Gas Company case,  
6 which is even more recent.

7           There are trust duties, and there is so  
8 much that the Water Commission's 2018 order did not  
9 address.

10           Now, Ms. Akagi and Mr. Wynhoff are  
11 partially correct that there is a little bit of overlap,  
12 and so let me try to address each of those separately.

13           The first issue is the point about the  
14 diversion structures themselves, and if you turn to  
15 Exhibit J-14, and if we turn to page 92 itself,  
16 Mr. Wynhoff correctly quotes from paragraph I of that  
17 decision, in terms of the commission's intent.

18           But the very next paragraph says, The  
19 commission also recognizes that it is not the purpose of  
20 this proceeding to determine how the diversion will be  
21 modified.

22           Now, the purpose of the proceeding in 2018  
23 was to talk about the amount of water that should be  
24 flowing in the streams, and that is completely conveyed  
25 or conveyed in a summary fashion in that table that's

1 starts at page 291 and 292 of the decision. That's what  
2 the decision was about water.

3 Now, the Water Commission also made some  
4 statements about diversion structures as well. I mean,  
5 one could call it dicta, I'm not going to do that.  
6 They're entitled to express their opinion about that.

7 The thing is, the Board of Land and Natural  
8 Resources is also a landlord. It controls property, and  
9 the Legislature has been very specific about that and  
10 clear about that.

11 And in this particular case, and it's an  
12 unusual case, there is a little bit of overlapping  
13 jurisdiction between the two agencies.

14 One cannot do something without the other  
15 because the land is owned by the State, but the  
16 diversion structures themselves are regulated by the  
17 Water Commission, not by the way, in the 2018 decision,  
18 but in a separate thing.

19 All that the Sierra Club has asked, is that  
20 the Board -- well, I guess there's two things that the  
21 Sierra Club has asked.

22 No. 1. The Board could have set some kind  
23 of deadline.

24 The Water Commission actually doesn't have  
25 as much regulatory authority as it probably should, and

1 its sister agency, the Board, provides that additional  
2 regulatory authority to move this slow-moving train  
3 along.

4           So the one thing we asked, one of two  
5 things was, the Board could have set some kind of  
6 deadline, and as I've repeatedly said, you know, with a  
7 giant parenthetical clause, with the ability to ask for  
8 extensions, or whatever circumstances arise.

9           I think mark Vaught talked about there's  
10 some regulatory hurdles. We understand that, that's why  
11 you have the parenthetical.

12           But you can't just let the applicant sit  
13 by, not move the process along to the degree it's in the  
14 applicant's control, and there are clearly things in the  
15 applicant's control. So that's one part of the  
16 equation.

17           The second part of the equation when it  
18 comes to structures is, there is very, very solid case  
19 law talking about the fact the applicant has the burden  
20 to show that it cannot implement mitigating measures.

21           And yesterday you heard from the testimony  
22 of, again, Mark Vaught, good guy, really good guy, and  
23 he talked about the fact that they could implement a  
24 number of the mitigation measures recommended by the  
25 Division of Aquatic Resources, but permit issues

1   aside --

2                   THE COURT:   Well, let's not argue all the  
3 details of that now, remember, we're in the context of a  
4 specific exhibit, all right.

5                   MR. FRANKEL:   Okay.  I'm sorry.

6                   THE COURT:   All right.  Mr. Baz is waiting,  
7 and I'd really like to take advantage of his being  
8 available.

9                   MR. FRANKEL:   I'm sorry, so I'm just -- I'm  
10 a little resentful that I feel the Sierra Club's  
11 position has been mischaracterized, so I'm just trying  
12 to point out, when it comes to structures, there's a  
13 little bit of overlap.

14                   But in the context of this case, that  
15 overlap is understandable, and there is a legal duty  
16 that we are arguing about, and it's not a challenge to  
17 the Water Commission's decision, it's a challenge to the  
18 Board of Land and Natural Resources' decision.

19                   The other issue that was raised by  
20 Ms. Akagi is the fact that some streams have less than  
21 the 64 percent base flow requirement, and the Sierra  
22 Club is not challenging the Water Commission's decision  
23 regarding the connectivity determination level.

24                   However, and I think in particular, and  
25 this is highlighted -- well, I guess you don't want to

1 go there, sorry.

2                   However, given the current context, which  
3 includes the new data from Dr. Parham, it makes sense to  
4 address that specifically with the Board of Land and  
5 Natural Resources had that done, and I'll get into the  
6 more details of that in closing argument.

7                   Now, Ms. Akagi pointed to two specific  
8 references in the document, and I want to address each  
9 of them, again, I'll try to be very brief.

10                   She talked about the seepage testimony of  
11 Rick Volner, pages 5 to 6 of one of those documents, and  
12 Your Honor, I didn't reference that document, but that  
13 was my -- I specifically asked the questions about that  
14 in my cross-examination with him. So that testimony has  
15 already been elicited in this case, I won't repeat what  
16 it was, but it's already been done, so we don't need  
17 this document, and he said the same thing on the stand  
18 that's in that document pretty much.

19                   And then as you point out, the testimony of  
20 Higashi, he's a witness in this case. We actually have  
21 a motion about him, but that's just not appropriate.  
22 Thank you.

23                   THE COURT: All right. So, before we  
24 continue this discussion, let me check in with Mr. Rowe,  
25 'cause I want to make sure we don't cause any scheduling

1 problems with Mr. Baz.

2                   So, Mr. Rowe, what's his  
3 availability 'cause I'm wondering if we should just  
4 terminate this argument right now and get to his  
5 testimony and resume the argument later?

6                   MR. ROWE: Your Honor, he's currently  
7 waiting in our office.

8                   THE COURT: But you know, we're going to  
9 need a break before we start his testimony, so at most,  
10 we're going to get maybe 45 minutes of him before the  
11 lunch break.

12                   What was your expectation again of how long  
13 you would be with him, I mean, again, assuming I permit  
14 him to testify.

15                   MR. ROWE: I don't expect more than 15 or  
16 20 minutes, I'll be very quick.

17                   THE COURT: All right. Anyone planning an  
18 extended examination of Mr. Baz? I'm seeing a lot of no  
19 head shaking, okay. We may be able to squeeze him in.

20                   All right. I'd like to -- I mean,  
21 fortunately this is a judge trial, if this was a jury  
22 trial I'd be wearing handcuffs on making some of these  
23 deferral decisions.

24                   But since it's a judge trial, I'm going to  
25 terminate the argument on this motion at this time.

1                   We're going to take a brief break, and  
2 we're going to come back pretty soon so that we can try  
3 and finish Mr. Baz before lunch so he can get back to  
4 all the things I'm sure he needs to be focusing on.

5                   And then we'll figure out when to resume  
6 the argument on the motions.

7                   All right, so we'll take a -- off record.

8                   (Off record.)

9                   THE COURT: Back on record. A really quick  
10 break, five minutes, and then get Mr. Baz ready.

11                   You're welcome to argue the motion if you  
12 want, Mr. Frankel, but I'm going to allow him to  
13 testify. I understand your argument, but I think I've  
14 already pretty much ruled on it, and I didn't see  
15 anything in the recent submittal that changed my mind.

16                   All right. Thank you. We're in recess.

17                   (Recess taken.)

18                   (Reconvened at 11:01 a.m.)

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

21                   THE BAILIFF: Yes.

22                   THE COURT: All right. I see all counsel  
23 present in the video screen.

24                   I take it that's Mr. Baz with you, Mr.  
25 Rowe?

1                   Good morning, sir.

2                   THE WITNESS: Good morning. Aloha.

3                   THE COURT: Aloha. So we're going to start  
4 by swearing you in, are you ready?

5                   THE WITNESS: Yeah.

6                   THE COURT: Here we go.

7                   THE CLERK: You may remain seated. Raise  
8 your right hand to be sworn in.

9                   Do you solemnly swear or affirm that the  
10 testimony you are about to give will be the truth, the  
11 whole truth and nothing but the truth? If so, please  
12 respond by saying "I do."

13                   THE WITNESS: I do.

14                   THE CLERK: Thank you.

15                   THE COURT: Okay. Mr. Baz, this is  
16 Judge Crabtree speaking. I'd like you to start by  
17 please giving us your full name and then spelling it so  
18 that our court reporter over here on Oahu can make sure  
19 she gets it right for our record, so please go ahead.

20                   THE WITNESS: Sure. Sananda  
21 Kalaiokamalamalama Baz so first name is Sananda,  
22 S-a-n-a-n-d-a, middle name is Kalaiokamalamalama, so  
23 K-a-l-a-i-o-k-a-m-a-l-a -- malama -- sorry, malamalama,  
24 m-a-l-a-m-a-l-a-m-a, uh, and then last name is Baz,  
25 B-a-z.

1 THE COURT: All right. Thank you very  
2 much, sir.

3 All right.

4 See, so this is Mr. Rowe, this is your  
5 witness; right?

6 MR. ROWE: That's correct, Your Honor.

7 THE COURT: Okay. Go ahead.

8

9

SANANDA BAZ

10 called as a witness, having been first duly sworn, was  
11 examined and testified as follows:

12

13

DIRECT EXAMINATION

14

15 BY MR. ROWE:

16 Q. Mr. Baz, could you please tell us what your  
17 position with the County of Maui is?

18 A. Sure. I'm the managing director for the  
19 County.

20 Q. And can you give us a description about  
21 what that job entails?

22 A. So the managing director is the second in  
23 command at the County, the acting mayor when the mayor's  
24 not available, and I am responsible for managing the  
25 departments of the executive branch of the county, um,

1 and implementation of the policies and ordinances, rules  
2 for the administration itself.

3 Q. Okay. And how long have you held this  
4 position?

5 A. Since January of 2019.

6 Q. Okay. Can you give us a little bit of your  
7 educational and work background.

8 A. Sure. I have a bachelor's degree in  
9 business management and an MBA in management and  
10 strategy.

11 I have been working a few prominent  
12 positions here in our community, one was for Maui  
13 Economic Opportunity, which is a community action  
14 agency, a large non-profit organization here doing a lot  
15 of employment-related workforce as well as  
16 transportation, Head Start preschools, different things  
17 like that.

18 I was the deputy director for five years  
19 and the CEO for five years over there.

20 Then I became the budget director for the  
21 County of Maui in 2011, and held that position for seven  
22 of the last eight years. I took a short break to be the  
23 Office of Council Services Director, but other than  
24 that, I've been at the County since 2011.

25 Q. Okay. Thank you, and just for the sake of

1 the court reporter, if you could slow down a little bit.

2 A. Sure, sorry.

3 Q. No problem.

4 A. Fast.

5 Q. Okay. And has Mayor Victorino asked or  
6 authorized you to speak on his behalf today?

7 A. Yes, he has.

8 Q. Would you say that it's fair that as part  
9 of your job duty that you help set the agenda for the  
10 administration?

11 A. Yes.

12 Q. And so would you say that you're generally  
13 aware of the policy, priorities and preferences of Mayor  
14 Victorino's administration?

15 A. Yes.

16 Q. How involved have you been in responding to  
17 the COVID-19 pandemic?

18 A. Quite a bit. The administration, the  
19 County's responsibility of managing the impact of the  
20 disease on our community and the prevention of its  
21 spread have been between the mayor and I with leadership  
22 of the County level with our emergency management team  
23 and the rest of our department, but yeah, we're very  
24 high.

25 Q. Okay. And as part of that, are you aware

1 of the economic situation of the County at large?

2 A. Yeah, I mean any specific, yeah.

3 THE COURT: I'm sorry, there was a gurgle,  
4 there I wasn't sure what happened.

5 MR. FRANKEL: I said objection vague.

6 THE COURT: I'll allow it, it's general,  
7 but we have to start somewhere, overruled. Go ahead.

8 MR. ROWE: Thank you, Your Honor.

9

10 A. (By the witness) And so in relation to the  
11 County as an organization, as our revenues, we are  
12 seeing some decreases in many of the fee revenues that  
13 we take in, waste water, water, those kind of things.

14 For the overall aspect of our community,  
15 we've seen significant level of unemployment in our  
16 community from the impacts of shutting down travel  
17 mostly in businesses, and even though there have started  
18 to ramp up again, we're still seeing a huge downturn in  
19 our economy because it's based on tourism.

20 Q. Okay. Do you know approximately what  
21 percentage of unemployment the County of Maui currently  
22 is?

23 A. Um, last report that I saw was 31.4 percent  
24 for May, that was the last State report that I saw.

25 Q. Um, would you say that this is different

1 than normal, for example, is it different than it was  
2 last year?

3 A. Definitely. I don't know exactly what it  
4 was at that point, but March of was 2.1 percent.

5 Q. Okay.

6 A. Between March and May it jumped 32 percent.

7 Q. And do you think it's fair to say that  
8 that's generally due to the effects of COVID-19?

9 A. Yes.

10 Q. Okay. To your knowledge are there any  
11 particular industries or types of jobs that have been  
12 particularly hard hit by COVID-19?

13 MR. FRANKEL: Objection, lacks foundation.

14 THE COURT: Overruled. Go ahead.

15

16 A. (By the witness) So as I mentioned, base  
17 of our economy has been tourism. It's been a  
18 visitor-related industry, so as that shutdown, we have  
19 -- that's where the bulk of the unemployment is, and a  
20 little -- a few of the ancillary businesses that are  
21 related have shut down or unemployed, but a majority of  
22 unemployment has been in that sector.

23 Our retail sector and agricultural sector  
24 have remained well employed.

25 Q. Due to what we've learned, or what you've

1 said you've learned from this pandemic, has the  
2 administration set any sort of priorities regarding job  
3 diversification?

4 A. Yes, we have. The administration created  
5 an economic recovery task force that is evaluating that  
6 types of activities. What we've done with every state  
7 and then so, most counties received monies from the  
8 CARES Act, and we have the federal CARES Act so that we  
9 can reasonably respond to the effects of COVID.

10 And one of the big things that we've put  
11 millions of dollars into out of that money is figuring  
12 out the best way to diversify our economy, looking at  
13 new industries, supporting some industries that could  
14 grow here in our community.

15 Q. Is one of those industries that has  
16 potential growth, diversified agriculture?

17 A. Yeah.

18 MR. FRANKEL: Objection, leading.

19 THE COURT: Overruled, it's transitional.  
20 Go ahead.

21 A. (By the witness) So diversified  
22 agriculture, agriculture in general is, we see that as a  
23 huge growth potential.

24 You know, when tourism ramped up over the  
25 last 40 years, we saw a huge downturn in or

1 agricultural industry. We have a lot of agriculture  
2 land that now sits fallow that could be utilized for  
3 diversified agriculture, we've been promoting actually  
4 even before COVID the use of that land for the  
5 diversified agriculture, diversified versus mono-crop,  
6 which was the previous agricultural use.

7 Q. And do you believe that diversified  
8 agriculture would be as badly hurt by something like  
9 COVID-19 as you testified the tourism industry was?

10 A. No.

11 MR. FRANKEL: Objection.

12 THE COURT: Hold on. Go ahead, Mr.  
13 Frankel.

14 MR. FRANKEL: Calling for expert opinion,  
15 speculation, lacks foundation, irrelevant.

16 THE COURT: Overruled.

17 MR. FRANKEL: His belief.

18 THE COURT: I'm sorry, what was that last  
19 one?

20 MR. FRANKEL: His belief, that was the  
21 question.

22 THE COURT: Well, I'm going to assume he's  
23 not answering giving personal beliefs, I'm going to  
24 assume he's going to answer giving the position of the  
25 County, so overruled. Go ahead.

1

2           A.           (By the witness) Yes, when I say, we  
3 believe, it's the position of the County that we believe  
4 that the way to increase our economy, and we have the  
5 ability to grow diversified agriculture.

6                       In fact, it's been a big push in our  
7 community ever since the rumored closure of Hawaiian C&H  
8 Sugar closed down, and there was a big push to get  
9 our -- that land that was available into diversified  
10 agriculture.

11                      So an organization has come in and  
12 purchased much of the land, and they have started  
13 planting diversified agriculture in much of the land.

14                      We've been supportive and working with them  
15 and others throughout the years. We also are increasing  
16 the amount of County agricultural parks that are  
17 available. We have lands that are available for people  
18 who want to do diversified agriculture.

19                      We just acquired and are developing more  
20 land for that as well, so supporting it, and we think it  
21 is the best way to get a stronger economy that's not as  
22 impacted by downturns in tourism.

23           Q.           Thank you. And just to clarify, that  
24 organization that you mentioned, would that be Mahi  
25 Pono?

1           A.       Yes.

2                   MR. ROWE:   Okay.  I have nothing further  
3 for this witness, Your Honor.

4                   THE COURT:  All right.  Thank you.

5                   Let's see, let's go with let's go with  
6 Mr. Schulmeister next.

7

8                                   CROSS-EXAMINATION

9

10 BY MR. SCHULMEISTER:

11           Q.       Mr. Baz, I think there was a question from  
12 Mr. Rowe about whether the administration believes that  
13 the type of jobs that diversified agriculture creates  
14 would be equally susceptible to being lost in situations  
15 like the current COVID pandemic, in other words, the  
16 agricultural jobs, are they as affected by the pandemic  
17 as service industry and tourism jobs?

18                   MR. FRANKEL:  Lacks foundation.

19                   THE COURT:  Overruled.

20           A.       (By the witness)  So they are not the case.  
21 So the impact of jobs in our community right now has  
22 been the shutdown of tourism, has been the shutdown of  
23 flights coming into our community, the quarantine  
24 lockdowns, and so that has prevented anybody from  
25 wanting to visit our community.  So that's where that

1 has shut us down.

2           Our agricultural industry isn't related to  
3 that same challenge because we don't -- we depend on  
4 that for growing our food, which we only grow about 20  
5 percent of the food that we consume here, and so we  
6 could actually grow quite a bit more.

7           Q.       And has the administration implemented some  
8 shutdown orders of certain types of businesses on Maui  
9 because of the pandemic?

10          A.       We have. In March we started shutting down  
11 government services, parks, and also then we shut down  
12 pretty much every business, except for essential  
13 businesses, including agriculture, retail, some retail  
14 that was related to, you know, essential needs,  
15 basically essential services were still allowed, but  
16 everything else is shut down.

17                We have opened up again, and we remain open  
18 at this point. Our other County, the City and County of  
19 Honolulu, as you may have heard has restricted. They're  
20 starting to restrict because increase of cases, but we  
21 have not.

22                We are, at this point, haven't restricted  
23 any current businesses that are open anymore.

24           Q.       I just want to make sure I heard and  
25 understood you correctly.

1                   So when you mentioned that essential  
2 services or essential business were not shut down, did  
3 you say that agriculture was one of the essential  
4 businesses or services, and so it was not shut down?

5           A.       That's correct. Agriculture, food  
6 production and distribution of food is a very essential  
7 function of our community.

8                   MR. SCHULMEISTER: Okay. I have no further  
9 questions.

10                  THE COURT: Thank you.

11                  Mr. Wynhoff.

12                  MR. WYNHOFF: No questions, Your Honor.  
13 Thank you.

14                  THE COURT: Thank you.

15                  Mr. Frankel.

16

17                                   CROSS-EXAMINATION

18

19 BY MR. FRANKEL:

20           Q.       Mr. Baz, the administration acts  
21 consistently with the general plan, that's its position,  
22 isn't it?

23           A.       Generally, yes. The general plan is  
24 adopted by the County, and County council, and then  
25 we're developing our community plans right now, but that

1 is the overarching policy-based document of our County,  
2 along with the charter and the County code.

3 Q. And so that helps guide, the County  
4 Charter, the County code and the general plan help guide  
5 the administration in its actions; right?

6 A. Yes.

7 Q. And that would include Chapter 2 of the  
8 Maui island plan, it talks about heritage resources;  
9 right?

10 A. I didn't memorize the plan, but I'm  
11 assuming you're correct.

12 Q. And when you talked about the goals of the  
13 County, either pre-COVID or post-COVID, those goals  
14 don't include the waste of water, does it?

15 A. No, we do not support the waste of water.  
16 We support utilizing it for agriculture and consumption  
17 for our citizens, yeah.

18 Q. And not -- yeah, so the County is not  
19 supporting actions that lead to the waste of water;  
20 right?

21 A. Maybe I don't understand your question.

22 Q. Well, is -- in terms of your understanding  
23 of County's policies, does the County support having  
24 water from EMI streams be wasted? If it's not used --

25 A. No.

1                   MR. FRANKEL: Thank you. No further  
2 questions.

3                   THE COURT: Back to you, Mr. Rowe.

4                   MR. ROWE: I don't have any further  
5 questions based on that, Your Honor.

6                   THE COURT: All right. Thank you.

7                   Mr. Schulmeister?

8                   MR. SCHULMEISTER: No further questions.

9                   THE COURT: Mr. Wynhoff?

10                  MR. WYNHOFF: Nothing, Your Honor. Thank  
11 you.

12                  THE COURT: All right. Thank you.

13                  That concludes your testimony, Mr. Baz.  
14 Thank you very much for coming in. Take care.

15                  THE WITNESS: Okay. Thank you very much.

16                  THE COURT: Let's take a brief recess. I  
17 kind of need to reorganize some of the documents down  
18 here, and then we can resume our argument on the motion,  
19 is that all right with everybody?

20                  Mr. Wynhoff, you have your hand up. Go  
21 ahead.

22                  MR. WYNHOFF: Perhaps Mr. Rowe could  
23 refresh my recollection as to whether he has one more  
24 witness before we do Suzanne.

25                  THE COURT: You got very gurgled there say

1 again.

2 MR. WYNHOFF: I was asking if Mr. Rowe  
3 would be so kind as to refresh my recollection as to  
4 whether there's one more witness before Suzanne.

5 MR. ROWE: No, Your Honor. I was intending  
6 to call Jeff Pearson tomorrow, and I let him know that  
7 he'd be going tomorrow, so that Ms. Case could have as  
8 much time as possible since she's only available today.

9 MR. WYNHOFF: Perfect. We'll have her here  
10 at 1:00, Your Honor.

11 THE COURT: That raises an issue, I wonder,  
12 depending should we go with her now and just put the  
13 motion off till later, or should we argue the motion  
14 first to get that squared away, or is she not available,  
15 or is she not available right now?

16 MR. WYNHOFF: You know, I assume she could  
17 start walking over and be here. She can't be here in  
18 more than 15 minutes, Suzanne.

19 THE COURT: Not worth it. I don't want to  
20 do that just for, yeah, I forgot that she had to move  
21 from where she is to where you are. So I didn't take  
22 that into account.

23 MR. WYNHOFF: Yes, thank you.

24 THE COURT: Let's take a brief break, and  
25 then we'll continue the motion. I assume Ms. Akagi's

1 available.

2 MR. SCHULMEISTER: Yes.

3 THE COURT: Okay. Great.

4 Five minutes and then we'll resume. Thank  
5 you. We're in recess.

6 (Recess taken.)

7 (Reconvened at 11:28 a.m.)

8 THE COURT: Okay. Back on record. FTR on?

9 THE BAILIFF: Yes.

10 THE COURT: All right. Thank you.

11 So returning to motion in limine No. 4 that  
12 we were arguing. So my notes end where Mr. Frankel was  
13 arguing about the two specific references that  
14 Ms. Akagi made during her argument.

15 But see, you think I'd remember this since  
16 it was only an hour ago, but it's been that kind of day.  
17 I think I got back to Ms. Akagi; right?

18 MR. FRANKEL: I think you were about to.

19 THE COURT: Okay.

20 So that was the end of your argument?

21 MR. FRANKEL: You asked me to sort of  
22 summarize, so yes, my argument was ended at that point.

23 THE COURT: All right. Now that we don't  
24 have the time crunch for Mr. Baz, is there anything you  
25 want to elaborate on? I want to give you a full chance

1 here.

2 MR. FRANKEL: Well, it's a little bit  
3 unclear to me how we're proceeding here, if we're  
4 talking about specifically just those two specific  
5 exhibits, I told you what the problem with those two  
6 exhibits are, why they're not necessary.

7 And then as a general rule, I think my  
8 Sierra Club memorandum in opposition to A&B's motion in  
9 limine No. 4 lays out the reasons why it's not  
10 admissible, all these exhibits are not admissible. They  
11 don't go through the proper steps, and the shortcutting  
12 is not the proper way to get exhibits into evidence.

13 I'll leave it at that, Your Honor.

14 THE COURT: Okay. All right, so back to  
15 you, Ms. Akagi, why don't you wrap up the argument on  
16 Exhibits AB-128 and AB-133, and then we'll go from  
17 there.

18 MS. AKAGI: Okay. So to refer back to  
19 Your Honor's earlier question about whether the two  
20 exhibits are referenced in CWRM's June 2018 decision and  
21 order.

22 THE COURT: Right.

23 MS. AKAGI: I have a couple of examples for  
24 Your Honor.

25 So starting with AB-128, which is Exhibit C

1 as in Charlie 91 in the CWRM contested case hearing.  
2 Those appear on page 27, paragraph 10; page 28,  
3 paragraph 11, and 12.

4 THE COURT: All right, that's for AB-128;  
5 right?

6 MS. AKAGI: That's correct.

7 THE COURT: How about AB-133?

8 MS. AKAGI: For AB-133, which is Exhibit C  
9 as in Charlie, 103 in the CWRM contested case hearing,  
10 that is referenced on page 190 in paragraph 658 and on  
11 pages 218 to 219, that's one paragraph 742.

12 MR. FRANKEL: Excuse me, I'm sorry, but are  
13 those the Bates stamp numbered or page numbers of the  
14 original documents?

15 MS. AKAGI: I'm sorry, those are the Bates  
16 stamp numbers.

17 MR. FRANKEL: Can you give me the two page  
18 numbers you cited again, I'm sorry.

19 THE COURT: That's fine, go ahead.

20 MS. AKAGI: Exhibit 8133?

21 MR. FRANKEL: The second one you talked  
22 about, whichever one that was.

23 THE COURT: It was page 190.

24 MS. AKAGI: Page 190.

25 THE COURT: It was page 190, paragraph 658,

1 and correct me if I'm wrong.

2 MS. AKAGI: I'm sorry.

3 THE COURT: Go ahead.

4 MR. FRANKEL: That's not right.

5 MS. AKAGI: It's paragraph 650, I can't  
6 read my own handwriting, I'm sorry.

7 THE COURT: 650, got it.

8 Other one, pages 218 to 219, paragraph 742, I believe.

9 MS. AKAGI: That's correct, that's correct.

10 THE COURT: All right. Got that,  
11 Mr. Frankel?

12 MR. FRANKEL: I'm trying -- I'm trying to I  
13 guess.

14 THE COURT: Let me know if you want us to  
15 repeat it.

16 In the meantime, Ms. Akagi, go ahead.

17 MS. AKAGI: Just to address one point that  
18 Mr. Frankel had raised regarding independent duties and  
19 referring to Judge Hifo's order.

20 Judge Hifo's order does not dress the RPs.  
21 It specifically states that it is not addressing the  
22 RPs, but addressing the lease.

23 And to the extent that it is applicable  
24 here, Judge Hifo determined that the BLNR was not  
25 obligated to duplicate the efforts of the Water

1 Commission.

2                   So as I have stated before, to understand  
3 what efforts BLNR was not required to duplicate, it's  
4 important to understand what efforts the Water  
5 Commission took in reaching its June 2018 decision.

6                   And with regard to what the plaintiff is or  
7 is not challenging, with all due respect, I don't  
8 believe that our ability to create a record should be  
9 limited based on Mr. Frankel's non-binding  
10 representations as to what the plaintiff is or is not  
11 challenging.

12                   I don't have anything further.

13                   THE COURT: Well, if he's making  
14 representations on what he's arguing and not arguing,  
15 they are binding, so they will be.

16                   All right. Any further argument on that  
17 motion?

18                   MS. AKAGI: No, Your Honor.

19                   THE COURT: All right. So let's go over to  
20 your --

21                   MR. WYNHOFF: Your Honor, may I be heard  
22 for 30 seconds.

23                   THE COURT: I'm sorry, of course. Go  
24 ahead.

25                   MR. WYNHOFF: Thank you very much,

1 Your Honor.

2 Your Honor, Mr. Frankel was dissatisfied  
3 with the completeness of my quote from the decision and  
4 order, I quoted paragraph I, igloo; he quoted a sentence  
5 from paragraph J as in John.

6 I believe the sentence he said was, The  
7 commission also recognizes that it is not the purpose  
8 of -- of this proceeding to determine how the diversions  
9 will be modified.

10 I would like to supplement that with the  
11 very next sentence in that same order: This issue will  
12 be before the commission in a subsequent process.

13 Thank you, Your Honor.

14 THE COURT: Thank you.

15 So that's the next sentence after the one  
16 that Mr. Frankel quoted, so if I just go to his citation  
17 to it, I'll find it in the same place?

18 MR. WYNHOFF: And I can give it to you  
19 again, Your Honor, yes.

20 THE COURT: Yeah.

21 MR. WYNHOFF: Also.

22 THE COURT: Please go ahead and give it to  
23 me again if you're ready.

24 MR. WYNHOFF: I will, Your Honor. It's on  
25 Exhibit J-14 on page 269, which is Bate stamped 292, the

1 additional sentence that I read is in paragraph J as in  
2 John.

3 THE COURT: All right. Got it.

4 All right. So, Mr. Rowe.

5 MR. ROWE: I have nothing further to argue,  
6 Your Honor.

7 THE COURT: All right, and  
8 Mr. Schulmeister, I think you got your chance on this  
9 one already; right? Geez hello. So that's it.

10 Right, anyone else want to argue anything  
11 more on that, on motion in limine No. 4?

12 Not seeing any hands go up.

13 All right. So that kind of closes the book  
14 on motion in limine No. 4. Let's move on to the next  
15 motion, which is Alexander and Baldwin's Motion to Admit  
16 Agency Exhibits and Related Court Pleadings and For  
17 Judicial Notice, that motion was filed August 10th.

18 There's certainly a good deal of overlap,  
19 but they're not completely overlapping, so feel free to,  
20 I mean, you're welcome to incorporate the arguments  
21 you've already made or restate them if you wish.

22 Go ahead.

23 MS. AKAGI: Thank you, Your Honor. Again I  
24 don't want to duplicate anything that we've written in  
25 our motion. I think we've set out the bases for the

1 exhibits. There are just a couple of exhibits that I  
2 want to talk about specifically.

3 But before we do that, I just want to bring  
4 to everyone's attention that there was an exhibit that  
5 was addressed in the motion, but excluded,  
6 inadvertently, from the table that's in our motion, and  
7 that's Exhibit AB-70.

8 It's addressed in the body of the motion,  
9 but it was just inadvertently left out of the table. So  
10 if you're working on the table, you'll want to add  
11 AB-70.

12 THE COURT: Okay. Hang on, let me make  
13 sure I've got that.

14 MR. FRANKEL: Are you sure it's not already  
15 in evidence?

16 MS. AKAGI: I don't believe that it is, but  
17 I will check on that.

18 THE COURT: A&B-70 was stipulated in at the  
19 start.

20 MS. AKAGI: I apologize, then.

21 THE COURT: Okay.

22 MR. WYNHOFF: You win.

23 MS. AKAGI: There are just a couple of  
24 exhibits that I want to talk about specifically. They  
25 fall into two groups.

1           The first one is AB-26, and this is a  
2 filing in the Water Commission contested case hearing.

3           It is proposed findings of fact and  
4 conclusions of law submitted by Maui Tomorrow Foundation  
5 in that proceeding.

6           And this document, I know, came up a little  
7 bit during Miss de Naie's testimony, but I just wanted  
8 to address the relevance of the document briefly.

9           So in this document, Maui Tomorrow  
10 Foundation is submitting some proposed findings and  
11 conclusions to the Water Commission, and I want to  
12 specifically look at page 26 of the document.

13           MR. FRANKEL: Your Honor, I just don't  
14 think it's appropriate. I really don't think it's  
15 appropriate to be reading from an exhibit.

16           THE COURT: This is just an argument,  
17 there's no witness.

18           MR. FRANKEL: I -- I understand that, but  
19 nevertheless, it's just being read into the record. She  
20 should make her argument without having to actually read  
21 the text of it, which I think she can do.

22           THE COURT: Well, let me put it this way.  
23 She gets to make her argument without interruption, and  
24 then you can make whatever request you wish to make.

25           All right. Go ahead, Ms. Akagi.

1 MS. AKAGI: Thank you, Your Honor. So the  
2 relevant portions of this document can be found on page  
3 26, and it is paragraph 131 to 133.

4 THE COURT: Wait I must have the wrong  
5 exhibit up because it doesn't have that page number.  
6 I'm looking at joint, it's AB-26, hold on.

7 You said page 26; right?

8 MS. AKAGI: Yes, that's correct.

9 THE COURT: All right. I'm there. Go  
10 ahead.

11 MS. AKAGI: Okay. So I'm looking at  
12 paragraph 131, 132, and 133.

13 One of the issues that has come up  
14 repeatedly in this trial so far has been about the 13  
15 streams for which there were no IIFS petitions filed,  
16 and I'm just going to generally refer to those as the 13  
17 streams.

18 And it is our position that CWRM's June  
19 2018 decision took into account the water from these 13  
20 streams in setting IIFS and determining the amount of  
21 water that would be reasonable and beneficial to use for  
22 agricultural use in central Maui.

23 And so this document, specifically  
24 paragraphs 131, 132, 133, are probative of what the  
25 parties to that decision understood was being addressed

1 and covered in CWRM's decision.

2           So in this paragraph, these paragraphs,  
3 Maui Tomorrow is stating that the 13 streams that are  
4 not subject to the IIFS petitions, and thus, not subject  
5 to any uncertainty with regard to what the minimum  
6 stream flows are would "be available to provide  
7 irrigation water for the minimal bona fide needs that  
8 A&B has presented to date."

9           So that is an issue that has been directly  
10 raised, and it is probative of that issue. In addition  
11 to that, during the testimony that has come out thus  
12 far, Lucienne de Naie was both president of Maui  
13 Tomorrow and the vice chair of the Sierra Club Hawaii  
14 Chapter at the time this document was filed.

15           She has stated that she does not change her  
16 position when she has her Maui Tomorrow hat on, or when  
17 she has her Sierra Club hat on.

18           Ms. de Naie was vice president or was  
19 president of Maui Tomorrow and vice chair of the Sierra  
20 Club at the time that CWRM's June 2018 decision and  
21 order came out, and at the time that Maui Tomorrow chose  
22 to not appeal that decision.

23           Ms. de Naie was also the person, months  
24 later, at the November 2018 BLNR meeting, that had  
25 petitioned the BLNR for a contested case hearing

1 regarding the subject RPs, which the denial of that  
2 request eventually led to the initiation of that  
3 litigation.

4 And so we have asserted defenses of  
5 estoppel, waiver and this is probative of those  
6 defenses.

7 Additionally, it's evidence that should be  
8 considered by the Court in deciding on plaintiff's  
9 request for equitable relief.

10 Now, whether or not the Court accepts any  
11 of those defenses is another question, but we are  
12 entitled to make a record to argue, at the least, those  
13 defenses.

14 The other group of exhibits that I wanted  
15 to discuss are: AB-71, AB-72, AB-73, AB-74 and AB-75.

16 So these are all minutes, agenda and staff  
17 submittals from CWRM meetings, and these are admissible,  
18 as I had mentioned earlier, as public record.

19 But these exhibits are particularly  
20 relevant because they are addressing, among other  
21 things, the application that A&B and EMI have filed  
22 regarding the abandonment of stream diversion works.

23 So this directly relates to the efforts  
24 that A&B and EMI have made to comply with CWRM's June  
25 2018 decision regarding removal and modification of

1 stream diversion works.

2 Now, one of the big issues in this case was  
3 whether or not the BLNR should have ordered that these  
4 stream diversion works be removed by a date certain, and  
5 it is our position that they had no obligation to do so,  
6 and it would be unreasonable and impracticable for the  
7 BLNR to do so, given that this is the subject of ongoing  
8 proceedings before CWRM.

9 So these exhibits are all probative of  
10 those arguments and those issues that have been raised  
11 in this case.

12 So if Your Honor has questions about other  
13 exhibits, I'm happy to address those as well, but I  
14 don't have anything further to add.

15 THE COURT: Hang on, let me check my notes.

16 (Brief pause.)

17 THE COURT: One of the notes I was writing  
18 in the margin while I was reading the motion was, at one  
19 point, this is page 4, you say, if the Court declines to  
20 accept any of these exhibits into evidence, you're  
21 asking the Court to take judicial notice of them.

22 I need some clarification on that, 'cause  
23 as a general matter, taking judicial notice of something  
24 is an even higher level than admitting it into evidence,  
25 because it's the Court finding something is true.

1           So we need to clarify what you mean by  
2 that. I think what the motion meant by that is just  
3 take judicial notice that these exhibits were part of  
4 the record for CWRM.

5           Can you either confirm that or explain why  
6 you're asking for something different than that.

7           MS. AKAGI: Well, these are all documents  
8 that are in the record of a public agency, which is  
9 something that the Court is capable of taking judicial  
10 notice of.

11           And with regard to the pleadings, they are  
12 pleadings in cases, some of which are before Your Honor,  
13 and the Court is allowed to take judicial notice of  
14 those pleadings.

15           So to the extent that the Court is  
16 unwilling to allow any of these exhibits into evidence,  
17 then we ask the Court to take judicial notice of the  
18 filing or the existence of these documents. For  
19 example, that this pleading was filed in this case, or  
20 these minutes were recorded with the agency.

21           THE COURT: All right. But you're not  
22 asking me to take judicial notice that the facts  
23 asserted in any of these documents are true; right?

24           MS. AKAGI: No, Your Honor.

25           THE COURT: Okay.

1 MS. AKAGI: Simply that those things were  
2 stated, filed with the agency, filed in the case, et  
3 cetera.

4 THE COURT: Okay, I thought that was the  
5 case, but I just wanted to clarify.

6 Hang on, let me see another note. I think  
7 I had another note here, but I think you already  
8 addressed it. Hold on.

9 Yeah, you did.

10 All right. No further questions at this  
11 time.

12 Let me hear from the other folks before I  
13 hear from Mr. Frankel.

14 Mr. Wynhoff.

15 MR. WYNHOFF: Thank you, Your Honor.

16 I'm just going to direct my attention to 73  
17 and 75, AB-73 and AB-75, which are minutes from the CWRM  
18 commission or from the CWRM, I mean.

19 And so I don't think there's any issue,  
20 Your Honor, and I certainly could be wrong, I suppose,  
21 as to whether they're authentic, these particular ones  
22 seem to be signed.

23 They came off of the CWRM website, and they  
24 would be authentic, specifically, Your Honor, under  
25 901 -- I'm sorry, give me a second, Your Honor, I might

1 as well cite the exact issue.

2 THE COURT: You really have to be careful  
3 about turning away from the microphone, it makes a big  
4 difference.

5 MR. WYNHOFF: It's good to know, Your  
6 Honor. It will be helpful when Ms. Case is here, too.  
7 I'm hoping that's going to go well.

8 Hope you're laughing with us and not at us,  
9 Your Honor.

10 THE COURT: I am.

11 MR. WYNHOFF: For authenticity I would cite  
12 the Court to 901(B)(7) with respect to public records or  
13 reports. These are signed, I don't think authenticity  
14 is a problem.

15 With respect to hearsay, I don't think  
16 they're hearsay because, again, we certainly don't  
17 endorse all of the statements that are made or quoted in  
18 the minutes, but the point is, that this is the CWRM  
19 following up on the diversion work, exactly like I just  
20 actually pointed out where in J-14, the order, which is  
21 not being attacked, apparently says that that issue will  
22 be before the Court in a subsequent process.

23 Well this is the subsequent process.  
24 So authenticity, hearsay, I assume they're not issues,  
25 and then the question of relevance, to some extent, we

1 discussed that back in 2010 minutes, but I think I would  
2 suggest that that's, I don't think there's really a real  
3 issue with respect to relevance.

4           The argument has been made repeatedly that  
5 the Board should have set a bunch of deadlines and  
6 should have done this and should have done that with  
7 respect to diversion.

8           It's our position in this case, as we have  
9 repeatedly said, that the Board is entitled to -- its at  
10 least reasonable for the Board in acting as a trustee to  
11 assume that the CWRM is going to discharge its duties,  
12 which I would point out to Your Honor are actually  
13 constitutionally mandated as well.

14           I believe it's Article 11, Section 7, yes,  
15 Article 11, Section 7 of the Hawaii Constitution says  
16 that the Legislature shall provide for a Water Resources  
17 agency, which as provided by law shall be a bunch of  
18 items mentioned in there relating to water.

19           And so it's reasonable for the Board to  
20 assume that the CWRM is discharging its Constitutional  
21 duties.

22           And I would also point out that the  
23 Constitution says, as provided by law, and that's, of  
24 course, as Your Honor knows, Hawaii Revised Statute  
25 Chapter 174C.

1           And so I guess for the third time, it's  
2 reasonable for the Board in acting as trustee to assume  
3 that other people and other agencies are discharging  
4 their Constitutional and statutory duties. It is not a  
5 breach of the public trust or the Board to make that  
6 assumption, it is not unreasonable to make that  
7 assumption.

8           And to the extent that assumption is being  
9 challenged, which it has been directly challenged and  
10 repeatedly challenged, then this Court ought to receive  
11 evidence that disputes that point, and so it ought to  
12 respectfully, Your Honor, receive Exhibits AB-73 and  
13 AB-75. Thank you, Your Honor.

14           THE COURT: All right. Mr. Rowe.

15           MR. ROWE: I have no further argument. I  
16 would just join in what the other defendants have said.

17           THE COURT: Thank you. Mr. Frankel.

18           MR. FRANKEL: Thank you, Your Honor.

19           Let me start with AB-26, which is, I  
20 believe, the first Exhibit that Ms. Akagi talked about.

21           I do want to move to strike those portion  
22 of her argument in which she actually read into the  
23 record, paragraphs 131 through 133 of that document, but  
24 I don't know if I should stop here or if I can continue  
25 making my argument.

1 THE COURT: No, if you're going to -- is  
2 that what you want to say about your motion to strike?

3 MR. FRANKEL: Yeah, yeah.

4 THE COURT: All right. The motion to  
5 strike is denied, but that doesn't, you know, you don't  
6 have to worry, that doesn't mean the Court -- I mean,  
7 these are proposed findings, these aren't even findings,  
8 so you don't have to worry that the Court's going to  
9 somehow accept them all as true, that's not how it  
10 works, so go ahead.

11 MR. FRANKEL: Right.

12 So I think that there's several problems  
13 with this exhibit. For example, the paragraph that  
14 Ms. Akagi highlights are highlighted in yellow. This is  
15 not a true and correct copy of the original document,  
16 that's like, it's patently obvious.

17 No. 2. The fact that Maui Tomorrow argued  
18 this position is irrelevant to whether the Water  
19 Commission actually looked at the total quantity of  
20 water from the entire watershed in making its decision.

21 The thing we're supposed to look at is the  
22 Water Commission's decision, and if the Water  
23 Commission, you know, A&B has made this mysterious  
24 calculation about how much water it believed it's  
25 entitled to based on the Water Commission's decision,

1 but that number's nowhere in the Water Commission's  
2 decision. We've talked about that.

3 So what they're trying to establish is just  
4 because one attorney wrote three paragraphs here, that  
5 somehow:

6 A. That's somehow binding on the Water  
7 Commission's methodological approach; and

8 B. That somehow it's binding on the Sierra  
9 Club.

10 And neither are true, neither -- it doesn't  
11 make sense.

12 You know, I think it's relatively fair to  
13 say the Water Commission rejected the proposed findings  
14 of fact, conclusions of law that Mr. Hall filed. So it  
15 doesn't -- it doesn't add anything to bring this  
16 document, which is not authentic, into the record.

17 It certainly is not evidence that the Water  
18 Commission, quote, I believe in Ms. Akagi's words, "Took  
19 into account the water from the 13 streams."

20 It doesn't. What we know the Water  
21 Commission did is what is in its decision. It's  
22 inappropriate to attempt to attribute whatever Maui  
23 Tomorrow did to the Sierra Club.

24 Ms. Townsend testified as to the very  
25 elaborate decision making process that Sierra Club has

1 with its multiple layers.

2 Ms. de Naie testified as to the role she  
3 played as one, and now I can't remember whether it was 9  
4 or 13 or whatever members of the Board of Directors of  
5 Maui Tomorrow Foundation, but she also explained why  
6 Maui Tomorrow didn't appeal; they didn't have enough  
7 money.

8 So, you know, you can't attempt to bind  
9 something Maui Tomorrow's attorney filed to the Sierra  
10 Club, that doesn't make any sense.

11 So this document is both irrelevant, it is  
12 not authentic. Proper foundation has not been laid for  
13 its admission.

14 If I can move on from there to Exhibits  
15 AB- -- let me start with AB-74 and 75. What I'd like to  
16 point out to the Court is, these two documents were  
17 created, Water Commission meeting took place after the  
18 Board of Land and Natural Resources's meeting in October  
19 of 2019, therefore, they are not relevant to assist this  
20 Court in determining whether the Board breached its  
21 trust duties.

22 I think we can all recognize the fact the  
23 Water Commission had some meetings after the Board met,  
24 but the minutes are not relevant to the legal issues at  
25 hand.

1 AB-71, 72, and 73 were produced prior to  
2 the Board's meeting. There is no evidence that's been  
3 submitted, maybe Ms. Case will do it when she testifies  
4 after lunch, that these were provided to the Board. I'm  
5 pretty sure they weren't, I don't think we're going to  
6 get that testimony. But at this point they're not  
7 relevant to the legal issues in this proceeding.

8 Now, I have a little bit of a problem,  
9 Your Honor, A&B and EMI defendants have filed this  
10 lengthy, 182-page motion regarding judicial notice, and  
11 it deals with, it looks like maybe a little bit more  
12 than a couple dozen documents.

13 Ms. Akagi hasn't referred to them today,  
14 but she's got her written thing. I have not had a  
15 chance to file anything in writing, I don't know if I'm  
16 physically capable of filing anything in writing, but to  
17 the degree that there's a possibility that this Court  
18 may admit any of these documents into evidence, I would  
19 like to have the opportunity, then, to orally go through  
20 these item by item, and I can just briefly cite off what  
21 our objections are to each of these. Is that all right?

22 THE COURT: It's your argument.

23 Here's my only issue at this point.

24 It's now noon. I don't mind going a little  
25 longer, but I actually have a settlement conference at

1 12:15, so I do need to, you know, think about the  
2 settlement conference before I start it.

3 So, if we can wrap up quickly great, if --  
4 I'm not rushing you, if you need more time, we'll  
5 continue this argument again later.

6 MR. FRANKEL: I think we'll need to  
7 continue it because I can't just let go unrefuted the  
8 number of exhibits that they're proposing to introduce  
9 quickly.

10 THE COURT: All right.

11 Well, sorry for the serial nature of the  
12 argument on these motions, but it's just that events are  
13 requiring me to deal with it that way.

14 So we will take our lunch break now, it's a  
15 little bit after 12. We will reconvene at 1:00.

16 Mr. Wynhoff, Miss Case was planning on --  
17 Chair Case was planning on being available at 1:00;  
18 right?

19 MR. WYNHOFF: Yes, Your Honor, and that's  
20 no problem. She'll be here, if it takes a little  
21 longer, she'll start when she starts.

22 THE COURT: I hear you, I'm just -- maybe  
23 I'm being naive, but I'm wondering if we start her at  
24 1:00 and keep on rolling, is there any chance we can  
25 finish her today, or is she going to have to come back

1 next week no matter what?

2 MR. WYNHOFF: I'm going to be surprised if  
3 we finish her today, could happen, I guess I wouldn't  
4 bet on it.

5 THE COURT: Yeah, that was my sense of it  
6 as well.

7 All right. I will try -- strike that.  
8 Don't strike that. I withdraw that.

9 MR. WYNHOFF: If only Ms. Goldman were  
10 here, Your Honor. Thank you.

11 THE COURT: You're free to tell her.

12 Hang on, let me think this through for a  
13 minute.

14 (Brief pause.)

15 THE COURT: All right. Here's what we're  
16 going to do.

17 We're going to -- is it fair to say that  
18 A&B is resting, except for the Court's ruling on these  
19 motions that we're talking about now, there's no new  
20 witness; right?

21 MS. AKAGI: That's correct, Your Honor,  
22 except that I want to add in that we had also filed a  
23 trial brief regarding some of the business records that  
24 we had tried to admit during Mr. Volner's testimony.

25 So subject to those documents, we have no

1 further witnesses, that is correct.

2 THE COURT: Okay. When did that one get  
3 filed?

4 MS. AKAGI: Yesterday morning.

5 THE COURT: Okay. I think I saw that come  
6 in, but I haven't even had the chance to look at it yet.

7 So which records does that one deal with?  
8 Is it a whole batch or just one or two or what?

9 MS. AKAGI: I think at the most there are  
10 four.

11 THE COURT: Okay.

12 All right. Well just to try to make the  
13 record a little less squishy, I'm going to ask A&B to  
14 rest subject to these pending motions that have all been  
15 discussed on the record, including the one you just  
16 mentioned, just so that we have that clarity, but I  
17 don't think I'm going to be able to rule before we need  
18 to resume testimony.

19 So I'm going to be deferring ruling, and I  
20 know we all wish that wasn't the case, everybody would  
21 like the certainty of having a ruling, but it's just not  
22 going to happen the way things are happening right now.

23 So if these documents are going to come up  
24 in Ms. Case's testimony, we're just going to have to  
25 deal with them one at a time as they come up in her

1 testimony, that's the best I can do right now, all  
2 right.

3           So any -- if anybody has any suggestions  
4 along these lines, I'm happy to hear them, but  
5 realistically that seems to be our only option as far as  
6 I can tell, 'cause I -- I just can't finish the argument  
7 right now and make a ruling in seven minutes, which is  
8 basically what I've got.

9           So that's our plan, then. So when we come  
10 back at 1:00, Ms. Akagi, I don't know if it will be you  
11 or Mr. Schulmeister, but I'll ask you folks to formally  
12 rest, except for A, B, and C, and feel free to make that  
13 record, and we'll just go from there on with Chair Case,  
14 all right.

15           MS. AKAGI: Understood, Your Honor.

16           THE COURT: All right. Thank you very  
17 much. We're in recess until 1:00.

18           (Recess taken at 12:06 p.m.)

19           (Reconvened at 1:10 p.m.)

20           THE COURT: All right. We're on record.

21           FTR on?

22           THE BAILIFF: Yes.

23           THE COURT: All right. I see everybody  
24 present. Ready to go?

25           MR. WYNHOFF: Your Honor, yes, Your Honor.

1 I'd like to note for the record that Ms. Goldman is now  
2 with us in this room off camera.

3 THE COURT: All right, welcome.

4 MR. WYNHOFF: There's her hand.

5 Chair Case walked over here, that's why we  
6 started a little late, Your Honor, because we realized  
7 that we are really concerned about COVID.

8 With Mr. Frankel's help we realized that,  
9 why did we need her over here after all, so she actually  
10 went over to a few offices down, and so she's on a  
11 different camera, 20 feet away.

12 Lauren Chun is with us virtually, and also  
13 I'd like to note that our other colleague, Linda Chow,  
14 is also listening in, so you see a couple of LCs on the  
15 computer. Thank you, Your Honor.

16 THE COURT: All right. Thank you. And  
17 let's see, check one thing here.

18 I see Ms. Townsend is listening in.

19 Okay. All right. I think we're ready to  
20 go.

21 MR. SCHULMEISTER: Can you hear me?

22 THE COURT: I can hear you fine,  
23 Mr. Schulmeister.

24 All right, so let's please swear in Chair  
25 Case.

1 THE CLERK: Okay. You may remain seated,  
2 but raise your right hand and I'll swear you in.

3 Do you solemnly swear or affirm that the  
4 testimony you're about to give will be the truth, the  
5 whole truth and nothing but the truth? If so, please  
6 respond by saying "I do."

7 THE WITNESS: I do.

8 THE CLERK: Thank you.

9 THE COURT: All right. Ma'am, please state  
10 your full name and spell it for our court reporter.

11 THE WITNESS: My name is Suzanne E. Case,  
12 S-u-z-a-n-n-e, Middle initial E, last name, C-a-s-e.

13 THE COURT: We're getting some gargle we  
14 need to work on, or it's going to be painful  
15 examination.

16 MS. CASE: Let me try my earbuds.

17 THE COURT: Okay. Thank you.

18 MR. WYNHOFF: Sorry, it seemed okay.

19 THE COURT: No rush, no rush, everyone.  
20 We'll figure it out.

21 MR. WYNHOFF: Thank you very much for your  
22 patience, Your Honor.

23 We also have a head set that we're not  
24 going to try that, okay.

25 THE WITNESS: How's this?

1 THE COURT: Try that again, I'm sorry.

2 THE WITNESS: Is this better?

3 THE COURT: We'll give that a go and see  
4 how it works.

5 THE WITNESS: Okay.

6 MS. GOLDMAN: Why don't I put that in there  
7 just in case so you have an option.

8 THE COURT: All right.

9 Let's go ahead and start the questions.

10 THE WITNESS: There's no volume button  
11 here.

12 MS. GOLDMAN: I think there, if you click  
13 on that, yeah. That one. Yeah.

14 THE WITNESS: Okay.

15 THE COURT: Please say a few things.

16 THE WITNESS: Okay. How's the sound check  
17 now? Does this work?

18 THE COURT: Say a few more things, please.

19 THE WITNESS: How about now, few more  
20 things.

21 MR. WYNHOFF: What I think we're  
22 experiencing, Your Honor, is that her S's are kind of  
23 getting dragged out. The sound quality is, it's okay  
24 for me, but I can certainly imagine the problem for the  
25 court reporter.

1                   THE WITNESS: Okay. I'm going to try it  
2 without the earbuds. I'll try and get a little closer.  
3 How's that.

4                   THE COURT: That's working better.  
5 Thank you.

6                   THE WITNESS: Okay. All right.

7                   THE COURT: All right. Go ahead,  
8 Mr. Wynhoff, and again, I may have to interrupt if it's  
9 getting too gargled, but we'll give it a go. Go ahead.

10                   MR. WYNHOFF: Thank you, Your Honor, I  
11 really appreciate your patience, and I also am very  
12 confident I speak for all of us when I extend all of our  
13 appreciations to your staff and most particularly to the  
14 court reporters.

15                   I'm ready to go.

16                   THE COURT: She gave a thumbs up. Go  
17 ahead.

18                   (Continued on the next page.)

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25

1 SUZANNE E. CASE

2 called as a witness, having been first duly sworn, was  
3 examined and testified as follows:

4

5 DIRECT EXAMINATION

6

7 BY MR. WYNHOFF:

8 Q. Ms. Case, were you born and raised here in  
9 Hawaii?

10 A. Yes, I was born in Hilo, grew up on the  
11 Big Island and on Oahu.

12 Q. Where did you attend high school?

13 A. I went to Punahou.

14 Q. And college?

15 A. College, I went to Williams College and  
16 then I went to Stanford University for the last two  
17 years.

18 Q. Williams college, uh --

19 A. Williamstown in Massachusetts.

20 THE COURT: Wait a minute. We got an  
21 overlap. We got to make sure the other person finishes.

22 All right. I got Williams College and then  
23 cut off.

24 THE WITNESS: Williamstown, Massachusetts.

25 BY MR. WYNHOFF:

1 Q. What was your degree in, Ms. Case?

2 A. History.

3 Q. Say it again, please.

4 A. History.

5 Q. I will tell you that I did not know until  
6 this very moment that you were a graduate of Stanford.

7 And then, Ms. Case, you also attended law  
8 school, did you not?

9 A. Yes, I did. I attended the University of  
10 California at Hastings.

11 Q. And did you -- did you graduate from there?

12 A. I graduated in 1983.

13 Q. Were you a practicing lawyer at any time  
14 after that?

15 A. Yes, I practiced law for 18 years.

16 Q. Tell us about that.

17 A. So I practiced real estate transactions at  
18 the law firm of Pettit and Martin in San Francisco for  
19 four years, including quite a bit of pro bono work.

20 And then I was inhouse counsel at the  
21 Nature Conservancy starting in 1987 until 2001, so for  
22 14 years, most of it in San Francisco, but representing  
23 the Nature Conservancy in the western United States and  
24 in Hawaii and all over the Asia Pacific.

25 Q. I take it at some point you were a member

1 of the California bar?

2 A. Yes. I was a member of the California bar,  
3 and I'm an inactive member now of the California bar.

4 Q. Were you ever admitted to it the bar in the  
5 State of Hawaii?

6 A. No.

7 Q. So right now you are barred in California,  
8 but you're an inactive member in California?

9 A. Correct.

10 Q. And not barred anywhere else?

11 A. Correct.

12 Q. Do you have personal -- so, you know,  
13 obviously, just so the record is clear, I mean, you have  
14 been listening to this trial since the beginning; right?

15 A. Correct.

16 Q. Okay. So you know -- you know generally  
17 what it's about?

18 A. Yes.

19 Q. I'd like to ask you if you have personal  
20 experience in or with the area of East Maui that we've  
21 been talking about for the last couple of weeks.

22 A. Yes, I do. So when I was growing up, I  
23 spent fair amount of time there. I had a family camping  
24 trip when I was in fifth grade, along the East Maui  
25 coast, and then in tenth grade another family friend's

1 trip including camping at Honomanu.

2 THE COURT: Pardon me, pardon me, Ms. Case.  
3 We've really been making an effort to spell stuff, so  
4 you busted out a Hawaiian word that started with an H,  
5 can you spell that for us, please.

6 THE WITNESS: Sorry, yes, H-o-n-o-m-a-n-u.

7 THE COURT: Pardon me for interrupting. So  
8 please, go ahead.

9 A. (By the witness) And then I, in grade  
10 school, high school and college I hiked through  
11 Haleakala Crater about a dozen times, including few  
12 times up the Kauko Gap, K-a-u-k-o, and I spent quite a  
13 bit of time in Kipahulu, K-i-p-a-h-u-l-u.

14 I also, which is a little bit further down  
15 the coast. I also actually sort of personal/  
16 professional, after I was a lawyer, I was the Hawaii  
17 State director for 14 years, so between my legal  
18 practice and my management, I worked quite a bit on East  
19 Maui Watersheds, and --

20 THE COURT: Ms. Case --

21 A. And also with friends, and about 20 years  
22 ago wrote a Hawaiian song about endangered forest birds,  
23 and one of them was the Poouli, P-o-o-u-l-i, which was  
24 highly endangered in Hanawi, H-a-n-a-w-i in East Maui,  
25 which sadly went extinct while we were in production.

1 Um, but I have quite a bit of personal and professional  
2 experience.

3 Q. Thank you very much, Chair Case. I'm very  
4 glad you mentioned that song. You had told me about it  
5 before. I was going to ask you about it, but you got to  
6 it, so thank you.

7 You consider yourself an environmentalist?

8 A. Very much, absolutely.

9 Q. What do you base that on?

10 A. Well I've dedicated my entire professional  
11 life to protecting our natural resources, especially in  
12 Hawaii, which I am deeply emotionally connected to,  
13 deeply spiritually connected to, and deeply dedicated.

14 Q. Thank you, Chair Case.

15 So I'm just going to ask you just maybe one  
16 question or maybe two questions about this, in addition  
17 to yourself having been born here and having described  
18 your background, your family has been here for a few  
19 generations if I understand this correctly?

20 A. Yes.

21 MR. FRANKEL: Objection.

22 THE COURT: Sustained. I mean, unless it  
23 ties in somehow, but if it's just for historical review,  
24 no need.

25 MR. WYNHOFF: You know, Your Honor, I would

1 actually like to be indulged with just that one question  
2 and then move on, I think it has some relevance, but if  
3 not, I would certainly accept your ruling.

4 THE COURT: It opens up a lot of areas to  
5 cross, you sure you want to go there?

6 MR. WYNHOFF: Well, now that I see my  
7 friend Mr. Frankel nodding his head, maybe I won't.

8 Thank you, Your Honor. Appreciate it.  
9

10 BY MR. WYNHOFF:

11 Q. So we've discussed some of your background.  
12 I would like to circle back to your time at the Nature  
13 Conservancy.

14 When you, I think I understood you to say  
15 that you were an attorney for the Nature Conservancy at  
16 a time when you were still working in San Francisco?

17 MR. FRANKEL: Objection, Your Honor, I feel  
18 I've given a lot of leeway, I think this is not  
19 relevant.

20 MR. WYNHOFF: I would have to respectfully  
21 disagree with that, Your Honor, I believe I'm entitled  
22 to lay the groundwork for her background and the reason  
23 why she is where she is now, and why she's the right  
24 person for the job and why she is discharging or  
25 believes she's discharging her public trust duties,

1 which is the issue in the case.

2 THE COURT: Well, does she have any, did  
3 the witness have any connection with the East Maui  
4 Watershed while she was doing work for the Nature  
5 Conservancy?

6 MR. WYNHOFF: Thank you, Your Honor.

7

8 BY MR. WYNHOFF:

9 Q. Did the witness have any connection,  
10 Ms. Case, I believe you heard that question. Would you  
11 care to answer?

12 A. Yes, as a lawyer I helped to form the East  
13 Maui Watershed Partnership, along with -- by the State.

14 THE COURT: Sorry, time out. I'm sorry  
15 it's getting very gargly again, I'm not sure why. It's  
16 really hard to understand.

17 I was getting about every other word of  
18 that.

19 Let's go off record.

20 (Discussion held off the record.)

21 (Recess taken.)

22 (Reconvened at 1:30 p.m.)

23 THE COURT: Okay. We're back on record.

24 FTR is on.

25 All right, I understand we got it fixed.

1 Are we ready to go?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Great.

4

5 BY MR. WYNHOFF:

6 Q. Ms. Case, would you please just finish your  
7 -- restart your answer to what your experience was in  
8 East Maui when you were still in San Francisco, and then  
9 I will move on to my next question area.

10 A. Well, in San Francisco and in Hawaii, my  
11 East Maui experience included work on the East Molokai  
12 Watershed Partnership, the Waikamoi Preserves,  
13 W-a-i-k-a-m-o-i, and work on the Kipahulu extension of  
14 Haleakala National Park.

15 Q. Thank you.

16 So --

17 A. Also -- also some marine work in later  
18 years in on Maui and East Maui.

19 Q. At some point did you move to Hawaii to  
20 work for the Nature Conservancy?

21 A. Yes, I moved back in 2000.

22 Q. And at that point were you still the Nature  
23 Conservancy's attorney?

24 A. Yes.

25 Q. At some point you became -- you had a

1 different role at the Nature Conservancy?

2 A. Yes, acting State director in 2001 and then  
3 state director from then -- from 2002 to 2015.

4 Q. Okay. And in your role as Director of the  
5 Nature Conservancy here in Hawaii, did you have any  
6 connection with the East Maui area at issue?

7 A. Yes, the same East Maui Watershed  
8 Partnership matters and some marine matters.

9 Q. So after you -- you said that you were in  
10 that role until 2015, what did you do at that point?

11 A. I was nominated to chair the Board of Land  
12 and Natural Resources and the Department of Land and  
13 Natural Resources, Board of Land and Natural Resources  
14 and department.

15 Q. And you were nominated by Governor Ige?

16 A. Yes.

17 Q. Confirmed by the Senate?

18 A. Yes. And then reconfirmed, um, for a  
19 second term last year.

20 Q. Okay. Re-nominated and reconfirmed?

21 A. Yes.

22 Q. So as the -- as the chairperson of BLNR, do  
23 you also have a role with the CWRM?

24 A. Yes. I am the chair of the Water  
25 Commission as well.

1 Q. Okay. So we've -- we've been, I think, I  
2 don't know what we've -- so the Commission on Water  
3 Resource Management is sometimes abbreviated as CWRM,  
4 people have referred to it as the CWRM, and you just  
5 referred to it as the Water Commission, we're all  
6 talking about the same thing; right?

7 A. Yes, the Commission on Water Resources.

8 Q. Water Resource Management?

9 A. Commission on Water Resource Management.

10 Q. Yeah, okay. That's right.

11 Okay, so you know, just briefly, what does  
12 DLNR manage and oversee?

13 A. DLNR's responsibilities, the oversight of  
14 our natural and cultural resources, and sustainable use  
15 of them.

16 So we have division -- the division of  
17 forestry and wildlife, managing our forests and  
18 wildlife.

19 Division of aquatic resources, managing our  
20 streams and reefs and ocean waters out to three miles.  
21 Um, historic preservation, state parks, conservation  
22 district regulation in the mauka and coastal areas  
23 ocean -- boating and ocean recreation.

24 We have an enforcement division with  
25 enforcement officers.

1           We have an engineering division. I often  
2 forget to include certain divisions, of course, the  
3 water -- Water Commission.

4           Q.       I think you got most of them. I wanted to  
5 make sure you mentioned our friends and DOBOR, and you  
6 did mention that.

7           So basically in addition to being the chair  
8 of the board, you're also effectively the administrative  
9 head of the department; is that fair?

10          A.       Yes. We have a staff of about a thousand  
11 people, and we manage about a million, million one  
12 acres, about a quarter of the land area of the state and  
13 all of the marine area of the state.

14          Q.       So in that role, can you just share with us  
15 your general approach to protecting the environment?

16               MR. FRANKEL: Objection, Your Honor,  
17 relevance.

18               THE COURT: Well, I think it's -- I think  
19 it is of some relevance. I'm not -- Mr. Wynhoff, if I  
20 overrule this objection, I don't want to hear objections  
21 by when Mr. Frankel's asking a whole lot of questions  
22 about this area, we clear on that?

23               MR. WYNHOFF: I think so, Your Honor, I  
24 mean, I've been pretty fair. I didn't object when we  
25 went back for a million years on his client on the

1 environment, so that's fair.

2 THE COURT: All right. Overruled.

3 A. (By the witness) Well, my career at the  
4 Nature Conservancy and at DLNR is a problem-solving  
5 approach, it's identifying what's important to protect  
6 and what are the threats to it, and what are the  
7 strategies to protect it, and then how do you monitor to  
8 make sure you're protecting it?

9 Q. What is your understanding of the role of  
10 the -- of the Water Commission or the CWRM with respect  
11 to use of Hawaii's waters?

12 A. The Water Commission itself and the staff  
13 of the Water Commission are charged with protecting and  
14 conserving our fresh water resources in the state and  
15 managing the use of them as well.

16 Q. You have a -- you have a water deputy?

17 A. Yes. Our water deputy right now is  
18 Kaleo Manuel, so he oversees that the commission staff.

19 Q. And Mr. Manuel reports to you?

20 A. Yes, he does.

21 Q. So then along those same lines, what is the  
22 role of the landlord with respect to water dispositions  
23 as you understand it?

24 MR. FRANKEL: Object -- well, fine.

25 THE COURT: Go ahead.

1           A.       (By the witness) Well in this context, the  
2 commission sets the instream use, the instream flow  
3 standards for streams.

4           The landlord does dispositions of revocable  
5 permits and leases for use of water.

6           Q.       You are aware that the Hawaii Constitution  
7 has something to say about Hawaii's resources, I just  
8 want to know if you know that?

9           A.       Yes. Article 11, Section 3 sets out our  
10 duties to protect and conserve our natural resources for  
11 present and future generations, and to promote the  
12 development and utilization of them for -- consistent  
13 with conservation of them for the self-sufficiency of  
14 the state and the utilization of the state, and they are  
15 declared to be public trust resources.

16          Q.       For the -- for the Water Commission East  
17 Maui decision issued in 2018, were you involved in that?

18          A.       Yes.

19          Q.       What was your role with respect to that  
20 decision?

21          A.       I was the chair of the Water Commission.  
22 We -- we oversaw the contested case for East Maui  
23 streams. We issued the decision after a year of  
24 deliberation, having received it from the hearing  
25 officer, Larry Miki (phonetic) who started that phase of

1 the contested case in 2014, finished, delivered proposed  
2 findings of fact and conclusions of law in 2017.

3 And then we took that and reviewed it very,  
4 very carefully and spent many, many hours, dozens of  
5 hours each individually and together deliberating it  
6 very carefully, and we really sort of took it -- took it  
7 apart piece by piece, stream by stream, and issued the  
8 final decision in June 2018.

9 MR. FRANKEL: Your Honor?

10 THE COURT: Yes.

11 MR. FRANKEL: I just want to point out that  
12 we're very close to a waiver of any deliberative  
13 process, privilege or exemption, and I'm going -- I'm  
14 going to go through that door if it's opened.

15 THE COURT: I appreciate you're putting  
16 everyone on notice, but we'll go ahead, it's up to  
17 Mr. Wynhoff.

18

19 BY MR. WYNHOFF:

20 Q. And you are aware that the -- that the  
21 commission had actually been looking at the water in the  
22 area of the East Maui for long before you were chair of  
23 that commission?

24 A. Yes.

25 Q. Were you -- did you also have a role with

1 this area and process in your capacity as chair of the  
2 Board of Land and Natural Resources?

3 MR. FRANKEL: Objection, vague.

4 MR. WYNHOFF: Foundational, transitional.

5 THE COURT: It's general. I'll allow it.

6 Go ahead.

7

8 BY MR. WYNHOFF:

9 Q. Do you remember or would you like me to  
10 repeat it, Ms. Case?

11 A. Yeah could you repeat it please.

12 Q. Did the Board also have a role with respect  
13 to the water of the East Maui area?

14 A. The landlord's role has to do with the  
15 disposition of water, but the Water Commission's role  
16 has to do with the setting of the instream flow  
17 standards that have to be abided by in the disposition  
18 of water.

19 So not a direct role as the landlord didn't  
20 have a direct role in the setting of the instream flows,  
21 but a role in the disposition of water subject to those.

22 Q. So you personally, when you're sitting in  
23 your role as chair, Chair of the Board of Land and  
24 Natural Resources, you also necessarily remember and  
25 know the information that you had gleaned or learned

1 from your role as chair of the commission -- the Water  
2 Commission; right?

3 MR. FRANKEL: Objection, Your Honor, a  
4 deliberative process, privileged exemption, if it's  
5 being waived here, let's be clear about that.

6 MR. WYNHOFF: I don't think I'm waving it  
7 by that, but we'll deal with it when Mr. Frankel asks  
8 his questions, I think the Court will remember this.

9 THE COURT: What's your objection?

10 MR. FRANKEL: That there is a deliberative  
11 process, privilege and exemption, and I'm putting it on  
12 the record here that that's the objection, if they're  
13 going to go ahead and waive it, I want that clear on the  
14 record.

15 MR. WYNHOFF: Well, Your Honor, I guess I  
16 would like, then, to address it. I don't think I waive  
17 that by saying, When you as a human being remember in  
18 one chair what you remember in another chair, that  
19 doesn't seem to me to waive anything and that's what the  
20 question asked. We certainly can argue about it at some  
21 point.

22 THE COURT: I doubt Mr. Frankel has the  
23 right to raise a deliberative process right to this  
24 question, so I'm going to overrule it on that basis. So  
25 you may answer.

1           A.           (By the witness)   Yes.

2

3 BY MR. WYNHOFF:

4           Q.           What did -- what did the department do to  
5 try to follow up on or explore the -- I asked about the  
6 department now, so keep that in mind, what did the  
7 department do to try to follow up on or explore or seek  
8 funding with respect to the Water Commission decision?

9           A.           The Water Commission decision, um, had  
10 elements in it that would benefit very much from seeing  
11 how -- how the -- how the -- the different standards for  
12 instream flows compared and actual results.

13                       And so we wanted to make sure there was  
14 monitoring, follow-up monitoring to be able to really  
15 tell the difference between a fully -- a stream that had  
16 all of the water restored and a stream that had the H90  
17 habitat standard.

18                       So we specifically asked the Legislature  
19 for funding to do monitoring for, and so the Water  
20 Commission staff have been working with the division of  
21 aquatic resources staff to do aquatic monitoring in the  
22 streams for that reason.

23                       We received, I think it was \$250,000 from  
24 the Legislature to do stream monitoring, post-decision.

25           Q.           And what was the specific relationship

1 between full restoration and H-90, I'm sorry I didn't  
2 grasp that.

3           A.       The standard for habitat restoration, short  
4 of restoration of all of the water in the streams was  
5 H-90, 90 percent of the habitat was anticipated to be  
6 protected by restoring 64 percent -- restoring the  
7 median base flow of 64 percent.

8                   So we wanted to be able to compare the two,  
9 and so there were two streams in the decision that were  
10 side by side that were, one was set at full of stream  
11 water restoration, and one was set at the H-90 standard,  
12 and that was an excellent opportunity to review the  
13 effectiveness of those two levels of restoration in  
14 restoring stream habitat.

15                   There was also another point of comparison  
16 for stream monitoring purposes was and is the difference  
17 in stream habitat health between -- or among the  
18 restoration, full restoration of stream flows in  
19 taro streams compared to two baseline streams that were  
20 not diverted at all for taro, but were fully, all the  
21 streams were -- all the stream water was restored, and  
22 then compare that to the H-90.

23                   And the reason for that to be a comparison  
24 of interest for monitoring purposes is that although in  
25 the taro streams the stream flows are fully restored,

1 they still are diverted for taro, and in some cases, the  
2 stream water is returned to the stream, not in all  
3 cases.

4 So we wanted to know what the effect on  
5 estuary species was under those different comparisons as  
6 well. So stream monitoring is good for all of this.

7 Q. Are you familiar with the concept of  
8 entrainment?

9 A. Yes.

10 Q. Can you explain to the Court and to the  
11 attorneys what we're talking about as you understand it  
12 when we talk about entrainment?

13 A. So if stream flows are inadequate to  
14 continue in all parts of the stream bed, larvae or  
15 creature might get -- get basically caught up in small  
16 pools, or they might get diverted into ditches.

17 Q. You familiar with the term freshets?

18 A. Yes.

19 Q. What does that mean?

20 A. Freshet is a period of increased stream  
21 flow following a rainfall event.

22 Q. What's the relationship between a fresh --  
23 between freshets and entrainment?

24 A. So in a freshet you'll get a sudden rapid  
25 flush of water, and water will rush down the stream,

1 notwithstanding any former sort of rock gravel or will  
2 get swept over the diversions because there will be  
3 water going over the diversions, not just in the  
4 diversions.

5 Q. What do those -- do those concepts relate  
6 to the ongoing study of comparisons you've been talking  
7 about with respect to full restoration, H-90 and  
8 taro streams?

9 A. Uh, they -- they can be. The monitoring is  
10 point in time, so it may or may not take into account a  
11 freshet.

12 Q. The streams that we're talking about,  
13 you've already alluded to a little bit but, and I don't  
14 think you used the word yet, but the concept of  
15 diversions, you understand that concept?

16 A. Absolutely.

17 Q. Tell us about that, please.

18 A. The stream diversions are works in the  
19 stream or along side the stream that are intended to  
20 capture water from the stream and divert it into ditches  
21 that will get them sent out of the stream for other uses  
22 offstream.

23 Q. What is your understanding of the  
24 relationship between diversions and the concept of full  
25 restoration?

1           A.       From the standpoint of the Water Commission  
2 decision, the decision required, when it required  
3 restoration of stream flows, it required -- that's what  
4 it required, restoration of stream flows, that means the  
5 diversions had to be modified to the extent necessary to  
6 make sure the stream flows could be met at the values  
7 established in the decision.

8           It did not, and specifically, the decision  
9 specifically did not require removal of the diversion  
10 structures, but it required modification of them to the  
11 extent sufficient to meet the standard for the instream  
12 flow.

13          Q.       What does it take to modify the -- speaking  
14 generally now, what does it take to modify the  
15 diversions to accomplish the requirements that the Water  
16 Commission put on the restoration -- the restoration  
17 levels?

18                   MR. FRANKEL:  Objection, vague.

19                   THE COURT:  Overruled.

20

21          A.       (By the witness)  It depends on the what's  
22 required, what the structures are, what is -- what are  
23 the mechanics of it, and what are the -- what are the  
24 required stream flows.

25                   So in some cases you might just be able to

1 make minor adjustments, close a gate, for example. And  
2 in some cases you may need to make more major  
3 adjustments, such as putting concrete over a grate.

4           The -- the Commission's decision did  
5 require a wetted pathway, and so sometimes those  
6 required modifications to the structures in the stream  
7 to make sure there was always a, again, a wetted pathway  
8 so that stream life could migrate up the stream, so that  
9 there wouldn't be a physical barrier.

10           And so there are very much different levels  
11 of actions in order to restore various levels of stream  
12 flows, and they may or may not require different levels  
13 of permits to -- to be done.

14           Q.       And is the -- is the process of making  
15 those changes in process underway?

16           A.       Yes. That's a requirement of the water,  
17 the management of stream diversions is a responsibility  
18 of the Water Commission, and so there is a process  
19 underway.

20           The streams that were identified for full  
21 restoration, that were for the taro-producing streams,  
22 they are divided into -- the steps to restore the stream  
23 diversions, the stream flows are in four categories of  
24 steps, one that requires very simple modifications in  
25 the ditch that can be done by minor adjustments, and

1 then varying degrees of complexity for permitting  
2 purposes.

3 Q. Like you to look at Exhibit S-33, please.

4 THE COURT: That is not in evidence; right?

5 MR. WYNHOFF: You're right, Your Honor.

6 Thank you.

7 THE COURT: Okay.

8 THE WITNESS: Yeah, got it.

9

10 BY MR. WYNHOFF:

11 Q. That is a document that purports to be --  
12 you tell us what it is, I'm sorry.

13 A. This is an application by Alexander and  
14 Baldwin in August 17, 2018, the application to the Water  
15 Commission for the Category 2, taro stream diversion  
16 abandonments.

17 Q. Category 2?

18 A. Category 2, yeah.

19 Q. Okay. So what's the date of this document?

20 A. August 17, 2018.

21 Q. And just inform, it's a letter from  
22 Alexander and Baldwin to Mr. Jeff Pearson?

23 A. It's a cover letter and an application, a  
24 fairly detailed application form with the technical  
25 information necessary.

1 Q. Jeff Pearson at the time was the Deputy  
2 Director for -- of the Water Commission?

3 A. He was, he preceded Kaleo Manuel.

4 Q. We are able to see this because we have  
5 this in electronic form, we see that it's 67 pages long?

6 A. Yes.

7 Q. You recognize this as being a true and  
8 correct copy of the document that it purports to be?

9 A. Yes.

10 MR. WYNHOFF: Your Honor, I'd like to have  
11 exhibit, I'd like to request that Exhibit S-33 be  
12 received into evidence. I believe there's -- I don't  
13 think there's a question as to authenticity, and I don't  
14 believe that it would be -- I'm not sure that it -- I  
15 don't think it's hearsay because the point is that we're  
16 trying to show that the application was made, not that  
17 the statements are made therein are correct.

18 But if it was, if there was a hearsay  
19 objection, which again, I don't think there is, the  
20 issue, then, it would be a public record.

21 THE COURT: Mr. Frankel.

22 MR. FRANKEL: Your Honor, objection, object  
23 to authenticity, at the very top there's a handwritten  
24 note said, Revised, after the date that Ms. Case  
25 testified to.

1           And I believe there is a -- there may be a  
2 later document that incorporates that. It's -- yeah,  
3 authenticity, Your Honor.

4           THE COURT: Maybe you want to try --  
5 I'm sorry, I thought you were done, go ahead.

6           MR. FRANKEL: There's actually three dates  
7 on that first page, one is file stamped, one is the date  
8 of the letter and one is the revised, and I'm -- I  
9 can't really read the file stamp thing, but there is  
10 some ambiguity there.

11           MR. WYNHOFF: It may be ambiguous, but it's  
12 still authentic.

13           THE COURT: Well --

14           MR. WYNHOFF: They certainly look --

15           THE COURT: Hold on, hold on, I get to  
16 talk, too.

17           Just trying to answer your question,  
18 Mr. Frankel.

19           The file stamp on it is December 5th,  
20 December 5th, okay.

21           MR. FRANKEL: Of the same year?

22           THE COURT: Oh, I just assumed it was that  
23 year, but hang on. It looks like a 2018, but obviously,  
24 the 8 is a little squishy looking, so I can't be  
25 positive, but certainly looks like 2018.

1 All right, so do any other counsel want to  
2 be heard before I circle back to Mr. Wynhoff on this  
3 issue, Mr. Schulmeister?

4 MR. SCHULMEISTER: I have nothing to  
5 comment on that.

6 THE COURT: All right. Mr. Rowe?

7 MR. ROWE: I support this being admitted  
8 into evidence, Your Honor.

9 THE COURT: All right. So, Mr. Wynhoff,  
10 back to you. The timing issue is a bit confusing right  
11 now, could you try to clear that up with the witness,  
12 and then we'll see reoffer it. Thank you.

13 MR. WYNHOFF: Sure, Your Honor.

14

15 BY MR. WYNHOFF:

16 Q. So, Ms. Case, you have any reason to  
17 believe that this isn't an authentic copy of the  
18 document as kept in the CWRM's records?

19 MR. WYNHOFF: I know that wasn't your  
20 specific question, Your Honor, but I wanted to ask that  
21 one first. Thank you for your indulgence.

22 A. (By the witness) I don't have any reason  
23 to think this is not an authentic copy.

24 (Continued on the next page.)

25

1 BY MR. WYNHOFF:

2 Q. Do you have any comment on the date stamp  
3 on the -- on the right-hand side of the document, it  
4 seems to be considerably later than the date of the  
5 document itself.

6 A. Uh, no, not personally.

7 Q. Do you have -- and how about the word, the  
8 statement "Revised" at the top?

9 A. Yeah, I mean, I presume that it came in, it  
10 needed some corrections and clarifications that the  
11 staff asked for, and they made them and revised them.  
12 It's not to the letter itself, so it's probably to the  
13 attachments, but I don't know further than that.

14 THE COURT: So, Chair Case, time out.

15 MR. WYNHOFF: I'm sorry, you first.

16 THE COURT: Chair Case, respectfully I know  
17 sometimes when someone is asking a, sort of a longer  
18 question, you know where it's going, and you want to  
19 answer, and you jump in. That's really normal  
20 conversation, but it -- it makes life hell for our court  
21 reporters.

22 So --

23 THE WITNESS: Sorry.

24 THE COURT: I get it.

25 So just wait till the end of the question,

1 and then answer, and life will be a lot easier in the  
2 room why where I'm sitting.

3 THE WITNESS: Will do.

4 THE COURT: Thank you.

5 THE WITNESS: My apologies.

6 THE COURT: Accepted.

7 All right. So, Mr. Wynhoff, you were going  
8 to say something. Go ahead.

9 MR. WYNHOFF: I don't remember what I was  
10 going to say, Your Honor, but what I am going to say now  
11 is, I don't think there is an issue as to whether the  
12 document is authentic.

13 She's testified that she recognizes a true  
14 and correct copy of the document in the files, if that's  
15 the way it's in the files, the difficulties or  
16 ambiguities don't have anything to do with authenticity,  
17 and that's the only thing I've heard.

18 She is the custodian of record for the  
19 CWRM, so with great respect, I'd ask that this document  
20 be received into evidence.

21 THE COURT: Okay. But on the purpose of  
22 it, you said you were just wanting to show that this  
23 application was made, okay, not for the truth of any  
24 particular, you know, statement in it.

25 So --

1 MR. WYNHOFF: Yeah, okay.

2 THE COURT: What does the document offer us  
3 on that front?

4 MR. WYNHOFF: Your Honor, the witness has  
5 been talking about, so the issue, there has obviously  
6 been a substantial issue in this case in diversions, the  
7 Sierra Club has specifically stated that they believe  
8 that the Board of Land and Natural Resources should have  
9 been in charge of taking out the diversions, in fact,  
10 they specifically said, one of the specific claims that  
11 was claimed is that it was a breach of the public trust  
12 to not put a timeline on the removing of diversions.

13 And the purpose of this document is to  
14 augment the witness's testimony and to show that the  
15 CWRM is, in fact, receiving these applications, moving  
16 it along, and taking charge of it, as is their  
17 Constitutional duty, and it will also show that it's not  
18 just simply a case of going up there with a hammer and  
19 busting a V-notch and stuff.

20 So I think these things are extremely  
21 important and relevant to rebut. Elements of -- that --  
22 that Sierra Club seems to think are pretty important.

23 THE COURT: I'm still -- I'm sorry to be  
24 yelling about this, but I'm just really to trying to  
25 separate all the different factors I'm hearing.

1           Okay. One thing I think I hear you saying  
2 is that you're trying to show that applications for  
3 diversions are really the kuleana of CWRM and not of  
4 BLNR, is that a fair statement?

5           MR. WYNHOFF: That's one.

6           THE COURT: Okay.

7           MR. WYNHOFF: Yes, that's one, thank you.

8           THE COURT: And then 2, you're trying to  
9 show that there's actually sort of a lot in progress  
10 that's being done to counter Sierra Club's argument that  
11 not enough is being done.

12           MR. WYNHOFF: That's also correct,  
13 Your Honor. That's true. Thank you.

14           THE COURT: But doesn't that depend on a  
15 showing that these things are actually happening, as  
16 opposed to just an application? What am I missing?

17           MR. WYNHOFF: You got to start somewhere,  
18 Your Honor. I mean, there's an application, with all  
19 due respect, the question -- now we're talking about  
20 relevancy, and the relevancy is where it is. I  
21 certainly hope that I'm going to be able to tie it up,  
22 but I got to start somewhere.

23           MR. FRANKEL: Your Honor.

24           THE COURT: Time out, I'm thinking.

25           (Brief pause.)

1           THE COURT: Just let the record show, the  
2 Court is trying to scroll through this 67-page document  
3 to get a better for what's in it, since I never reviewed  
4 it before.

5           Actually, we've been going an hour. Let's  
6 take our recess now, and I'll spend my time scrolling  
7 through this while you folks take your break.

8           So we'll go take a recess for ten minutes.  
9 I'll see you back here at 2:15, everyone.  
10 We're in recess.

11          MR. WYNHOFF: Thank you, Your Honor.

12          THE COURT: All right.

13                         (Recess taken.)

14                         (Reconvened at 2:15 p.m.)

15          THE COURT: All right. We are back on  
16 record.

17          FTR on?

18          THE BAILIFF: Yes.

19          THE COURT: All right. Thank you.

20                 I see everybody in the camera. I spent  
21 recess scrolling through the document. I'm going to  
22 allow it. It's very strictly with the understanding  
23 that it's not being offered for its truth. It is an  
24 application that was sent to CWRM.

25                 Where exactly that's going to lead in terms

1 of relevance, I'm not somebody is -- where exactly it's  
2 going to lead in the evidence, I'm not sure, but I'm  
3 going to give the State some leeway here.

4 But I really hope this isn't going to turn  
5 into a giant document dump as we go through this  
6 testimony, 'cause it's just not the Court's intention to  
7 put hundreds and thousands of pages of documents into  
8 the record if they're not for their truth, okay.

9 Mr. Frankel, you have your hand up. You're  
10 muted.

11 MR. WYNHOFF: Trust us, David, you're  
12 muted.

13 THE COURT: You're still muted.  
14 There you go.

15 MR. FRANKEL: Okay. So you've ruled,  
16 Your Honor. I wanted to make my point, four quick  
17 points.

18 THE COURT: I thought -- I'm sorry, I  
19 thought you had argued already.

20 MR. FRANKEL: Well, I wanted to respond,  
21 Mr. Wynhoff went and asked more questions, and I wanted  
22 to respond.

23 THE COURT: All right. Go ahead.

24 MR. FRANKEL: So first of all I think  
25 authenticity is in question.

1                   Secondly, this is cumulative, and I'd  
2 really like to direct all the attorneys and this Court's  
3 attention to Exhibit J-21, which is in evidence at page  
4 161, and I'll say, the better evidence rule is, you've  
5 already got this great document into evidence, and it's  
6 already proven that that was before the Board of Land  
7 and Natural Resources, so you don't need all this stuff,  
8 and it gets you everything you want.

9                   No. 3, I object based on relevance, and  
10 No. 4, it is hearsay, it does not qualify as a public  
11 record.

12                   But, you know, if people could focus on the  
13 exhibits that are in evidence that give you exactly what  
14 you need, I think we're all better off. Thank you.

15                   THE COURT: All right. Thank you.

16                   All right same ruling. The document's in,  
17 but for a very limited purpose as the Court has stated  
18 on the record.

19                   MR. WYNHOFF: May I hear, may I ask  
20 Mr. Frankel to repeat what page of J-21 he thought was  
21 so wonderful for me, I'm always happy to take his memo.

22                   MR. FRANKEL: Page 161, the Bate stamped  
23 page.

24                   MR. WYNHOFF: Just give me a second,  
25 please.

1           THE COURT: Oh and one thing I forgot to  
2 say. I wanted to thank folks for getting Chair Case the  
3 head set. It's made a huge difference in here. So life  
4 is much easier. Thank you.

5           Go ahead.

6           MR. WYNHOFF: Thank you, Ms. Goldman.

7           MS. GOLDMAN: Happy to hear it.

8           MR. WYNHOFF: So, Your Honor, I actually am  
9 going to, believe it or not, I hope the Court does  
10 believe this, but I do listen to you and so I'm going  
11 to -- I was going to go ahead and introduce the exact  
12 same document for categories 1, 3 and 4, and also some  
13 documents related to those, but I don't think that's  
14 necessary.

15           I'll ask her questions about it instead,  
16 and it's also -- I also appreciate very much that  
17 Mr. Frankel has told me that there's wonderful evidence  
18 in already, and so that's very helpful.

19           I will refrain from putting in hundreds of  
20 pages of more documents.

21           THE COURT: Thank you.

22           MR. WYNHOFF: So thank you, Your Honor.

23

24 BY MR. WYNHOFF:

25           Q.       So, Ms. Case, we have this document in, and

1 this document, Exhibit S-33, relates to the so-called  
2 Category 2 diversions. Do you see that?

3 A. Yes.

4 Q. So I guess I'm going to start, rather than  
5 that, I'm going to go back. So you mentioned and we're  
6 already seeing that there's Categories 1, 2, 3 and 4,  
7 you remember testifying to that?

8 A. Yes.

9 Q. Do you know what -- do you know what the  
10 categories refer to generally speaking?

11 A. Generally -- I mean, generally speaking  
12 they refer to the diversions that --

13 Q. Wait hold on, hold, if you don't mind, I  
14 was just thinking of a yes right there, if the answer is  
15 yes.

16 A. Yes.

17 Q. All right. Thank you.

18 So are you aware that there -- we have in  
19 evidence Exhibit S-30 -- Ms. Goldman, please.

20 I'm sorry. I'm sorry, I couldn't help but  
21 pull her leg. She's rolling her eyes at me in person.

22 You're aware that we have, there was also  
23 an application to the Water Commission for Category 1  
24 diversions; right?

25 A. Yes.

1 Q. And for Category 3 diversions?

2 A. Yes.

3 Q. And Category 4 diversions?

4 A. Yes.

5 Q. Do you know which so let's talk about  
6 Category 1, what type of category, Category 1 is?

7 A. Category 1, my recollection, Category 1 are  
8 the simplest stream diversions to make minor adjustments  
9 to their diversions in the ditches that EMI was able to  
10 make -- make adjustments to restore the stream flows  
11 without any modifications of the diversion structures.

12 Q. Do you know if the CWRM has taken action  
13 with respect to the application for Category 1 diversion  
14 modifications?

15 A. So the -- those ones were -- did not  
16 require permits, and so the actions were taken right  
17 away, and the Water Commission staff are actually now  
18 proposing the formal abandonment of them, that's the  
19 last step of that.

20 Q. When is that -- do you know if that is  
21 coming before the CWRM at any specific time?

22 A. Yes, it's actually on the agenda for next  
23 Tuesday.

24 Q. Okay. Tell us what exhibit -- what are  
25 Category 2 diversions, that's the one where we actually

1 got the exhibit into evidence.

2 A. Yes. So those are diversions that are off  
3 the ditch. They require some -- some work to  
4 structurally modify the diversion structures in order to  
5 restore stream flows.

6 Q. And do you know if those proposed Category  
7 2, do those require permits from someone beside the  
8 CWRM, do you know?

9 A. Yes, I believe they require permits from  
10 the Department of Health and potentially the U.S. Army  
11 Corps of Engineers.

12 Q. Do you know the status of the CWRM's  
13 oversight of Category 2 diversion work?

14 A. Yes, I believe those were the permits  
15 were -- came before the Water Commission and the, I  
16 believe the work is underway.

17 Q. I'm sorry, did you say the Army Corps of  
18 Engineers?

19 A. I can't recall, it's probably the Category  
20 3 are the Army Corps of Engineers ones.

21 Q. Okay. And can you tell us what Category 3  
22 diversion work is?

23 A. So similar modifications to the structures,  
24 but requiring more extensive modifications, and  
25 therefore, more extensive permitting. I believe those

1 are the ones that require some permitting from the U.S.  
2 Army Corps of engineers.

3 Q. And are you aware that the -- so there's an  
4 application, the CWRM has an application to do that work  
5 similar to the exhibit that was received as Exhibit  
6 S-33?

7 A. Yes.

8 Q. Do you know what the status of that work  
9 is?

10 A. I believe those are still in the permitting  
11 process.

12 Q. Can you tell us what Category 4 diversion  
13 work is.

14 A. I'd have to -- I have to look at it to  
15 remember, but I believe those were older -- older --  
16 older diversions, older diversions that were previously  
17 reviewed.

18 Q. Do you know what the status of that work  
19 is?

20 A. I don't -- I don't quite recall, I think  
21 that work was done quite a while ago.

22 Q. Okay. Is there also an application for  
23 Category 4 diversion work, similar to S-33?

24 A. Yes. These are -- these are applications,  
25 the ones that have come before the Board are the

1 applications for the abandonment of those diversions.

2 THE COURT: So I'm sorry, sorry, point of  
3 clarification.

4 So Category 4 is not necessarily more  
5 complicated or more extensive, it just deals with older  
6 structures?

7 THE WITNESS: I believe that's true.

8 THE COURT: Okay. All right thanks.

9 Thank you.

10 Go ahead, Mr. Wynhoff, sorry to interrupt.

11 THE WITNESS: Not older structures --  
12 sorry. Not older structures, but work that was done to  
13 restore stream flows some time ago.

14

15 BY MR. WYNHOFF:

16 Q. So a few, probably a few minutes ago and  
17 some lines ago you talked about matters coming before  
18 the Board. Did you actually mean before the Water  
19 Commission or --

20 A. Yes.

21 Q. Thank you. So maybe, maybe I have -- I may  
22 have asked this question incorrectly or incompletely.  
23 You, in your most recent answers you drew a distinction  
24 between work, diversion work and abandonment, can you  
25 elaborate on that, please.

1           A.       The ultimate aim is to abandon the use of  
2 the diversions for diverting stream water, so that the  
3 last step of this process is for the applicant to  
4 abandon, abandon the use of the diversion.

5           Q.       To your understanding, is there a statutory  
6 basis for the Commission's role in overseeing these  
7 diversions?

8           A.       Yes. It's the statutory responsibility of  
9 the Water Commission.

10          Q.       So with respect to this work on different  
11 categories of diversions, one or more of these, we've  
12 established, I believe, that each of those has an  
13 application similar to the one that we've looked. Is it  
14 your understanding that one or more of these  
15 applications would also have staff analysis in the form  
16 of a submittal to the Commission on Water Management?

17          A.       Yes.

18          Q.       And okay, so to the extent that the  
19 board -- that the Commission on Water Management  
20 actually has gotten around to acting on or looking at  
21 these applications, there would be minutes with respect  
22 to the CWRM's action on those application?

23          A.       Yes.

24                   MR. WYNHOFF: Your Honor, I'm just going to  
25 put on the record and tell the Court that we have those

1 documents, and they're lengthy and they're voluminous,  
2 but respecting what the Court has told us, I'll just --  
3 I'm not intending to put them on right now anyway, maybe  
4 my colleagues would beat me up at the next break, but  
5 that's my intention right now.

6 THE COURT: Well, if they try that, you can  
7 tell them that that at bear minimum all these documents  
8 have to be -- well, I don't want to rule in advance,  
9 but --

10 MR. WYNHOFF: I know. Thank you,  
11 Your Honor, that's fine.

12 THE COURT: Let me put it this way.  
13 If there's a document with 200 pages in it, I kind of  
14 doubt every single one of those pages is relevant, maybe  
15 some of them might be.

16 MR. WYNHOFF: Thank you, Your Honor.

17 THE COURT: Okay. Thank you.

18 MR. WYNHOFF: Thank you, Your Honor.

19 Well, we will try to pare it down and thank you for your  
20 candid statements.

21

22 BY MR. WYNHOFF:

23 Q. So with respect to with respect to the  
24 streams -- with respect to all of the streams in the  
25 East Maui area, do those -- as far as you know, do all

1 of the streams have IIFS interim instream flow  
2 standards?

3 A. Yes.

4 Q. And so what is -- tell us about just  
5 generally tell us about the nature of the IIFS that were  
6 set most recently in 2018.

7 A. The IIFS for those streams was evaluated --  
8 well, they were set -- they were set to provide for  
9 different levels of protection, depending on what was  
10 important to protect on each stream.

11 So the contested case particularly focused  
12 on the taro streams. There was a lot of discussion over  
13 many years about taro streams, and so those were  
14 formally set in the decision at full restoration of  
15 stream flows. Other than any diversions for the taro  
16 themselves, diversions for taro themselves.

17 Streams that were formed to be important  
18 for natural habitat that were set at either full  
19 restoration, as I've said before on two streams,  
20 particularly for habitat protection and at the H-90  
21 level for the remaining ones that were determined to be  
22 important for habitat protection for ecological values.

23 And then there were other streams that were  
24 not identified as having high value for taro or for  
25 habitat or other -- or other purposes, such as --

1           THE COURT: Hold on, we didn't get that  
2 your voice dropped out when you paused. Please repeat.

3           A.       (By the witness) So the remaining streams  
4 that were not deemed to have high habitat values or  
5 other values were set at a minimum at what was  
6 considered to be a connectivity level, so making sure  
7 there was wetted pathway on each of them.

8                   So, for example, if -- if a stream didn't  
9 have taro farming on it, didn't have particular scenic  
10 values or recreational values, maybe it had invasive  
11 species in it, maybe it had a terminal water fall, so it  
12 didn't end in an estuary, maybe it had a losing reach on  
13 it, so not streams that were the highest values  
14 otherwise, so they were set at a level of 20 percent  
15 base flow to ensure connectivity.

16                   The idea in the decision was to at least  
17 ensure there was a wetted pathway for even those  
18 streams. There were a couple of -- excuse me. There  
19 were a couple of streams that didn't have any  
20 diversions, so they didn't have any change.

21           Q.       Were there streams that -- okay, so you  
22 talked about at least three categories of streams, and  
23 please correct me if I heard this wrong, but full  
24 restoration, H-90 and connectivity; correct?

25           A.       Correct.

1 Q. There were those three.

2 What about, what about the others? I guess  
3 I was of the impression that there were streams that  
4 weren't restored at all, but that didn't sound like what  
5 you just said.

6 Now you said there were some that didn't  
7 have diversions on them. Can you help us understand  
8 that, please.

9 A. Yes. There were a few streams that didn't  
10 have any diversions on them at all. So those were --  
11 those were set at their -- their status quo, which was  
12 full stream flow.

13 Q. Okay. So -- so let's just, then you also  
14 mentioned a bunch of terms that maybe not all of us  
15 where familiar with, and I started to try to write them  
16 down, so terminal waterfall tell us about that.

17 A. In a terminal waterfall, the stream comes  
18 down mauka to makai, but ends up at a cliff rather than  
19 at a beach.

20 So the waterfall, the water comes to the  
21 edge of that cliff and falls down into the ocean in a  
22 waterfall.

23 Q. What's the significance of that as you  
24 understand it?

25 A. The -- it doesn't have at the end of it

1 the -- the salt water-fresh water mixing zone, and for  
2 the most part, pathways for stream life to use for  
3 reproduction, juvenile stage, migration up and down the  
4 stream.

5 Q. So is it your understanding as the Chair of  
6 the Water Commission that that lessens the stream's  
7 value for aquatic life or aquatic life habitat?

8 A. It doesn't have the same value for  
9 aquatic life habitat that an estuary does.

10 MR. FRANKEL: I guess I have to unmute  
11 again, objection, lacks foundation, move to strike.

12 THE COURT: Overruled.

13 MR. FRANKEL: Your Honor --

14 MR. WYNHOFF: Thank you.

15

16 BY MR. WYNHOFF:

17 Q. Ms. Case, Chair Case, you used the term,  
18 losing reach, I'm pretty sure I heard that right, losing  
19 reach was the term?

20 A. Yes.

21 Q. Tell us what that is, please.

22 A. Losing reach is where you have stream water  
23 coming down, and then usually for geological reasons,  
24 sometimes increased by diminishment of stream flow, but  
25 under natural conditions, it's a stream that doesn't

1 run, doesn't have running water at base flow levels for  
2 a certain stretch of the stream.

3 Q. Would it be fair to say, and please tell me  
4 if I'm wrong, that that would be kind of the opposite of  
5 a gaining, g-a-i-n-i-n-g, stream?

6 A. Correct.

7 Q. Then go ahead and explain what a gaining  
8 stream is, please.

9 A. In a gaining stream, you have a certain  
10 amount of water coming down the stream, but you also  
11 have water, um, that's accumulated from the ground water  
12 that ends up in the stream, and so the volume of the  
13 stream increases.

14 Q. Can you tell us what you understand the  
15 term in your role as the chair of the CWRM, what do you  
16 understand the term base flow means? What does it mean  
17 to you?

18 A. It's the -- it's the median base flow of  
19 ground water, not including freshets and storms.

20 Q. So I know we've had some discussion about  
21 these H-90 streams, and I'd like you to -- I would like  
22 to make sure that I understand it, 'cause I'm not sure  
23 that I do.

24 So H-90, just that phrase, does the H stand  
25 for something?

1 A. Habitat.

2 Q. And what does the 90 stand for?

3 A. 90 percent of the habitat values, 90  
4 percent of the habitat is protected.

5 Q. 90 percent of the habitat is protected by  
6 what?

7 A. By the 64 percent median base flow.

8 Q. So you get, I guess, the habitat is good;  
9 right?

10 A. Yes.

11 Q. And so --

12 A. It's the -- it's the level at which -- it's  
13 the level it flows, according to the aquatic experts,  
14 you'll protect 90 percent of the habitat for stream  
15 life.

16 Q. So my understanding, then, is that you're  
17 protecting 90 percent of the habitat or wildlife by only  
18 restoring 64 percent of the flow?

19 A. Of median base flow.

20 Q. So that my -- that's a yes then also, yes?

21 A. Yes.

22 Q. So you heard the phrase "bang for the  
23 buck"?

24 A. Yes.

25 Q. What does bang for the buck mean in the

1 context of these streams and what we're talking about  
2 right now?

3 A. Well in this context you're looking at how  
4 much of each value you can protect with certain levels  
5 of flows, and you might be able to get a very high level  
6 of habitat protection, for example, with not 100 percent  
7 of flow restoration.

8 So when you're balancing, you're looking at  
9 how to -- how to protect the different values using  
10 available water in the most effective, efficient way  
11 without -- without it necessarily being 100 percent of  
12 the flow.

13 Q. So with respect to an H-90 stream, if my  
14 math is correct, and if I'm understanding what you're  
15 saying, an H-90 stream, you're putting in 64 percent of  
16 the median base flow, and if you put in 100 percent of  
17 median base flow, then you would expect -- if you  
18 increase the flow from 64 percent to 100 percent, you  
19 would expect to increase the habitat from 90 percent to  
20 100 percent, am I correct about that?

21 A. I would presume so.

22 Q. Okay. That's the way you understand it;  
23 right?

24 A. Yeah.

25 Q. Okay. So tell us about, then, you were

1 talking about other streams, and help me connect the  
2 dots on three terms that all seem to me to relate to the  
3 same streams.

4           You said 30 percent, connectivity and  
5 wetted, w-e-t-t-e-d, pathway?

6           A.       Path.

7           Q.       Pathway or path, okay. Those three terms  
8 all relate to particular streams, am I right about that?

9           A.       Yes.

10          Q.       Can you explain that, please, and tie those  
11 terms together.

12          A.       Some of our stream life, the 'O'opu,  
13 several species can migrate upstream directly, other  
14 stream life can go back and forth, but they need to  
15 have -- it can't be completely dry. They need to be  
16 able to have what they call a wetted pathway, up through  
17 the stream, including up through the diversion.

18                 And if you're able to provide for that, the  
19 estimate of stream flow generally required to create a  
20 wetted pathway is 20 percent, and that provides you  
21 connectivity, in other words, you would have under that  
22 scenario, some level of stream water connected all the  
23 way mauka to makai, and would therefore ensure that  
24 stream life can migrate.

25          Q.       20 percent of what?

1           A.       Median base flow.

2           Q.       Okay.  You're aware, are you not, that  
3 there were -- there are streams that the CWRM did not --  
4 oh, I'm sorry, I wanted to ask you a question before  
5 that.

6                    You've talked about these different flows.  
7 To the extent, like say, for example, the H-90 streams,  
8 when the CWRM set these IIFS standards for that, do you  
9 know the units in which that's expressed, or how does --  
10 how does that work, if you understand that question.

11          A.       Yeah, I couldn't -- I couldn't speak to the  
12 direct correlation for each one.  But there's, the  
13 calculation by the experts is -- is a way of expressing,  
14 it's a model, it's a way of expressing what the  
15 expectation of suitable habitat level will be under each  
16 scenario.

17          Q.       You're aware, are you not, that there were  
18 some streams that were not specifically included in the  
19 CWRM's 2018 decision setting IIFS?

20          A.       Yes.  They are referenced in the decision.  
21 They, the Commission did not set updated instream flow  
22 standards for them.  They are referenced in the  
23 decision.

24          Q.       So the commission -- did the commission  
25 receive evidence and testimony and was made aware of

1 these streams during the course of those proceedings?

2 A. Commission was aware of the streams in the  
3 proceeding.

4 Q. So you mentioned earlier, in response to an  
5 earlier question, that these -- so first of all, do you  
6 remember how many streams we're talking about?

7 A. It's 13 streams, depending on how you  
8 count, sometimes it's 12, depending on how you count the  
9 tributaries.

10 Q. We'll just call them -- well whatever. So  
11 with respect to these streams, I think I had asked you  
12 earlier whether they, in fact, have an IIFS, and you  
13 said yes. Do you remember that testimony?

14 A. Yes.

15 Q. What kind of IIFS do these 12 or 13 streams  
16 have?

17 A. They have the status quo instream flow that  
18 was in place in 1988 when -- when instream flow  
19 standards were required to be set.

20 Q. All right. So that was long before your  
21 tenure at the -- at the DLNR?

22 A. Yes.

23 Q. And do you know whether those IIFS, the  
24 status quo lines, are they numerical, do you know if  
25 they have an actual numerical value attached to them?

1           A.        I don't -- I am not sure.

2           Q.        During the time that you have been at  
3 the -- at the CWRM and at the Department, has anyone  
4 petitioned CWRM to change the status quo IIFS?

5           A.        No.

6           Q.        Was the -- let's turn now to the Board of  
7 Land and Natural Resources. The Board of Land and  
8 Natural Resources in -- well, the Board of Land and  
9 Natural Resources as a preliminary matter has issued,  
10 authorized the issuance of four revocable permits for  
11 water use to A&B, right, you're aware of that generally  
12 speaking?

13          A.        Yes.

14          Q.        And the Board of Land and Natural Resources  
15 revisited that -- those RPs and discussed those RPs in  
16 November of 2018?

17          A.        Yep, yes.

18          Q.        You were there; right?

19          A.        Yes, yes.

20          Q.        You remember that?

21          A.        Yes.

22          Q.        You have -- you go to very many, many, many  
23 meetings, don't you?

24          A.        Yes.

25          Q.        You remember this meeting particularly from

1 the benefit of -- well, do you remember this meeting in  
2 particular?

3 A. Yes, I remember it.

4 Q. And you're aware, I know, because I --  
5 well, you're aware, are you not, yeah, right, thank you,  
6 Mr. Frankel.

7 You're aware that the transcript of the  
8 proceedings of that meeting has been received into  
9 evidence of this case?

10 A. I'm aware that there's a transcript, yes.

11 Q. Have you read it recently --

12 A. Yes, I have read it.

13 Q. -- in preparation for your testimony,  
14 that's consistent, was consistent with your  
15 recollection?

16 A. Yes.

17 Q. Okay.

18 THE COURT: I'm sorry, I think this might  
19 be a good time for our break. So, let's take ten  
20 minutes and resume at 3:00, and we'll take a very brief  
21 break at the bottom of the hour, around 3:30 just to  
22 break up the full hour a little bit all right.

23 MR. WYNHOFF: Thank you, Your Honor.

24 THE COURT: All right. We're in recess  
25 until 3:00 p.m. Thank you.

1 (Recess taken.)

2 (Reconvened at 3:00 p.m.)

3 THE COURT: We're back on record.

4 FTR on?

5 THE BAILIFF: Yes.

6 THE COURT: All right. I see everybody,  
7 who I should be able to see?

8 Please continue, Mr. Wynhoff.

9 Chair Case, respectfully you're still under  
10 oath.

11  
12 THE WITNESS: Yes, sir.

13 THE COURT: All right.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: You're muted.

16 THE WITNESS: You're muted.

17 MR. WYNHOFF: Trying to make Mr. Frankel  
18 feel better. Thank you. Thank you, Chair Case.

19

20 BY MR. WYNHOFF:

21 Q. Chair Case, I'd asked you some preliminary  
22 questions already about the November board meeting with  
23 respect these revocable permits, and that's what I'm  
24 looking at and talking about right now. We've  
25 established that you remember that meeting?

1           A.       Yes.

2           Q.       So generally speaking, with respect to  
3 these meetings, what happens is the staff has prepared a  
4 submittal for you, among other things, for the Board;  
5 right?

6           A.       Yes, I should say just the general process  
7 to get something before the Board is it goes through the  
8 staff, and the staff does a very -- this is true for the  
9 landlord and the Water Commission.

10                    The staff receives a request or has some  
11 other reason to take an action and does a detailed  
12 review at the staff level and the administrative --  
13 administrator level.

14                    And they put together the submittal, which  
15 I then review for suitability to put before the Board,  
16 sign off on it, and it goes to the Board. It's put on  
17 the next agenda.

18           Q.       You -- it's up to you to decide, generally  
19 speaking, what's on the agenda and what isn't on the  
20 agenda?

21           A.       Yeah, yes.

22           Q.       Just even more basically, you understand  
23 what the, generally speaking, what the sunshine law is,  
24 am I right about that?

25           A.       Yes.

1 Q. And the Board of Land and Natural Resources  
2 is a sunshine board in most instances?

3 A. Yes.

4 Q. And this particular meeting that we're  
5 talking about was a sunshine meeting?

6 A. Yes.

7 Q. I also note, in addition to you receiving  
8 the staff submittal, the Board also receives  
9 testimony -- or can receive testimony from outside,  
10 outside persons; right?

11 A. Yes.

12 Q. Without asking you specifically, you know,  
13 who -- who submitted testimony, do you have a  
14 recollection that this was a pretty -- there was a fair  
15 number of people interested in this item, is that their  
16 estimate?

17 A. Yes.

18 Q. Do you recall that you received testimony  
19 from -- written testimony from persons other than the  
20 staff itself?

21 A. Yes. We received written testimony from a  
22 number of representatives of farm industry, farmers,  
23 Farm Bureau, farm -- Cattlemen's Association, Hawaii  
24 Agriculture Research Center, and also some testimony in  
25 opposition to the submittal, letters of testimony.

1 Q. I'm sorry.

2 A. E-mails, written testimony.

3 Q. That kind of testimony is submitted to the  
4 Board for its consider -- its review before the meeting  
5 and consideration and decision making, am I right about  
6 that?

7 A. Yes. We ask people to submit it by the day  
8 before so that we collect it, and we provide it to the  
9 board members to review, and also post it.

10 Q. Could I ask you to look at, please, Exhibit  
11 S as in Sam 38.

12 A. Yes, I have it here.

13 Q. I'm just going to wait a second or two to  
14 make sure everybody has it.

15 THE COURT: S what?

16 MR. WYNHOFF: 38, Your Honor.

17 THE COURT: 38, okay I thought I heard 88,  
18 and there is no such thing, okay. Got it.

19 All right. I'm ready.

20 MR. WYNHOFF: Thank you, Your Honor.

21

22 BY MR. WYNHOFF:

23 Q. So, Chair Case, can you tell us what  
24 Exhibit S-38 is.

25 A. This is the collection of written testimony

1 that was submitted to the Board of Land and Natural  
2 Resources on this item for a November 6, 2018,  
3 meeting -- I'm sorry, November 9th, 2018, meeting.

4 MR. WYNHOFF: All right. Your Honor, I'd  
5 like to have that exhibit received into evidence, if I  
6 might.

7 I don't, again, I don't think it's hearsay,  
8 because we're certainly not adopting the substantive  
9 evidence that people who are opposing it, but it's  
10 highly relevant to understand what the Board had in  
11 front of it and the items it was able to consider.

12 THE COURT: All right. So for the record,  
13 I assume, these are the submittals for the meeting of  
14 the Board that resulted in the revocable permit?

15 MR. FRANKEL: Yes.

16 MR. WYNHOFF: Well -- well, okay. I mean,  
17 again, I think Mr. Frankel is sort of probably on the  
18 same page as me. They had the revocable permits long  
19 before November 18, and yes, with that caveat.

20 THE COURT: I meant the renewal of it,  
21 okay. All right.

22 MR. WYNHOFF: Thank you, Your Honor.

23 THE COURT: All right, Mr. Frankel, your  
24 position.

25 MR. FRANKEL: They can be admitted into

1 evidence for a limited purpose, obviously, it is  
2 hearsay.

3 I don't think Mr. Wynhoff is saying he  
4 wants them for the truth of the matter, but in terms of  
5 providing a document, in terms of what materials are  
6 before the Board when it made a decision, I'm fine with  
7 that, and that's -- it hasn't been extensively said like  
8 that by Mr. Wynhoff, but he's nodding his head. I think  
9 we have an agreement.

10 MR. WYNHOFF: I agree with what Mr. Frankel  
11 said, Your Honor, thank you, Your Honor.

12 THE COURT: All right, Mr. Schulmeister?

13 MR. SCHULMEISTER: No objection.

14 THE COURT: All right. Mr. Rowe?

15 MR. ROWE: I support moving this exhibit  
16 into evidence, Your Honor. Thank you.

17 THE COURT: All right. S-38 is accepted --  
18 is admitted into evidence by the Court as evidence of  
19 what was before the Board for the meeting that led to  
20 the renewal of the revocable permit. It is not being  
21 accepted for the truth of everything in it.

22

23

24

25

1 (Exhibit S-38 was  
2 received in evidence.)

3 MR. FRANKEL: And, Your Honor, I think you  
4 should also, in your ruling, say the year, as I think, I  
5 cannot remember if this is 2019 or 2018 was the year,  
6 but we should be clear about that.

7 THE COURT: This is the 2018 meeting, so it  
8 would be for the 2019 renewal, right, or is it for the  
9 2018 renewal?

10 MR. WYNHOFF: It's the 2018 action that  
11 renewed it for the 2019 calendar year, Your Honor.

12 THE COURT: Okay, got it. With all that  
13 understanding, that exhibit is received in evidence.

14 MR. WYNHOFF: Thank you, Your Honor, and I  
15 appreciate Mr. Frankel making sure that the record is  
16 clear.

17

18 BY MR. WYNHOFF:

19 Q. Chair Case, so typically in these meetings,  
20 they start off by the staff making a brief presentation?

21 A. Yes.

22 Q. That happened in this case?

23 A. Yes.

24 Q. Tell us about other things, so what other  
25 people can you tell us about that?

1           A.       Typically our staff makes a presentation,  
2 the Board has a chance to ask questions, and then the  
3 applicant makes a presentation or comments, and the  
4 Board has a chance to ask them questions, and then we go  
5 to public testimony, and we hear public testimony from  
6 anyone who wants to provide it in attendance.

7           Q.       Do you recall that Mayor Arakawa from Maui  
8 was there?

9           A.       I certainly do.

10           MR. FRANKEL: Your Honor.

11           THE COURT: Yes.

12           MR. FRANKEL: Cumulative. We have the  
13 transcript of that meeting in evidence, and to the  
14 extent we're going to be rehashing that, it's  
15 cumulative.

16           THE COURT: That's fine, but he might --  
17 I'm not predicting anything, but Mr. Wynhoff might be  
18 asking the chair for observations or what have you that  
19 might not be available just from the cold page of the  
20 transcript, so.

21           MR. FRANKEL: Okay.

22           THE COURT: Overruled.

23           MR. WYNHOFF: Thank you, Your Honor. I  
24 thank you, Your Honor, and I will try to, yeah, I don't  
25 intend to just have her read stuff, but I appreciate

1 that, point proved, Your Honor.

2

3 BY MR. WYNHOFF:

4 Q. Did you find that significant or unusual  
5 that Mayor Arakawa came over to testify?

6 A. Yes. It's quite unusual for a mayor to  
7 come in person, to have to take the better part of a day  
8 to fly over to testify on a matter, and so it was  
9 obviously of import to the Mayor of the County of Maui.

10 Q. I take it that the Mayor was in support of  
11 the proposed action?

12 A. Yes, he was.

13 Q. Were there people there also -- who else do  
14 you remember that was there in support?

15 A. Uh, Scott Enright, was there in person. He  
16 was the Chair of the Board of Agriculture, the head of  
17 the Department of Agriculture. There were  
18 representatives of -- there were farmers in support.

19 Q. So generally speaking, is it fair to say  
20 that the application here, the revocable permit here  
21 allows A&B to divert water out of this watershed for  
22 other uses?

23 A. Yes.

24 Q. Tell us about those other uses, I mean,  
25 what are those other uses?

1           A.       Those other uses include domestic uses for  
2 the County of Maui. They include agricultural uses,  
3 they include agriculture uses in central Maui and  
4 agriculture uses in upcountry Maui.

5           Q.       Hm.

6           A.       What are --

7           Q.       I'm sorry, did you say domestic use in  
8 upcountry Maui or agricultural use in upcountry Maui?

9           A.       I believe that's both.

10          Q.       Okay. So with respect to the agricultural  
11 uses in central Maui, are you familiar with the concept  
12 of important agricultural lands?

13          A.       Yes, I am.

14          Q.       Can you tell us about that, please.

15          A.       Well, important agricultural lands are  
16 recognized in Hawaii law as -- as I believe it's in the  
17 Constitution as well as the statutes to ensure that  
18 Hawaii has land that remains in agriculture. We've had  
19 a long history of conversion of lands from agriculture  
20 to urban uses, and so these lands were -- had gone  
21 through the statutory process to designate approximately  
22 22,000 acres as important ag, agriculture lands in  
23 central Maui.

24          Q.       Were there people there who also testified  
25 in opposition to the -- the request, the request for

1 action?

2 A. Yes.

3 Q. And can you tell us was Ms. de Naie there?

4 A. Yes.

5 Q. What do you recall about

6 Ms. de Naie testifying?

7 A. Lucienne de Naie was there testifying.  
8 She -- she spoke particularly of the need for better  
9 communication, um, between EMI and her community at  
10 least. She testified to what she considered to be, um,  
11 trash in the -- in her watershed area, and I believe she  
12 testified on what's the time line for restoration of  
13 stream flows in some of the streams.

14 Q. Do you recall, when you say some of the  
15 streams, what are you referring to?

16 A. Two of these streams in the Huelo,  
17 H-u-e-l-o, license area were to be restored, the stream  
18 flows were to be restored under the IIFS, and so they  
19 were included in the -- included in the -- I believe  
20 those were for full -- full stream flow restorations.  
21 So they were included in the streams that had to go  
22 through the process to do that.

23 Q. So she was inquiring about the timetable  
24 with respect to full restoration of those two streams  
25 that the Commission had already ordered to be restored,

1 is that what you mean?

2 A. I believe -- I believe that was her focus,  
3 yeah.

4 Q. Was Ms. Townsend there, Marti Townsend?

5 A. Yes, she was.

6 Q. What do you recall about her testimony?

7 A. Um, my recollection is similar to Ms.  
8 de Naie's testimony, with comments about trash and a  
9 timeline for the stream diversion structures.

10 Q. Do you happen to remember if Ms. Townsend  
11 had specified one particular stream that was important  
12 to her, and if not, then that's fine?

13 A. Yeah, I can't remember, it may have been  
14 Hanehoi Stream, H-a-n-e-h-o-i.

15 Q. Okay. As the Court pointed out, we could  
16 look at that in the minutes, I just was wondering about  
17 your recollection.

18 Do you remember that Alan testified?

19 A. Yes, he did.

20 Q. Can you tell us who Alan Murakami is or  
21 was?

22 A. He's a lawyer for the Native Hawaiian Legal  
23 Corporation, who when was the petitioner for the 27  
24 streams, which was the petitioner.

25 Q. What do you recall about Mr. Murakami's

1 testimony?

2 MR. FRANKEL: Objection, relevance.

3 THE COURT: Overruled.

4 A. (By the witness) Mr. Murakami brought up  
5 the fact that there were other streams in the East Maui  
6 area that had not gone through the updated IIFS process,  
7 and that he reminded the Board that that needed to be  
8 included in their awareness as part of this decision.

9 He -- he did say he hadn't really focused  
10 on the specifics, I think he said he hadn't looked at a  
11 map lately, so he wasn't -- he was talking conceptually  
12 about it, nothing specific.

13 Q. It would be fair to say that in making its  
14 determination and thinking about this, the Board, it had  
15 been brought to the Board's attention that these 13  
16 streams were still operating under their old status quo  
17 IIFS?

18 A. Yes.

19 Q. You said that you mentioned trash a couple  
20 times, do you remember -- well, I mean so that was an  
21 issue that was brought to the Board's attention?

22 A. Yeah, um, there were some -- there were  
23 references to trash and debris, and there was some,  
24 well, I recall there were some hard copy computer  
25 printout photos provided, but they didn't have -- they

1 didn't have GPS locations on them. They didn't have any  
2 particular context, and so you didn't really know  
3 without further investigation whether it was, you know:

4           No. 1. Whether it was in the licensed area  
5 or not; and

6           No. 2. Whether it was material that was  
7 still in use or not, or potentially could be in use or  
8 not.

9           So the subject was brought generally, but  
10 you know, it wasn't necessarily clear even if it was  
11 trash or debris, depending on, you know, different  
12 people's points of view.

13           Q.       Do you recall if the Board put any  
14 conditions in the RPs related to trash or to, you know,  
15 responding to these allegations of trash?

16           A.       Yes, we did put a condition in, you know,  
17 requiring A&B to make sure that they take a look at it  
18 and don't have trash lying around.

19           Q.       Did that seem reasonable to you?

20           A.       Yes, I thought it was a good response. I  
21 mean, we did hear the complaint, and with the limited  
22 information we have, that was an action that we took to  
23 address it at the time.

24           Q.       I'd like to ask you some questions now  
25 about the -- you recall that this matter came before the

1 Board again in 2019 for renewal or continuance of these  
2 same permits; right?

3 A. Yes.

4 Q. And what do you recall about that meeting?  
5 Let me ask -- I'm sorry, let me withdraw that question,  
6 and ask it in a slightly different way.

7 I mean, generally speaking, that had the  
8 same general aspects of it, was vetted by staff for  
9 submittal presentation by staff and then discussion from  
10 persons other than staff, is that a fair  
11 characterization?

12 A. Yes.

13 Q. Did it have -- do you recall that at the  
14 time that -- and you were there, you were still the  
15 Chair of the Board; right?

16 A. Yes.

17 Q. Do you also have a recollection of that  
18 meeting, it wasn't quite as long as those, the one  
19 before that?

20 A. Yes.

21 Q. Do -- do you recall that -- do you recall  
22 whether the Board had information about the -- or was  
23 aware that the 13 streams still had not had specific  
24 IIFS set as of the time of the November meeting?

25 A. Yes.

1 Q. And do you recall if there was a discussion  
2 about the 13 streams?

3 A. Yes. There was some discussion about the  
4 13 streams, some -- I don't recall specifically what the  
5 language of it was, but it was part of the discussion, I  
6 think, I remember Roehrig asked some specific questions  
7 about it, and the Board was aware of the distinction  
8 between the 27 streams that had recent IIFS set, and the  
9 13 streams in the licensed area that had status quo IIFS  
10 set.

11 Q. Can you spell Mr. Roehrig's name, please.

12 A. R-o-e-h-r-i-g.

13 Q. All right. I'll ask you to go back to the  
14 November 18 meeting, what was the result, what was the  
15 Board's decision?

16 A. Board approved the revocable permits  
17 renewal.

18 Q. Do you remember the Board setting a  
19 quantity or quantifiable standard with respect to those  
20 permits in November 2018?

21 A. I believe the Board did not set a quantity  
22 to the -- maybe it was 80 million gallons a day or else  
23 that was the estimate of what it was.

24 Q. Do you recall, I guess I'm sorry, I'm going  
25 to go back to the 2018 meeting again. Do you recall if

1 the Board was asked questions about or urged to find --  
2 to find out more information from the A&B or Mahi Pono  
3 as to its use of the water, do you remember that?

4 A. Yes, and I believe Ms. Townsend asked some  
5 questions or urged the Board to find out more data on  
6 the actual use of the water for agriculture in central  
7 Maui.

8 Q. So that, that issue was actually raised  
9 with the Board?

10 A. It was.

11 Q. And obviously you don't, I mean -- That  
12 same question with respect to 2019 were those issues  
13 raised as to whether the Board should obtain additional  
14 information about -- about the use of the water before  
15 it made a decision?

16 A. Yes. The -- there was testimony that the  
17 Board should have much more specific information  
18 about -- about crops, crop types, crop status and amount  
19 of water required for each crop.

20 Q. Go ahead, I'm sorry.

21 A. The Water Commission's decision sets  
22 instream flows, and so the -- the fundamental  
23 requirement here is how much water has to stay in the  
24 streams, and then depending on whatever, rainfall, um,  
25 general -- general water supply, the water that does

1 not -- isn't -- does not have that -- the water that is  
2 in excess of those instream flows standards is available  
3 for offstream use.

4           So that includes water, sort of base flow  
5 above -- above the instream flow standard and also  
6 freshets and storm water is available for collection for  
7 offstream use.

8           The most important thing in this process  
9 here is to make sure that water that is required to be  
10 in the stream is kept in the stream, and then you have a  
11 certain amount of water that varies, that is available  
12 for allocation for offstream use. That's the topic that  
13 goes to the land board.

14           Q.       With respect to the 13 streams that had the  
15 status quo IIFS, what is your understanding as to what  
16 the status quo was back in 1988 when that standard was  
17 set?

18           A.       Generally there was diversion of the base  
19 flow.

20           Q.       We've had a discussion about the base flow,  
21 but can you just refresh our recollection when we're  
22 talking about the specific stream?

23           A.       It's the -- it's the diversion structures  
24 are generally designed to capture the median base flow  
25 in the stream.

1           There is water beyond that in the form of  
2 freshets and storm water, and also some of these streams  
3 are gaining streams, so there may be, even if you take  
4 the median base flow, there still may be more water in  
5 the stream certainly from time to time.

6           Q.       So I believe I've heard one or more  
7 witnesses talk about draining those streams dry, do you  
8 think that's a fair characterization?

9           MR. FRANKEL:  Objection, lacks foundation.

10          THE COURT:  Overruled.

11          A.       (By the witness)  Certainly not all the  
12 time, maybe, maybe in periods of draught, but not, not  
13 as a necessary -- it's not necessarily true.

14          THE COURT:  All right.  So this is a good  
15 time to take our break at the bottom of the hour.

16          We'll take a five-minute break and then  
17 come back for our last 25 or so minutes, all right.

18          MR. WYNHOFF:  Thank you.

19          THE COURT:  See everyone in five minutes.

20          We're in recess.

21                    (Recess taken.)

22                    (Reconvened at 3:35 p.m.)

23          THE COURT:  All right.  We are back on  
24 record.

25          FTR is on?

1 THE BAILIFF: Yes.

2 THE COURT: Please continue. You're on,  
3 Mr. Wynhoff. Everybody's present.

4 MR. WYNHOFF: Oh, I'm sorry.

5 Everybody's here, okay. Thank you,  
6 Your Honor.

7

8 BY MR. WYNHOFF:

9 Q. So, Ms. Case, talking again about the  
10 November 2019 meeting. There was, do you recall if  
11 there was testimony about what would happen if the  
12 application was not granted?

13 A. Yes. There was testimony about what would  
14 happen if the application was not granted.

15 Q. And what do you recall about that  
16 testimony?

17 A. The effect, the testimony -- the testimony  
18 was to the effect that if the applicant was not --  
19 application was not granted, then water could not be  
20 delivered to the uses in central Maui, including  
21 agriculture in central Maui, agriculture in upcountry  
22 Maui, the Kula farm lots, domestic uses in upcountry  
23 Maui, including for homes, and you know, hospitals, the  
24 public, public buildings, DHHL land, 35,000 people  
25 depend on that water.

1           So the testimony was to the effect that  
2 there could be very serious repercussions to farming and  
3 domestic and other uses in central and upcountry Maui.

4           Q.       Do you yourself have an understanding as to  
5 whether conservation and protection of agricultural  
6 lands, including diversified agricultural is something  
7 actually included in our state Constitution?

8           A.       Yes.

9           MR. FRANKEL:  Objection, argumentative,  
10 lacks foundation, irrelevant to her understanding.

11          THE COURT:  I thought we already covered  
12 this, didn't we?

13          MR. FRANKEL:  Cumulative.

14          MR. WYNHOFF:  We covered something  
15 different, Your Honor.  I don't think we can say that  
16 her understanding of the Constitutional provisions is  
17 not relevant, I'm debating that.

18          THE COURT:  Well, I mean, obviously, she  
19 has a -- I don't mind hearing her understanding, go  
20 ahead.

21          A.       (By the witness)  Yeah, I believe it's  
22 Article 11, Section 3 of the Constitution says priority  
23 for the State, agriculture is.

24                   (Continued on the next page.)

25

1 BY MR. WYNHOFF:

2 Q. So just so I'm clear about the ways that I  
3 understand these meetings work is we established that  
4 this was a sunshine meeting, so that means if I'm -- and  
5 please correct me if I'm wrong, that the Board does all  
6 of its deliberations in public; right?

7 A. That's correct.

8 Q. I believe, if I'm remembering that my  
9 review of the minutes correctly, there may have been an  
10 executive session, but the executive session would not  
11 have been -- well, I mean, okay, so I'll just leave it.  
12 The testimony is what it is.

13 So you wouldn't have -- let me just, I do  
14 want to follow up with this, is you don't have any way  
15 of knowing what Tommy Roy or Stan Roehrig or Chris Yuen  
16 was actually thinking in their mind, other than by what  
17 they said at the meeting, is that a fair  
18 characterization?

19 A. That's correct.

20 Q. Um, you recall that your staff submittal,  
21 your staff's submittal had made the recommendation that  
22 the applicant be limited to no more than 35 million  
23 gallons per day, do you remember that?

24 A. Are you talking about the 2018 meeting or  
25 the 2019 meeting?

1 Q. 2019 meeting?

2 A. Yes, the staff submittal had a  
3 recommendation that the withdrawals be limited to 35  
4 million gallons a day.

5 Q. And do you have an discussion -- do you  
6 have a recollection of there being a discussion of that  
7 number at the Board meeting?

8 A. Yes, I do.

9 Q. What do you recall about that discussion?

10 A. The discussion focused on the -- first of  
11 all, there were -- there was testimony submitted that  
12 the -- that the applicant should not get more than 35  
13 million gallons a day because that's what they were  
14 using at the time, or should get less than that.

15 And the discussion was about the Mahi  
16 Pono's projections of water needs in a grow-out phase of  
17 their production. So the projections were, I believe,  
18 between a range depending on the pace of the grow-out, a  
19 range of something like between 35 million gallons a day  
20 and 55 or 56.

21 The applicant had requested 45 million  
22 gallons a day as an average over the year based on the  
23 fact that their production, farm production plan was in  
24 a -- was in development, it wasn't -- it wasn't an  
25 established operation with everything that was going to

1 be planted already in the ground and with the water  
2 requirement clearly established. They testified that  
3 they were in the process of getting tenants for the  
4 farm lands, and that they needed some level of certainty  
5 that there would be water available before making a  
6 commitment to farm that land.

7 Q. What ultimately did the Board decide with  
8 respect to the quantitative -- the quantity?

9 A. Ultimately the Board decided to go with the  
10 45 million gallons a day figure average over the year.

11 Q. And was that 45 million a maximum?

12 A. Maximum for the -- uh, yes, average over  
13 the year.

14 Q. Did that mean that Mahi Pono or A&B had to  
15 use all of that water?

16 A. No, the specifically the Board decision was  
17 up to 45 million gallons a day, um, but not -- not to  
18 use water that, you know, not to take water that they  
19 didn't need for production.

20 Q. Did that water, did that maximum of 45  
21 million gallons per day authorize them to waste water?

22 A. Absolutely not.

23 Q. Was that specifically discussed?

24 A. Yes, it was specifically discussed, it was  
25 condition placed in the permit, and it's they're not

1 allowed to waste water.

2 Q. Are you aware that there is a provision  
3 that that 45 million gallon per day maximum includes a  
4 factor for system loss?

5 A. Yes. That's part of the calculation.

6 MR. FRANKEL: Objection, move to strike,  
7 lacks foundation.

8 THE COURT: Overruled.

9

10 BY MR. WYNHOFF:

11 Q. What do you understand the term "system  
12 loss" means?

13 A. In the transport and storage of water  
14 for -- from the source to the ultimate use, there are,  
15 there is loss of the water along the way, depending on  
16 what the diversion structures are made of and the  
17 storage structures are made of, and so  
18 evapotranspiration, seepage into the ground, those are  
19 system losses.

20 Q. Do you recall the concept of system loss  
21 was also discussed by and in front of the Water  
22 Commission?

23 A. The decision and order analyzed system  
24 losses in some detail.

25 Q. Do you happen to remember a quantitative

1 figure for what the CWRM said was reasonable?

2 A. It analyzed the existing projections at 22  
3 percent of the -- the, I believe it was 22 percent of  
4 the prior use, and analyzed it and determined that that  
5 was reasonable.

6 Q. Was the question of -- of system loss  
7 brought -- brought to the Board's attention at the  
8 November 2019 meeting?

9 A. Yes, it was.

10 Q. Were there -- I mean, tell us about that,  
11 in what way?

12 A. Well, there was some testimony that the  
13 system losses were, I suppose they were conceived as the  
14 equivalent of waste, but that's not the same thing. If  
15 you have a system loss that is excessive or the result  
16 of, you know, some massive leak or something, that might  
17 get to the point of being categorized as waste, but a  
18 system loss is a recognized part of irrigation systems.

19 MR. FRANKEL: Objection, move to strike,  
20 Your Honor, nonresponsive. The question regarded the  
21 BLNR discussion, not with regard to her understanding of  
22 this concept.

23 MR. WYNHOFF: Actually I did ask her, I  
24 specifically said, What is your understanding of the  
25 concept?

1 THE COURT: No, the question was to  
2 testimony.

3 MR. FRANKEL: Oh, okay.

4 THE COURT: I'm reading it right here.

5 MR. WYNHOFF: My bad, that's a good  
6 example. Thank you, Your Honor.

7 MR. FRANKEL: So, Your Honor, I'd like to  
8 move to strike that answer.

9 MR. WYNHOFF: I think I'm just going to ask  
10 her the question, what is your understanding of the same  
11 testimony, Your Honor, so it doesn't really seem that  
12 useful.

13 MR. FRANKEL: I think -- Your Honor, to the  
14 extent that this is about the BLNR's decision, and given  
15 whatever remains of any deliberative process privilege,  
16 she cannot -- her testimony about her understanding of  
17 this is irrelevant.

18 What's important is the Board's  
19 understanding that's reflected in the minutes and the  
20 decision itself, but some post hac rationalization here  
21 is not appropriate.

22 THE COURT: Well, the question was to  
23 testimony.

24 MR. FRANKEL: Right.

25 THE COURT: So what's your objection to

1 that? I mean, that was before the Board.

2 MR. FRANKEL: Right, but her answer, which  
3 I'm asking you to strike, was not about the testimony.

4 Her answer was, she launched into a lengthy  
5 explanation.

6 THE COURT: Wait, time out, time out. I'm  
7 sorry, could you please scroll back to the witness' last  
8 answer so I can read the whole thing.

9 (The witness' last answer was brought  
10 up on the Court's monitor.)

11 THE COURT: Oh, I see what your objection  
12 is. The witness started talking about testimony about  
13 system losses, but then kind of segued into how system  
14 loss may or may not be unreasonable. So your point is  
15 that that wasn't necessarily part of the testimony, I  
16 get it, okay.

17 Yeah, that's fair. I'll strike the answer,  
18 and you can go at it again, Mr. Wynhoff.

19 MR. WYNHOFF: Your Honor, it is now ten  
20 minutes to, or to be fair, 11 minutes to 4:00. I am  
21 very tired, and I have told Mr. Frankel already that I'm  
22 not going to finish today, and I am not, in fact, going  
23 to finish today.

24 I wonder if I might have the Court's  
25 indulgence to just simply stop here at this point. If

1 not I'll continue on.

2 THE COURT: No, that's fine, and the same  
3 thing happened to me, I understand where you're coming  
4 from.

5 MR. WYNHOFF: I appreciate it, Your Honor,  
6 I really do.

7 THE COURT: All right. Anything else  
8 anyone else wants to discuss on the record before I  
9 thank and excuse our court reporter? I'm not seeing  
10 anything, so we are in recess, and you are excused with  
11 much thanks.

12 (Proceedings concluded at 3:50 p.m.)

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3 STATE OF HAWAII )

4 CITY AND COUNTY OF HONOLULU )

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8 I, NIKKI BEAVER CHEANG, RPR, CRR, CSR-340, an  
9 Official Court Reporter for the First Circuit Court,  
10 State of Hawaii, hereby certify that the foregoing  
11 comprises a full, true and correct transcription of my  
12 stenographic notes taken in the above-entitled cause.

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15 Dated this 13th day of August, 2020.

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17 OFFICIAL COURT REPORTER

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21

/s/ Nikki Beaver Cheang

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NIKKI BEAVER CHEANG, CRR, CSR-340

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