

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 Monday, August 17, 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

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Testimony of:

SUZANNE E. CASE

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

2 Monday, August 17, 2020, with Judge Crabtree 1:02 P.M.

3

4                   THE COURT: All right. Back on record  
5 after a lunch break.

6                   FTR on?

7                   THE BAILIFF: Yes, it is.

8                   THE COURT: And I see all the attorneys on  
9 video, and I see Chair Case here, so I think the witness  
10 is ready.

11                   We all ready to go?

12                   THE WITNESS: Yes.

13                   MR. WYNHOFF: Yes, Your Honor.

14                   THE COURT: All right. Mr. Wynhoff.

15                   Oh, a quick reminder. Chair Case,  
16 respectfully, you are still under oath. Thank you.

17                   THE WITNESS: Yes, Your Honor.

18                   (Continued on the next page.)

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1 SUZANNE E. CASE

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

4

5 DIRECT EXAMINATION (Resumed)

6

7 BY MR. WYNHOFF:

8 Q. Chair Case, on Thursday --

9 MR. WYNHOFF: Sound check, how am I  
10 sounding, Your Honor?

11 MR. FRANKEL: There's an echo.

12 MR. WYNHOFF: I have no idea why that would  
13 be so.

14 THE COURT: It's pretty bad.

15 THE BAILIFF: How loud is your speaker?  
16 It's probably feedback from your speaker because  
17 sometimes we could hear it when Melissa was doing her  
18 examination not this.

19 THE COURT: We're off record now.

20 (Break.)

21 (Reconvened at 1:21 p.m.)

22 THE COURT: All right. We're back on  
23 record after a break to try and work on some of our tech  
24 issues. I understand it got sorted out, ready to go?  
25 Go ahead, Mr. Wynhoff.

1 MR. WYNHOFF: Yes, I believe we're ready to  
2 go.

3 THE COURT: Uh, oh the echo's back.

4 MR. WYNHOFF: Would it be possible to go  
5 off the record for a minute.

6 THE COURT: The echo is so bad, I can't  
7 even understand what you're saying.

8 Off record.

9 (Break.)

10 (Reconvened at 1:38 p.m.)

11 THE COURT: All right. Back on record all  
12 right back on record.

13 FTR on?

14 THE BAILIFF: Mm-hm.

15 THE COURT: It looks like we solved our  
16 technological echo problem, so, Mr. Wynhoff, please go  
17 ahead.

18 MR. WYNHOFF: Your Honor, I'm going to  
19 start off with just a sound check. Are we still hearing  
20 me okay?

21 THE COURT: Yes.

22 MR. WYNHOFF: Okay. Good.

23 (Continued on the next page.)

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DIRECT EXAMINATION

BY MR. WYNHOFF:

Q. Ms. Case, when I talked to you Thursday, we had established that there was a distinction between abandonment and removal of diversions, and now I would just like you to explain what that distinction is.

A. So abandonment means that you're not going to use it any more to divert water off of the stream.

We also use the term "abandon in place" if it doesn't necessarily mean you're going to remove the diversions. Removal is actually taking out the diversions.

Q. Thank you.

When -- when the -- when the Board made its decision in 2019 it had the DEIS available to it; correct?

A. Yes, linked into the submittal.

Q. The power report was part of the DEIS?

A. Yes, it was.

Q. If you can just tell me yes or no, was there a discussion of trash at the 2019 board meeting?

A. I believe so.

Q. Do you recall that various persons asked the Board to get more information from A&B at the 2019

1 meeting?

2 A. Yes.

3 Q. Do you recall that there was a presentation  
4 and discussion regarding other sources of water at the  
5 2019 meeting?

6 A. Um, I don't -- I don't recall specifically  
7 about the 2019 meeting on that.

8 Q. Was it clear -- was there a presentation to  
9 the Board at the 2019 meeting that more water would be  
10 better for the stream biota?

11 A. A presentation --

12 Q. Or discussion?

13 A. I'm sorry, I don't remember specifically,  
14 certainly generally.

15 MR. WYNHOFF: I don't have any additional  
16 questions at this time. Thank you for your indulgence.

17 THE COURT: I forget what order were we  
18 following before. I think Mr. Schulmeister would be  
19 next

MR. SCHULMEISTER: Okay.

20 (Continued on the next page.)

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CROSS-EXAMINATION

BY MR. SCHULMEISTER:

Q. Ms. Case, I'd like to follow up on the different capacities in which you've been exposed to this matter, and I think we've already, Mr. Wynhoff already covered with you on direct, you're the Chair of the Board of Land and Natural Resources, which is the agency that made the decision that's being challenged in this case, but in addition to that, you're also the Chair and a member of the Water Commission?

A. Yes, that's correct.

Q. Which, obviously, the decision and order is also an issue in this case.

And then in addition to that, the revocable permit decisions that are being challenged in this case, those were made by the Board of Land and Natural Resources in a Chapter 92 meeting; correct? Do you understand what I mean by that?

A. They were not in a contested case, they were in a Sunshine meeting.

Q. Right. And the -- but the Board of Land and Natural Resources has also -- also had the pending Chapter 91 contested case hearing pending before it involving the lease application and the revocable



1 permits; is that right?

2 A. Yes.

3 Q. And in addition to that, the Water  
4 Commission has pending before it various permits, permit  
5 applications pertaining to modification and abandonment  
6 of diversions, and those were all, thus far, the  
7 decisions there have all been under a Chapter 92  
8 process; is that right?

9 A. Correct, those are stream diversion works.

10 Q. All right. So we have both the Board and  
11 the Water Commission engaging in both Chapter 91 and  
12 Chapter 92 decision making, all in relation to the same  
13 streams in East Maui; is that right?

14 A. Yes.

15 Q. Now, and in all of that decision making, so  
16 the Board was acting as a quasi adjudicator on a  
17 contested case hearing, and I guess an agency on a  
18 Chapter 92 decision, in both capacities is it your  
19 understanding that the Board is acting as a public  
20 trustee with regard to the water resources?

21 A. Yes.

22 Q. Now, are you familiar with the -- I'm just  
23 going to read some language and ask if you're familiar  
24 with it from the Supreme Court.

25 Says: The Commission must not relegate

1 itself to the role of a mere umpire passively calling  
2 balls and strikes for adversaries appearing before it,  
3 but instead must take the initiative in considering,  
4 protecting and advancing public rights and the resource  
5 at every stage of the planning and decision making  
6 process. Does that sound familiar to you?

7 A. Yes.

8 Q. Do you have an -- is familiar to you as a  
9 pronouncement of the Supreme Court of Hawaii with regard  
10 to the Commission in particular in that case; is that  
11 right?

12 A. I'm familiar with it, yes.

13 Q. Okay. Do you have an understanding of what  
14 is meant by an umpire passively calling balls and  
15 strikes?

16 A. Uh, I have a general understanding of the  
17 analogy, yes.

18 Q. Now, like in A Court proceeding like this  
19 trial, I mean, this is a situation where the Judge is  
20 acting as an umpire calling balls ask strikes, right,  
21 between adversaries?

22 A. Yes.

23 Q. But the Commission is not supposed to do  
24 that; right?

25 A. Right.

1 Q. And in -- is it your understanding that is  
2 not supposed to do that in either the Chapter 92 or the  
3 Chapter 91 context?

4 A. Uh, I'm sorry, I don't -- I haven't thought  
5 of it in that context.

6 Q. All right. But, you know, the phrase that  
7 Dr. Strauch referred to in doing his work, he tried to  
8 use the best available information, is that a phrase  
9 you're familiar with?

10 A. Yes.

11 Q. And is it your understanding that's the  
12 phrase that comes out of the Water Code?

13 A. Yes.

14 Q. Okay. All right. Now, one of the  
15 questions that's come up during the trial is what --  
16 what exactly was the record or source of information  
17 that the Board considered or had available or relied on  
18 with regard to its decisions on the renewal of the  
19 revocable permits you --

20 A. Yeah.

21 Q. -- you understand that?

22 A. Yeah.

23 Q. And what I want to ask you to do right now  
24 is to take a look at Exhibit AB-21A.

25 A. So I have AB-21.

1 Q. Okay.

2 MS. GOLDMAN: Your Honor, we are -- we need  
3 to transmit 21A to the witness, and it was added during  
4 trial, if we may just e-mail that to her quickly.

5 MR. WYNHOFF: Would we be allowed to do  
6 that, or do we need any kind of preliminary discussion?

7 THE COURT: Anyone have an objection to  
8 that or the witness looking at the proper exhibit?

9 MR. FRANKEL: (Shakes head.)

10 THE COURT: No, didn't think so.

11 Okay. So go ahead and just make sure you  
12 send her 21A and not something else.

13 MS. GOLDMAN: I'll CC the Court if that's  
14 helpful, I'll CC Tara.

15 MR. WYNHOFF: Thank you, Your Honor.

16 THE COURT: While we're waiting, just as a  
17 parenthetical, Chair Case, basically 21A included a  
18 couple of extra pages that were -- had been sort of  
19 truncated or cut off a little bit on the original  
20 exhibit, so it's a more.

21 THE WITNESS: Okay I have.

22 THE COURT: Go ahead.

23 THE WITNESS: I have AB-21A, and it has 45  
24 pages.

25 (Continued on the next page.)

1 BY MR. SCHULMEISTER:

2 Q. And on the first page it's got sort of a  
3 litigation caption; correct?

4 A. Yes.

5 Q. And it indicates that this particular  
6 document was filed in DLNR file No. 01-05-MA, and on the  
7 left it says:

8 In the Matter of the Contested Case Hearing  
9 regarding Water Licenses at Honomanu, et cetera; is that  
10 right?

11 A. Yes.

12 Q. So do you recall being aware of the fact  
13 that -- and this was relatively early in your  
14 involvement as Chair of the Board of Land and Natural  
15 Resources; is that right?

16 A. Yes.

17 Q. So 2016. So back in 2016, there was this  
18 contested case hearing was pending, which was a Chapter  
19 91 process, and there was -- this related to the order  
20 that the Board had issued to A&B to commence the  
21 environmental review process for the -- for the  
22 long-term lease application; correct?

23 A. Yes.

24 Q. Okay. And just to be clear, you remember  
25 this? You remember this?

1 A. Yes, yes.

2 Q. Okay. And so this particular document was  
3 the submission of the scope of work, which is pursuant  
4 to an order that the Board had issued, which actually is  
5 also attached at the end of the exhibit as part of the  
6 submittal, and that was an order signed by you; correct?

7 A. That was, yes.

8 Q. All right. Now, in the -- if you look at  
9 page -- oh, and by the way, do you remember who the  
10 board members were at the time that this was taking  
11 place, board members besides yourself?

12 A. In July 2016?

13 Q. Yeah.

14 A. I probably can put them together, yes.

15 Q. That would include --

16 A. Probably, um, yeah. Sam Gon (phonetic) --  
17 sorry, do you want to hear them?

18 Q. Chris Yuen?

19 A. Yes.

20 Q. Stanley Roehrig?

21 A. Yes.

22 Q. Keoni Downing?

23 A. Yes.

24 Q. Thomas Oi?

25 A. Yes.

1 Q. James Gomes?

2 A. Yes.

3 Q. And someone from the Department of Health  
4 -- no, I'm sorry Ulalia Woodside?

5 A. I -- I can't remember when Ulalia  
6 Woodside transitioned out.

7 Q. Okay. But in any event there was  
8 significant overlap between the board members in 2016  
9 when dealing with this issue and this contested case  
10 hearing --

11 A. Yes.

12 Q. -- and the members who dealt with the RP  
13 renewals in 2018 and 2019; correct?

14 A. Yeah, yes.

15 Q. Okay. Now, when the board members are  
16 participating in a Chapter 92 meeting on something like  
17 the RP renewals, is there any sort of, you know, like  
18 self-hypnosis or cleansing process, they wipe out  
19 anything they know because of other capacities in which  
20 they've been exposed to the issue?

21 MR. FRANKEL: Objection, form of the  
22 question.

23 BY MR. SCHULMEISTER:

24 Q. Do you understand?

25 THE COURT: It is a little unusual, but I

1 think the point is there, and I'll allow the Chair to  
2 answer it.

3 A. (By the witness) I know of no such  
4 process.

5 MR. FRANKEL: (Laughing.)

6

7 BY MR. SCHULMEISTER:

8 Q. So when we talk about what information the  
9 board members would have had in 2018 and 2019, it would  
10 include information they had from exposure to the issues  
11 in the pending contested case hearing, as well as  
12 whatever was submitted in connection with the action of  
13 items in 2018 and 2019; correct?

14 MR. FRANKEL: Objection, calls for  
15 speculation, vague.

16 THE COURT: I think at this point the  
17 question is phrased as a concept, it's not a specific  
18 inquiry as to what actually happened, so I will allow  
19 it.

20 A. (By the witness) Yes.

21

22 BY MR. SCHULMEISTER:

23 Q. All right. So now looking specifically at  
24 page Bate stamp 011 of Exhibit AB-21A, this is part of  
25 the scope that was submitted by A&B, and there's a table



1 of streams, do you see that?

2 A. Yes.

3 Q. And this scope, by the way, do you recall  
4 that what the Board had ordered A&B to do was to present  
5 the scope in such a way that the work could be staggered  
6 between work that could be -- could reasonably be done  
7 on the environmental impact statement before the Water  
8 Commission made its final decision on the IFS decision,  
9 and work that would have to be deferred until after the  
10 Water Commission issued that decision?

11 A. Yes.

12 Q. Okay. And did the environmental impact  
13 statement relate to the action of A&B having requested  
14 to, basically, to be a long-term lease, to continue to  
15 divert water from the streams in the licensed area that  
16 are listed in the table?

17 A. Yes.

18 Q. And so that includes both streams where in  
19 the third, I guess it's the fourth column in the table  
20 that are listed, subject to the petition to amend the  
21 IFS, and there was a yes or a no as you go down the list  
22 for each stream; is that right?

23 A. That's correct.

24 Q. All right. So that was the way the issue  
25 was sort of framed, the table was set before the Board

1 in connection with the environmental impact statement --

2 MR. FRANKEL: Objection.

3

4 BY MR. SCHULMEISTER:

5 Q. -- in the middle of 2016; is that correct?

6 A. Yes.

7 MR. FRANKEL: Objection, vague, form of the  
8 question.

9 THE COURT: Sustained.

10

11 BY MR. SCHULMEISTER:

12 Q. The Board had information in 2016 based on  
13 this scope that the Board had ordered that the lease  
14 application was, and therefore the environmental impact  
15 statement dealt with the continued diversion of all of  
16 the streams in the licensed area that had previously  
17 been diverted, not just the ones that were the subject  
18 of IIFS petitions; correct?

19 A. Correct.

20 MR. FRANKEL: Objection, vague, compound.

21 THE COURT: Sustained. You need to do this  
22 in bite-size pieces, Mr. Schulmeister.

23 MR. SCHULMEISTER: Okay.

24 (Continued on the next page.)

25

1 BY MR. SCHULMEISTER:

2 Q. All right. The issue before the Board in  
3 the contested case hearing, that the scope was submitted  
4 in, was the initial scope of work to be done on  
5 environmental impact statement; correct?

6 A. Yes.

7 Q. And the environmental impact statement was  
8 being performed in connection with a request for a  
9 auction of a long-term lease for East Maui watersheds;  
10 correct?

11 A. That's correct.

12 Q. And the long-term lease would have included  
13 the right, privilege and authority to enter and go upon  
14 licensed areas for the purpose of developing, diverting,  
15 transporting and using government-owned Waters for 31  
16 streams listed in this table; correct?

17 A. Correct.

18 Q. And it was known by the Board that the  
19 these streams included streams that have been referred  
20 to repeatedly in this case as the 12 streams or the 13  
21 streams that would not be having their interim instream  
22 flow standards amended based on what was pending before  
23 the Water Commission at that time; correct?

24 A. Correct.

25 MR. FRANKEL: Objection, compound, vague,

1 calls for speculation.

2 THE COURT: Sustained. It's compound,  
3 Mr. Schulmeister.

4

5 BY MR. SCHULMEISTER:

6 Q. The Board knew that the extent -- work was  
7 being deferred on the environmental impact statement  
8 pending decision by the Water Commission, the decision  
9 of the Water Commission was not to amend the 12 streams  
10 that are listed here as being No's in the fourth column;  
11 correct?

12 A. Correct.

13 MR. FRANKEL: Objection, objection  
14 compound, vague, calls for speculation.

15 THE COURT: Sustained. I know we're going  
16 to get to this eventually, but you might consider just  
17 asking the second half of that question. I think that's  
18 what you really want to get at, and that's not compound.

19 MR. SCHULMEISTER: Okay.

20

21 BY MR. SCHULMEISTER:

22 Q. So the time this document was submitted to  
23 the Board in 2016, you and the Board had no expectation  
24 that the IFS petitions that were pending with CWRM were  
25 going to amend the instream flow standards for the 12

1 streams; right?

2 A. Correct.

3 MR. FRANKEL: Objection, calls for  
4 speculation.

5 THE COURT: Overruled. You may answer.

6 A. (By the witness) That's correct.

7

8 BY MR. SCHULMEISTER:

9 Q. Okay. And, okay. So if we fast forward  
10 from 2016 to 2018 when the Water Commission issued its  
11 2018 D&O, I mean, it was no surprise to you that the 12  
12 streams weren't receiving IFS amendments; correct?

13 A. Correct.

14 Q. I mean, the table had been set years before  
15 in terms of which streams were the subject of the IFS  
16 amendment petition; right?

17 MR. FRANKEL: Objection, in terms of the  
18 table being set, vague, compound.

19 THE COURT: I know what he means. I'm not  
20 completely clear on whether an appellate court would  
21 having sat through two weeks of trial, but I understand  
22 the question. You may answer.

23 A. (By the witness) That's correct.

24 (Continued on the next page.)

25

1 BY MR. SCHULMEISTER:

2 Q. All right. Now, the -- now the parties to  
3 this contested case hearing included Maui Tomorrow;  
4 correct?

5 A. Correct.

6 Q. And as of this date and time in 2016, to  
7 your knowledge, no -- nobody had filed a petition to  
8 amend the IIFS for the 12 or the 13 streams; correct?

9 A. That's correct.

10 Q. And this background was within the  
11 knowledge or -- of the -- all of the members of the  
12 Board of Land and Natural Resources who were presiding  
13 over the contested case hearing in June of 2016 when  
14 this was filed; correct?

15 MR. FRANKEL: Objection, vague, calls for  
16 speculation, lacks foundation.

17 THE COURT: Sustained.

18

19 BY MR. SCHULMEISTER:

20 Q. Okay. Let's move to exhibit -- oh wait,  
21 before I leave that. Towards the end of  
22 Exhibit AB-21A is the order which you had signed, a copy  
23 of the order that you had signed, and --

24 THE COURT: Do you have a page reference?

25 MR. SCHULMEISTER: Yes, it's -- well the

1 signature page is 041.

2 THE COURT: Thank you.

3 MR. SCHULMEISTER: But I wanted to visit  
4 the body of it where it starts on 039.

5 THE COURT: All right. I'm there. Thank  
6 you.

7

8 BY MR. SCHULMEISTER:

9 Q. All right. There's a paragraph that starts  
10 near the bottom of the page about the Board of Land and  
11 Natural Resources having held oral arguments on May the  
12 8, 2015. You see that?

13 A. Yes.

14 Q. Were you present for that oral argument?

15 A. Yes.

16 Q. Okay. And it says here that during the  
17 oral argument, Namoku agreed to withdraw its objection  
18 to A&B doing environmental assessment. Did I read that  
19 correctly?

20 A. Yes.

21 Q. Now, the next sentence talks about the  
22 parties having agreed that the Board would defer  
23 decision making on the motion, and the motion that's  
24 being referred to is the motion entitled, To establish  
25 scope of reconvened contested case proceeding, until

1 further notice and to facilitate discussion between the  
2 parties regarding the lawsuit pending in Circuit Court,  
3 and there's a footnote No. 1, do you see that?

4 A. Yes.

5 Q. And footnote No. 1 refers to the Carmichael  
6 suit?

7 A. Yes.

8 Q. Is that the same one that was recently  
9 argued in the Supreme Court to your knowledge?

10 A. To my knowledge, yes.

11 Q. And that's the case in which the  
12 Namoku plaintiffs were seeking a declaration that the RP  
13 for calendar year 2014 was invalid because no  
14 environmental impact statement had been prepared?

15 A. Yes, to my knowledge.

16 Q. Yeah, but the Board had -- all right. Well  
17 now let's move to Exhibit J-16.

18 A. Okay.

19 Q. All right. So Exhibit J-16, I believe, is  
20 the submittal, the staff submittal in connection with  
21 the item D-14 of the December 11th, 2015, board meeting  
22 pertaining to the revocable permit; is that right?

23 A. Sorry, did you say J-16?

24 Q. J-16, right.

25 A. I have, um, D-7, November 9, 2018.



1 Q. I'm sorry?

2 A. The item that I have listed as J-16 is the  
3 November 9, 2018, Land Division submittal to the Land  
4 Board.

5 Q. Right, okay, that's, okay.

6 A. Oh yeah, yeah, okay.

7 Q. So I think you testified earlier that  
8 submittals have to be approved by you --

9 A. Yes.

10 Q. -- before they go through. So this was a  
11 submittal that was approved by you?

12 A. Yes.

13 Q. If you go to page 000003, there's a section  
14 that talks about procedural history. Do you see that?

15 A. Yes.

16 Q. And the procedural history covers from May  
17 26, 2000, and you know, there's a chronology goes  
18 forward describing different things that had happened  
19 since May of 2001 when EMI had filed its application for  
20 long-term lease; is that right?

21 A. Correct.

22 Q. So all of this background information was  
23 being provided to the Board to assist in its  
24 consideration of the item that was on the agenda for  
25 December 11th, item D-14?

1 MR. FRANKEL: Objection, assumes facts not  
2 in evidence.

3 BY MR. SCHULMEISTER:

4 Q. Correct?

5 THE COURT: Sustained. Wait, just says  
6 provided to the Board, I thought I heard considered.

7 So, sorry. The Court overrules the  
8 objection.

9 MR. FRANKEL: It was the date, Your Honor.

10 THE COURT: Oh, I'm sorry, I was focusing  
11 on the provided versus actually considered.

12

13 A. (By the witness) Yes, I believe this was  
14 submitted to --

15 THE COURT: I'm sorry, Chair, hold on. I'm  
16 reviewing the question.

17 THE WITNESS: Sorry.

18 THE COURT: I see. It covers from May, is  
19 that the objection?

20 MR. FRANKEL: I thought he said something  
21 about December 2018, that's what I thought I heard.

22 MR. SCHULMEISTER: Yeah, the meeting -- I'm  
23 sorry.

24 THE COURT: Let's rephrase. Thank you.

25 (Continued on the next page.)

1 BY MR. SCHULMEISTER:

2 Q. All right. The meeting was November 9,  
3 2018 meeting?

4 A. Yes.

5 Q. All right. And so in this submittal, I  
6 mean, on Exhibit J-16, including all this background  
7 information was provided to the Board in advance of the  
8 November 9, 2018 meeting; correct?

9 A. Correct.

10 Q. And that included this procedural history  
11 that spans from May 26th, essentially, all the way till  
12 the date of the submittal; correct?

13 A. Yes.

14 Q. And in particular the bottom of page Bate  
15 stamp page 3, there's a discussion about the contested  
16 case proceeding before the Board, and the findings of  
17 fact, conclusions of law and decision and order on March  
18 the 23rd of 2007; is that right?

19 A. At the bottom of page 3.

20 THE COURT: And going over to page 4.

21 A. (By the witness) Yes. Thank you.

22

23 BY MR. SCHULMEISTER:

24 Q. All right. So is the prior decision of the  
25 Board in March of 2007 was specifically recited to the

1 Board in connection with the November 9th, 2018 meeting;  
2 correct?

3 A. Correct.

4 MR. FRANKEL: Objection. Assumes facts not  
5 in evidence, mischaracterizes the evidence, document  
6 speaks for itself.

7 THE COURT: Remind me at the break, and we  
8 can have a longer discussion about that, that particular  
9 objection.

10 MR. FRANKEL: We've had it, Your Honor,  
11 before.

12 THE COURT: It's not lining up for me,  
13 Mr. Schulmeister, the content of the exhibit appears  
14 different from the content and the question you asked,  
15 sorry. So sustained.

16 MR. SCHULMEISTER: All right. I'll  
17 withdraw the question.

18

19 BY MR. SCHULMEISTER:

20 Q. Okay. I'm just going to move forward now  
21 to Exhibit J-21.

22 THE COURT: Actually, if you're launching  
23 into a whole new area, this would be a good time for a  
24 break, or are you just wrapping up or what?

25 MR. SCHULMEISTER: No, I'm not wrapping up,

1 not yet.

2 THE COURT: Okay. We'll take a ten-minute  
3 break. I'll see you back here at 25 after 2:00.

4 We're in recess.

5 (Recess taken at 2:14 p.m.)

6 (Reconvened at 2:25 p.m.)

7 THE COURT: Back on record. FTR on?

8 THE BAILIFF: Yeah.

9 THE COURT: All right. Please continue.  
10 Go ahead, Mr. Schulmeister. You're muted.

11

12 BY MR. SCHULMEISTER:

13 Q. Exhibit J-21, which is the submittal for  
14 the October 11th, 2019, meeting on the RPs. Do you have  
15 that up?

16 A. Yes.

17 Q. Okay. So this, I'd like to direct your  
18 attention specifically to page Bate stamp page 6, last  
19 paragraph. Do you see that?

20 A. Yes.

21 Q. And again, to the extent that this  
22 submittal was approved by you, I mean, basically you're  
23 approving this statement of recommendation that's being  
24 made to the Board that's contained in this paragraph;  
25 correct?

1           A.        Uh, I mean technically I'm approving it for  
2        submittal to the Board for consideration.

3           Q.        Okay. But you reviewed it, you reviewed it  
4        for and approved it, as you say, as a recommendation to  
5        the Board for its consideration --

6           A.        Yes.

7           Q.        -- is that fair?

8           A.        Yes.

9           Q.        And here, basically, what the staff  
10        recommendation is is to not impose any conditions that  
11        would interfere with CWRM's regulatory authority,  
12        including the IIFS determination and diversion  
13        abandonment processes. Do you see that?

14          A.        Yes, that's correct.

15          Q.        Now, with regard to the diversion  
16        abandonment in particular, this was something that you  
17        were familiar with because you were sitting at the  
18        commission meetings where diversion modification  
19        abandonment permits were being periodically brought  
20        before the commission for action; correct?

21          A.        That's correct.

22                    THE COURT: Mr. Schulmeister, I really  
23        apologize for interrupting, but I'm looking at that last  
24        paragraph on Bate stamp 6, and it doesn't -- it doesn't  
25        use the language you're using in your question about,

1 you know, abandonment.

2 MR. SCHULMEISTER: The end of the second  
3 line.

4 THE COURT: The last paragraph on Bates 6.

5 MR. SCHULMEISTER: Yes. Let me just read  
6 it:

7 Staff does not recommend imposing any  
8 conditions that would interfere with CWRM's regulatory  
9 authority, including the IIFS determination and  
10 diversion abandonment processes.

11 THE COURT: Well, I know what the problem  
12 is, okay. Got it. thank you. Go ahead. My mistake.

13

14 BY MR. SCHULMEISTER:

15 Q. All right. So you were familiar with what  
16 the status was of the regulatory actions that were  
17 ongoing against CWRM at the time of this submittal to  
18 the Board of Land and Natural Resources; correct?

19 A. Correct.

20 Q. All right. And you agreed with this  
21 recommendation that, that the Board should not be  
22 imposing conditions that would interfere with what was  
23 going on before CWRM; correct?

24 A. I did agree with that.

25 Q. Do you still agree with that?

1 A. Yes. This is CWRM's jurisdiction.

2 Q. All right. Now, the next page, there's a  
3 first full paragraph it starts: If the Sierra Club  
4 believes, do you see that?

5 A. Yes.

6 Q. That the 12 streams that were not included  
7 in the CWRM ordered weren't for the protection, and the  
8 appropriate action would be to file a petition to amend  
9 the IIFS for those streams, do you see that?

10 A. Yes.

11 Q. And you approved of that being the  
12 recommendation submitted to the Board in -- for the  
13 October 11, 2019 meeting; is that right?

14 A. Yes, that remedy is specifically laid out  
15 in statute in the Water Code.

16 Q. Now, there's another sentence, a couple,  
17 well, the next sentence says:

18 The Board does not have the expertise to  
19 evaluate the necessary flow standards to protect  
20 instream uses, and then next sentence, That expertise  
21 lies with the CWRM.

22 A. That's correct.

23 Q. Now, I mean, do you have personal knowledge  
24 of the level of expertise that CWRM has with regard to  
25 evaluating the necessary flow standards to protect



1 instream uses?

2 A. I have had numerous interactions with the  
3 staff at CWRM and also for them numerous times before  
4 the Commission, so yes.

5 Q. And among the staff members at CWRM with  
6 expertise, would that include Dr. Strauch?

7 A. Absolutely.

8 Q. And is there anybody at the DLNR who has  
9 the sort of expertise that Dr. Strauch has?

10 A. No.

11 Q. So were you advocating here to the Board  
12 that they should rubber stamp what CWRM did as far as  
13 the D&O?

14 A. No.

15 Q. And I use that phrase because that's a  
16 phrase that Sierra Club has used in this litigation.  
17 They complain that the Board can't just rubber stamp  
18 what the Board or the Commission does. Does that have a  
19 connotation to you?

20 A. It sure does.

21 Q. Do you agree that this approach that has  
22 been set forth in this submittal, that you approved to  
23 the Board, are you advocating that the board rubber  
24 stamp what the Water Commission did?

25 A. No.

1 Q. And why not? I mean, why is not an  
2 advocacy of rubber stamping?

3 A. The decision of the Water Commission was  
4 incorporated into the Land Board's submittal for the  
5 Land Board's review, but it is reasonable to rely on the  
6 expertise of the Water Commission and their jurisdiction  
7 in making those determinations.

8 Q. Now, as far as the expertise of CWRM's  
9 concern, we just touched briefly on Dr. Strauch, which  
10 is timely, considering that he spent a fair amount of  
11 time testifying, so his expertise was on full display.

12 But are there other assets of the Water  
13 Commission that give the Water Commission more expertise  
14 in this area than the Board of Land and Natural  
15 Resources?

16 A. Yes. The Water Commission has a whole  
17 division, stream protection and management division that  
18 has people with expertise in this.

19 Q. And what about the commission members  
20 themselves?

21 A. The commission members are selected with  
22 the -- except for the ex officio ones, they have to have  
23 knowledge in and experience in water use and water use  
24 flow.

25 Q. That's a statutory requirement --

1           A.       Yes.

2           Q.       -- is it of the water code?

3           A.       Yes, it is.

4           Q.       All of the members appointed by the  
5 governor have to have experience in water resource  
6 management and at least one needs to also have  
7 experience and expertise in Hawaiian water rights and  
8 usage; correct?

9           A.       Yes.

10          Q.       Okay. And then, you know, and periodically  
11 at its meetings, the Water Commission has informational  
12 presentations from Dr. Strauch and other agencies, such  
13 as the USGS, sometimes as a result of studies that have  
14 been done with joint funding between USGS, the Water  
15 Commission and the Board of Water Supply, for example,  
16 on the County of Maui, does all of this contribute to  
17 the continuing accumulation of expertise on the part of  
18 the commission members themselves?

19          A.       Yes, because there are regular  
20 presentations of informational briefings before the  
21 Water Commission on its work.

22          Q.       Now, let's look at J-14.

23          A.       I have it.

24          Q.       Okay. All right. What I'd like to do is  
25 direct your attention to Bates stamp page 22.

1           MR. FRANKEL: Your Honor, to the extent  
2 that we're going to be reading from the document, I'm  
3 going to object.

4           THE COURT: That's sustained.

5           MR. SCHULMEISTER: I haven't made a  
6 question yet.

7           THE COURT: Well, we have discussed it two  
8 or three times, I'm just reminding you.

9

10 BY MR. SCHULMEISTER:

11           Q.       During your direct testimony last week, a  
12 question from Mr. Wynhoff, you had described what you  
13 considered a dividing line between the jurisdiction of  
14 the Board of Land and Natural Resources and the Water  
15 Commission with regard to the East Maui streams.

16                   And so what I'd like to do here is to ask  
17 you -- well, let me just ask you if you remember, do you  
18 remember whether the Water Commission in its  
19 D&O recognized that the Board of Land and Natural  
20 Resources had authority over the disposition of the  
21 water for offstream use that was not within the  
22 jurisdiction of CWRM when it was setting the interim  
23 instream flow standards?

24           MR. FRANKEL: Objection, relevance,  
25 compound.

1 THE COURT: There's literally seven parts  
2 to that question. It's very -- it's not easy to follow.

3 MR. SCHULMEISTER: Well, let me withdraw  
4 the question.

5

6 BY MR. SCHULMEISTER:

7 Q. Does the Water Commission's exclusive  
8 jurisdiction to decide interim instream flow standards  
9 include determining who gets to use water that is  
10 diverted in excess of the IIFS amounts that it sets?

11 MR. FRANKEL: Objection, calls for legal  
12 conclusion, compound, vague.

13 THE COURT: I'll allow Chair Case's  
14 understanding. You may answer.

15 A. (By the witness) My understanding of the  
16 way this is set up is that the Water Commission sets the  
17 instream flow standards, which result in an  
18 identification of how much water remained in each  
19 stream.

20 Any amount of water above the IIFS, or the  
21 IFS available for allocation, that is the responsibility  
22 of the Land Board to determination the allocation of  
23 that water in excess of the IIFS.

24 (Continued on the next page.)

25

1 BY MR. SCHULMEISTER:

2 Q. Okay. And to your recollection is there  
3 anything in the D&O, Exhibit J-14 to the effect the  
4 Water Commission was delegating to the Board of Land and  
5 Natural Resources the responsibility to do the instream  
6 protection analysis for the 12 or 13 streams that didn't  
7 have an explicit IIFS amendment set forth in the D&O?

8 A. No.

9 Q. So the jurisdiction over any potential  
10 amendments of the interim instream flow standards for  
11 the 12 or 13 streams to account for resource protection  
12 remains with the Water Commission even after the  
13 issuance of its decision; correct?

14 A. Correct.

15 MR. FRANKEL: Objection, calls for legal  
16 conclusion, cumulative, irrelevant.

17 THE COURT: Again, I'll take the Chair's  
18 understanding of that without it being binding on the  
19 Court.

20 You may answer.

21 A. (By the witness) Correct.

22

23 BY MR. SCHULMEISTER:

24 Q. And you in your position as Chair of the  
25 Water Commission, can you confirm the Water Commission

1 has not relinquished or delegated away this  
2 jurisdiction?

3 MR. FRANKEL: Objection, calls for  
4 conclusion, irrelevant, vague.

5 THE COURT: Overruled. You may answer.

6 A. (By the witness) It has not.

7

8 BY MR. SCHULMEISTER:

9 Q. Now, if -- now, if as the Chair of the  
10 Board of Land and Natural Resources you arrive at the  
11 judgment that the -- these 12 or 13 streams should have  
12 their IFS amounts looked at, you could take that to the  
13 Water Commission if you chose; right?

14 A. Uh, yeah.

15 Q. And that would be a more direct route than  
16 using your position as Chair of the Board of Land and  
17 Natural Resources to ask the Board of Land and Natural  
18 Resources to do that; right?

19 A. Correct.

20 Q. So let me change to a different topic.  
21 The action that was the subject of this lawsuit were the  
22 continuation of RPs for calendar years 2019 and 2020;  
23 correct?

24 A. That's correct.

25 Q. And one of the things that the Board had to

1 wrestle with at both meetings in 2017, and I'm sorry  
2 2018 and 2019, was what sort of conditions to impose in  
3 the event that the renewals were granted; correct?

4 A. That's right.

5 Q. And these RPs are a maximum term of one  
6 year; is that right?

7 A. Maximum.

8 Q. And --

9 A. 30-day revocable permits for a maximum  
10 period of one year.

11 Q. So the recipient of the RP is only  
12 guaranteed an RP for 30 days from the date for -- well,  
13 from the commencement of the period; correct?

14 A. That's correct.

15 Q. So do the same sort of considerations apply  
16 to the sort of conditions you impose on somebody for a  
17 one-year permit that terminable on 30 days' notice, same  
18 considerations apply to that as you would for a 30-year  
19 lease?

20 MR. FRANKEL: Objection, vague,  
21 speculation, lacks foundation.

22 THE COURT: Overruled.

23 A. (By the witness) Much more thorough,  
24 deeper, long-term analysis for a long-term lease than  
25 for a 30-day revocable permit.



1 BY MR. SCHULMEISTER:

2 Q. And in this case, for example, there's an  
3 environmental impact statement that's going to have to  
4 be completed and accepted prior to the Board even taking  
5 up whether to hold the auction for those long-term  
6 leases; correct?

7 A. That's correct.

8 Q. And were you here when Ms. Ching testified  
9 that the process of preparing an environmental impact  
10 statement is an expensive one and takes several years,  
11 do you recall that?

12 A. Yes, I was.

13 Q. And that it's not something that would be  
14 practical to do for a one-year permit that's terminable  
15 in 30 days' notice?

16 MR. FRANKEL: Objection, form of the  
17 question, asking about other people's testimony is not  
18 appropriate.

19 THE COURT: I think the question is simply,  
20 Is an EIS going to work for something that's a 30-day  
21 revocable permit? You may answer.

22 MR. SCHULMEISTER: That is it.

23 A. (By the witness) Something that takes four  
24 years to do and costs \$2-and-a-half million is  
25 absolutely not a reasonable expectation for a 30-day

1 revocable permit.

2

3 BY MR. SCHULMEISTER:

4 Q. Okay. Thank you. What about completing an  
5 interim instream flow standard petition and amendment  
6 for a one-year permit with a 30-day revocable provision?

7 A. Those are much longer processes.

8 Q. So even if in your judgment you had  
9 concluded that the Water Commission should consider  
10 amending the IFS for the 12 or 13 streams, it still  
11 wouldn't be practical to get that done in connection  
12 with a renewable one-year RP; correct?

13 A. That's correct.

14 MR. SCHULMEISTER: I have no further  
15 questions. I'm sorry, can I take that back.

16 THE COURT: Yes, you may.

17 MR. SCHULMEISTER: I do have one more  
18 question.

19 May it please the Court. May I have one  
20 more question.

21 THE COURT: I'm sorry, I said yes, you may.  
22 Go ahead.

23

24 BY MR. SCHULMEISTER:

25 Q. There was some testimony earlier today and

1 you heard it about modifications to diversion structures  
2 to comply with interim instream flow standards as not  
3 necessarily being "forever", in other words, that the  
4 modifications may not last forever, do you recall that  
5 testimony?

6 A. Yes.

7 Q. So are interim instream flow standards by  
8 design supposed to be forever?

9 A. No, they're interim instream flow  
10 standards, they're designed to be, um, available for  
11 modification in the future should that be required,  
12 should that be deemed prudent.

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

15 THE COURT: All right. Mr. Rowe.

16 MR. ROWE: Thank you, Your Honor. I don't  
17 have any questions for this witness.

18 THE COURT: Thank you.

19 Let's see, it's going to be your turn,  
20 Mr. Frankel, but we've only been going 20 minutes.

21 Go ahead.

22 MR. FRANKEL: Your Honor, we might see the  
23 light at the end of the diversion ditch tunnel.

24 THE COURT: Okay.

25 (Continued on the next page.)

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CROSS-EXAMINATION

BY MR. FRANKEL:

Q. Ms. Case, you're the Chair of the Board of Land and Natural Resources?

A. Yes.

Q. You've been Chair since 2015?

A. Yes.

Q. You changed the procedure by which these permits were considered --

THE COURT: Sorry. We missed that part. Please repeat that question.

BY MR. FRANKEL:

Q. You changed the procedure by which these permits were considered, remember that?

A. I -- could you be more specific, please.

Q. 2015 was the first time in more than a decade that the Board of Land and Natural Resources identified the continuation of these revocable permits on its agenda pursuant to the Sunshine law, remember that?

A. I remember that, Mr. Frankel, at your request, you wanted to make sure that the permits -- our revocable permits were specifically listed in the

1 public -- public posted submittal, and we did that.

2 Q. And that did not occur prior to 2015;  
3 correct?

4 A. Not that I know of, but I only know what  
5 happened in 2015.

6 Q. Well, you do know that the complaint was  
7 filed with the office because in prior years, the Board  
8 had not posted the continuation of the revocable  
9 permits, of these revocable permits on the agenda, do  
10 you remember that?

11 A. What I recall is that you made a request  
12 and I looked at it, and I thought it was a reasonable  
13 request, so we did it.

14 Q. All right. So you voted to approve the  
15 continuation of revocable permits in 2015?

16 A. Yes.

17 Q. And 2016?

18 A. Yes.

19 Q. 2017?

20 A. Yes.

21 Q. 2018?

22 A. Yes.

23 Q. 2019?

24 A. Yes.

25 Q. And in 2019, last year, A&B diverted water

1 from East Maui streams; right?

2 A. Yes.

3 Q. Approximately 27 million gallons of water a  
4 day?

5 A. I believe that's estimated.

6 Q. And in October 2019 you voted to allow A&B  
7 to increase the amount of water taken from these streams  
8 to 40 million gallons of water a day; right?

9 A. Yes.

10 Q. And can you please tell Judge Crabtree  
11 which streams the increase in diversion will come from?

12 A. Well, the water is, um, combined, and so I  
13 can't say which, which streams the water will come from.

14 Q. You don't know; right?

15 A. Um, no, I don't know specifically which  
16 they will come from. I know what the instream flow  
17 standards are that they have to meet.

18 Q. And you never asked A&B or EMI which  
19 streams the increase in diversion would come from, did  
20 you?

21 A. We conditioned the permit on making sure  
22 that they met the instream flow standard.

23 Q. But just a yes or no --

24 A. For each stream.

25 Q. It's just a yes or no question, Ms. Case,

1 did you ask A&B or EMI which streams the increase in  
2 diversions would come from, yes or no?

3 A. No.

4 Q. You're familiar with the concept of dual  
5 mandate of public trust; right?

6 A. Please explain what you're talking about.

7 Q. Do you understand the mandate of protection  
8 and reasonable and beneficial use?

9 A. Yeah, the Constitution requires us to  
10 conserve and protect our natural resources and provide  
11 for the development and utilization consistent with  
12 their protection.

13 Q. So if we, let's just focus on the first  
14 prong of the analysis as articulated by the Hawaii  
15 Supreme Court, we'll get to reasonable, beneficial use a  
16 little later, just focusing on the protection element  
17 for now.

18 A. Yeah.

19 Q. There were 13 streams that were not the  
20 subject of the Water Commission contested case; right?

21 A. That's correct.

22 Q. And the Water Commission did not discuss  
23 the biological or recreational value of these 13 streams  
24 in its decision; right?

25 A. The Water Commission decision recognized

1 that they were there, but did not amend the IIFS because  
2 there was no petition to do so.

3 Q. Now, Ms. Case, I'd like you to answer the  
4 question I'm asking. The question I'm asking is, did  
5 the Water Commission discuss the biological or  
6 recreational value of these 13 streams in its decision,  
7 yes or no?

8 MR. WYNHOFF: Your Honor, I don't think  
9 that's really a fair thing to do. It's not up to him to  
10 dictate yes or no, he asked a question, and he got a  
11 fair answer.

12 THE COURT: Objection's overruled.

13 The witness can answer yes or no or I'm not  
14 sure or whatever.

15 A. (By the witness) I'm sorry I had a sound  
16 blip there because my phone rang, so could you please  
17 repeat it.

18

19 BY MR. FRANKEL:

20 Q. Sure. Yes or no question, did the Water  
21 Commission discuss the biological or recreational value  
22 of these 13 streams in its decision?

23 A. No.

24 Q. Okay. Now, the Sierra Club highlighted  
25 these 13 streams in its written testimony to the Board



1 of Land and Natural Resources in October of 2019; right?

2 A. I'm sorry, I don't recall.

3 Q. All right. Why don't we take a look at  
4 Exhibit 27 really quickly, it's Sierra Club's Exhibit  
5 27.

6 THE COURT: That's already in evidence.

7 MR. FRANKEL: Yeah.

8

9 BY MR. FRANKEL:

10 Q. And, Ms. Case, have you ever seen this  
11 document before?

12 A. I believe I have.

13 Q. And did you read it before you rendered  
14 your decision in 2019, October?

15 A. If it was submitted on time, we would have  
16 reviewed it before the decision.

17 Q. Well I'm not -- well, okay. And you see,  
18 there's a heading that says, 13 streams unaddressed by  
19 the 2018 CWRM award; right?

20 A. Yes.

21 Q. All right. Now, A&B's consultant  
22 Dr. Parham recognized the harm caused by the diversion  
23 on these 13 streams, didn't he?

24 A. Um, his report reviewed the habitat  
25 impacts, yes.

1 Q. All right. And he concluded that the  
2 diversion of water from these 13 streams reduces habitat  
3 units on those streams from 588,000 square meters to  
4 88,386 square meters, didn't he? Does that sound  
5 familiar?

6 A. Yes.

7 Q. Okay. And that's a reduction of about 85  
8 percent, isn't it?

9 A. Yes.

10 Q. Now BLNR has allowed A&B and EMI to take  
11 water from these 13 streams pursuant to the revocable  
12 permits; right?

13 A. Yes.

14 Q. And BLNR has imposed no limits on the  
15 amount of water A&B can take from these streams?

16 A. They were subject to the 1988 IIFS.

17 Q. Sure. And the Board of Land and Natural  
18 Resources doesn't know how much water was running in  
19 these streams in June 1988, which is the standard that  
20 was set; isn't that right?

21 A. There's -- there's not a quantified amount.

22 Q. All right. So --

23 A. It's presumed to be the median base flow.

24 Q. Right, and so A&B can take -- well, if it's  
25 the median base flow, that means A&B can drain these

1 streams dry 70 to 80 percent of the time?

2 A. These streams are mostly gaining streams,  
3 so it's not necessarily drained dry.

4 Q. So right, so water will come down, the  
5 first diversion will take, according to the base flow,  
6 will take all the water, then there will be a dry  
7 stretch for a while, then there will be some more water,  
8 the stream will build up, and then there will be another  
9 diversion, and it will take all the water, then there  
10 will be a dry stretch, and then there will be another  
11 diversion where water's gained, and it will take that  
12 water; right?

13 So there will be these four diversions,  
14 along the way there will be these periods of dry  
15 stream bed 70 to 80 percent of the time; right?

16 MR. WYNHOFF: Objection, compound,  
17 ambiguous vague.

18 THE COURT: It is definitely compound,  
19 let's see, though.

20 I'm just going to treat the question as the  
21 last part, and I think that's what the witness answered.

22 A. (By the witness) It depends on the flow.

23 (Continued on the next page.)

24

25 BY MR. FRANKEL:

1 Q. Okay. Thank you. Now, you are familiar  
2 with Dr. Parham's work, you're familiar with his work?

3 A. Presented in the draft IES.

4 Q. And Dr. Parham's 2019 study was not  
5 available to the Water Commission when it made its  
6 decision in 2018, was it?

7 A. Not his study at the time, right.

8 Q. Right, and Dr. Parham's 2019 study used  
9 base data, modeling processes and suitable criteria as  
10 close as possible to the information reported in a 2009  
11 study that the Water Commission relied on, didn't it?

12 A. That's beyond my expertise.

13 Q. Okay. The 2019 study was broader in scope  
14 than the prior work that was done in 2009 by  
15 Dr. Parham and the Division of Aquatic resources staff,  
16 wasn't it?

17 A. I'm sorry, I can't speak to that.

18 Q. All right. Do you know whether it included  
19 more streams, more diversions and more bases?

20 A. I haven't compared those two reports  
21 directly.

22 Q. When you made your decision, the Board made  
23 its decision in 2019, did you know that Dr. Parham had  
24 calculated that the Water Commission's decision resulted  
25 in 706,507 square meters of habitat units with a fully

1 restored streams?

2 MR. WYNHOFF: Could I have that number  
3 again, please, Your Honor.

4 MR. FRANKEL: Yeah, so I'll do the whole  
5 question again so you have the context.

6 Q. When you made your decision in 2019, did  
7 you know that Dr. Parham calculated that the Water  
8 Commission's decision resulted in 706,507 square meters  
9 of habitat units with a fully restored stream, do you  
10 know that?

11 A. I don't remember that figure offhand.

12 Q. And in comparison, did you know that for  
13 the 13 streams, approximately 500,000 habitat units are  
14 lost when they're fully diverted, did you know that?

15 A. If that's what the draft EIS attachment  
16 says, then it's in there.

17 Q. Okay. And at the October 2019 meeting, did  
18 anyone criticize Dr. Parham's report?

19 A. Not that I recall.

20 Q. And did anyone at the October 2019 meeting  
21 present any information that contradicted Dr. Parham's  
22 report?

23 A. Not that I recall.

24 Q. All right. Now, we've just talked about  
25 the 13 streams, and now I want to switch gears and talk

1 about diversion structures.

2 I want to first turn your attention to the  
3 diversion structures on Waiohue Stream. Please take a  
4 look at Exhibit J-23.

5 A. Okay.

6 Q. You've seen this before; right?

7 A. I have.

8 Q. Now, back in April 2010, the Division of  
9 Aquatic Resources made recommendations regarding  
10 modifications to various diversion structures, do you  
11 remember that; right?

12 A. I wasn't there.

13 Q. But you've seen this document before;  
14 right?

15 A. That's correct.

16 Q. Okay. So turning to, and you probably -- I  
17 know you've heard this before, but if we turn to page 11  
18 of this document.

19 MR. WYNHOFF: Your Honor, I object, this is  
20 a document that got there before the witness of done,  
21 and No. 2, we're just talking about exactly what we're  
22 talking about with Mr. Frankel which is reading from  
23 documents in evidence into the record.

24 THE COURT: Agreed. Sustained.

25 MR. FRANKEL: On the first or second basis,

1 Your Honor?

2 THE COURT: Well primarily the second  
3 basis.

4 MR. FRANKEL: Okay.

5

6 BY MR. FRANKEL:

7 Q. My question to Ms. Case is, had the Board  
8 of Land and Natural Resources ordered East Maui  
9 Irrigation to do the modification recommended by the  
10 Division of Aquatic Resources on page 11 of this  
11 document?

12 A. No, it hasn't.

13 Q. Okay. Now, let's talk about Puohokamoa  
14 Stream, which is on page 7 of this document. There are  
15 a series of recommendations in this letter regarding  
16 modifications to be made. Had the Board of Land and  
17 Natural Resources ordered EMI to do the modifications  
18 recommended by the Division of Aquatic Resources in this  
19 letter, page 7?

20 MR. WYNHOFF: Objection, Your Honor, as  
21 pointed out this morning, we've already heard five  
22 times, and I think there was two more this afternoon,  
23 that's not within the Board's jurisdiction to do, it's  
24 within CWRM's jurisdiction.

25 THE COURT: You may answer.

1

2 BY MR. FRANKEL:

3 Q. The jurisdictional issue -- I thought you  
4 were talking to me.

5 A. (By the witness) My answer is it would be  
6 misleading to continue to say no on these when it's not  
7 in the jurisdiction of the Board, and the Division of  
8 Aquatic Resources has its particular perspective, not  
9 the whole picture.

10 Q. So, you know, we're going to get to  
11 jurisdiction really soon, believe me, we're going to get  
12 to jurisdiction really soon, but I just want to get  
13 through these foundation questions.

14 And now Hanawi Stream, which is on page 12  
15 of this document, there's recommendations here, and has  
16 the Board of Land and Natural Resources ordered the  
17 V-notch that was recommended here be installed, yes or  
18 no?

19 MR. WYNHOFF: Same objection, Your Honor,  
20 and I also object to him saying yes or no. We already  
21 know that that's an unfair question. This is --

22 THE COURT: Wait, look, people, I know  
23 we're at the end of a long day, after two long weeks,  
24 but that's not how we do it.

25 The questioner gets to ask their question.



1 They get to try to get the witness to say yes or no.

2 If you don't like the result, you get a  
3 chance to ask the witness to clarify things when it's  
4 your turn, so let's just operate under those general,  
5 normal rules.

6 Go ahead, Mr. Frankel.

7 MR. WYNHOFF: Objection, objection,  
8 Your Honor.

9 THE COURT: Okay. Overruled.

10 MR. WYNHOFF: No. 1, it's --

11 THE COURT: Overruled. You may go into  
12 this subject if you wish when it's your turn.  
13 Please answer the question.

14

15 BY MR. FRANKEL:

16 Q. Has the Board of Land and Natural Resources  
17 ordered that the V-notch recommended in this April 1st  
18 2010 letter be installed, yes or no?

19 A. No, it has not.

20 Q. Okay. Now we'll get to the really  
21 interesting question.

22 If the Water Commission wanted a structure  
23 to be modified, what is your understanding of the  
24 statutory authority the Commission has to order it?

25 A. The Water Commission has jurisdiction over

1 stream diversion works by statute.

2 Q. Now, if someone like EMI does not file a  
3 petition to modify a diversion structure, what is your  
4 understanding of the authority, the statutory authority  
5 the Water Commission has to make EMI modify it?

6 A. I don't have the answer to that.

7 Q. All right. Well, let's take a look at DLNR  
8 or S-19A, DLNR Exhibit 7 -- sorry S-79A.

9 THE COURT: That's in evidence.

10

11 BY MR. FRANKEL:

12 Q. So I'd like you to turn to page 27 of this  
13 document, which is in evidence, and this is, when you  
14 talk about the Water Commission's exclusive jurisdiction  
15 deal with stream diversion works or stream diversion  
16 structures, however we've been referring to, this is the  
17 section of the water code you've generally been  
18 referring to; isn't that right?

19 A. That's correct.

20 Q. Now if an applicant does not file a  
21 petition to modify a diversion structure, where, in this  
22 section of the water code, is there any authority for  
23 the Water Commission to order that the structure be  
24 modified?

25 A. I'm not prepared to answer that. I'd have

1 to look into it more.

2 Q. Yeah. You understand that the Board of  
3 Land and Natural Resources has different authority than  
4 the Water Commission that when -- well, let me take a  
5 step back.

6 The Board of Land and Natural Resources and  
7 the Water Commission are sister agencies, isn't that  
8 kind of a fair characterization?

9 A. I don't know.

10 Q. Well, um, you work in a little bit  
11 independent, I'm an only child, so I don't know, you  
12 have siblings that are -- are operate -- there's two  
13 agencies that are operating with similar kind of  
14 mandates, but they have different jurisdictional roles,  
15 they're different, but they have some similarities; is  
16 that fair?

17 MR. WYNHOFF: Objection, compound and  
18 argumentative.

19 THE COURT: Sustained.

20 MR. FRANKEL: Okay. Thank you, Your Honor.

21 THE COURT: Let's not use this trial to  
22 have a debate on legal issues, okay, we can do all that  
23 in the conclusions of law later.

24 MR. FRANKEL: Your Honor, I just want to  
25 point out, on page 154 of the transcript of August 13th,

1 which was last week, Mr. Wynhoff was asking Ms. Case the  
2 same question in a bit more general terms, and I just  
3 have two more questions on this arena, and it's her  
4 understanding, I acknowledge that it's her  
5 understanding.

6

7 BY MR. FRANKEL:

8 Q. But I would like to know, Ms. Case, do you  
9 understand that the Board of Land and Natural Resources  
10 had different authority than the Water Commission for  
11 those structures that are on public land?

12 MR. WYNHOFF: Objection, argumentative  
13 calls for legal conclusion.

14 THE COURT: You may answer.

15 MR. WYNHOFF: I didn't ask anything.

16 THE COURT: It's Chair Case's understanding  
17 is what the question's asking for.

18

19 A. (By the witness) My understanding is the  
20 Water Commission has jurisdiction over structures in the  
21 stream.

22

23 BY MR. FRANKEL:

24 Q. Understood. Now if there's no mechanism by  
25 which the Water Commission to order certain structures

1 that are harming native aquatic life to be modified, if  
2 that's true, but if the Board of Land and Natural  
3 Resources has authority as a landlord, as the owner of  
4 public land, is it possible, in your understanding, the  
5 Board of Land and Natural Resources could help out the  
6 Water Commission by issuing orders where the Water  
7 Commission lacks the authority?

8 MR. WYNHOFF: Objection, vague and  
9 ambiguous, compound, hypothetical, argumentative.

10 THE COURT: It's asking for the witness's  
11 understanding on the subject. I'll allow it.

12 THE WITNESS: I'm sorry I didn't follow it.

13

14 BY MR. FRANKEL:

15 Q. Okay. If there's something the Water  
16 Commission cannot do, so, for example, if it does not  
17 have the statutory authority to order the modification  
18 of a diversion structure, absent a application, do you  
19 recognize the Board of Land and Natural Resources can  
20 step in and provide regulatory assistance to help the  
21 Water Commission?

22 MR. WYNHOFF: Same objections, and I guess  
23 assuming it gets overruled, then the question was  
24 supposed to be her understanding, but even if it is, I  
25 have the same objections.

1                   THE COURT: Yes, it's Chair Case's  
2 understanding is what the question is directed at.

3

4           A.        (By the witness) No, there's a lot of  
5 complicated procedures in these jobs, and so I can't  
6 answer your question without giving it some careful  
7 review.

8

9 BY MR. FRANKEL:

10           Q.       And you do not recall the Sierra Club ever  
11 raising this issue to you at any Board of Land and  
12 Natural Resources meeting ever before?

13           A.       I don't recall.

14           Q.       Okay. You talked about Dr. Strauch's great  
15 expertise with the Water Commission. Do you know who  
16 Ruben Wolf is?

17           A.       No.

18           Q.       Do you know he works for you?

19           A.       I am not familiar, I haven't worked with  
20 him directly.

21           Q.       Okay. Is it possible he works at the  
22 Division of Forestry and Wildlife?

23           A.       I -- I don't know him.

24           Q.       Okay. If you could take a look at  
25 Exhibit S-5, that's DLNR's Exhibit 5.

1 THE COURT: Since you're going to a new  
2 area, I am going to take a break now, we'll split our  
3 time between when we started this session and the end of  
4 the day.

5 Take 10 minutes now. See you all back here  
6 at 20 after.

7 We're in recess.

8 (Recess taken at 3:11 p.m.)

9 (Reconvened at 3:21 p.m.)

10 THE COURT: We're back on record.

11 FTR on?

12 THE BAILIFF: Yes.

13 THE COURT: All counsel are present,  
14 witness is present.

15 Please continue.

16 MR. FRANKEL: Thank you, Your Honor.

17

18 BY MR. FRANKEL:

19 Q. Just a quick look at Exhibit S-5. You've  
20 seen this document before, and this exhibit has been  
21 admitted into evidence for very a limited purpose.

22 Ms. Case, you've seen this document before;  
23 right?

24 A. Let me pull it up.

25 Yes.

1 Q. And if you turn to page 3 of this document,  
2 you'll see that it's written by Stephen Gingrich and  
3 Ruben Wolf, you see that?

4 A. I see that.

5 Q. And if, if Ruben Wolf works for your  
6 Department of Land and Natural Resources, division of  
7 forestry and wildlife, he might have some expertise that  
8 would complement expertise that Dr. Strauch has, right,  
9 but he's in a different division?

10 MR. WYNHOFF: Objection, vague, ambiguous,  
11 compound, hypothetical.

12 THE COURT: Rephrase. He might have.

13 MR. FRANKEL: That's all right.

14 THE COURT: He might have some expertise?

15 MR. FRANKEL: Well, if you look at the --  
16 okay.

17

18 BY MR. FRANKEL:

19 Q. Ms. Case, you read this report, you've  
20 relied on it, haven't you?

21 A. Yeah, I've seen it, yes.

22 Q. And it's a pretty complicated scientific  
23 report, isn't it?

24 A. Yep, it's a technical report.

25 Q. And Ruben Wolf is one of the authors?



1           A.       Looks like it.

2           Q.       I'll leave it at that, and Skippy Hau and  
3 Glenn Higashi have expertise that are part of the  
4 Department of Land and Natural Resources expertise,  
5 aren't they?

6           A.       Yes.

7           Q.       All right let's move on.

8                    We've talked about the protection mandate,  
9 now let's talk about the reasonable and beneficial  
10 portion of dual mandate, and let's talk about the waters  
11 of what Mahi Pono needs from East Maui streams to  
12 irrigate its crops.

13                   How much water did Mahi Pono tell you it  
14 needed to irrigate each acre of its crops in 2020?

15          A.       I believe we have a report on that that  
16 came in on the spring.

17          Q.       Okay, that's great, and we'll get there,  
18 but let's back up a step, because it's for the year  
19 2020, so it would be the 2019 meeting. How much water  
20 did Mahi Pono tell you in 2019 that it needed to  
21 irrigate each acre of its crops?

22          A.       That wasn't before the Board.

23          Q.       So are you saying -- so, well the revocable  
24 permit --

25          A.       It was discussed at the Board meeting, and

1 so the Board put in the condition asking them to report  
2 on water usage.

3 Q. So at that point you didn't have any  
4 information on water usage, did you?

5 A. We had information -- we had the condition  
6 that the water usage meet the IIFS and there be no  
7 waste.

8 Q. Okay. But at the 2019 meeting, did the  
9 Board of Land and Natural Resources know how much water  
10 Mahi Pono needed to irrigate each acre of its crops, yes  
11 or no?

12 A. Not at that level of detail.

13 Q. Okay. And did BLNR ever determine how much  
14 water per acre was reasonable for Mahi Pono to use for  
15 2020, yes or no?

16 A. That wasn't part of the analysis. The  
17 reasonable and beneficial use was, agriculture is a  
18 reasonable and beneficial use.

19 Q. Right, okay, but you didn't -- you didn't  
20 break it down in terms of determining how much water was  
21 a reasonable amount of water to use per acre, did you?

22 A. No.

23 Q. And the board could have limited the amount  
24 of water used for irrigation purposes to 2,500 gallons  
25 per acre, but you didn't, did you?



1

2           A.        (By the witness) I'm sorry, I'd have to  
3 look back at the decision to confirm that --

4

5 BY MR. FRANKEL:

6           Q.        Okay.

7           A.        -- your statement.

8           Q.        And we'll talk about it in closing  
9 argument.

10                    Did the Board of Land and Natural Resources  
11 ever determine that losses of more than 22.7 percent  
12 would ever be acceptable?

13           A.        No. That wasn't a determination.

14           Q.        Okay. Now, so I'd like you to take a look  
15 at Exhibit J-27. Tell me when you're there.

16           A.        I'm there.

17           Q.        Let's turn to page 7 of the Bate stamp  
18 number.

19                    Well, that's not right, 8 of the Bate stamp  
20 number.

21                    Are you there?

22           A.        Yes.

23           Q.        So you seat third column of this table  
24 talks about the 22.7 percent loss, and there's a  
25 calculation to quarterly average for system losses with

1 6.31, you see that?

2 A. Yes.

3 Q. And the last column includes evaporation as  
4 well, so we don't know how much more is evaporated, do  
5 you see that?

6 A. Yes.

7 Q. So system losses for the first quarter of  
8 2020 were greater than 22.7 percent; right?

9 A. I'm sorry, where are you? What are you  
10 calculating?

11 Q. Well there's a system loss in the third  
12 column, it says system loss, but there's also  
13 evaporation which is a system loss in the last column,  
14 and we don't know what that number is, but we know if  
15 it's in the last column, that system losses are greater  
16 than the 6.31 or 22.7 percent that's reflected in the  
17 third column.

18 MR. WYNHOFF: Objection, argumentative,  
19 misstates the testimony and the evidence.

20 THE COURT: That's compound and hard to  
21 follow. Break it down. Rephrase.

22 MR. FRANKEL: Okay.

23 (Continued on the next page.)

24

25 BY MR. FRANKEL:

1 Q. So the third column reflects system losses  
2 of 22.7 percent; right? Are you there, Ms. Case?

3 A. I, um, I'm seeing the 6.31 and the heading  
4 that says 22.7 percent as cited in the CWRM D&O.

5 Q. So those are all system losses, right, the  
6 6.31; right?

7 A. Yeah.

8 Q. Now, in the last column, the title  
9 includes, the third term there is evaporation, and the  
10 Water Commission has recognized that evaporation is part  
11 of system losses; right?

12 A. Yes.

13 Q. So A&B, EMI, Mahi Pono, whoever we're  
14 talking about here, has determined that system losses  
15 for the first quarter of 2020 were greater than 22.7  
16 percent; right?

17 MR. WYNHOFF: Argumentative, misstates the  
18 record or the document, I meant, I'm sorry.

19 THE WITNESS: I'm not following you, sorry,  
20 I shouldn't respond. Sorry.

21 THE COURT: I think the question boiled  
22 down is, evaporations in the last column, so if you add  
23 that to column No. 3, where's that leave you?

24 MR. WYNHOFF: But that's not what the  
25 document does, and Your Honor, that's why it misstates

1 the document.

2 THE COURT: It says evaporate. I don't  
3 want to do the questioning, but, Mr. Frankel, you can  
4 simplify it to get an answer, so why don't you do that.

5 MR. FRANKEL: Okay.

6

7 BY MR. FRANKEL:

8 Q. System losses in the first quarter of 2020  
9 exceeded 22.7 percent, didn't they?

10 A. I'm not -- I'm not seeing that.

11 Q. All right. That's fine.

12 BLNR has never determined that losses of  
13 greater than 22.7 percent was acceptable, has it?

14 A. I don't know what you're referring to.

15 Q. Well, system losses, the Water Commission  
16 determined 22.7 percent was acceptable, and the Board of  
17 Land and Natural Resources never determined that losses  
18 greater than 22.7 percent were acceptable, has it? I'm  
19 not looking at the document.

20 A. That's -- that's right, there's no separate  
21 determination there.

22 Q. Okay. And you don't need to look at the  
23 documents for now.

24 And, in fact, the Board of Land and Natural  
25 Resources has never made its determination as to how

1 much water would be a reasonable quantity of water for  
2 EMI to lose, has it?

3 A. No, the Water Commission made an analysis  
4 of that.

5 Q. Okay.

6 A. So that Water Commission decision was  
7 incorporated into the Land Board decision.

8 Q. Okay. And now so some of the water that's  
9 lost comes from East Maui streams; correct?

10 A. Yes.

11 Q. Now, you testified last week, when  
12 Mr. Wynhoff was talking to you, that the BLNR  
13 specifically discussed system loss at its meeting. If  
14 the transcript is different than your memory, are you  
15 willing to defer to the transcript?

16 A. Uh, yeah, I defer to the transcript.

17 Q. Okay. Has Mahi Pono ever explained to the  
18 board why it cannot line its reservoirs to reduce system  
19 loss, has Mahi Pono explained that to you, yes or no?

20 A. I don't recall.

21 Q. Okay. And looking again at Exhibit J-27,  
22 sorry, the last column that's titled, reservoir, fire  
23 protection, evaporation, pest control, hydroelectric,  
24 you don't really know what happened to this 16.44  
25 million gallons per day, do you?



1           A.       Excuse me, I'm pulling it up again.

2           Q.       Okay.

3           A.       It's not broken down, if that's what you're  
4 saying.

5           Q.       Well, so where does it go after it's used  
6 by the hydroelectric plant? It doesn't disappear;  
7 right?

8           A.       It remains in the system.

9           Q.       And then how's it used?

10          A.       Same way the system is used.

11          Q.       So you think looking at this chart, you  
12 have a firm understanding of how this water is used,  
13 how --

14          A.       No, it's not broken down.

15          Q.       Okay. So does the Board of Land and  
16 Natural Resources know, looking at this chart, how the  
17 end use of this water, how much is actually used as  
18 consumptive use?

19          A.       The Board hasn't seen this chart, the Board  
20 asked for the report to be made to the staff.

21          Q.       Right.

22          A.       So after the decision, that was a condition  
23 of the decision.

24          Q.       That's right, that's right.

25          A.       It's not before the Board right now.

1 Q. So let's take a look at Exhibit 111.  
2 That's Sierra Club's 111.

3 THE COURT: That's already in.

4 MR. FRANKEL: Right.

5

6 BY MR. FRANKEL:

7 Q. Now, regardless of whether your attorneys  
8 have seen this document, if you turn to page 6 of it,  
9 have you ever seen this before?

10 MR. WYNHOFF: May I understand what we're  
11 talking about as far as page 6, 6 of 8?

12 MR. FRANKEL: 6 of 8, thank you. It's  
13 titled Exhibit A at the bottom of the document.

14 Thank you, Bill.

15 A. (By the witness) I can't recall.

16

17 BY MR. FRANKEL:

18 Q. This table is interrogatory response, was  
19 it provided to the Board of Land and Natural Resources  
20 at its 2019 meeting?

21 A. I can't recall.

22 Q. But if it was, it would be in the staff  
23 submittal; right?

24 A. I can't recall.

25 Q. All right. So you know what, let's look at

1 what information the Board actually had before it. let's  
2 look at Exhibit J-21, which is the staff submittal, and  
3 look at page 96 of that document.

4 So Exhibit J-21.

5 A. Okay.

6 Q. So --

7 A. What page are you on?

8 Q. Sorry, page 96.

9 A. Okay.

10 Q. There? So, you know, this -- this isn't  
11 like that table we just looked at, the interrogatory  
12 response, and it's not like the table you're getting in  
13 quarterly reports from Mahi Pono now, instead you have a  
14 little bit of narrative, you see that in italicized  
15 there under No. 3?

16 A. Yes.

17 Q. And you relied on this information that was  
18 provided to you from Alexander and Baldwin, didn't you?

19 A. Yes, it was part of the submittal.

20 Q. And this A&B told you that it was using  
21 East Maui stream water to irrigate 6,500 acres of  
22 irrigated pasture, do you remember that at all?

23 A. I do.

24 Q. And you made no effort to verify whether it  
25 actually needed East Maui stream water to irrigate the

1 pasture, did you?

2 A. Needed East Maui water?

3 Q. Mm-hm.

4 A. I don't know what you mean that.

5 Q. Sure. Well let's look at the second  
6 italicized paragraph, Meredith Ching's response there,  
7 it says:

8 The current need for water -- need -- for  
9 East Maui water streams averages approximately 27  
10 million gallons per day, do you see that?

11 A. Yeah.

12 Q. And then it goes on to describe how this  
13 water's use, and it includes at the end of that  
14 paragraph there, 6,500 acres of irrigated pasture.

15 A. Okay.

16 Q. You see that?

17 A. Yes.

18 Q. So my question to you again is, did the  
19 Board of Land and Natural Resources make any effort to  
20 verify whether Mahi Pono or A&B or EMI actually needed  
21 this water to irrigate pasture?

22 A. I don't understand what you mean by  
23 "needed". This was an authorized use, it was well  
24 within the IIFS, and this is what their representation  
25 to the Board was.

1 Q. And you now know that that representation  
2 was not accurate; right? They were not irrigating any  
3 pasture in 2019, you heard Grant Nakama's testimony on  
4 that?

5 A. I did.

6 Q. So actually the Board made its decision in  
7 2019 without knowing how many millions of gallons of  
8 water diverted from streams was actually being used, did  
9 you?

10 A. We made our decision based on the  
11 representations, and the need for flexibility in Mahi  
12 Pono's grow-out of its farm operation.

13 Q. You relied on the representations; correct?

14 A. Yes.

15 Q. And at least one of the representations was  
16 clearly not accurate; correct?

17 A. Uh, according to their testimony, in  
18 retrospect, it may not have been accurate, but it is  
19 still within the authorized uses for this water and the  
20 anticipated grow-out that Mahi Pono was working on.

21 Q. But in determining whether Mahi Pono  
22 actually needed the water, it would help if you had  
23 accurate representations of how it was actually being  
24 used, wouldn't it?

25 A. Well, Board wants to make sure that it's

1 being used in the right way and not being wasted. So if  
2 it's not using it to irrigate pasture, then, but it's  
3 not being wasted, it's not a problem.

4 Q. But if it is being wasted, it is a problem,  
5 isn't it?

6 A. Well, there's no evidence of waste.

7 Q. Well, if more than 22.7 percent of the  
8 water is being lost in the system, some people might  
9 call that waste; right?

10 A. Some might, but it's not necessarily called  
11 waste, depending on what's actually going on with that  
12 water.

13 Q. And the Board has never made such a  
14 determination, has it?

15 A. The Board did not have any evidence of  
16 waste.

17 Q. Because it hadn't gathered any information  
18 prior to its meeting as to how the water was actually  
19 being used; isn't that right?

20 A. It's -- that's not necessarily true.

21 Q. All right. Let's -- let's change, talk  
22 about debris of public land in East Maui.

23 At the Board of Land and Natural Resources  
24 meeting in 2018, Lucienne de Naie and Marti Townsend  
25 testified about trash in the revocable permit area. Do

1 you recall that?

2 A. I recall that they testified about what  
3 they referred to as trash.

4 Q. And that was in 2018; correct?

5 A. Yes.

6 Q. And you said that BLNR imposed a condition  
7 in the revocable permit requiring A&B to deal with the  
8 trash; right?

9 A. Yes.

10 Q. That's what you testified to this Court  
11 last week; correct?

12 A. I can't remember.

13 Q. And you testified that it was a good  
14 response to the trash complaints, didn't you?

15 A. I -- I don't recall.

16 Q. All right. Ms. Case, that condition was  
17 actually imposed in 2017, wasn't it?

18 A. Uh, well, if it was imposed in 2017, I  
19 believe it was cumulative.

20 Q. Well, what do you mean by cumulative?

21 A. I have to go back and look at the actual  
22 decision, but I know that some of the decisions have the  
23 wording that these additional conditions are being met,  
24 are being required.

25 Q. Okay. So let's look at Exhibit J-13 at 13.

1                   Are you there?

2           A.       Yes.

3           Q.       You at page 13? So do you see the last  
4 condition that was added to the motion on page 13 of  
5 Exhibit J-13 is about A&B needs to clean up their  
6 debris, starting with more accessible areas in long  
7 streams, do you see that?

8           A.       Yes.

9           Q.       So given that Ms. Townsend and  
10 Ms. de Naie testified in 2018, BLNR did nothing in  
11 response to the photographs -- photographs of trash and  
12 testimony, did it?

13          A.       Well, first of all, it's not clear whether  
14 something is trash or not, and second of all, we have  
15 asked A&B to follow-up on them and remove anything  
16 that's -- that's actually trash.

17          Q.       And in 2018 you did not ask anyone on your  
18 staff to investigate whether debris littered public  
19 lands in East Maui, did you?

20          A.       I don't recall, not specifically, but we  
21 did ask A&B to follow-up and make sure there was not  
22 trash.

23          Q.       My question to you is, you did not ask  
24 anyone on your staff to investigate, determine whether  
25 debris littered the public lands on East Maui, did you?



1           MR. WYNHOFF: Asked and answered, asked and  
2 answered, he just asked the exact question and got an  
3 answer.

4           THE COURT: I think that's right.

5           Just looking at the Q and A, she said not  
6 specifically but, et cetera.

7

8 BY MR. FRANKEL:

9           Q.       So the answer's no --

10          A.       Let me say, I am not sure I did in the  
11 meeting, but I'm not sure I didn't as a follow-up to the  
12 meeting because we often do that.

13          Q.       All right. So do you remember sitting  
14 through a deposition that I conducted?

15          A.       Yes, I do.

16          Q.       And you've actually had to sit through a  
17 couple depositions with me, one in this case and one in  
18 Pohakuloa, do you remember that?

19          A.       Yes, I do.

20          Q.       So let's take a look at Exhibit 126, Sierra  
21 Club's Exhibit 126.

22                 THE COURT: So that one is not in; right?

23                 MR. FRANKEL: It's a deposition transcript,  
24 Your Honor.

25                 THE COURT: All right. Sorry, never mind.

1

2 BY MR. FRANKEL:

3 Q. So if you could turn to page 17 of the  
4 transcript.

5 A. Yeah.

6 Q. So at the top of the page there, starting  
7 on line 3, the question:

8 Okay. And my question again is the efforts  
9 that BLNR and DLNR engaged in.

10 My question is not what A&B did or EMI did,  
11 my question is, what did BLNR and DLNR do to discover  
12 whether there is discarded material on the revocable  
13 permit parcels?

14 And your answer then is, I don't recall;  
15 right?

16 A. That's correct.

17 MR. WYNHOFF: Objection, Your Honor.

18 Q. If you go down to --

19 MR. WYNHOFF: Objection, that this is not a  
20 proper use of a deposition, Your Honor, and I object  
21 because what he needs to do is ask a question and  
22 then --

23 THE COURT: No long speaking objections.  
24 You can say improper use of depo and --

25 MR. WYNHOFF: Because it's not

1 inconsistent.

2 THE COURT: Fine.

3 MR. FRANKEL: And --

4 THE COURT: It's not the same question,  
5 Mr. Frankel.

6 MR. FRANKEL: I absolutely agree,  
7 Your Honor.

8 Now we go down to page 19.

9 MR. WYNHOFF: Object, Your Honor, then I  
10 object and ask the previous question and all of  
11 Mr. Frankel's reading be -- that part of it to be  
12 stricken, please.

13 THE COURT: Let's move on.

14 MR. FRANKEL: Thank you, Your Honor.

15 MR. WYNHOFF: May I have it stricken or no,  
16 Your Honor, please.

17 THE COURT: We don't strike things that are  
18 in the record.

19

20 BY MR. FRANKEL:

21 Q. So starting on page 18, line 8, are you  
22 there?

23 A. Yes.

24 Q. The question is, Have you ever asked the  
25 managers or staff at Land Division to conduct an

1 inspection to see if there's discarded material on site,  
2 do you see that?

3 A. Yes.

4 Q. And your answer is no; right?

5 MR. WYNHOFF: Objection, still not the same  
6 question, Your Honor, it's not inconsistent, and I'd ask  
7 that it be stricken.

8 Your Honor, I have to -- I have to, it's  
9 immaterial, that's my only remedy for when something is  
10 read into the record when it's not a proper question.

11 THE COURT: The objection is sustained, but  
12 I'm not striking it.

13

14 BY MR. FRANKEL:

15 Q. Okay. So then we'll just go ahead and cut  
16 to the chase.

17 Line -- page 19, line 2, says: Okay, but  
18 that's not my question. My question -- my question is,  
19 have you asked anyone on your staff to investigate, and  
20 your answer then was, No.

21 See that?

22 A. Yes.

23 Q. Thank you.

24 MR. WYNHOFF: Your Honor, again the  
25 question, he didn't ask -- the question now, if you look

1 at what the antecedent to it is, it's still not the same  
2 question and I object.

3 THE COURT: Well, the question that may or  
4 may not be the same was so long ago, I don't remember.

5 So, Mr. Frankel, you know how to do this,  
6 why are you floundering around like this, let's get to  
7 it, do it efficiently.

8 MR. FRANKEL: Because there needed to be  
9 context for it.

10 THE COURT: I'm not interested in context  
11 when you're trying to use a prior sworn statement to  
12 impeach.

13 Ask the same question, if you get a  
14 different answer, then pull out the transcript.

15 MR. FRANKEL: Okay.

16

17 BY MR. FRANKEL:

18 Q. So in 2018, you did not ask anyone on your  
19 staff to investigate whether debris littered public  
20 lands in East Maui, did you?

21 A. I -- I don't recall, but you know, conduct  
22 an investigation, do a site visit versus follow-up to  
23 make sure, those are all three different things.

24 Q. My question was, did you ask anyone on your  
25 staff to investigate? I didn't use the word conduct an

1 investigation, I said to investigate.

2 A. Well to investigate is a pretty technical  
3 term.

4 Q. And your answer today is, yes or no?

5 A. I don't recall.

6 Q. So if you look at your deposition  
7 transcript from 2019, would that help refresh your  
8 recollection?

9 A. I see that I said no.

10 Q. All right. Let's move on.

11 MR. FRANKEL: And I'm very close to the  
12 end, Your Honor just to assure you.

13

14 BY MR. FRANKEL:

15 Q. In 2018 A&B tells DLNR that besides the  
16 abandoned tractor it removed, there was little debris in  
17 the area, does that sound familiar?

18 A. Yes.

19 Q. And in 2019 the Sierra Club filed this  
20 suit, does that sound right?

21 A. Yes.

22 Q. By September 2019, A&B tells DLNR it had  
23 recovered several hundred feet of old pipe, several old  
24 wooden gates and remnants of steel and concrete, didn't  
25 it?



1 up begin after the Sierra Club filed suit?

2 A. (By the witness) I don't know.

3

4 BY MR. FRANKEL:

5 Q. All right. Has BLNR taken any enforcement  
6 action of any kind to ensure that A&B cleans up the  
7 mess, the debris left in and around East Maui streams?

8 MR. WYNHOFF: Objection, assumes facts not  
9 in evidence, argument is baked into that question.

10 THE COURT: Overruled. You may answer.

11 A. (By the witness) We haven't taken any  
12 enforcement action.

13 MR. FRANKEL: Thank you, Your Honor. I  
14 have no further questions.

15 THE COURT: All right. Thank you.

16 Back to you, Mr. Wynhoff.

17 MR. WYNHOFF: Thank you, Your Honor.

18 (Continued on the next page.)

19

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25



1

2 BY MR. WYNHOFF:

3 Q. So, I'm sorry if I'm going to jump around a  
4 little bit, Chair Case.

5 So let me just make sure that I reconfirm  
6 this. The 2019 permit limits A&B to 45 million gallons  
7 per day; right?

8 A. Correct.

9 Q. That's a maximum; right?

10 A. Correct.

11 Q. So is there anything in there that allows  
12 them to use 45 million -- to take 45 million  
13 dollars [sic] per day if they're not using?

14 THE COURT: You mean gallons, not dollars.

15 A. No.

16 MR. WYNHOFF: Thank you, Ms. Case, and  
17 thank you, Your Honor.

18

19 BY MR. WYNHOFF:

20 Q. So, Chair Case, would you look back at  
21 Exhibit 27, Sierra Club's Exhibit 27.

22 A. Yeah, yes.

23 Q. I know give me a second. I should have  
24 given myself a page reference with respect to this.

25 All right, I'm just going to withdraw that

1 question and move on.

2 Chair Case, we had, I think I asked you and  
3 also Mr. Frankel asked you about the Parham report that  
4 was included in the DEIS, do you recall that discussion?

5 A. Yes.

6 Q. So that was information that was available  
7 to the Board; right?

8 A. Yes, yes.

9 Q. And did you also see in the Parham report  
10 that he suggested that the proponents' withdraw of water  
11 results in a good balance between use and protection?

12 A. That sounds familiar, yes.

13 Q. Was that the issue that the Board was  
14 considering, trying to balance?

15 A. Yes.

16 Q. So when you were asked about -- so Mr.  
17 Frankel skillfully brought out that at certain times  
18 DAR had made the various recommendations, do you recall  
19 that, those questions?

20 A. Yes.

21 Q. And part of your answer was that DAR, DAR,  
22 and just so the record is clear, we're talking about  
23 Division of Aquatic Resources, DAR doesn't have the  
24 whole picture, did I hear you say that? Did I hear that  
25 correctly?

1                   MR. FRANKEL: Objection, cumulative,  
2 inappropriate question.

3           A.        Yes, that's what I said.

4                   MR. WYNHOFF: Wait, you have to let the  
5 Judge rule, Miss Case.

6                   THE COURT: Overruled.

7                   MR. WYNHOFF: Sorry.

8                   THE COURT: Overruled. I hope we can move  
9 on to new matters.

10           A.        (By the witness) Yes.

11

12 BY MR. WYNHOFF:

13           Q.        Can you explain what you mean by that?

14           A.        Well the Division of Aquatic Resources is  
15 focused on the stream life and not on the balancing of  
16 all of the instream uses and off stream uses.

17                   So their -- their advice and expertise is  
18 important to consider, but it's not -- it's not the  
19 final decision on what happens.

20           Q.        Do you recall that that exact discussion  
21 was contained in the CWRM's D&O?

22           A.        Yes.

23                   MR. WYNHOFF: I don't have any further  
24 questions, Your Honor. Thank you.

25                   THE COURT: Thank you Mr. Schulmeister.

1                   MR. SCHULMEISTER: Just one, and this has  
2 to do with the issue of jurisdiction over the diversion.

3

4

5

RECROSS-EXAMINATION

6

7 BY MR. SCHULMEISTER:

8           Q.       Mr. Frankel asked you a question about  
9 whether or not CWRM had the authority to, I guess,  
10 regulate diversion modifications if there was no  
11 application, and there was some back and forth about  
12 that, do you remember that?

13          A.       Yes.

14          Q.       But in the D&O, didn't the Water Commission  
15 specifically say that diversion structures only need to  
16 be modified to the degree necessary to accomplish the  
17 amended IIFS and to allow for passage of stream biota if  
18 needed and that would be --

19          A.       Yes, excuse me.

20          Q.       -- and that's at Bates 000219 of J-14.

21          A.       Yes, that was specifically laid out in the  
22 decision and order.

23          Q.       And in all of the proceedings that have  
24 subsequently occurred on diversion modifications, has  
25 A&B or EMI ever argued or contended that the Water

1 Commission doesn't have the authority to impose whatever  
2 conditions they need to with regard to these  
3 modifications?

4 A. No.

5 MR. SCHULMEISTER: No further questions.

6 THE COURT: Mr. Rowe?

7 MR. ROWE: I have no further questions for  
8 this witness, Your Honor. Thank you.

9 THE COURT: Back to you, Mr. Frankel.

10

11

12

RECROSS-EXAMINATION

13

14 BY MR. FRANKEL:

15 Q. Ms. Case, you talked about balancing the  
16 interest, the Board did not and still does not know  
17 precisely how Mahi Pono's using the water that it places  
18 in the amorphous category: Reservoir, fire protection,  
19 evaporation, pest control, hydroelectric, does it?

20 A. It's not broken down in that report.

21 Q. So you don't know?

22 A. I don't know what?

23 Q. So you don't know how the water -- the end  
24 use of the water, what the use of the water is?

25 MR. WYNHOFF: Asked and answered.

1 THE COURT: Overruled.

2 A. (By the witness) I don't have the  
3 breakdown of that.

4 MR. FRANKEL: Okay. Thank you. No further  
5 questions.

6 THE COURT: All right. Mr. Wynhoff?

7 MR. WYNHOFF: The State is done,  
8 Your Honor. We rest. Thank you, Ms. Case.

9 THE COURT: Let's take one thing at a time.  
10 Let's finish the testimony first.

11 MR. WYNHOFF: Sorry, Your Honor.

12 THE COURT: So no further questions?

13 MR. WYNHOFF: I don't have anymore  
14 questions, I don't, thank you. Just wishful thinking,  
15 Your Honor.

16 THE COURT: Mr. Schulmeister, you're next.

17 MR. SCHULMEISTER: I'll take the hint, no  
18 further questions.

19 THE COURT: Mr. Rowe?

20 MR. ROWE: No further questions,  
21 Your Honor. Thank you.

22 THE COURT: All right.

23 We're done.

24 MR. WYNHOFF: We rest, Your Honor.

25 THE COURT: Chair Case, you're certainly

1 welcome to continue to observe, but your testimony's  
2 concluded. Thank you.

3 THE WITNESS: Thank you.

4 MR. WYNHOFF: Thank you, Chair.

5 THE COURT: All right. State rests.

6 Okay now wait. At some point we need to  
7 circle back and have some clarity on A&B's exhibits  
8 before they fully and finally rest.

9 When do you folks want to do that? Is  
10 there further -- we're pau witnesses; right?

11 Everyone agree that there's no more  
12 witnesses to be called?

13 MR. FRANKEL: Yes.

14 MR. WYNHOFF: Yes, Your Honor.

15 THE COURT: Okay. Record should reflect  
16 all counsel indicate no further witnesses are intend.

17 So how about tomorrow morning, we can nail  
18 down the record and be done with that piece of this  
19 trial.

20 MR. WYNHOFF: Your Honor, of course, we'll  
21 be here. I actually had scheduled a couple of meetings  
22 I thought we were going to be dark that day.

23 THE COURT: We don't have to do it at 9:00.

24 MR. WYNHOFF: Afternoon?

25 THE COURT: We don't have to do it at 9:00,

1 I'd happy to accommodate everybody's schedule, as long  
2 as there's not too much of a delay.

3 MR. WYNHOFF: Afternoon? I actually  
4 scheduled meetings back-to-back-to-back-to-back all  
5 morning.

6 And absolutely, this is No. 1, obviously, I  
7 would break if we could do it in the afternoon, that  
8 would be preferable to me.

9 THE COURT: How about 1:30?

10 MR. WYNHOFF: Fine. Thank you, Your Honor.

11 THE COURT: I see everybody nodding. At  
12 1:30 tomorrow we will finish the issues of which of the  
13 exhibits that A&B is offering, that will be admitted  
14 into evidence.

15 One other thing I want you folks to think  
16 about is, you know, to the extent that I have excluded  
17 exhibits already or exclude some of A&B's tomorrow, we  
18 need to have an agreement on protocol of how we're  
19 going -- to make sure those excluded exhibits are part  
20 of the record, so that an appellate court can review my  
21 ruling.

22 Because right now they're just sitting in  
23 the cloud, or at least some of them are. Some of them  
24 are attached to motions and so on and so forth, but I  
25 think we need to be careful to make sure we make a



1 complete record on anything I'm excluding, so I'm asking  
2 you folks to give that some thought.

3 MR. FRANKEL: You have the hard copies.  
4 You have the hard copies of them all, Your Honor.

5 THE COURT: Yes. So, I guess you're  
6 implying that I would load them or --

7 MR. FRANKEL: I don't know how you guys  
8 prepare the records when they go up, but I thought  
9 that's what was done, I don't know.

10 THE COURT: Okay. All right. Give it some  
11 more thought. There might be an easier way to do. I'm  
12 still, frankly, wondering whether it might be easier to  
13 do it digitally, but we'll figure it out, it's just  
14 logistics.

15 All right. Other than that, and the  
16 exhibits that I decide on tomorrow, what other things  
17 should we be prepared to discuss tomorrow afternoon,  
18 just so everybody's on the same page on what they need  
19 to be ready for, I see Mr. Frankel.

20 MR. FRANKEL: I have --

21 THE COURT: Go ahead.

22 MR. FRANKEL: I have a lengthy agenda.

23 No. 1, you have to issue a ruling on the  
24 Glenn Higashi issue, the memos on that, you gave an  
25 inclination.

1           You got to give us a date for the findings  
2 of fact. We got to figure out a date for the closing.

3           We have -- I mentioned once that we would  
4 like to be able to use the WebEx in closing arguments to  
5 put exhibits up and find out from you folks whether  
6 that's technologically possible and whether or not  
7 that's acceptable to you.

8           We would also like to ask, I assume the  
9 witness exclusion rule is over at this point, I think  
10 that's a fair conclusion to draw, so we'd like to ask  
11 the Court if the closing arguments could be live  
12 streamed, similar to how the Carmichael arguments, I  
13 think you had something with -- anyway, if that could be  
14 done.

15           THE COURT: Well, on that last point, you  
16 know, we were live streaming hearings routinely, using a  
17 Youtube channel, but then I don't have any firsthand  
18 knowledge of this, but apparently, that was discontinued  
19 because we didn't have any adaptive accommodations for  
20 like what is it for?

21           THE BAILIFF: Closed captioning.

22           THE COURT: Sign language; right? So it  
23 was deemed to be -- or at least there was a concern  
24 raised that it violated the law to live stream court  
25 hearings without signing. So it was discontinued as a

1 judiciary policy. So I'm certainly not going to buck  
2 that.

3 I haven't seen any kind of written order on  
4 that, but it is certainly the sort of shared knowledge  
5 in the building that we're not supposed to be  
6 transmitting these things over Youtube until they get  
7 the signing issue squared away out of respect for people  
8 with disabilities, which is a good goal.

9 That said, I don't have any problem with  
10 people listening in. So anyone you know who might want  
11 to listen in is welcome to, we'll just give them the  
12 dial-in info.

13 MR. FRANKEL: What's your maximum capacity  
14 of people who can call in?

15 THE COURT: I've heard up to dozens and  
16 dozens and dozens. We don't think there's any realistic  
17 capacity limitation.

18 MR. FRANKEL: Well, I guess then, I guess  
19 all of our boxes get smaller and smaller until we can't  
20 even see each other.

21 THE COURT: Okay.

22 All right. So just -- I don't want our  
23 court reporter to have to work too much later if she  
24 doesn't have to.

25 Is there anything else just to be on the

1 agenda for tomorrow that we need to put on the record,  
2 or can we go off record now? Yes, Mr. Wynhoff.

3 MR. WYNHOFF: I think it might be a good  
4 idea if we compared notes about the exhibits. We could  
5 do that tonight and in the morning, and then just  
6 confirm on the record what's in, it's pretty standard  
7 procedure.

8 THE COURT: Right, we can do that.

9 MR. FRANKEL: I'll e-mail all everybody  
10 tonight in a couple minutes, and then you guys can look  
11 at it and see where I'm wrong.

12 MR. WYNHOFF: Thank you, Mr. Frankel.

13 THE COURT: Send a copy to Tara, and I'll  
14 compare what she gets with my list and the Court Clerk's  
15 list which is the only official list.

16 All right. Anything else to put on the  
17 agenda for tomorrow? Seeing nothing further.

18 We are off record, and you are thanked and  
19 excused.

20 MR. WYNHOFF: Yeah, again, I think we all  
21 want to really thank all of your staff, Your Honor, and  
22 again, most especially the court reporter.

23 Thank you all very much, very much, and  
24 Tara, too.

25 MS. GOLDMAN: Thank you, Your Honor.

1                   MR. WYNHOFF: Oh, yeah, and you, that's  
2 right, thank you, Your Honor.

3                   (Proceedings concluded at 4:06 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.

13

14

15 Dated this 17th day of August, 2020.

16

17 OFFICIAL COURT REPORTER

18

19

20

/s/ Nikki Beaver Cheang

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NIKKI BEAVER CHEANG, CRR, CSR-340

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