

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

<hr/>)	
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.)	
<hr/>)	

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JEFFREY P. CRABTREE Judge, Sixth Division, presiding, on Thursday, September 24, 2020.

CLOSING ARGUMENTS

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

1 moved.

2 Okay. Everyone else is showing movement,
3 but Mr. Frankel's image is just totally frozen, so I
4 think we have a band width problem.

5 THE CLERK: Judge, I think we have to dial
6 in again.

7

8 THE COURT: Does he just need to call back
9 in?

10 THE CLERK: So they're all there, but it's
11 just the line is not showing on here.

12 THE COURT: Okay. Mr. Frankel, I don't
13 know if you can hear me, if you can, you're going to
14 need to come back in again.

15 (Break.)

16 THE COURT: We're back, we had to redial
17 our WebEx connection, so we're back in. Can everyone
18 hear me?

19 MR. WYNHOFF: Good morning, Your Honor.

20 THE COURT: Here we go.

21 Recall the case. Thank you.

22 THE CLERK: Recalling the case now, 'cause
23 of our technical difficulties, before the Honorable
24 Jeffrey Crabtree in the First Circuit, Sixth Division on
25 this September 24th, 2020.

1 Calling Civil case No. 19-1-0019, Sierra
2 Club versus Board of Land and Natural Resources for
3 closing arguments.

4 Appearances of counsel first, please.

5 MR. FRANKEL: Good morning, Your Honor.
6 David Frankel and Marti Townsend here for the Sierra
7 Club.

8 THE COURT: Good morning. Mr.
9 Schulmeister, go ahead.

10 MR. SCHULMEISTER: Good morning,
11 Your Honor. David Schulmeister and Trisha Akagi for A&B
12 and EMI.

13 THE COURT: Good morning. Mr. Wynhoff.
14 Not hearing you, you're muted.
15 Okay. Go ahead.

16 MR. WYNHOFF: Your Honor, good morning.
17 William Wynhoff, Deputy Attorney General, on behalf of
18 the State of Hawaii. I'd like to note that Melissa
19 Goldman, my colleague, and Lauren Chun are also here.
20 I believe that Linda Chow may be in and out.

21 I would note for the Court that to the best
22 of my knowledge, Board members Suzanne Case, James Gomes
23 and Chris Yuen are also listening in, and I'm quite
24 certain that there's a number of other people from the
25 DLNR.

1 THE COURT: All right. Thank you.

2 Welcome, everybody.

3 Mr. Rowe, go ahead.

4 MR. ROWE: Good morning, Your Honor.

5 Deputy Corporation Counsel Caleb Rowe on behalf of the
6 County of Maui.

7 My boss Moana Lutey who is the head
8 corporation counsel will also be coming on, and she will
9 not be participating, but she will be observing.

10 THE COURT: All right. Thank you, and
11 she's welcome, of course.

12 All right, then we have, I'm guessing,
13 about 15 or 20 people who are listening. I'm not going
14 to put all their names on the record at this point, but
15 you do need to remain signed in under an identified
16 account, we don't let people listen in if they're not
17 willing to identify themselves, so thank you everyone.

18 So the court reporter is asking that if
19 you're not speaking, please mute yourself in your own
20 office 'cause we're getting a lot of feedback in here.

21 Mr. Schulmeister, you're not muted, please
22 do so.

23 We have a lot of people listening in who
24 are not muted, we need you to mute yourselves, please.

25 THE CLERK: I'm just muting everybody.

1 THE COURT: We're just going to have to
2 universally mute everyone 'cause we're just getting too
3 much feedback in here.

4 MR. WYNHOFF: Nobody that isn't muted is
5 muting themselves. Well, I see one person did.

6 THE COURT: Well we're going to mute
7 everyone, and we'll just have to mute each person as
8 it's their turn to speak.

9 Okay. Mr. Frankel.

10 MR. FRANKEL: It's a lot better now.

11 THE COURT: It is. All right. We're good
12 to go on our end. Thank you everyone for your patience.

13 MR. WYNHOFF: It is better.

14 THE COURT: Mr. Frankel, you ready to go?

15 Mr. Frankel, can you hear me?

16 MR. FRANKEL: We can't hear you, Your
17 Honor. You're muted.

18 THE COURT: Oh, 'cause I'm muted, hang on.
19 I'll unmute myself.

20 Okay. Still getting a little used to this
21 even after five, six months.

22 Okay, Mr. Frankel, you ready to go?

23 MR. FRANKEL: Yes, I am, Your Honor.

24 THE COURT: All right. Go ahead.

25 (Continued on the next page.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CLOSING ARGUMENT

MR. FRANKEL: Our streams are public trust resources, that has been the black letter law of this state for more than four decades.

The State may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence and foresight, commensurate with a high priority these rights command under the laws of our state.

This principle was articulated by the Supreme Court in the *Waiahole* decision 20 years ago. It was repeated in the *Waiahole* decision in 2004. It was repeated in *Kelly* decision in 2006. It was repeated in the *Kukui* decision in 2007.

Agencies must take the initiative in considering, protecting and advancing public rights and the resource at every stage of the decision making process.

All those cases articulate and rearticulate this principle, as well as in the case of *Iao* and *Kauai Springs*.

Although this has been black letter law in this state for the past two decades, the Board of Land and Natural Resources has repeatedly ignored its legal

1 duties, whether out of ignorance or apathy, BLNR has:

2 1. Failed to protect 13 streams.

3 2. Failed to address the harmful diversion
4 structures on public land.

5 3. Failed to scrutinize A&B's request for
6 public water from these streams; and

7 4. BLNR failed to make sure that A&B
8 cleaned all its mess that litters public land.

9 I'm going to discuss these four points
10 today, but before doing so, just a little bit of
11 context.

12 The demand for water from east Maui streams
13 has been increasing. In 2017, 23.99 million gallons of
14 water a day were taken from east Maui streams. In 2018,
15 that increased to 25.75 million gallons a day. In 2019
16 it increased again to 27 million gallons a day, and this
17 year, in 2020, A&B and EMI and Mahi Pono have requested
18 that they be allowed to take 45 million gallons of water
19 per day on average.

20 All right, given that context, let's look
21 at each of the issues. First, BLNR failed to protect
22 streamflow within 13 streams.

23 More than three decades ago the Water
24 Commission set flow standards for all the streams in
25 east Maui.

1 The status quo standard was, Water was
2 flowing in the water on June 15, 1988, the height of the
3 summer.

4 As the Water Commission's Ayron Strauch
5 explained, his testimony is August 17th:

6 The status quo standard was based on
7 existing diversions, and not on the biological,
8 ecological or recreational values.

9 Your Honor, I provided the Court and all
10 the parties with an exhibit, a PDF of a number of the
11 documents, exhibits in evidence and transcripts, and the
12 first two pages that I provided to you are the
13 transcripts of Ayron Strauch's testimony, that's exactly
14 what he testifies to on page 76 and 77 of his testimony,
15 August 17th.

16 Those standards did not protect the
17 biological, ecological, recreational value of those
18 streams. The Water Commission itself explains on its
19 website, which is the third page of the documents I
20 provided to you, and it's Exhibit S-78:

21 The status quo interim instream flow
22 standards were not adequate to protect streams.

23 As the Hawaii Supreme Court explained in
24 its *Waiahole* decision:

25 The status quo standards did nothing more

1 than ratify the major diversions already existing.

2 The status quo standards were based on
3 existing diversions, rather than on the basis of the
4 biological or ecological value of the streams.

5 And that excerpt is provided to you in the
6 fourth page of the exhibits I've provided to the Court
7 and all the parties today.

8 The diversion structures on these streams
9 were designed to take all the water, most the time. As
10 the Division of Aquatic Resources concluded, this is
11 Exhibit S-19 at page 29, it's the fifth page of the
12 documents I provided. The diversions resulted in 100
13 percent removal of water approximately 70 to 80 percent
14 of the time.

15 The Water Commission's 2018 decision
16 provides no protection to these 13 streams. As Chair
17 Case admitted, this is the August 17th transcript, page
18 48, page 6 of the documents I provided to you.

19 13 streams fought the subject of the Water
20 Commission contested case hearing.

21 Nor, this is on the next page of the
22 transcript as Chair Case testified, Nor did the Water
23 Commission discuss the biological or recreational value
24 of these 13 streams in its decision.

25 Among these 13 streams are: Hoolawa

1 Stream, Kolea Stream and Puakea Stream. We provided you
2 a photograph, which is Exhibit 50, of what Hoolawaliilii
3 Stream looked like in February, all the water taken.
4 It would take a very large storm event for water to pass
5 this diversion structure. The stream is dry.

6 Look at Kolea Stream, the Division of
7 Aquatic Resources produced a report, it's Exhibit J-22,
8 page 8 of this report, which is the ninth document I
9 provided to you.

10 The Division notes that Kolea Streams ends
11 in a terminal waterfall, nevertheless, they write -- or
12 the Division writes:

13 Kolea Stream has a large amount of
14 potential habitat in the middle and upper reach.

15 Restorational flow to increase animal
16 passage between diversions would greatly improve the
17 productivity of the stream and increase the availability
18 of potential habitat to native species.

19 Now, BLNR claims in its proposed findings
20 of fact that the Sierra Club has provided no evidence
21 that Puakea Stream is diverted.

22 Actually, all the parties stipulate into
23 evidence A&B's Exhibit 170, page 136 of this document
24 shows Puakea Stream is diverted, it reads:

25 K-11 is side diversion with Puakea Stream

1 flowing over the dam.

2 And on page 137 of this document, and this
3 is the 12 pages of documents I provided to you today,
4 there's a photograph showing this diversion structure
5 under the full diversion scenario allows all the water
6 to be taken out of the stream.

7 As A&B's paid consultant writes at the top
8 of page 137:

9 During full diversion, no water would flow
10 past the dam, except in flood conditions and would
11 affect -- and would affect upstream passage from
12 migratory stream animals.

13 And this is not the only evidence that the
14 diversion structure exists and takes water off of Puakea
15 Stream.

16 Ayron Strauch was asked in his testimony:

17 Are you personally familiar with the
18 diversion structures or structure on Puakea Stream?

19 He answered: Yes.

20 In renewing the permit, BLNR authorized A&B
21 and EMI to take all the water from 13 east Maui streams,
22 all of it.

23 BLNR did not require that 64 percent of the
24 base flow remain in these streams so that native species
25 could grow and reproduce. It didn't even require 20

1 percent of the base flow for connectivity as Ian
2 Hirokawa testified on August 4th, page 26 of his
3 testimony:

4 The Board of Land and Natural Resources
5 allowed A&B, EMI to take water from these 13 streams
6 without any condition requiring a minimum amount of
7 water in any of these 13 streams, and without imposing
8 any condition to protect native aquatic species in these
9 13 streams, that's page 14 and 15 of the documents I
10 provided today.

11 And as Meredith Ching testified, at the
12 conclusion of her testimony, the Board of Land and
13 Natural Resources imposed no restriction on the amount
14 of water that it could divert from these 13 streams,
15 which reduces suitable habitat for native aquatic
16 species by 85 percent.

17 BLNR authorized full diversion, no limits,
18 Dr. Parham, Alexander & Baldwin's paid consultant,
19 concluded that BLNR's full diversion authorization has
20 devastating and dire consequences.

21 Exhibit J-20, at page 62 documents this
22 loss, this is the 17th page of our documents provided
23 today.

24 It shows that 500,000 square meters are
25 lost under full diversion.

1 To give a sense of scale and perspective,
2 one can compare the amount -- the amount of habitat
3 restored -- or streams restored by the 2018 Water
4 Commission decision, and that's provided in Exhibit J-20
5 at page 625, 18th page of our document.

6 So under the full -- there is supposed to
7 be, according to Dr. Parham, approximately 706,000
8 square meters of habitat. Full diversion allowed 74.8
9 percent of the habitat remaining -- to remain, 74
10 percent of 706,000 gives you 528,000 acres -- sorry, 528
11 square meters of habitat.

12 The Water Commission's full restoration
13 scenario allows 96.7 percent of the habitat to be
14 restored. The math is, takes multiple steps, but it's
15 not anything more sophisticated than sixth grade math.

16 You get 683,192 square meters of habitat.
17 If you subtract the habitat created from the habitat
18 with full diversion, you get 154,000 square meters of
19 habitat created.

20 So that's -- somebody's not muted.

21 THE COURT: Yeah, hold on a second.

22 Someone just joined and is not muted.

23 Hey, whoever just joined, you're causing a
24 lot of feedback in here in our courtroom. Would you
25 please mute yourself.

1 Thank you. I think we're okay now.

2 Go ahead, Mr. Frankel.

3 MR. FRANKEL: So these nine streams that
4 were fully restored created 154,725 square meters of
5 habitat, that compared to the 500,000 square meters of
6 habitat lost on these 13 streams by full diversion.

7 Or alternatively, if you look at the
8 habitat streams, which is on page 627 of Exhibit J-20,
9 and the 19th page of the exhibit I provided to the
10 Court, there are 224,192 square meters of habitat
11 expected on these streams, full restoration -- sorry,
12 64 percent restoration allows 172,852 square meters of
13 habitat to be created.

14 If you subtract the habitats available with
15 full diversion from those restored with 64 percent
16 base flow, you get 60,000 square meters of habitat and
17 change; 60,000 compared to the 500,000 we're talking
18 about in these 13 streams.

19 It's a matter of scale, the destruction --
20 the number of habitat units, the amount that is
21 destroyed is incredibly significant.

22 But BLNR did not care enough to protect the
23 flow of these 13 streams. It did not protect the O'opu
24 and opai that should thrive in these 13 streams.

25 BLNR failed to take the initiative to

1 consider, protect and advance the public rights in these
2 13 streams.

3 It ignored the Supreme Court's statement in
4 the *Pilaa* decision, a case Mr. Wynhoff was involved in
5 that said:

6 "The BLNR is constitutionally mandated to
7 conserve and protect Hawaii's natural resources."

8 It ignored the *Ching* decision, another case
9 Mr. Wynhoff was involved in:

10 "The most basic aspect of the State's trust
11 duties is the obligation to protect and maintain the
12 trust property and regulate its use".

13 The BLNR must, in the words of the Kauai
14 Springs Court, apply a presumption in favor of public
15 use, access, enjoyment and resource protection.

16 The Board of Land and Natural Resources
17 utterly ignored these holdings of the Hawaii Supreme
18 Court.

19 Second major point, BLNR failed to address
20 the harmful diversion structures on public land.

21 You were provided photographs, such as
22 Exhibit 54, which has been provided to you. BLNR knows
23 that these diversion structures harm native aquatic
24 species. They block migration. They capture species
25 going upstream and larvae coming down stream.

1 The diversion structures also facilitate
2 mosquito breeding. They mar natural beauty. All of
3 this has been pointed out by the Division of Forestry
4 and Wildlife, by the U.S. Fish and Wildlife Service and
5 the Division of Aquatic Resources.

6 DLNR's Division of Aquatic Resources
7 concluded it would be simple to modify a number of these
8 diversion structures. We find this in Exhibit J-23, and
9 if you look at page 7 or its page 21 of today's
10 document, the Division concluded it would be relatively
11 simple to put in V-notches in three of the diversion
12 structures on Puohokamoa Stream.

13 On page 11 of the same document, for
14 Waihee Stream, it would be relatively simple. And page
15 12, Hanawi Stream, it would be simple to provide
16 passage.

17 The Division of Aquatic Resources refers to
18 these pages from its April 1st, 2010 letter, which is
19 Exhibit J-23, as report cards, and I can point you to
20 the August 7th transcript of Glenn Higashi's testimony,
21 this is page 24 of the exhibit I provided to you.

22 Mr. Wynhoff makes it clear that the
23 reference is to Exhibit J-23. In the back of these
24 letters Mr. Higashi said, These things, they call them
25 report cards.

1 Now, this reference to report cards is
2 important. In internal e-mails, the Division of Aquatic
3 Resources reveals:

4 The modifications have not been made, and
5 these structures are still harming aquatic life.

6 These e-mails are so great. They --
7 there's no attorney breathing down the neck of the
8 Division of Aquatic Resource's staff.

9 There's no prepping the witness on what to
10 write in the e-mail. These are unvarnished comments of
11 the staff. So let's look at what they say.

12 Exhibit 16, which is page 25 of the
13 document, and this is an e-mail from Skippy Hao.

14 "We're asking that stream habitat be
15 restored to improve successful migration of aquatic
16 resources. Just restoring stream flow is a good,
17 immediate first step, but does not dress the
18 intermittent conditions the stream experiences
19 throughout the year or the impacts to the eco system.

20 The previous report cards, as we just
21 talked about, in the past required the notching of dams
22 and walls to improve continuous stream flow. Those
23 recommendations should be in the files and were never
24 implemented."

25 This e-mail was sent April 15, 2019.

1 There's another e-mail, Exhibit 15, sorry
2 it's not an e-mail, it's a memorandum, staff memorandum,
3 this is an excerpt from it, 26 pages of document I
4 provided to you today. It's Exhibit 15 at page 3251.

5 The walls and dams have been constructed to
6 direct water to intakes and diversion -- constructed to
7 direct water to intakes and diversion must also be
8 removed or modified. These areas that construct flow
9 prevent animals from migrating upstream. The presence
10 of some animals, which we've identified, helps to
11 validate that few animals can migrate up stream.

12 The multiple diversions present -- prevent
13 healthy populations to successfully migrate to upper
14 elevations.

15 Exhibit 18, an internal e-mail from
16 Skippy Hao, page 27 of the documents today.

17 Exempting them from permits will not exempt
18 environmental impacts on the migration of native stream
19 animals.

20 My comments on walls and dams built in
21 streams will continue as -- as constrictions in the
22 natural stream channels. It will reduce upstream
23 migration and success of stable upstream populations.

24 The Division of Aquatic Resources' e-mails
25 and memoranda are damming. These e-mails were

1 stipulated into evidence, we didn't need to go through
2 them with the witnesses in the trial.

3 Despite this clear evidence, the DLNR's
4 taking no action to consider, protect and advance public
5 rights of the resource at every stage of decision
6 making.

7 Now, you might argue, Well, we don't know
8 if the Board of Land and Natural Resources ever saw
9 these e-mails, we're not claiming they did. This kind
10 of information should have been provided to the Board,
11 but it wasn't.

12 But you know what, sufficient information
13 was provided to the Board in Dr. Parham's report. If
14 you turn to Exhibit J-20, his report, which was given to
15 the Board, page 627, this is the 28th page of the
16 document provided to you today, it reads:

17 Restoration of base flow still leaves
18 approximately 36 percent entrainment at each diversion.

19 Any action or modification of the diversion
20 to decrease entrainment would increase the total
21 restored habitat unit without any additional water
22 released in the stream.

23 In other words, there could be significant
24 improvement to habitat without putting more water in the
25 stream if you just fix some of these diversion

1 structures, and he's referring to the habitat streams in
2 this particular reference.

3 It also talks about it with respect to the
4 connectivity streams on page 628, which is the 29th page
5 of the document provided today.

6 The model did not consider potential design
7 improvements to stream diversions to
8 minimize entrainment, as these are not mandated under
9 the 2018 IIFS.

10 These streams would benefit from
11 modifications to decrease entrainment, or consider the
12 non-IIFS streams.

13 Dr. Parham writes on page 629:

14 The loss of habitat was both from loss of
15 instream habitat to water diversion and to passage
16 and entrainment issues at each of the diversions.

17 That would still be substantial
18 entrainment of larva in the multiple diversion ditches,
19 he notes, even if some water was restored.

20 So, BLNR ignored these concerns. As Ian
21 Hirokawa testified August 4th, this is the 31st page,
22 BLNR did not require any alteration of any diversion
23 structures on any of the east Maui streams and did not
24 set any deadline for altering any of the harmful
25 diversions on public land.

1 BLNR's decision was made without diligence
2 and foresight commensurate with the high priority these
3 rights command under the laws of our state. It failed
4 to take the initiative in considering, protecting and
5 advancing public rights in the resource.

6 Third major issue. BLNR failed to
7 scrutinize A&B's request. The Hawaii Supreme Court, we
8 have an excerpt for you on the 32d page of the documents
9 provided to you.

10 BLNR failed to apply a high level of
11 scrutiny, that's what the Supreme Court has commanded.

12 The permit applicants have a burden to
13 show:

14 A. Their actual need.

15 B. The access of a practical alternative.

16 C. They must demonstrate there is
17 reasonable and beneficial use of the water, and finally,
18 they need to address mitigation of harm that they
19 caused.

20 This is on the Kauai Springs case nicely
21 summarizes that at 133 Hawaii, 174, 175.

22 So, let's look at each of these issues.

23 A. Did BLNR ensure the applicant
24 demonstrated its actual needs?

25 No. As Chair Case testified on August

1 17th, page 66 of the -- of the transcript, the Board
2 doesn't know how much water needed to irrigate each
3 acre of its crops, and it doesn't know the actual needs
4 of irrigation.

5 Grant Nakama testified on August 13th, this
6 is page 35 of the documents provided to you:

7 Would it be difficult to add a column that
8 let people know how many acres were cultivated in each
9 of these fields?

10 His answer's: No, that's something we
11 could do, we could add.

12 And he's asked: Could you add another
13 column there that also included information, how many
14 gallons per acre each of these cultivated crops require?

15 Yeah, he could -- they could do that he
16 says.

17 And then:

18 Has the Board of Land and Natural Resources
19 or the Department ever asked you to provide that
20 information?

21 No.

22 The Board has the burden to make sure an
23 applicant demonstrates its need. It did not do that.

24 In fact, nobody asked how A&B, EMI, Mahi
25 Pono were using the water, until the Sierra Club sent an

1 interrogatory in this case, that's Exhibit 111, which is
2 the 37th page of the document provided to you today.

3 This interrogatory asked the basic
4 question:

5 How is the water in the east Maui streams
6 being used? And they provide a table, 39th page of the
7 documents provided to you.

8 Four interesting things to note about this.

9 First, no one had this information before
10 the Board made its decision in 2018.

11 Secondly, these units are per month, not
12 per month. You have to divide by 28 or 30 or 31, but
13 it's remarkable, if you look at the columns for
14 diversified agriculture, A&B declares they're using 4
15 million gallons a day, every day throughout the year,
16 contrast with what they said in their annual report this
17 year, which fluctuates month by month how much water
18 they use, but here it's a consistent 4 million gallons
19 of water a day. You have to wonder how truthful they
20 are being in answering this interrogatory.

21 The last category, though, is the most
22 interesting. The vast majority, the vast majority of
23 the water is used in this amorphous category titled:
24 Reservoir, Fire Protection, Hydroelectric, Seepage and
25 Evaporation.

1 Your Honor, these are not final consumptive
2 uses of the water. This huge amorphous category
3 represents water that is not being reasonably used.

4 As you heard witness after witness testify,
5 the water that goes to the hydroelectric plant does not
6 disappear.

7 The water in the reservoir either is
8 recorded as used in the irrigated -- irrigation column,
9 or it's lost seepage and evaporation. It's a huge
10 amount of water that's not being reasonably used.

11 But more important, BLNR does not how the
12 water in this amorphous category is being used.

13 Chair Case testified to that on page 93 of
14 the August 17th testimony.

15 The Board does not know how Mahi Pono uses
16 the water that it places in the amorphous category
17 reservoir, fire protection, evaporation, dust control,
18 hydroelectric.

19 Permit applicants must demonstrate their
20 actual needs and propriety of draining water from public
21 streams to satisfy those needs.

22 The Board compromised right from the
23 resource. It did so without diligence, foresight or
24 scrutiny.

25 B. Did BLNR ensure the applicant

1 demonstrated an absence of practical alternatives? No.
2 The Board didn't ask the applicant about using
3 alternative water sources.

4 You can see that Grant Nakama testified
5 that there was no question asked of them of whether the
6 crops would be too brackish to use the ground water.

7 The Water Commission's decision,
8 Exhibit J-14 at page 221, says there's 17 million
9 gallons of water a day of ground water available.

10 A&B's EIS says there's 16 million gallons a
11 day available. Whether it's 16 or 17 million gallons a
12 day, that water's available.

13 The Board did not ask A&B, EMI, Mahi Pono
14 to make sure that water is used first or in conjunction
15 with water taken from east Maui, no question at all.

16 BLNR failed to hold A&B to its burden on a
17 compromised public rights in the resource. There was no
18 diligence or foresight or scrutiny.

19 C. Did BLNR ensure the applicant's use is
20 reasonable and beneficial?

21 No. The Board has taken no steps to
22 ensure the water's being used in a reasonable and
23 beneficial way.

24 If you look at the 44th page of the
25 documents provided today, Exhibit 106, these are BLNR's

1 fourth set of admissions.

2 The DLNR and BLNR have not monitored or
3 investigated, determined whether any of the water being
4 taken is being used in a reasonable and beneficial
5 manner.

6 In fact, most of the water's not being
7 used, and as Chair Case explained, That's not good.

8 Exhibit S-51, bottom of the page, page 45
9 of the exhibits provided to you.

10 Suzanne Case says, You don't want to be
11 running water through a system that's not being used.
12 Sierra Club agrees.

13 The Water Commission concluded that a loss
14 of 22.7 percent of the water was reasonable. If you
15 turn to Exhibit J-14, as provided in the 46 pages of the
16 documents today. The Water Commission says, HC&S's
17 losses of 22.7 percent included not only seepage and
18 evaporation losses, but also miscellaneous losses.

19 On the next page, Finding of Fact 737, it
20 says.

21 Thus HC&S's system losses of 22.7 percent,
22 which is 41.67 million gallons a day of 183.61 million
23 gallons a day of surface water delivered and ground
24 water pumped, were reasonable losses under sugar cane
25 cultivation.

1 Because the same distribution system would
2 be used for diversified agriculture, the same rate of
3 22.7 percent losses should be applicable.

4 Meredith Ching and Suzanne Case's post
5 hoc rationalization that the percentage is higher today
6 because the denominator is lower makes no sense.

7 The Water Commission used the word
8 "percent" it talked about a rate.

9 I want to go back to sixth grade math. A
10 percent is the same thing as a ratio, it's the same
11 thing as a fraction, it's the same thing as a rate.

12 When the numerator goes down, when the
13 denominator goes down, the numerator has to go down to
14 stay -- to keep the same percentage.

15 So you have 33 percent is the same thing as
16 33 over 100, which is the same as 3 over 10, which is
17 the same as 1 over 3, 2 over 6, that's the whole point
18 of a percent, you change the denominator, you change the
19 numerator.

20 So this post hoc, spurious attempt to
21 justify the allowing more than 22.7 percent to be lost
22 makes no sense.

23 The Water Commission used the word
24 percentage, it used the word rate, that means, As the
25 denominator changes, the numerator must as well.

1 So if you look at Exhibit J-27, which is
2 the 49th page of the document, it's painfully clear that
3 Mahi Pono is not using most of the water that is being
4 provided from east Maui streams.

5 There are two columns here, one is titled,
6 System Losses, 22.7 percent, and there's another column
7 titled, Reservoir, Fire Protection, Evaporation, Dust
8 Control and Hydroelectric.

9 They are double counting evaporation in two
10 columns because a lot of water's not being used.

11 The water on in the hydroelectric plant
12 does not disappear, it's available for other uses, but
13 we don't know how it's actually being used. It's pretty
14 clear it's being lost through seepage and evaporation.

15 As Grant Nakama testified on August 13th,
16 this is page 50 of the documents provided today, the
17 16.44 million gallons a day, and the 6.31 million
18 gallons a day have to be added together in some respect,
19 and it shows they are -- they are not using a
20 significant amount of water taken from east Maui
21 streams.

22 Chair Case testified the Board never
23 determined that the losses of more than 22.7 percent
24 would ever be acceptable. That's page 68 of her
25 testimony on August the 17th, and that's the 51st page

1 of the documents provided to this Court today.

2 Prior to 2018 and 2019, the Board made no
3 effort to ensure the water from east Maui streams is
4 actually being used in a reasonable and beneficial
5 manner. It took no steps to reduce waste.

6 In fact, it ignored the Water Commission's
7 specific recommendation. This is a section that was not
8 read during the trial, I'm going to read it to you, it's
9 the 52nd page of the document provided to you, it's
10 Exhibit J-14 at page 22.

11 This is what the Water Commission says that
12 Chair Case chairs.

13 Although estimates of over 20 percent
14 transmission system losses may comport with current
15 industry standards, they do not reflect best practices,
16 will not serve the interest of future generations and
17 are not acceptable.

18 Modern agri business investors should not
19 expect to build a new industry on the back of
20 century-old infrastructure.

21 Investment in ditch systems must be made to
22 avoid leakage and waste, install modern ground water
23 source technology, optimize use of non-potable water and
24 improve water capture and storm events that increases
25 total flow availability.

1 At the bottom of the page, the Commission
2 says:

3 The Commission would ask the land board to
4 consider, and then on page 7 it says, require
5 improvements in the water delivery systems to minimize
6 leakage and waste.

7 The Water Commission is begging the Board
8 to take some action to make sure the water's actually
9 used in a reasonable, beneficial way.

10 But the Board failed to ensure that the
11 water from east Maui streams is used in a reasonable and
12 beneficial manner.

13 D. Did the Board ask -- ask about or
14 impose reasonable mitigation measures?

15 No. It didn't set any deadlines for the
16 removal or modification of harmful diversion structures
17 of public land.

18 It didn't require the use of alternative
19 water sources, even though the Water Commission's
20 decision said, There's alternate water available.

21 It did not require the lining of reservoirs
22 to reduce system losses. It did not limit the diversion
23 of water from these 13 streams one bit.

24 Fourth major issue. BLNR failed to ensure
25 that A&B cleaned up all its trash that litters public

1 land.

2 In 2017 BLNR imposed a condition, A&B needs
3 to clean up its debris, that's Exhibit J-13 at 13, the
4 54th page of the documents.

5 In 2018 A&B claims, Hey, we removed one
6 tractor. There's little other debris, that's
7 Exhibit J-16, page 27.

8 The Sierra Club disputed A&B's claim, the
9 Sierra Club sued, and it concluded the Sierra Club was
10 right.

11 In 2019 A&B revealed, this is Exhibit J-21
12 at page 98, 56th page of the documents provided today,
13 There's several hundred feet of old pipe, several old
14 wooden gates and remnants of steel and concrete, two
15 large tractors were abandoned on the field many decades
16 ago.

17 So A&B's claim the year before, There's
18 little other debris, was clearly false, but given the
19 Sierra Club suit, A&B had to act.

20 A&B's report, A&B-33 --

21 THE COURT: Mr. Frankel, I'm sorry, I'm
22 sorry, I have to interrupt you. Somebody's not muted,
23 and I get, like, pots and pans banging around.

24 Folks, it really has a serious impact on
25 our court reporter's ability to transcribed this

1 proceeding. I really need you all to be conscious about
2 muting and stay muted please.

3 Go ahead, Mr. Frankel.

4 MR. FRANKEL: Thank you, Your Honor.

5 So A&B in its report, June 30th, 2020,
6 which is Exhibit A&B-33 shows a couple of photos of the
7 trash removed from public land that A&B claimed there
8 was very little debris there.

9 Now it's not -- the Board of Land and
10 Natural Resources can't argue, Well, we've succeeded,
11 the trash is gone, because as Mark Vaught testified on
12 August 12th, page -- page 77, the 58th page of the
13 documents provided to you today, he was asked:

14 Now are there still old pipes and other
15 debris within the area covered by the revocable permits?

16 Oh, I'm sure, yes, he replied, and, in
17 fact, Ayron Strauch said the same thing, he saw trash on
18 public lands.

19 It is really galling that BLNR has now
20 taken the new position that, well, some of this debris
21 on public land may be used at some point in the future.

22 You know, our public lands are not a
23 junkyard. This is not an episode of "Sanford and Son".

24 If A&B and wants to reuse pipes, great, the
25 Sierra Club is all for recycling, but you don't leave

1 pipes that are not being used on public land on the hope
2 that one day you may need to use them. Get them out of
3 there. They are not being used, they are trash, they
4 should be removed, and it is unacceptable to argue that
5 because there may be a use for this debris in the
6 future, at some unknown point in the future that it can
7 be left there. It is trash, it needs to be removed.

8 The State has an affirmative constitutional
9 obligation to protect public land. It cannot abdicate
10 that role and delegate it to A&B to determine whether
11 that trash might be needed at some point in the future.
12 It is trash today, get rid of it.

13 Those four examples of the Board of Land
14 and Natural Resources defendant's breach of their trust
15 duties are overwhelming and really undisputed.

16 What you will hear in their closing
17 arguments from the defendants are legal arguments which
18 hold no water.

19 We would like to ask this Court for a quick
20 decision. I know it's daunting, but the Board of Land
21 and Natural Resources will be relooking at these
22 revocable permits in the next couple months, and they
23 need a decision from this Court to let them do their job
24 properly.

25 We've asked for declaratory relief. We've

1 asked for prohibitory injunctive relief. We've also
2 asked for mandatory injunctive relief, something that
3 the defendants have ignored. The mandatory injunctive
4 relief faces a high bar, but we've met that bar. The
5 evidence is clear and compelling.

6 A&B's argued, This Court doesn't have the
7 authority to impose injunctive relief, thinking that all
8 the Court's power is based on statute, it is not. This
9 Court's power is constitutionally based.

10 As the Court -- Supreme Court ruled in
11 *State v. Harrison*, 95 Hawaii 28 at page 32:

12 Inherent powers of the Court are derived
13 from the State Constitution and are not confined by or
14 dependent on statute.

15 Inherent powers recognize the Court's
16 inherent equity power to create a remedy for a wrong,
17 even in the absence of statutory remedies and to prevent
18 unfair results.

19 This Court has the power to issue the
20 declaratory, prohibitory and mandatory relief the Sierra
21 Club is requesting.

22 In my opening statement I asked about the
23 difference about ignorance and apathy. For nearly two
24 decades the Board of Land and Natural Resources has
25 known or should have known its duties.

1 It must take the initiative in considering,
2 protecting and advancing public rights in the resource
3 at every stage of the decision making. This phrase,
4 this principle has been articulate by the Supreme Court
5 over and over again.

6 And in the *Morgan* case the Supreme Court
7 recognized that the underlying intent of the Coastal
8 Zone Management Act to protect, preserve and where
9 possible, restore the natural resources of Hawaii's
10 coastal zone.

11 At times the Board of Land and Natural
12 Resources displayed willful ignorance refusing to ask
13 for critical information needed to make a decision with
14 diligence and foresight.

15 At times, the Board displayed apathy,
16 showing no consideration or care for the 13 forgotten
17 streams, while millions of gallons of water were taken
18 from them unused.

19 Whether it's ignorance or apathy, I don't
20 care, I don't know, either way, BLNR breached its trust
21 duties and violated HRS Chapter 205A.

22 Thank you.

23 THE COURT: Thank you. We'll take our
24 mid-morning break now for 10 minutes.

25 All right, 10 minutes, everyone. We're in

1 recess for 10 minutes. Please come back at 8 minutes
2 after 10:00.

3 Thank you.

4 (Recess taken at 9:58 a.m.)

5 (Reconvened at 10:08 a.m.)

6 THE COURT: FTR on?

7 THE CLERK: Yes Judge I just turned it on.

8 THE COURT: All right. We're back on
9 record, no need to recall the case.

10 Who's going next, or are we just going by
11 caption?

12 All right. Mr. Schulmeister, you have your
13 hand up. Go ahead. Thank you.

14 MR. SCHULMEISTER: Thank you.

15

16 CLOSING ARGUMENT

17

18 MR. SCHULMEISTER: This case is principally
19 about Count 2 of the Sierra Club's First Amended
20 Complaint, BLNR's alleged breach of the public trust
21 doctrine by not requiring restoration of the 13, what
22 I'm going to refer to as the non-petition streams, I
23 think everybody knows what I'm talking about.

24 This is by far the argument that Sierra
25 Club has invested most of its attention to. The fact

1 that the 13 non-petition streams were not ordered to be
2 restored by either CWRM or BLNR is, in our view, a huge
3 red herring for the following reasons:

4 No. 1. The public trust doctrine does not
5 require the restoration of every stream.

6 So the mere fact that there's been no
7 restoration ordered to the non-petition streams standing
8 alone does not establish any breach of trust.

9 No. 2. CWRM, not the BLNR, and not this
10 Court, has exclusive jurisdiction over the setting of
11 IIFS for purposes of stream protection.

12 If plaintiff wants the IIFS for the 13
13 streams to be amended, it can file an IIFS petition with
14 CWRM, but not with BLNR or this Court.

15 Nor can the Sierra Club sue CWRM in this
16 Court to compel CWRM to amend the IIFS for the
17 non-petition streams.

18 No. 4. Sierra Club and its members have
19 known since at least 2001 that the 13 streams are
20 diverted by the EMI ditch system, and that A&B's RPs and
21 long-term lease application contemplate the continuation
22 of those diversions.

23 No. 5. Sierra Club and its members have
24 also known since at least 2001 that the 27 IIFS
25 amendment petitions filed with CWRM by Na Moku did not

1 include the non-petition streams.

2 No. 6. At any time Sierra Club or its
3 members could have, but never did, file a petition to
4 amend the IIFS for the 13 streams; and

5 No. 7. To the contrary, Maui Tomorrow,
6 while Lucienne de Naie was its president and
7 simultaneously the vice chair of the Sierra Club, argued
8 to CWRM in 2017 to ask for the termination of HC&S's
9 sugar operations, that CWRM should make its IIFS
10 determinations for the 27 streams on the assumption that
11 the 13 non-petition streams would continue to be
12 available to be averted by A&B for its irrigation use in
13 central Maui. I'm referring to Exhibit A&B-26 at and
14 page 26.

15 And I think it's worth quoting actually
16 from page 26, this is Maui Tomorrow's argument or
17 proposed findings to the hearings officer. It says:

18 The hearings officer found that EMI ditch
19 system diverts a total of at least 43 streams, and only
20 23 petition streams are being diverted.

21 This means approximately 20 streams are not
22 subject to the petitions, and this is the key phrase, Or
23 to any uncertainty that could possibly arise by virtue
24 of the establishment of minimum stream flows.

25 And then the next paragraph: These

1 approximately 20 streams are available to provide
2 irrigation water for the minimal bona fide needs that
3 A&B has presented to date.

4 So that argument was made by Maui Tomorrow
5 in 2017 while Lucienne de Naie was its president, not
6 just a board member, but its president.

7 Then suddenly in 2018, the very next year,
8 Sierra Club's Ms. de Naie is involved in causing Sierra
9 Club to file this lawsuit, contending the exact opposite
10 of what Maui Tomorrow had just argued in 2017 to CWRM.

11 The Maui Tomorrow argument to CWRM, under
12 Ms. de Naie's watch as its president, is smoking gun
13 No. 1, demonstrating the disingenuous nature of Sierra
14 Club's claims regarding the alleged failure by BLNR to
15 provide for restoration of the 13 non-petition streams.

16 Now, we know that neither the Sierra Club,
17 Maui Tomorrow nor anyone else ever filed any IIFS
18 petitions for the 13 streams.

19 If, however, Sierra Club had filed IIFS
20 petitions for these 13 streams and was unsatisfied with
21 CWRM's disposition of such petitions, Sierra Club's only
22 recourse would have been an appeal from CWRM's decision
23 directly to the Supreme Court.

24 Under no circumstances could Sierra Club or
25 anyone ever challenge any of CWRM's IIFS determinations,

1 whether for the 13 streams, or any other streams in this
2 Court.

3 This is a point we have made repeatedly,
4 and it is so important and so indisputably clear as a
5 matter of law that it cannot be overemphasized. Sierra
6 Club's failure to exhaust its administrative remedies
7 with regard to the 13 streams is fatal to its clients
8 because it deprives this Court of subject matter
9 jurisdiction.

10 As this Court is well aware, subject matter
11 jurisdiction either exists or it does not exist. The
12 Court has no discretion to create subject matter
13 jurisdiction that it does not have, nor can the parties,
14 by agreement or otherwise, confer subject matter
15 jurisdiction that does not already exist.

16 Now, apart from Sierra Club's failure to
17 file any IIFS petitions, the fact that Sierra Club does
18 not and never has really cared about protecting the 13
19 streams, is also demonstrated by the fact that the
20 injunctive relief that Sierra Club is requesting does
21 not include any protection or restoration of the 13
22 streams whatsoever.

23 Under the injunctive relief requested by
24 Sierra Club, the diversion of these streams will be
25 allowed to continue, so long as the aggregate --

1 aggregate amount of water diverted in the licensed areas
2 does not exceed 27 million gallons a day.

3 Now Mark Vaught testified that most of the
4 water currently being diverted from east Maui comes from
5 the 12 of these 13 streams that are located in the Huelo
6 license area. This will be allowed to continue under
7 Sierra Club's requested injunction.

8 This, obviously, does not garner any
9 greater protection to the 13 streams than they presently
10 have under the status quo IIFS from 1988.

11 Now, if there's any authenticity to Sierra
12 Club's suddenly desperate plea in its 2018 complaint for
13 restoration of these streams, contrary to the position
14 approved by Ms. de Naie barely a year earlier in 2017 on
15 behalf of Maui Tomorrow, you can bet that the Sierra
16 Club would have designed their prayer for injunctive
17 relief around the protection of these streams, but
18 Sierra Club did not.

19 Instead, by putting this requested
20 injunction on the aggregate diversion amounts from the
21 licensed area, Sierra Club is pursuing its true
22 objective, which is not to obtain an amended IIFS for
23 the 13 streams, but to halt any further roll out of Mahi
24 Pono's farm plan in central Maui.

25 There is, in other words, a complete

1 disconnect between the injunctive relief being requested
2 from this Court by the Sierra Club, and the purported
3 need for the protection or restoration of the 13
4 streams.

5 Stated simply, Sierra Club's requested
6 injunction does not redress any injury being claimed by
7 Sierra Club arising out of the absence of an amended
8 IIFS for the 13 streams.

9 Now, in addition to demonstrating Sierra
10 Club's lack of any true interest in protecting these 13
11 streams, this disconnect destroys any legal support for
12 Sierra Club relying upon the Board's need to protect
13 these streams.

14 A claimed injury does not redress, by the
15 requested injunction, causes the request for injunctive
16 relief to fail for lack of redressability. As detailed
17 in our proposed conclusions of law, all of Sierra Club's
18 claimed injuries suffered from this fatal defect of lack
19 of redressability.

20 Now, the disconnect between the 13 streams
21 and the effect of Sierra Club's requested injunction,
22 and this disconnect we just talked about, is smoking gun
23 No. 2, regarding the disingenuousness of Sierra Club's
24 claims regarding the 13 non-petition streams.

25 It demonstrates that Sierra Club's

1 objective with this lawsuit is to inhibit Mahi Pono's
2 farm plan, rather than to secure a protection for the 13
3 streams. This objective could also be observed during
4 the cross-examination of Grant Nakama of Mahi Pono.

5 Mr. Frankel pointed out that Mahi Pono had
6 bought the former HC&S sugar lands without any guarantee
7 of a water lease, and that the DEIS, the draft
8 environmental impact statement discusses a scenario with
9 a smaller farm plan for Mahi Pono in the event that it
10 were never to obtain any water from the licensed area.

11 THE COURT: Mr. Schulmeister.

12 MR. SCHULMEISTER: Under this no action or
13 no lease scenario, there's a forecast of 390 direct
14 farming jobs with being generated by Mahi Pono as
15 compared to the 790.

16 THE COURT: Mr. Schulmeister, I apologize
17 for interrupting, but you're going really fast. Can
18 you --

19 MR. SCHULMEISTER: Okay.

20 THE COURT: -- slow it down a little bit,
21 it would be very helpful. Thank you.

22 MR. SCHULMEISTER: Okay.

23 All right. Under this no action or no
24 lease scenario, there's a forecast of 390 direct farming
25 jobs being generated by Mahi Pono, as compared to the

1 790 if the water lease were to be obtained.

2 Sierra Club's implication is contrary to
3 CWRM's findings in the 2018 decision and order that it
4 would clearly be in the public interest to preserve the
5 EMI ditch system, and to allow water to continue to be
6 diverted from east Maui to support the transition of
7 HC&S' former sugar fields to diversified agriculture.

8 This Court, you know, Sierra Club is
9 basically suggesting this Court should disregard that
10 finding, along with any negative impacts to agriculture
11 in central Maui because according to Sierra Club, Mahi
12 Pono "assumed the risk" of no water lease and could
13 still create some farm jobs, albeit, less than it if it
14 were to have access to east Maui water.

15 So even though CWRM, BLNR and the County of
16 Maui all support the continued operation of the EMI
17 ditch system, to support diversified agriculture in
18 central Maui, Sierra Club is suggesting that, perhaps,
19 there should be no lease of water from east Maui at all.

20 Sierra Club makes this suggestion, while at
21 the same time, disingenuously representing that it is
22 not challenging the 2018 D&O in this action.

23 But by designing its injunctive remedy to
24 accomplish nothing in the of way stream restoration,
25 while simultaneously restricting the use of east Maui

1 water to a level that is far below the amount that CWRM
2 forecast that its decision and order would make
3 available to service the important agricultural lands of
4 central Maui that Mahi Pono purchased from A&B, Sierra
5 Club is, in fact, challenging and asking this Court to
6 second guess the intent of the 2018 D&O.

7 I'd like to turn now to the procedural
8 setting which led to the Carmichael case being filed in
9 2015, and this case being filed in 2019. There are
10 three years in particular in this history that the Court
11 should focus upon with regard to the procedural setting
12 of this case, the three years are: 2007, 2016, and
13 2018.

14 So talking first about 2007. Now as of
15 2007, and this is as embodied pretty much in
16 Exhibit A&B-7, A&B-7 was the findings of fact and
17 conclusions of law of the Board of Land and Natural
18 Resources in the contested case hearing that's still
19 pending before the board in -- in connection with said
20 lease applications and the RPs.

21 So as of 2007, the table was clearly set
22 regarding the relationship between the 27 IIFS petitions
23 filed by Na Moku back in 2001, the contemplated
24 environmental impact statement, and the holdover of the
25 revocable permits pending the completion of the

1 environmental impact statement and the lease process.

2 In its 2007 decision, in the contested case
3 hearing, again, I'm referring to Exhibit A&B-7, and
4 specifically page 2, the Board relied on the public
5 trust doctrine to justify the continued holdover of the
6 RPs.

7 The BLNR ruled that environmental
8 assessment was not required for the holdover of the RPs.
9 Everyone understood it was required for the long-term
10 lease, but it was also understood that the long-term --
11 that the environmental impact statement needed to await
12 the completion of the Water Commission ruling on the 27
13 IIFS petitions.

14 And at A&B-7 page 2, the Board points out,
15 All parties now concede that this process is likely to
16 take years.

17 One of the parties was Maui Tomorrow.
18 Nobody appealed this. So as of 2007, the table was set.
19 There was 27 IIFS petitions, and everyone knew that this
20 does not include the 13 streams, and everyone knew that
21 the environmental impact statement was going to await
22 the IIFS determinations, and that the process is likely
23 to take years, and it did take years, and it wasn't a
24 surprise because it was forecast and conceded by
25 everyone in 2007 as recounted in this exhibit.

1 Now, let's fast forward the tape to the
2 year 2016. 2016 was a very important year in the
3 procedural and historical background of this case
4 because of:

5 No. 1. The *Carmichael* case, it was decided
6 in 2016 by Judge Nishimura; and

7 No. 2. The Legislative enactment of Act
8 126 in response to the *Carmichael* case; and

9 No. 3. The fact that HC&S announced that
10 2016 would be the final harvest for the sugar
11 plantation, so that changed a lot of the assumptions
12 that the Water Commission was looking at in terms of
13 arriving at its IIFS determinations.

14 And -- and also in 2016, following the
15 withdrawal by Na Moku of its objection that it made back
16 in 2001 to A&B being the party performing the EIS, the
17 BLNR ordered A&B to proceed with so much of the EIS as
18 possible, pending CWRM's determination of the 27 pending
19 IIFS petitions, that is -- that order is Exhibit A&B-19.

20 All right. Now, with respect to the
21 *Carmichael* case, the *Carmichael* plaintiffs filed in 2015
22 seeking to inval -- I'm sorry, yes in 2015 seeking to
23 invalidate the revocable permit only for the calendar
24 year 2015, and the basis was that there was no
25 environmental impact statement or environmental

1 assessment.

2 Now Judge Nishimura actually ruled against
3 the Carmichael plaintiffs in their Chapter 343 claim in
4 January of 2016, holding an EA was not required for a
5 one-year RP, but she invalidated RPs instead for a
6 purported lack of statutory authority under Chapter 171
7 to renew an RP for more than one year.

8 Judge Nishimura's decision contained
9 no review or analysis of the public trust doctrine
10 basis, it was actually relied upon by BLNR for the
11 holdover of the RPs as, you know, confirmed and
12 explained in the BLNR's 2007 CCH decision, again, that's
13 Exhibit A&B-7.

14 Now this decision by Judge Nishimura caused
15 great consternation, was immediately appealed. In the
16 meantime the Legislature enacted 126 in mid-2016 which
17 temporarily remedied any gap in statutory authority
18 under Chapter 171, by authorizing BLNR to continue the
19 RPs for up to three years to allow for the completion of
20 the long-term lease process, which of course, included
21 the environmental impact statement, which in this case,
22 also included getting the IIFS petitions resolved.

23 Now before the end of 2016, BLNR went ahead
24 and renewed the RPs calendar year 2017 in reliance on
25 both its 2007 holdover rationale, that is to say, the

1 public trust doctrine unnecessarily authorized the Board
2 to be able to continue the use of the public interest in
3 order to protect public trust uses, and also based on
4 the holdover provisions of Act 126, and you can see that
5 in the staff submittal for the December 9th, 2016
6 meeting, which is Exhibit A&B-23 at page 3.

7 Now, there's a paragraph here on page 3
8 that starts --

9 THE COURT: Hang on.

10 MR. SCHULMEISTER: The Department considers
11 the revocable permits to be in continued holdover status
12 until --

13 THE COURT: Mr. Schulmeister, I'm sorry,
14 hold on, let me get to that exhibit and again, you're
15 speeding up a little bit.

16 MR. SCHULMEISTER: Okay.

17 THE COURT: Hold on.

18 MR. SCHULMEISTER: All right.

19 THE COURT: Okay. A&B-23 at page 3. Okay,
20 I'm there. Go ahead.

21 MR. SCHULMEISTER: So this is a paragraph
22 that starts, I think it's near the bottom of the page.

23 But it says the Department considers the
24 revocable permits to be in continued holdover. I'm not
25 going to read the whole thing out loud.

1 But what I wanted to point out to the Court
2 is that this paragraph shows up in the submittal for the
3 December 9th, 2016 meeting, and you'll see it also, that
4 this is a portion -- this analysis, basically, it is put
5 forth on the history of this thing, and the authority
6 for the Board to issue the RPs, particularly for
7 calendar years 2017, 2018 and 2019, it appears in all of
8 the submittals and is, you know, is part of the Board's
9 decision for all three of those renewals.

10 So again, we're talking about 2000 --
11 calendar year 2017, 2018 and 2019, because those are the
12 three years that Act 126, you know, specifically
13 authorized the Board to be able to, under Chapter 171,
14 to renew an RP, notwithstanding Judge Nishimura's ruling
15 that there was, you know, according to her, an absence
16 of authority under 171.

17 And in addition, though, what they said was
18 that they're using two grounds. One is Act 126, but
19 they're also relying on the fact of the earlier public
20 trust doctrine analysis which, you know, while that
21 wasn't even addressed or accepted at all by
22 Judge Nishimura, but, of course, the parties had all
23 appealed, so the issue was still alive on appeal in the
24 *Carmichael* case.

25 All right, so again I want to -- I'm still

1 talking about 2016. So the other thing that happened in
2 2016, this is April 14th of 2016, the Board issued its
3 order to commence the environmental review process,
4 that's A&B-19.

5 Now the order was clear, and this was
6 discussed during the testimony of Suzanne Case, that the
7 13 non-petition streams were part of the licensed area
8 and were expected to be diverted under the water lease.

9 Maui Tomorrow, this was -- this order was
10 issued in the contested case hearing before BLNR on the
11 lease application in the RPs, to which Maui Tomorrow was
12 a party, and again, you know, I think that it came out
13 very clearly during the trial that Ms. de Naie was
14 wearing two hats through pretty much the entire period;
15 she was both a board member and the president of Sierra
16 Club -- I mean, not of Sierra Club, but of Maui Tomorrow
17 at the same time she was a board member and/or co-chair
18 of Sierra Club.

19 So through -- so through Lucienne de Naie,
20 Sierra Club continued to be on notice as they had been
21 since at least 2001, that the 13 non-petition streams
22 were subject to the lease application, would be
23 evaluated as part of the EIS process, because they're
24 discussed specifically in the order and the scoping of
25 Exhibit A&B-19.

1 And this would be even though the IIFS
2 amendments -- even though no IIFS amendments were being
3 sought for these streams.

4 So the table had been set that way in 2007,
5 and now we fast forward to 2016, and it's still set that
6 way, there's no ifs, ands, or buts about it. No one can
7 claim surprise that when the IIFS came out, that it did
8 not include amendments for the 13 non-petition streams.

9 So by the end of 2016, the IIFS proceedings
10 were continuing in front of CWRM on the 27 streams. The
11 RPs and the lease applications were, you know,
12 proceeding, including the 13 non-petition streams, and
13 the EIS and the completion of the lease process still
14 could not be completed until after CWRM ruled on the
15 27 petitions.

16 And so for calendar year 2017, the RPs
17 continued the holdover status, notwithstanding the
18 *Carmichael* decision, and that was due to act -- both Act
19 126 and the, as I said, the Board's position that it
20 still had the authority of the public trust doctrine,
21 although that issue was on appeal in *Carmichael*.

22 So at the November 9th, 2017 meeting, all
23 right -- I'm sorry. Fast forward now from 2016 to 2018.

24 So at its November 9, 2017 meeting, BLNR
25 had again extended the holdover status of the RPs, this

1 time for calendar year 2018, on the same dual grounds
2 articulated the previous year, and the exhibits there
3 are the submittal is A&B-70, and it's at page 4, the
4 BLNR minutes are A&B-69, it's at page 14.

5 Then finally on June 20th, 2018 CWRM, the
6 CWRM D&O was issued, and that's J-14, and was not
7 appealed.

8 So that decision and order finally set the
9 IIFS for the petitioned streams, and obviously, you
10 know, we spent a lot of time in the hearing, trial,
11 looking at that extensive document.

12 And clearly, CWRM determined the public
13 interest in preserving the EMI system to both serve
14 Upcountry Maui and the transitioning of HC&S former
15 sugar lands diversified ag, engaged in a balancing of
16 offstream needs and instream on regional basis and
17 specifically talking about, not all the streams are
18 going to be restored, and the concept of the biggest
19 bang for the buck was going to be followed based on the
20 recommendations of the Division of Aquatic Resources.

21 So CWRM balanced the offstream needs and
22 the instream values on a reasonable basis.

23 In doing so CWRM included the water that
24 was being diverted from the 13 non-petition streams in
25 the analysis of how the offstream needs would be met.

1 But CWRM did not amend the IIFS for the non-petition
2 streams, which was absolutely no surprise to anyone, I
3 mean, that's -- that was the expectation from the very
4 beginning.

5 So the 2019 RP, the meeting was held on
6 November 9th of 2018. So we talk about the 2019 RP,
7 this is the last of the three years that Act 126
8 provided for, and the RPs were extended for calendar
9 year 2019, again, on the same dual grounds of authority
10 as the previous two years, and here, the staff submittal
11 is J-16, and that background section and the rationale
12 is at pages 4 to 5, and the BLNR minutes, that's
13 Exhibit J-15 at page 11.

14 Various conditions were imposed, including
15 most importantly, compliance with the D&O. And Lucienne
16 de Naie testified against the renewal and requested a
17 contested case hearing which was later denied.

18 And then from there, so that's the
19 background through the *Carmichael* and then we come to
20 the Sierra Club complaint.

21 Now I'd like to talk about the Sierra Club
22 complaint and its relationship to *Carmichael*.

23 The Sierra Club complaint is similar to the
24 *Carmichael* complaint in its reliance upon the purported
25 need for a Chapter 343 environmental assessment, or

1 environmental impact statement prior to BLNR being able
2 to issue the RP.

3 So the Carmichael suit -- Carmichael
4 plaintiffs make this claim in an effort to invalidate
5 the RP for 2015. Now the Sierra Club makes this same
6 claim in Count 1 of its complaint, but with respect to
7 the RPs for calendar year 2019 and 2020.

8 Unlike *Carmichael*, however, Sierra Club
9 makes the additional argument in Count 2, which is the
10 one that we've spent all this time in front of
11 Your Honor on, that BLNR breached its public trust
12 duties by issuing the RPs. Now, and that that would be
13 additional ground to invalidate the RPs.

14 Now this theory appears to ignore the fact
15 of BLNR's dual reliance on Act 126 and BLNR's inherent
16 authority under the public trust doctrine to authorize
17 the continued diversion of water to satisfy the public
18 trust and the public's interest in continuing the uses
19 of this water for Upcountry Maui and to support
20 agricultural uses in central Maui.

21 So Count 2 seeks to invalidate the RPs on
22 the ground that BLNR allegedly breached its duty of the
23 public trust doctrine by failing to, in effect, and this
24 is their primary argument, it's always been the primary
25 argument, by failing to amend the IIFS to the 13

1 non-petition streams and require the modification and
2 removal of diversions in order to protect the instream
3 values for these streams.

4 What is extremely ironic about this, is
5 that Sierra Club claims it does not want its requested
6 declaration of invalidity of the RPs under Count 2 to
7 actually result in the cessation of diversions, because
8 Sierra Club recognizes that this would not be in the
9 public interest and would deprive Upcountry Maui of
10 domestic water that's clearly a protected trust purpose.

11 This, obviously, guts against the notion
12 that Sierra Club can establish that BLNR's issuance of
13 the RPs is so violative of the public trust doctrine
14 that the RPs should be invalidated.

15 Now, in the pending *Carmichael* appeal, you
16 know, that we've had discussions about, you know, the
17 fact that the *Carmichael* appeal is pending and what
18 potential effect it might have on this case.

19 In the pending *Carmichael* appeal, BLNR is
20 arguing and the Supreme Court is considering, whether
21 the public trust doctrine, in as much as it is
22 Constitutional in origin and thus cannot be trumped by a
23 statute, such as Chapter 343 or Chapter 171, so whether
24 it could be a grounds for validating rather than
25 invalidating the 2015 RP.

1 If the Supreme Court so rules, this will
2 clearly undercut Sierra Club's claims in Count 2, at
3 least to the extent that Sierra Club seeks to invalidate
4 the RPs for an alleged breach of the public trust.

5 If the public trust is upheld as the
6 source, as the actual source of BLNR's authority to
7 issue, as you know BLNR has consistently articulated
8 since at least the 2007 findings that we talked about,
9 then it stands to reason that the public trust will
10 surely be upheld as a valid source of BLNR's authority
11 to issue or holdover the RPs for 2019 and 2020.

12 So I don't know if I stated that clearly
13 enough, but what I'm saying is, that, you know, if the
14 Supreme Court rules that, as BLNR believed when it was
15 authorizing a holdover for the RPs way back in 2001 and
16 then as explained in 2007, that it had the authority to
17 do so because it needed to do so in order to fulfill the
18 public trust, and so therefore, it had the implied power
19 to do so.

20 If that's true with regard to 2015, then
21 the same logic is going to apply also to 2019, 2020, so
22 that really cuts hard against, you know, the Sierra
23 Club's argument that, or that would cut very hard
24 against the Sierra Club's argument that the public trust
25 is actually a reason to invalidate the permits, it's

1 just the opposite, I mean, it potentially could be
2 exactly the opposite. The public trust is what would
3 authorize, what would support the authorization of the
4 permit.

5 And the reason why is because, as we've
6 heard a lot about, I mean, the public interest requires
7 it. It doesn't even seem to be that much of a
8 controversy in this case. I mean, even Sierra Club is
9 admitting that they don't want the water to stop
10 flowing.

11 All right. So this Court is beyond any
12 doubt the correct forum for a Chapter 343 claim, so both
13 in the *Carmichael* case is a Chapter 343 claim, and this
14 Court is the appropriate forum for that under
15 Chapter 343 and also the *Carmichael* case.

16 But the Chapter 343 claim in this case has
17 already been dismissed, and so this trial really has not
18 been about the Chapter 343 claim, it has been almost
19 entirely about Count 2 which, in turn, is almost
20 entirely about BLNR's alleged failure to protect the
21 instream values for the 13 non-petition streams via IIFS
22 amendments and diversion modifications.

23 So I mean, A&B submits that Count 2 in that
24 sense of the Sierra Club complaint, is clearly an
25 inappropriate collateral attack on the Water

1 Commission's decision and order.

2 The reason why is because Sierra Club is
3 suing the Board, BLNR, for CWRM's alleged omissions, and
4 the reason why I say that is, you know, during
5 Mr. Frankel's argument he talked on and on about, Well,
6 BLNR had a continuing duty to do this. They had to take
7 the initiative every step and down, down, down, quoting
8 from the Waiahole case, which was actually talking about
9 CWRM's continuing duties.

10 It is impossible for the Court to find that
11 the Board is guilty of breach of trust for failing to
12 protect the 13 streams, without first finding that CWRM
13 breached its duty, because CWRM has a continuing duty to
14 take the initiative, and is the agency with exclusive
15 jurisdiction over setting of instream flow standards and
16 the regulation of diversion structures and the
17 disposition of waste complaints.

18 So but this Court doesn't have the
19 jurisdictional authority to review the merits of CWRM's
20 IIFS decision, only the Supreme Court has that
21 authority.

22 And so, you know, the -- to attack BLNR for
23 not -- I mean, basically what Sierra Club is arguing is,
24 Well, CWRM omitted to do all these things that the
25 public trust clearly required, but instead of suing

1 CWRM, which they can't do, because they can't get
2 jurisdiction over CWRM, they sue the Board instead and
3 say, We're going to sue you, Board, because CWRM didn't
4 do what it was supposed to do.

5 Now, if this Court did have appellate
6 jurisdiction to review the merits of CWRM's IIFS
7 decision, it would have to do so on the entire record of
8 the CWRM contested case hearing, not on just a partial
9 record, such as been received in evidence in this trial.

10 Obviously, if the D&O had been appealed to
11 the Supreme Court, the entire record would have been
12 sent to the Supreme Court. There would be no cherry
13 picking from the record by the parties, and no part of
14 the record would be excluded from evidence. The entire
15 record would go up, and any party could refer to any
16 party of it.

17 Furthermore, CWRM, when it was considering
18 and deciding the D&O, was required to consider and
19 receive the "best available information" relevant to the
20 issues, regardless of whether it would be admissible in
21 a trial in court.

22 It makes no sense for this Court to, you
23 know, in a backdoor way try to consider the merits of
24 the CWRM D&O on only a partial record of what CWRM did
25 and was obligated to consider.

1 Now, as we set forth in our proposed
2 conclusions of law, Sierra Club's complaints against the
3 Board almost all relate to these three areas of CWRM
4 responsibility, namely: Instream protection via IIFS
5 amendments, diversion modification, removal again for
6 instream protection, and the prevention of waste by EMI
7 and Mahi Pono.

8 It is undisputed that CWRM has not only the
9 jurisdictional mandate to deal with these three areas of
10 concern, but also the expertise, given its staff and
11 experience requirements that are statutorily required to
12 qualify the commission.

13 Only -- only the Board's alleged failure to
14 do more to enforce the requirement, that EMI clean up
15 all of the debris that has accumulated in the licensed
16 areas over the last 120 years, I, mean only that might
17 fall outside of CWRM's exclusive jurisdiction.

18 So the Sierra Club clearly has
19 administrative remedies before CWRM that it has not
20 exhausted.

21 Most, obviously, Sierra Club, for 17 years,
22 has failed to petition CWRM to amend the IIFS for the 13
23 streams, and Sierra Club cannot sue the BLNR for failing
24 to amend the IIFS, because:

25 First, BLNR lacks the authority to set an

1 IIFS.

2 Second, Sierra Club has not exhausted its
3 administrative remedy to petition CWRM itself.

4 Third, by requesting a mandatory injunction
5 against BLNR to petition CWRM to amend the IIFS for the
6 13 streams, Sierra Club is conceding that CWRM is the
7 appropriate agency to set the IIFS.

8 But since the Sierra Club can, but has not
9 itself petitioned CWRM, it cannot establish that it has
10 exhausted its administrative remedies, which Sierra Club
11 must do in order to pursue a claim versus BLNR.

12 The same arguments apply to the Sierra
13 Club's complaints about diversion modifications and
14 removal and the prevention of waste, and these are set
15 forth in some detail in our proposed conclusions of law.

16 Now the exhaustion requirement is not
17 excused by the existence of an independent duty of BLNR
18 under the public trust doctrine, and the *Kauai Springs*
19 decision of the Hawaii Supreme Court is not to the
20 contrary.

21 This case is a direct action by Sierra Club
22 against BLNR, unlike *Kauai Springs*, which was an agency
23 appeal. There is nothing in the *Kauai Springs* decision
24 that suggests that administrative exhaustion is not
25 required when suing an agency in a direct action for

1 breach of the public trust doctrine.

2 So, in other words, even if BLNR has an
3 independent duty, and even if BLNR breached it,
4 exhaustion is still required, and failure to exhaust is
5 jurisdictional for all of the reasons we have previously
6 argued.

7 Now, even if for some reason exhaustion
8 were not required, and I can't imagine what that reason
9 might be, but even if that were the case, then Sierra
10 Club still has not carried its burden to establish the
11 standard of care applicable to BLNR's issuance of an RP
12 and this is very important, something that Mr. Frankel
13 completely glosses over and has from day one and
14 continues to.

15 This is an RP with a maximum term of one
16 year that is revocable on 30 days' notice. It's not a
17 long-term lease, right, and that is the decision that
18 BLNR made that is being challenged.

19 Now, the Court is encouraged to review the
20 Hawaii Supreme Court's decision in *Kelly versus 1250*
21 *Oceanside Partners*, which we've cited extensively in our
22 proposed conclusions of law.

23 *Kelly*, like this case, and unlike the *Kauai*
24 *Springs* case, clearly establishes the plaintiff's burden
25 to establish a standard of care, including the

1 submission of expert testimony on technical issues if
2 they are germane to establishing what specific acts were
3 required of the agency, and what acts or omissions are
4 alleged to have constituted a breach of the public trust
5 under those circumstances.

6 Sierra Club offered no expert or other
7 testimony in this case regarding what the public trust
8 required of BLNR in the specific context of the action
9 taken by BLNR on the RPs issued for 2019 and 2020, and
10 whether the purported required actions would have been
11 practicable in a context of issuing an RP terminable on
12 30 days' notice.

13 Sierra Club's only expert, Mike Kido,
14 offered no testimony on the standard of care. Sierra
15 Club is relying exclusively on argument, not testimony,
16 and it is essentially asking this Court to simply
17 substitute its judgment for that of the BLNR board
18 members.

19 But the BLNR is entitled to a presumption,
20 under the law, they've got to comply with the public
21 trust obligation. This presumption has not been
22 overcome by Sierra Club's arguments.

23 Board members are expected to rely upon
24 their real world experience and common sense when
25 weighing the competing considerations that factor into

1 decisions on matters like the issuance of RPs,
2 particularly where the overarching consideration is
3 protection of the public interest.

4 Now Chair Case and the BLNR board members
5 clearly considered the evidence presented to the two
6 board meetings at issue, and the extensive history of
7 the lease application, and the IIFS determinations, and
8 made good faith, reasoned decisions to renew the RPs on
9 the grounds that this would be in the best interest of
10 the state, and consistent with the public trust
11 doctrine, including the continuation of supplying water
12 to Upcountry Maui and fulfilling the second prong of the
13 dual mandate of the public trust doctrine, which again,
14 is something the Sierra Club ignores, which is to
15 maximize reasonable and beneficial use.

16 So even the Sierra Club is, in effect,
17 agreeing with the BLNR's decision to authorize the
18 continued diversion of water, because this is so
19 obviously in the public interest.

20 The Sierra Club and its members, however,
21 want to be perpetual backseat drivers nit-picking the
22 terms and conditions that BLNR imposes on the RPs.

23 Now the Court has heard the Sierra Club's
24 testimony. I think it should be obvious that no matter
25 what conditions the BLNR imposed, Sierra Club would

1 opine that the conditions are not adequate.

2 And we respectfully submit that the Sierra
3 Club's contrary opinions about the precise terms and
4 conditions that should be imposed on the RPs do not
5 amount to proof of a breach of the public trust.

6 Now, I'm going to try to wrap up a little
7 bit here, so I can have a little time to respond to a
8 couple of Mr. Frankel's points.

9 So wrapping up, there is simply no reason
10 for this Court to disturb the RPs issues for 2019, 2020.
11 There is no emergency that is in need of Court
12 intervention.

13 There will only be emergences if the Court
14 agrees to step in and invalidate the RPs or enjoin the
15 diversion of sufficient water to supply Upcountry Maui
16 and support for the Mahi Pono farm plan.

17 The Board of Land and Natural Resources and
18 CWRM, obviously, do not believe that the 2018 D&O should
19 have provided for restoration of the 13 streams.

20 And again, I think it's critical to keep in
21 mind that, I mean, in 2017, even Maui Tomorrow was
22 arguing that those 13 streams should be available for,
23 or would be available for irrigation for central Maui.

24 So the Sierra Club wants the CWRM -- so
25 between 2017 and 2018, you know, they've had some

1 epiphany that the prior 17 years, assuming that those
2 streams should be available for offstream use need to be
3 revisited.

4 So they want CWRM to take affirmative
5 action to revisit that and restore the 13 streams. This
6 Court, you know, doesn't have jurisdiction to order CWRM
7 to take any such action.

8 Sierra Club does not need any order from
9 this Court to itself just go ahead and petition CWRM to
10 amend the IIFS for the 13 streams or to require the
11 modification or remove diversions.

12 I mean, this issue about the -- I mean, I
13 don't want to repeat a lot of what you've already heard
14 in trial, but there's a lot of evidence in trial that
15 CWRM is continuing to review the permit applications for
16 these diversion modifications.

17 And that's an ongoing process with CWRM,
18 and Sierra Club, Ms. de Naie shows up for every meeting
19 and testifies. She could ask for a contested case, and
20 if they filed a petition to amend the 13 streams,
21 clearly CWRM could address the diversions. CWRM did
22 address the diversions with regard to the 27 streams,
23 and it made specific findings to the effect that they
24 did not, their guidance was not to remove them
25 completely, and that the specific modifications were

1 something that would be the subject of subsequent
2 proceedings before CWRM, which the Court has heard a lot
3 about.

4 So, because the Sierra Club for over 17
5 years has chose not to file its own petition, and it
6 still has not filed its own petition, Sierra Club cannot
7 establish that it has exhausted its administrative
8 remedies.

9 There's no reason and there's no
10 jurisdictional basis for this Court to excuse the Sierra
11 Club from the exhaustion requirement by -- by ordering
12 BLNR to petition CWRM, when Sierra Club can do it
13 itself.

14 All right. So there is, moreover, and this
15 is another completely independent problem, a complete
16 disconnect between Sierra Club's claimed injuries in
17 this case, and the injunctive relief being sought,
18 because the requested injunction, even if granted, will
19 not redress the Sierra Club's claimed injuries.

20 And, you know, I talked a little bit about,
21 specifically with regard to the 13 streams, in other
22 words, the requested injunction is not going to change
23 anything with regard to the 13 streams.

24 So there's a complete disconnect there, and
25 all of the Sierra Club's other claimed injuries, in

1 terms of loss of enjoyment of hiking, and I think that's
2 principally what they're claiming, every one of the
3 Sierra Club members.

4 I mean, if the diversions are going to
5 continue the way they are now, then the injunction isn't
6 redressing that alleged loss of enjoyment of hiking, and
7 so that -- there's a major disconnect that runs through
8 all of Sierra Club's claimed injuries, a disconnect
9 between those injuries and what the injunction is
10 designed to remedy, and that disconnect is fatal because
11 you can't show irreparable harm that is redressable with
12 an injunction, if the injunction is not going to
13 actually redress the alleged harm.

14 Now, I think the Sierra Club may have
15 concerns about the eventual publication and acceptance
16 of the final environmental impact statement and the
17 terms and conditions of the issuance of a long-term
18 lease. Those issues are not currently ripe for
19 adjudication. Sierra Club will have future
20 opportunities to advance its position on future RPs,
21 whether the environmental impact statement should be
22 accepted, and what the BLNR's eventual action on the
23 long-term lease application should be.

24 There's no need for this Court to, you
25 know, try to put its thumb on the scale now with regard

1 to issues pertaining to the long-term lease, the
2 environmental impact when those issues aren't ripe, and
3 really, you know, these instream protection issues that
4 Sierra Club is asking the Court to look at, these are
5 issues that should be decided by CWRM.

6 CWRM has the expertise. CWRM would look at
7 the complete record, this Court only has a partial
8 record, and this Court should not be, you know,
9 effectively second guessing CWRM by saying, Well, CWRM
10 didn't do these things that CWRM should have done, so
11 I'm going to order the Board to petition CWRM to do it.

12 No. The problem is, that if the Court is
13 reviewing what CWRM did on an incomplete record, then I
14 mean, that's clearly inappropriate. The Supreme Court
15 wouldn't do that. If the Supreme Court was being asked
16 to review the -- whether or not CWRM D&O breached the
17 public trust because it failed to do amendments for the
18 13 streams, Supreme Court would look at that on the
19 whole record, it wouldn't look at it as just
20 cherry-picked pieces of the record.

21 So all right, what I'd like to do now is --
22 so anyway, how much time do I have left? Ten minutes,
23 okay.

24 Okay. I'm going to start with this spot,
25 before I go to some of Mr. Frankel's arguments. You

1 know, this I mean, there is really is no emergency or
2 need for this Court to intervene right now in the
3 trajectory that this Court case has taken with regard to
4 the lease application, the holdover of the RPs for all
5 these years, the environmental impact statement, et
6 cetera.

7 This whole issue of the long-term lease
8 application and the necessity of having a holdover of
9 the RPs in order to prevent cessation of public trust
10 uses and damage to the public's interest, that
11 trajectory is continuing a pace, and you know, and in a
12 year or two, what's going to happen is those issues are
13 going to be really be joined in terms of the long-term
14 lease application.

15 All that's before the Court right now is
16 the decisions made by the Board with regard to
17 continuing the RPs for calendar year 2019 and 2020, even
18 the Sierra Club doesn't really dispute that the
19 diversion should continue, they just want to impose
20 conditions, but again, the condition that they want to
21 impose won't redress the harms that they're alleging
22 gives them standing, and it doesn't address the 13
23 streams.

24 The only effect of the Court coming in and
25 granting this sort of injunction that the Sierra Club is

1 asking for, the only effect it's going to have is to
2 inhibit the, you know, the further roll-out of the Mahi
3 Pono plan, and that's a plan that is projected to be
4 used with way less water, than what the Water Commission
5 has already determined, had already assumed, based on
6 its balancing, would be available to allow the -- the
7 transition of A&B's former sugar lands on Maui to
8 diversified agriculture.

9 And everybody agrees that that's in the
10 public interest, with the possible exception of the
11 Sierra Club when they asked questions of Mr. Nakama,
12 like, Well isn't it true that if you don't get a lease,
13 you can get smaller farm plan, maybe has less jobs, but
14 that's totally contrary to what the Water Commission has
15 already decided would be in the public interest in terms
16 of maximizing the reasonable and beneficial use of this
17 valuable resource, which is the EMI ditch system.

18 So if this Court were to dismiss these
19 claims, Sierra Club could still argue, show up at the
20 meeting and argue about what the terms and conditions
21 should be for the next renewal, and Sierra Club has been
22 pounding its chest, you know, congratulating itself for
23 the fact that the Board has, in fact, been very
24 responsive and has imposed additional conditions as
25 Sierra Club has raised them.

1 And you know, and then the issue of the
2 long-term lease can be dealt with in due course, and
3 that's going to be a separate matter, and if there's a
4 Chapter 343 challenge, then that would be a separate
5 litigation. There's no reason for this Court to now put
6 its thumb on the scale and say, No, I'm going to impose
7 a burden on Mahi Pono's farm plan at a time when the
8 County of Maui needs diversified ag, needs the essential
9 jobs. There's a pandemic going on, the Mayor
10 represented and testified that Maui County doesn't want
11 to see that, not in the public interest.

12 Why do that if it's not even going to
13 redress the alleged harm that the Sierra Club is
14 complaining about?

15 What do I have left? Five minutes. All
16 right. I'm going to try to make the best use of this
17 five minutes here. Need to wet my whistle, though, my
18 mouth is getting kind of dry.

19 All right. I think one of the most
20 noteworthy things about Mr. Frankel's argument is how he
21 kept on making the argument about, BLNR breached its
22 duty to take the initiative each step of the process,
23 and I've already made this point, he was quoting
24 statements from Supreme Court cases that talk about what
25 the Water Commission's duty is.

1 So, again, by arguing that BLNR failed to
2 do all these things, and remember, this all came up
3 after the D&O, essentially, what he's arguing, even
4 though he doesn't like to admit it, is that the Water
5 Commission, in Sierra Club's opinion, did not fulfill
6 its public trust duty.

7 And I think, but he can't argue that,
8 because he doesn't want to say that, 'cause he doesn't
9 want to say, Well, Judge, I want you to second guess
10 what the Water Commission did, but through the
11 backdoor, that's exactly what he's asking you to do,
12 because you cannot find that the Board breached its duty
13 without first finding that the D&O failed, that there's
14 omissions, and there's no way that the CWRM's duty is
15 any less than the BLNR, so it's a very tricky maneuver
16 here.

17 So here you have Suzanne Case, Chair Case,
18 the chair of both the Water Commission and the Board,
19 and as she testified, there's no self-hypnosis or
20 cleansing of her mind when she's acting in one capacity
21 versus another.

22 So he's suing Suzanne Case, and he's asking
23 you to order Suzanne Case, you know, as Chair of the
24 BLNR to petition Suzanne Case as Chair of the Water
25 Commission to petition for an IIFS. So it's like, he's

1 suing Suzanne Case's left brain, because you know,
2 there's no jurisdictional problem suing the left brain,
3 the BLNR side of the brain, but the right side of the
4 brain, which is the Water Commission, he can't sue that.

5 So he's going to order -- he wants you to
6 order Suzanne, one-half of her brain, to tell the other
7 half of the brain that she's got to do something to
8 amend the IIFS.

9 That is obviously a backdoor attempt to
10 second guess what Suzanne Case, as Chair of the Water
11 Commission and what the Water Commission decided, they
12 obviously, don't think that IIFS amendment is needed.

13 There were 17 years where the table was
14 set. Everyone understood you couldn't restore all the
15 streams.

16 You've heard a lot of potential
17 explanations for why these streams don't have the same
18 value as the other streams in terms of habitat, et
19 cetera.

20 So this is a backdoor attempt to challenge
21 the Water Commission, which is inappropriate.

22 Two minutes.

23 All right. I just wanted to comment, the
24 only real issue I wanted to comment on for Mr. Frankel
25 was this system loss issue. You know, the issue of the

1 22.7 percent, I think that the testimony was pretty
2 clear on what's happened there.

3 I mean, during sugar cultivation, you had
4 all they reservoirs, and Mr. Volner explained that how
5 they calculated the 22.7 percent. So if you're
6 importing 150 million gallons of water a day, and you're
7 constantly filling these reservoirs, which are
8 earth, unlined reservoirs, but you're constantly
9 supplying water to the fields, then yes, you're going to
10 have a significant seepage loss from the reservoirs,
11 which the Water Commission had looked at in 2010 and was
12 quite aware of.

13 And the whole issue of, You spent 43
14 million to line those reservoirs and the Water
15 Commission never required it. Now you have a situation
16 where you're not bringing in that amount of water, but
17 you've only got a 30-day terminable RP.

18 So, effectively, I mean, there's no waste
19 going on here, and Suzanne Case was clear, this is
20 system loss, this is seepage, and it's recharging the
21 aquifer. It makes no sense for the Board to impose a
22 condition on Mahi Pono to spend \$43 million to line the
23 reservoirs and prevent this seepage loss, if their
24 permit could be terminated in 30 days' notice.

25 If you want to talk about a condition like

1 that in the lease, that's a whole another ball game, as
2 Suzanne case testified. Long-term lease terms are a
3 whole different matter, and the provision from the CWRM
4 decision, that Mr. Frankel cited, in terms of counseling
5 the Board, was with respect to leases, not revocable
6 permits that are terminable on 30 days' notice. So I
7 don't think that Mr. Frankel's argument on that point
8 was fair.

9 The water needs to continue to be brought
10 in to the reservoirs because, you know, the County of
11 Maui relies on that for fire protection. They've had
12 serious problems with dust and fires. So you can't just
13 stop bringing the water in.

14 And so you bring the water in, yeah, it's
15 seeping, but it's seeping into the aquifer and the total
16 amount of water that's being lost into the aquifer, I
17 mean, it's still way below the amount that's being lost
18 during sugar, and it's still, you know, you're still not
19 bringing in anywhere near the amount of water that the
20 IIFS contemplated could be used for central Maui.

21 I'm told that my time is out, so I will
22 close now.

23 THE COURT: I have a question for you,
24 and don't anyone take anything from this question. I'm
25 not trying to send any signals or anything, it's just a

1 really interesting issue to me, and I'm trying to figure
2 it out.

3 You're saying, it sounds like you're
4 saying, that in the context of a revocable permit versus
5 a long-term lease, there's a different constitutional
6 standard, and mainly because you're talking about
7 context of the revocable permit.

8 And I'm trying to figure out what that
9 really means and whether that's really correct, or is
10 there a never-changing constitutional standard that
11 applies, regardless of whether you're talking about a
12 long-term lease or a short-term revocable permit.

13 MR. SCHULMEISTER: Well, I think that the
14 -- I think the way I'll try to answer that is I think
15 that we have, in fact, cited a significant number of
16 cases that talk about, you know, what the standard of
17 care is with regard to breach of the public trust.

18 Yes, the duty is constitutional, and the
19 formulation of the duty is broad, all right. But when
20 you apply -- but when you say, all right, what does that
21 duty, which is stated broadly, if you had to consider
22 this and that, and you balance this against that, so
23 it's stated very broadly.

24 I mean, what does the -- what is required
25 in order for the trustee to be acting as a prudent

1 trustee in any particular fact pattern?

2 And I believe we cited a number of cases,
3 including cases, and I can't -- trust me that you'll see
4 them in the conclusions of law, that the Court has
5 looked to private trust law for guidance in terms of
6 what is required of a trustee.

7 So, and the big issue there, and to me,
8 it's an issue that is very front and center of this case
9 is, you can't -- I mean, the law cannot -- will not and
10 it makes no sense for the law to impose upon a trustee
11 an obligation to do something that is either impossible
12 or impracticable under the circumstances, and we cited
13 the cases on here that.

14 Here, I mean, the great example in this
15 case of what would be just utterly impracticable, for
16 example, is, and this was covered by both Meredith
17 Ching's testimony and Chair Case's testimony.

18 I mean the argument that you had to prepare
19 an environmental impact statement that takes four, five
20 years to prepare and costs \$2-and-a-half million, you
21 know, in order to turn around a request for a revocable
22 permit to be terminated on 30 days' notice, it's
23 impossible.

24 So the law cannot and should not require
25 something that's impossible; right? And I think that

1 similarly, when you talk about, like for example, lining
2 the reservoirs. I mean, it would make no sense for the
3 Board to say, All right, you know, we'll give you a
4 one-year permit, which will terminate on 30 days'
5 notice, but only if you stop using reservoirs long
6 enough, and you spend \$43 million to line them all, so
7 we don't have this issue of seepage loss.

8 Again, it's just not practicable. It
9 Would just defeat the whole purpose of somebody even
10 wanting to have the RP.

11 So those things pertain to the standard of
12 care, and that's why you need, that's why I would
13 submit, that you need expert testimony about what a
14 prudent manager or trustee would do under these specific
15 facts and circumstances.

16 And as Chair Case clearly testified, that
17 you do not analyze a revocable permit with a maximum
18 term of one year that's terminable on 30 days' notice
19 with the same set of criteria that you would look at a
20 long-term lease. You just have to look at what's at
21 stake, and the parties' investment, the public interest
22 and everything else.

23 If you impose requirements that would just
24 drive everybody away and make it impossible for the
25 continuation of EMI ditch system, then you're defeating

1 the public trust, you're defeating the public interest.
2 So, obviously, you cannot do that, so that's the best I
3 can articulate.

4 THE COURT: All right. So we'll take our
5 next break now, another ten minutes, although now I'm
6 wondering, you know, looking at the clock, well let's go
7 off record.

8 (Discussion held off the record.)

9 THE COURT: Okay. So we'll take our recess
10 now. Please return in nine minutes at 25 minutes after.
11 We're in recess. Thank you.

12 (Recess taken at 11:16 a.m.)

13 (Reconvened at 11:25 a.m.)

14 THE COURT: FTR on?

15 THE CLERK: Yes, Judge.

16 THE COURT: Okay. We're back on record,
17 Mr. Wynhoff.

18

19 CLOSING ARGUMENT

20 MR. WYNHOFF: Good morning, Your Honor.
21 Thank you for the opportunity to make this closing
22 argument.

23 Going to start by addressing the question
24 that the Court asked to Mr. Schulmeister at the end of
25 his argument. And my answer to that, Your Honor, is

1 that the trustee, including a public trustee, has a duty
2 to act reasonably and to act prudently.

3 And so the fact that we are looking at a
4 one-year revocable permit clearly has bearing on what is
5 reasonable and what is prudent. It is simply not
6 reasonable, nor prudent to require A&B to make millions
7 of dollars worth of investment, when the matter might be
8 -- the revocable permit might be terminated next month,
9 and there's considerable amount of discussion of that
10 also in our conclusions of law, Your Honor.

11 I would like to also suggest that it's kind
12 of remarkable that plaintiff hasn't attempted grapple
13 with this question before, and I think that's part of
14 the confusion, and I do think there is some confusion in
15 this case as to what we're actually here, and what are
16 we doing? I'm going to get into that a little bit more
17 later.

18 But I would like to at this point segue to
19 the argument that I had prepared, and this also is
20 somewhat of a little bit of a change, because the very
21 first seconds of Sierra Club's argument really sums up
22 their problem, their problem with this case.

23 They talk about public trust, and then they
24 talk about this use of the water as a compromise of the
25 public trust. And very respectfully, Your Honor, and

1 very importantly, that is an absolute category mistake
2 that permeates plaintiff's entire case.

3 It is their view that any use of the water,
4 other than allowing it to warble unobstructively to the
5 ocean is a presumptive violation of the public trust,
6 and cannot be allowed until it is completely justified
7 by every possible piece of information that they can
8 dream up, that they might like this Court to find out,
9 but that's simply wrong.

10 The basis of the public trust duty is in,
11 as we all know, but I will nevertheless repeat, in the
12 Hawaii Constitution, Article 11, Section 1 for the
13 benefit of present and future generations, et cetera.

14 The State shall conserve and protect
15 Hawaii's natural beauty and all natural resources,
16 including water, shall we say, and shall promote the
17 development and utilization of these resources in a
18 manner consistent with their conservation, and in
19 furtherance of the self-sufficiency of the State.

20 All public resources are held in trust by
21 the State for the benefit of its people.

22 So Sierra Club picks out portions of
23 various cases, the Supreme Court's voluminous cases on
24 the issues for things that it likes, but it doesn't
25 point out to you other excerpts from *Waiahole I* and

1 *Waiahole* I at 94 Hawaii -- I don't -- maybe I won't give
2 you the pin cite, Your Honor, but it's 94 Hawaii at 138
3 is the general area.

4 Article 11, Section 1 requires the State
5 both to protect natural resources and promote their use
6 and development.

7 The State water resources trust thus
8 embodies a dual mandate, and I think we've used those
9 words before, Your Honor, a dual mandate of protection
10 and maximum reasonable and beneficial use.

11 Another quote, I think this is at 141:

12 The public has a definite interest in the
13 development and use of water resources for various
14 reasonable and beneficial public and private offstream
15 purposes, including agriculture. That's a quote.

16 At the same spot, Reason and necessity
17 dictate that the public trust may have to accommodate
18 offstream diversions inconsistent with the mandate of
19 protection to the unavoidable impairment of public
20 stream uses and values.

21 Even *Kauai Springs*, which was a case
22 considerably different than this, Your Honor, and that I
23 would say from my own view, points out the outer limits
24 of the use of the water. Even in *Kauai Springs* there
25 are no absolute priorities between uses under the public

1 trust.

2 So the State and the subdivision must weigh
3 competing private and public water uses on a
4 case-by-case basis according to any standards applicable
5 by the law.

6 So, Your Honor, what Sierra Club's case
7 turns on is, first of all, the unstated, what needs to
8 be stated presumption, that any use of the water, other
9 than continuing in its natural state, so that members of
10 Sierra Club can listen to it and experience inequitable
11 joy of frolicking in it is presumptively wrong, any use,
12 other than leaving it there, is presumptively wrong,
13 that's one key tenet of Sierra Club's case, and it's
14 simply wrong.

15 And then what they also have talked about
16 is, they talk about how this water use is so substantial
17 and so increasing, but we all know, and Sierra Club's
18 own findings start off by saying, and I think it's, the
19 State believes that it's important to keep in mind that
20 this use in this particular area has been going on for
21 some 130 years, construction of this ditch system began
22 in the 19 -- I'm sorry, 1870s, and was completed in the
23 1920s. So it started 150 years ago, and it was
24 completed 100 years ago.

25 The diversions capture were designed to

1 capture, as Sierra Club posits, and nobody ever
2 disputed, 100 percent of the base flow, but that leaves
3 a lot of water that isn't captured.

4 We had a lot of discussion about freshets,
5 waterfall, rain, torrent storms, 20, 30 percent of the
6 time there's going to be water flowing in there.

7 Another, important point of Sierra Club's
8 case is that they want to focus this Court on the 13
9 streams. Mr. Schulmeister did a good job of explaining
10 the history of this area and explaining why the 27
11 streams at CWRM did talk about, were talked about, and
12 that the 13 streams that Sierra Club's now talked about
13 have not been the focus of anyone's attention over this
14 time.

15 It's very clear -- well first of all, let
16 me start off by saying, that the area in general, while
17 Sierra Club wants you to focus only on these 13 streams,
18 the area in general here is some 50,000 acres of
19 watershed in east Maui. Of that 50,000 acres, some
20 33,000 is the State's land from which the water flows.

21 It's important also to note at this point
22 that all of this is our water, it's all the State's
23 water, and so I have been puzzled from time to time that
24 Sierra Club says, Well, they should use different water,
25 ground water or some other water, it's still the State's

1 water, can't just start using other water without having
2 any -- without having oversight and permission, and the
3 idea that it's costless or not a public trust issue to
4 simply use some other water is not correct.

5 The historical context, first of all, the
6 big picture shows that we're talking about a much larger
7 area than Sierra Club would like you to focus on, and
8 second of all, their repeated assertions that the water
9 use is large and increasing is also deliberately and
10 misleadingly myopic.

11 The undisputed facts in this case are that
12 historically, Maui, the sugar area, sugar growing area
13 in Maui, was using some 165 million gallons per day from
14 the east water -- east water -- east Maui watershed,
15 165.

16 In 2004 to 2013, the use decreased to 126,
17 sometimes I might omit the million gallons per day, but
18 I think we all know what we're talking about and the
19 scale is important thing.

20 165 million gallons per day down to 126
21 million gallons -- gallons per day in 2016, 40 MGD,
22 2017, to the present, somewhere in the area of 24 to 28
23 are being used.

24 The permitted use, so actually the fall-off
25 has been enormous, and even in -- even in just -- even

1 in just some seven years, there's been a decrease of 80
2 percent, and over a slightly longer period, the decrease
3 is closer to 90 percent, but does Sierra Club
4 acknowledge that or made any acknowledge of it? No,
5 they haven't, but it's extremely important.

6 And in terms of the permitted use in 2016,
7 the permitted use was 80 million gallons per day, 2018
8 there wasn't actually a limit imposed, I believe.

9 In 2020 Sierra Club makes a big deal out of
10 the fact that the staff recommended 35 million gallons
11 per day, whereas, the Board approved 45 million gallons
12 per day.

13 In any event, the point is, as we know, the
14 Board had -- had cogent reasons for it, which it thought
15 about very carefully, but at any point, the
16 unacknowledged facts here, this is a much bigger area
17 than these 13 streams, and historically there's been an
18 enormous decrease in the amount of water that's used.

19 The 2018 CWRM decision is, of course, a
20 milestone that the Court is very aware of, all the
21 parties have emphasized very clearly in the 2018 CWRM
22 decision.

23 CWRM, all of the streams, of course, as we
24 know, have IIFS. In the old days, those IIFS were set
25 based on historical use. In 2018 the CWRM set IIFS for

1 some 27 streams out of the, say, 40 that are it in
2 there. Of course, we all know that there is some
3 discrepancy as to how many there actually are, depending
4 on subsidiaries and tributaries and stuff, but that's
5 the general magnitude of the situation.

6 So why did CWRM -- why did CWRM devote a
7 decade or more to these particular streams? It's
8 because everyone acknowledged that these were the
9 important streams in the area, the streams that had the
10 most water, the streams that had the most habitat, the
11 streams that had the most wildlife or fish, animals, the
12 streams that had the most cultural value.

13 So, and what the CWRM did, is it decided
14 that from nine of these streams, no water was going to
15 be diverted. I believe that we think it's ten, but
16 let's just say it's nine or ten.

17 So why did the CWRM decide that? This is
18 in the record. They decided that these ten would not
19 be, the water would not be diverted from these streams
20 because they were spread out geographically through the
21 relevant area, and the point of that would be that it
22 would provide greater protection against local
23 disruption of wider benefit to the ocean, and more
24 function across the watershed.

25 It's important to note, Your Honor, that of

1 these streams that were fully restored, two of them, and
2 I'm trying to look for my specific notes on the point,
3 but in any event, two of them bracket 12 of the 13
4 streams that are directly at issue in this case, oh,
5 okay.

6 So anyway, Honopou and Hanehoi, and
7 Waikamoi basically bracket the streams that are at issue
8 in this case, and the idea being that -- okay.

9 MR. SCHULMEISTER: I can't hear for the
10 last minute or two.

11 THE COURT: I know. Time out.

12 MR. WYNHOFF: Can you hear me? Am I
13 stopped?

14 THE COURT: No, I can hear you just fine.

15 MR. SCHULMEISTER: I can't hear anybody
16 right now.

17 THE COURT: We're getting too much
18 interference. Lock the meeting.

19 THE CLERK: It's locked.

20 THE COURT: I'm sorry to have to say this,
21 but I don't think people can appreciate how much
22 interference is caused here in the courtroom by this
23 background noise.

24 So I'm going to have to be harsh about it.
25 The next time I hear background noise or voices or

1 extraneous stuff, we're just going to eject everybody
2 from the hearing, okay.

3 Sorry to have to do that, but it's the only
4 way I can explain to you all how serious it is here on
5 our end when we get that interference. It just makes it
6 impossible to follow the argument, so it's not fair to
7 the lawyers.

8 So if we have to eject everybody, we will.

9 All right, Mr. Wynhoff, go ahead.

10 MR. WYNHOFF: Thank you, Your Honor, and I
11 surely appreciate, of course, that you will stop me and
12 let me know if you can't hear my argument, or maybe at
13 least as importantly, if I dare say so, that the court
14 reporter can't hear me. So thank you, Your Honor. Much
15 appreciated.

16 So, Your Honor, I was talking about the 21
17 streams, of which nine streams were -- nine or ten were
18 fully restored, of course, the Court is aware that five
19 streams were put back to what's called H90, by which 64
20 percent of the water was put back in the stream, and to
21 -- with the idea that that would provide 90 percent of
22 the habitat.

23 That's actually a study point, to some
24 extent, that the evidence shows that that is a
25 hypothetical or --

1 THE COURT: Time out.

2 Eject everybody from the meeting except the
3 attorneys.

4 We're going to go off record for a few
5 minutes while we handle the technological stuff on our
6 end of it. We're off record.

7 (Discussion held off the record.)

8 (Recess taken at 11:38 a.m.)

9 (Reconvened at 11:50 a.m.)

10 THE COURT: FTR on?

11 THE CLERK: Yes, Judge.

12 THE COURT: We're back on record.

13 Mr. Wynhoff, sorry for the --

14 MR. WYNHOFF: Thank you, Your Honor.

15 THE COURT: -- sorry for the interruption
16 and unevenness, but I'm following your argument just
17 fine. Just pick up where you left off, we'll be good.

18 MR. WYNHOFF: Great, thank you, Your Honor.
19 I appreciate it, and we just have these problems, so
20 thank you for taking care of them for us.

21 So, as the Court will remember, I was
22 talking about the streams that the CWRM had dealt with,
23 there was nine or ten. I talked about those.

24 I was talking about the page 90 streams, to
25 some extent, that's a scientific experiment that's still

1 in process to find out whether the 64 percent of the
2 water will, in fact, restore 90 percent of the streams,
3 I think so, but we'll find out because we have some
4 subject streams and some control streams.

5 Eight of the streams have the so-called 20
6 percent, which is the wetted path, these streams there
7 was no restoration, and, of course, these 13 streams
8 that were not studied by the CWRM.

9 So what the Sierra Club is arguing, and
10 what they specifically say in their findings, 70, I
11 believe. The BLNR defendants have taken no substantive
12 action to protect instream uses, including fishery,
13 wildlife, recreational or other beneficial instream uses
14 of these 13 streams.

15 To some extent that may be true,
16 Your Honor, but that is exactly the problem with Sierra
17 Club's case. It doesn't mean that they ignored these 13
18 streams, or that they breached their public trust duties
19 with respect to these 13 streams.

20 What it means is that they, meaning the
21 Board and the CWRM, unlike Sierra Club, and unlike
22 Sierra Club would like to have you do, is Sierra Club is
23 the Board and the CWRM looked at the entire big picture.
24 They looked at 50,000 acres of watershed. They looked
25 at 35 streams.

1 Some of these streams were not restored.
2 Why were they not studied? Why were they not restored?
3 The record is replete with evidence that they weren't
4 studied or restored because these are the streams with
5 the least value.

6 And so, again, what -- what Sierra Club is
7 trying to do is two-fold. First of all, they want you
8 to assume the very conclusion that you need to reach,
9 which is, Any use of the water, other than in the
10 stream, is per se, a violation of the public trust; and

11 No. 2. They want you to focus only on
12 these 13 streams, without taking into account the fact
13 that the CWRM and the DLNR and the BLNR have been
14 intensely studying this entire area for 20 years and
15 have determined that use of the water from these 13
16 streams is the appropriate way to proceed.

17 The DLNR, according to the Sierra Club's
18 proposed findings, did not provide a justification for
19 allowing less water in these streams than is necessary
20 to provide suitable habitat.

21 And that actually goes back to what I felt,
22 the State felt was a very compelling part of Sierra
23 Club's own testimony, its representative
24 Ms. Townsend, and she was more than happy to say, The
25 Sierra Club doesn't object to use of the water, provided

1 that enough water is left in -- provided that there's
2 water left over after the uses to which they prefer,
3 their use of the hiking, their desires, that's fine, but
4 that's not the way the BLNR is supposed to do it.

5 The BLNR and the DLNR and the CWRM are
6 required to consider the interests of all of the people
7 of the state, not just a relative handful who like to
8 hike into those areas, and apparently feel that they
9 need to have these 13 streams also unimpeded because
10 they can't get their sidekick satisfaction out of
11 walking to the other ones that have been fully restored.

12 But this Court and the BLNR, and I guess
13 ultimately this Court, also has to take into account the
14 30- to 35,000 people in Upcountry Maui who has a simple
15 human desire to turn on their taps and flush their
16 toilets, and it also has the DLNR and this Court, I
17 guess, have the duty to take into account the fact that
18 the water that is taken from these streams is being used
19 to water some 30,000 acres of land in central Maui,
20 including 22,000 acres of important agricultural lands,
21 which is based on the public policy of the state is an
22 enormous issue for the public trust and for beneficial
23 uses of water.

24 Important agricultural lands are subject of
25 Legislation, they're the subject of executive branch

1 action, they're the subject of Land Use Commission
2 action, and they are an important, extremely important
3 public policy goal of the state, along with increasing
4 our agricultural self-sufficiency that cannot simply be
5 brushed aside in favor of people who wish to hike.

6 So there's been a considerable amount of
7 discussion, and plaintiff's would have an emphasis on
8 the 2009 DEIS, the Parham report, which is supposedly a
9 part of it, the new information in Parham's report that
10 was not available to CWRM, according to Sierra Club,
11 when it rendered its 2018 decision, but it was available
12 to BLNR when it made its 2019 decision.

13 And these same issues and arguments that
14 were brought to this Court were repeatedly and
15 emphatically made to the Board itself. Parham report
16 says that 588,000 acres, pardon me, 588,000 square
17 meters of habitat is lost because these 13 streams
18 aren't restored.

19 They made that same argument to the Board.
20 The evidence is absolutely crystal clear that the Board
21 carefully considered it, I'm going to allude later to
22 some of the statements made at these meetings.

23 Okay, so these 588,000 square meters are
24 reduced by 85 percent. Well the evidence also showed,
25 588,000 sounds like a big number and, in fact, in Sierra

1 Club's proposed findings and conclusions, they say that
2 this is, quote unquote, Obviously significant.

3 Well, Your Honor, we submit that it is not
4 obviously significant. It's only obviously significant
5 -- in fact, nothing is obviously significant, it's only
6 obviously -- it's only significant in relationship to
7 the big picture.

8 588,000 square meters turns out to be some
9 146 acres out of 50,000. Mr. Frankel previously and
10 very perceptively pointed out that while there may be
11 50,000 acres in the entire watershed, that doesn't mean
12 that there's 50,000 acres of suitable habitat, so maybe
13 146 acres is significant, and maybe it's not
14 significant.

15 But it's not obviously significant, and
16 it's not obviously a breach of public trust duties to go
17 that way, and nor does it support this Court doing what
18 plaintiffs are asking them to do.

19 And I also want to point out, as I already
20 have, that that same argument was made to the Board,
21 they're just simply choosing another forum and hoping
22 that they're going to get a different result from this
23 forum.

24 So with respect to diversion structures,
25 Your Honor, diversion structures, Sierra Club's proposed

1 findings would tell you, diversion structures can
2 interfere with native aquatic species, and they can
3 facilitate mosquito breeding, and they can mar natural
4 beauties, but where's the evidence that they're actually
5 doing any of that?

6 And again, now I think it's really
7 important, when we talk about diversions, that all of a
8 sudden we're asked to take our eyes off the ball. Now
9 we're not talking about these 13 streams anymore. Now
10 we're talking about diversion structures that are left
11 elsewhere on these other streams.

12 So, and keep in mind also, in terms of
13 keeping your eye on the ball, this, for better or worse,
14 this case is about water. And so what the Sierra Club
15 is asking you to do, or is asking you -- well, is asking
16 you to do is it's saying, take your -- we filed this
17 lawsuit about these 13 streams, and now take your eye
18 off the ball of these 13 streams, and order -- no water
19 can come out of these 13 streams until the Board orders
20 Sierra Club -- the Board orders A&B to go elsewhere and
21 remove or remodel these other diversions elsewhere.

22 What does that have to do with the water in
23 these 13 streams, Your Honor? It doesn't have anything
24 to do with it.

25 Mr. Frankel in his questioning on multiple

1 occasions said, Ah, oh, okay, so Mr. Witness or
2 Ms. Witness, you would agree with me, would you not,
3 that those diversions aren't going to last forever?
4 Sure, okay, I guess we'd all agree with that, forever is
5 a pretty long time.

6 And maybe, maybe 50 years from now those
7 diversions will -- they'll deteriorate such that 50
8 years from now, they're interfering with use of the
9 water in these other streams that are not actually part
10 of Sierra Club's case.

11 Well, first of all, that's purely
12 speculation and simply has no real bearing on what we
13 have to be doing with respect to the water in these 13
14 streams.

15 And second of all, Your Honor, I think
16 Your Honor will remember that we went through in some
17 detail with Chair Case, the fact that the Commission on
18 Water Resource Management made a bunch of determinations
19 about the diversions, which are not being attacked,
20 we've been repeatedly told, and we also went through
21 that the CWRM is looking into additional diversions.

22 I remember -- I think you'll remember that
23 we had a discussion about admission, a bunch of evidence
24 and documents with respect it Category 1, 2, 3 and 4
25 diversions. The Court indicated to me that, if I'm

1 remembering it correctly, that the Court had understood
2 my point, and so that I'd forbore from spending a bunch
3 more time bringing all these in there.

4 But the evidence is undisputed that the
5 CWRM is looking at these diversions, and so it's kind of
6 taken our eye off the ball to say that, with respect to
7 protecting the water from the 13 streams at issue, the
8 CWRM ought to -- I mean, the Board of Land and Natural
9 Resources ought to have ordered A&B to spend untold
10 millions of dollars doing something with diversions in
11 other areas.

12 And furthermore, the evidence is very clear
13 that it is far from what Sierra Club would have you
14 believe. It's not -- it's not that easy to go ahead and
15 remove these diversions. At a minimum, they're all in
16 the conservation district, you're going to need a
17 conservation district use permit, the evidence shows.

18 In some cases you're going to need -- I
19 know one of the permits for sure that you might need was
20 from the Army Corps of Engineers, the Federal Army Corps
21 of Engineers, and I believe the third permit was from
22 the Department of Health.

23 But in any event, there's a reason that all
24 those permits are needed, and that is because removing
25 those or modifying those diversions is not easy, not

1 quick, not without other effect on the environment, and
2 for Sierra Club to have you just cavalierly say, Well no
3 water should come out until those things are removed is
4 a vast overstretch.

5 So I guess my discussion here kind of ends
6 up tracking the way that Sierra Club organized its own
7 findings, and is not exactly the way that they argued it
8 today.

9 So after going to diversion structures,
10 they then talked about, starting at finding 90,
11 Consideration of reasonable and beneficial use of water.
12 And basically their argument there was that the Board's
13 consideration was superficial, and what they meant by
14 superficial, I think is very clear and it's very clear
15 from their argument, too, is that the Board should have
16 asked for a whole bunch of different information; A&B
17 didn't disclose how much water per acre, and how much
18 water per crop.

19 Basically the way, it's our view,
20 Your Honor, that in terms of lack of information, they
21 simply told Your Honor, whatever -- whatever information
22 was in there, there's reams and reams and reams,
23 particularly and most recently with the draft EIFs
24 available, there's literally thousands of pages of
25 information that is available, and so they went through

1 there and they said, Well, I don't see this in there.
2 How much water did they use on this particular acre of
3 their 30,000 acres?

4 Maybe they want to know that, they made a
5 pretty big point of saying, Hey, BLNR didn't even know
6 this until we asked. Well, you know what? That's
7 BLNR's determination that that information is not
8 necessary or relevant or reasonable in order to make the
9 decision that they made.

10 And in particular, keeping in mind,
11 Your Honor, that we're talking about a one-year permit,
12 as Mr. Frankel -- at most one year, it's cancellable on
13 30 days' notice.

14 Mr. Frankel correctly pointed out that, and
15 I think we all can do the math, that this, the permit
16 approved last year is just about pau. It's going to
17 come up for consideration again, and you know, what
18 information is reasonable for a one-year permit,
19 apparently Sierra Club disagrees with what the Board
20 did.

21 They then -- they then -- so they don't
22 really attack the idea, when you look at their findings
23 with respect, starting at 90, with respect to the other
24 use of the water, there really isn't any attack, nor
25 could there reasonably be, we submit, Your Honor, an

1 attack on the idea that this use of the water, other
2 than for offstream purposes, is, in fact, reasonable and
3 beneficial.

4 I mean, just to reiterate, it's used for
5 35,000 people for domestic water use; it's used for
6 30,000 acres of diversified agriculture, of which 22,000
7 is important agricultural lands.

8 Look at their findings, Your Honor. They
9 don't say that any of this is not a reasonable and
10 beneficial use of the water, and they couldn't say that,
11 so that's extremely, extremely important.

12 They then -- they then turn to the idea of
13 trash, that's at their finding 116. Your Honor, trash
14 is also, first of all, I would say, trash is also, I
15 would ask you to keep in mind that trash also is asking
16 you to take your eye off the ball here, because trash
17 does not have anything whatsoever to do with the water
18 that's coming out of these 13 streams.

19 What Sierra Club is asking you to do,
20 again, is to extort money out of or services out of A&B;
21 they're not going to get their water use until they go
22 do something else, and it doesn't have anything actually
23 directly to do with the use of the water.

24 But substantively with respect to trash,
25 the evidence shows in this case that Mr. Frankel

1 apparently thought that I had misspoke or was incorrect
2 when I said, One man's trash is another man's treasure,
3 but I stand by that statement. I think that's what the
4 evidence showed in this case. It is very clear that
5 some of the rusting pipes and other structures in there
6 that the Sierra Club objects to when they come
7 frolicking through the woods and they see them there,
8 are things that are part of -- are part of the
9 diversion, either working now or that could be working
10 at some time in the future.

11 With respect to the trash that has been
12 taken out, I think it's extraordinarily telling,
13 Your Honor, that the -- the only -- the only pictorial
14 evidence of trash, or at least pretty much the only
15 pictorial evidence of trash, it's trash that was
16 removed.

17 I was looking around through my notes, I
18 think it was at page 52 of Mr. Frankel's exhibits that
19 he shared with the Court today. I may be wrong, but it
20 was a picture of trash that was removed, and so sure,
21 there certainly could be trash up there, but all of that
22 trash was removed at the behest of the Board of Land and
23 Natural Resources.

24 The Board of Land and Natural Resources
25 imposed a condition on A&B that they need to report,

1 that they need to remove trash. When trash is reported
2 by the Sierra Club or others, that it then goes to A&B,
3 and they go out there and remove it. It's certain
4 possible, as perhaps Sierra Club is implying, that the
5 Board could have imposed a condition that A&B go up
6 there and do some sort of a foot-by-foot inspection of
7 the property in order to find out if there's anything up
8 there in trash, that was trash, but we submit very
9 clearly, Your Honor, that making -- making A&B do that
10 is -- is -- would not be reasonable, and furthermore, it
11 certainly is not unreasonable to not do that. What we
12 have there, in fact, is we have a very robust system of
13 when trash is reported, it gets removed.

14 When we go to -- we go to, on the other
15 hand, the adverse impacts. First of all, we're talking
16 about what the Sierra Club, when they talk about, on the
17 other hand, adverse impacts, at their finding 128, they
18 are talking about, in those paragraphs ad sect, they're
19 talking about their individual desires to enjoy nature,
20 enjoy the quieting sounds and beauty of free flowing
21 streams, their hiking experience is adversely affected.
22 They like to frolic and explore.

23 So, Your Honor, I think those, maybe some
24 people would argue as to how much value that includes,
25 and there's no evidence as to how many people there

1 actually are that experience that and feel that way.

2 There is no evidence whatsoever as to why
3 they needed to frolic and explore with respect to these
4 13 minor streams as to other streams.

5 But then actually what I would point out to
6 Your Honor is, they really end up using that as an issue
7 of the Sierra Club has standing for -- to bring this
8 lawsuit, which the State does not -- the State does not
9 dispute, I think there's been some dispute about that, I
10 didn't hear about it in Mr. Schulmeister's opening
11 argument, perhaps, I missed it.

12 But I think it's extremely important that
13 these issues that the Sierra Club brought up for their
14 specific members are not actually end up -- they don't
15 end up in the section that Sierra Club's called, Balance
16 of the Harms, which runs from their -- their findings of
17 fact 138 to 158.

18 And, in fact, when you look at those --
19 those findings, Your Honor, what you're going to find is
20 that they are pretty much exclusively devoted, the
21 balance of the harms that they suggest is that these
22 stream diversions are hurting native -- native stream
23 life.

24 Which, again, there really is no dispute
25 about that. It's absolutely crystal clear, nobody would

1 have ever said anything different. We never said
2 anything different, and none of our witnesses have ever
3 said anything different. In fact, I think, I don't
4 remember exactly who it was that said it, but it's just
5 pretty clear, and it just stands to reason that more
6 water is better.

7 If you put all the water back into these 13
8 streams, you'd have more habitat, and you'd have more
9 fish, nobody disputes that.

10 But the other issue, Your Honor, is -- the
11 other concept besides more water is better is, bang for
12 the buck. Remember, we talked about that, too, and I
13 love that phrase, so the syllogism that the Sierra Club
14 asked you to follow, and pardon me for repeating myself
15 is, assuming that any use of the water, other than
16 leaving it in the streams is presumptively invalid, they
17 have conclusively proved, and we admit that they have
18 conclusively proved, that if you put more water back in
19 some of these streams, then you'd have more -- you'd
20 have more animals.

21 But that's exactly, exactly the issue that
22 the CWRM and the Board already visited and decided that
23 this is the best way to get the most bang for the buck.

24 So if you take your thumb off the scale and
25 say, well, there are such a thing as beneficial

1 offshore -- offstream uses, and if you don't follow what
2 Sierra Club said, which is, Oh, that's fine, we're more
3 than happy to let other people use the water, provided
4 that everything we want in stream is used first, then
5 it's very clear that the Board and the CWRM have very
6 carefully thought about and carefully balanced all of
7 the issues, and in particular, have carefully thought
8 about and carefully balanced the only issue that Sierra
9 Club talks about in their section, Balance of the Harms,
10 the Wildlife.

11 I talked about that already where these
12 nine streams were spread out geographically for the
13 specific purpose of protecting and helping the
14 wildlife. I talked about the fact that two of the
15 streams bracket the 12, and one of them is right in the
16 middle of it.

17 I would also like to emphasize that a very
18 important point in the evidence in our view, Your Honor,
19 and that is that these harms, to the extent that there's
20 harms at all, are not permanent.

21 The evidence is very clear that once the
22 water is restored, then we would expect to see the
23 animals back in the streams very quickly.

24 So should there be some time in the future
25 where Sierra Club wishes to go and have different, not

1 new, different IIFS standards imposed for these 13
2 streams, and should the CWRM decide that those streams
3 also ought to be restored, then the animals will quickly
4 come back, that's undisputed, Your Honor.

5 And then so, on the other side of that,
6 there simply is no dispute, and I don't think you will
7 find, I didn't see it myself in Sierra Club's proposed
8 findings, that these other offstream uses are not
9 valuable and important, and I didn't hear that in any of
10 their arguments today either.

11 So in terms of the balance of the harms,
12 what we're talking about is we're talking about
13 protection for the animals, which was carefully thought
14 about and carefully done by way of the science, after
15 years, decades perhaps, of study by the dozens and
16 dozens of people who are charged with doing that in the
17 CWRM and at the DLNR, and this is what the Board ended
18 up ruling on.

19 And so with respect to -- so actually,
20 again, and so now, there's where we are. There's where
21 we are.

22 We have -- we have the balance of the harms
23 is where it is, so why have -- why -- why is it, in
24 Sierra Club's view, that the Board has, maybe that's
25 putting the cart before the horse a little bit, because

1 that's kind of -- you don't even get to the balance of
2 the harms until you find that there's some sort of
3 determination in their favor on the merits.

4 Well, why is it in their view that the
5 Board breached its duty of trust? And the answer to
6 that, Your Honor, is, first of all, I mean, backing up a
7 little even further than that.

8 The question is, What is the standard for
9 the fiduciary duty that we have here? The Sierra Club,
10 as I mentioned right at the outset of this, they've
11 never identified that, and they've never drilled down on
12 it. What they have said is, The Board breached its duty
13 because it doesn't have all of this information.

14 Well, information, Your Honor, we submit,
15 is not a be all and end all in itself. Information is
16 not free. What we need to -- what we actually have here
17 is the Board has a duty as a public trustee to act
18 reasonably and prudently.

19 Now, the question of how much information
20 they actually need is a question of their reasonable and
21 prudent balance.

22 They had, as I said, they had thousands and
23 thousands of pages, decade of experience, decade or more
24 of experience with this, and they decided that this was
25 the reasonable amount of information that they needed in

1 order to make the decision, particularly since it's a
2 one-year permit.

3 Oh, and actually now that I do see my
4 allusion to page 52, if Your Honor gets a chance to go
5 back to page 52 of Mr. Frankel's exhibits, you will find
6 that he made an allusion to something that the CWRM
7 itself had decided, and he pointed out to us that the
8 CWRM -- I have so many things open here.

9 Well, I can do it from memory I'm pretty
10 sure, but the CWRM had decided that BLNR ought to go
11 look into some of these things, but he didn't say and
12 although in all fairness, it was right there, but he
13 didn't highlight it and he didn't say it today, in the
14 context of long-term leases.

15 Well, the Board is, in fact, going to look
16 into that in the context of long-term leases, but the
17 Board has also made a reasoned decision that it is
18 reasonable and prudent to have somewhat less information
19 and somewhat less action with respect to these revocable
20 permits.

21 And so, Your Honor, I would actually like
22 to finish up 'cause I think I only have a couple of
23 minutes. What I also want to point out something is
24 that the Sierra Club has not ever told you what exactly
25 it's asking you to do, and by that specifically I mean,

1 What is your standard of review?

2 Are you -- is the Sierra Club asking you to
3 stand in the shoes of the BLNR and make a de novo
4 decision that you, the Honorable Jeffrey Crabtree, is
5 going to decide that the Board should do this or this
6 should happen with the water or that should happen with
7 the water, or are you reviewing what the Board did to
8 determine whether it fails to meet some standard, such
9 as arbitrary and capricious?

10 The Sierra Club has never told you that,
11 and of course, Your Honor, that makes a huge amount of
12 difference.

13 We respectfully suggest that it would be
14 completely improper for you to substitute your judgment
15 for that of the CWRM and that of the DLNR. It would be
16 completely improper, and I mean this with the greatest
17 respect, for you to make a determination that if you
18 were looking at this ab initio, you would say that the
19 water ought to stay in the streams, and 22,000 acres of
20 land in central Maui, important agricultural lands,
21 ought to be turned back into a dust bowl, that's not the
22 standard that we submit here, Your Honor.

23 And I think that it's pretty obvious, in
24 fact, that that is not a sensible way to proceed. I
25 have emphasized many, many times, and I'm going to do it

1 this one maybe last time, that the CWRM and the Board
2 have been looking at this for decades, that the CWRM and
3 the Board have dozens, if not hundreds, of people on
4 their staff, including scientists, who have been
5 studying this area.

6 Just for one example, of course, is Ayron
7 Strauch who's been up there hundreds of times, has seen
8 all of the streams, um, has studied them carefully.

9 Your Honor, we had a lot of discussions
10 during the two-weeks that you had the benefit of
11 learning about this second-hand. There was a lot of
12 discussion from Your Honor about what information you
13 weren't going to listen to, because the discussion was,
14 Well, you shouldn't -- you shouldn't hear this,
15 Your Honor, Sierra Club in particular was one to say,
16 because this isn't something that the Board considered.

17 Well, again, I think that it's really
18 important, has been emphasized already that the Board
19 has a certain element of continuity, they rely on their
20 scientists.

21 At the 2019 meeting, you'll see in the --
22 if you get a chance to read the transcript or re-read
23 the transcript, Tommy Oi, one of the Board members
24 specifically asked, I think it was Ayron, Have you --
25 have you looked at this, have you thought about our

1 public trust duties, and can we rely on you?

2 Those things are all out there, and they're
3 things that the Board had and the CWRM had, and
4 respectfully, Your Honor, it just -- it just doesn't
5 make sense, we submit, for this Court, after having the
6 benefit of a limited amount of information from a
7 two-week trial for it to step into the shoes of the
8 Board of Land and Natural Resources and make a de novo
9 decision as to what it would do.

10 When you -- if you look at it, as we
11 believe would be appropriate, and I think this is true
12 with respect to any kind of trustee, and we've had quite
13 a bit of discussion about it in the conclusions of law
14 as well, the issue is giving deference to the trustee,
15 has the trustee abused any of its or violated any of its
16 trust duties?

17 There's certain per se trust duties I would
18 say, there's no question about that, the duty of
19 loyalty, the duty of not self-dealing. But other than
20 that, what the duty of the trustee is, is to follow the
21 terms of the trust.

22 And the terms of the trust, to end up
23 exactly back where I started, Your Honor, the terms of
24 the trust are set out in the Hawaii Constitution,
25 Article 11, Section 1, and that is to preserve --

1 conserve and protect Hawaii's natural beauty and all
2 natural resources and to promote the development and
3 utilization of these resources in a manner consistent
4 with their conservation. And in furtherance of the
5 self-sufficiency of the state.

6 That is a dual mandate, Your Honor, and so
7 very respectfully, we think that -- and urge this Court
8 to find that the Board of Land and Natural Resources
9 carefully, meticulously drilled down into what was a
10 reasonable and prudent thing to do, what was their
11 public trust duties?

12 I'm going to just interject a person note,
13 I can tell you that the Board of Land and Natural
14 Resources, I'm confident, finds it offensive that they
15 are accused of apathetic, of apathy with respect to
16 their trust duties, and they are personally offended
17 that they find that they are ignorant of their trust
18 duties. Their trust duties were carefully thought
19 about. Their trust duties include, use of the water
20 offstream.

21 And we suggest and ask this Court to find
22 that it is patently reasonable and prudent for the water
23 to be used offstream in the manner that the Board of
24 Land and Natural Resources has allowed it to be used.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 And let's go off record, and we'll figure
3 out when we're coming back.

4 (Discussion held off the record.)

5 (Recess taken at 12:28 p.m.)

6 (Reconvened at 1:30 p.m.)

7 THE COURT: Back on record.

8 THE CLERK: Yes, Judge.

9 THE COURT: FTR on?

10 THE CLERK: Yes, Judge.

11 THE COURT: All right. For the record
12 we're back after the lunch break. I see all counsel of
13 record on my video screen, I don't think we need to
14 recall the case.

15 Mr. Rowe, I believe you're up next.

16

17 CLOSING ARGUMENT

18

19 MR. ROWE: Thank you, Your Honor. The
20 County's position since the initiation of this lawsuit
21 has been fairly clearly. It relies on water from the
22 four licensed areas that are at issue in this
23 case.

24 It's part of the communities of Upcountry
25 Maui, and that includes two Hawaiian Homesteads. This

1 community consists of nearly 35,000 individuals, who
2 receive water in their homes for domestic use and
3 drinking water, as well as hundreds of businesses,
4 schools, including Kamehameha Schools Maui Campus and
5 the Kula hospital.

6 Additionally, the County has shown that
7 both legislatively set policies, and policies that have
8 been derived from current on-the-ground realities favor
9 continuation of the revocable permits in order to
10 sustain existing agricultural land and increase economic
11 diversity.

12 The County also, however, recognizes the
13 concern -- concerns that have been raised by the
14 plaintiffs and has taken, on its own, several proactive
15 measures to address conservation of water resources from
16 the licensed areas involved in this case.

17 These proactive efforts can be seen on many
18 front, and show that the County has met the objectives
19 from the Maui Island Plan that have been identified by
20 plaintiff in its proposed conclusion of law 98.

21 Namely, that "The County should work with
22 State agencies to protect baseline stream flows for
23 perennial streams, and support policies that ensure
24 adequate streamflow to support Native Hawaiian Aquatic
25 species, traditional kalo cultivation and

1 self-sustaining ahupua'a."

2 To start with, the County has been an
3 active participant in this and other litigation
4 regarding the licensed areas, such as the *Carmichael*
5 case, and while we haven't been originally named as a
6 party, as here, we have moved to intervene to make sure
7 that we can address our concerns.

8 The County is also a party to the pending
9 contested case hearing over the long-term permits for
10 these licensed areas and has participated throughout the
11 long process of setting interim instream flow standards
12 in East Maui.

13 The County has also contributed funding to
14 several studies related to the East Maui Watershed,
15 including USGS reports, such as the 2015 habitat Study,
16 which was admitted into evidence as State's Exhibit S-5.

17 Finally, the County has presented evidence
18 that it has undertaken several infrastructure
19 improvements to increase efficiency within the entire
20 Upcountry system, and thus, reduce its dependence on
21 water from the licensed areas.

22 For starters, it has increased its
23 induction capacity of its Piiholo water treatment plant,
24 and completely replaced the intake the Olinda water
25 treatment plant. Both of these treatment plants derive

1 water from surface waters that are outside the licensed
2 areas in this case.

3 It has also spearheaded conservation
4 efforts to reduce water usage by its end users, and
5 install the new ground water well with a
6 1-million-gallon-per-day capacity to be used as an
7 alternative source of water during low-rainfall
8 conditions.

9 It's also realigned its Waikamoi, Kahakapao
10 and Piihola Reservoirs to reduce system losses.

11 All these efforts have led to a significant
12 reduction in the average water use by the County since
13 the inception of the East Maui EIS proceedings, and this
14 has been shown by the evidence and testimony that has
15 been adduced at trial.

16 Even with these efforts, however, the
17 County's need for water from these licensing areas
18 remain significant. Surface water sources, such as
19 those used by the County, are especially susceptible to
20 weather conditions. To be brief, as discussed by
21 Director Pearson, When there is less rain, there is less
22 water flowing in rivers.

23 These are reserved intakes that the
24 County's Piiholo and Olinda treatment plants and also
25 fill the reservoirs for those treatment plants.

1 In the alternative, the Kamole water
2 treatment plant relies on the Wailoa ditch operated by
3 EMI. Because the EMI Wailoa ditch spans a greater
4 distance and derives its water from a greater number of
5 streams than the intakes for the County treatment
6 plants, it is more a reliable source of water during dry
7 conditions, and thus, acts as a backup source for the
8 entire system.

9 As a result, there are times when, despite
10 the County's efforts to reduce its use of water from the
11 licensed area, it has no alternative if it's to meet the
12 needs of its customers of Upcountry Maui.

13 Accordingly, the yearly average usage of
14 surface water from the licensed area at Kamole plant are
15 quite low, especially compared to prior use. It
16 fluctuates quite greatly on a daily and monthly basis.

17 For example, looking at the last year
18 alone, the average water use for the -- over the course
19 of 2019 was only 1.67 million gallons a day.

20 However, if you look at the high ends and
21 low ends of monthly usage at Kamole, usage ranged
22 between 0.283 million gallons a day, and 3.6 million
23 gallons a day.

24 Because of this fluctuation, the County
25 requires considerable flexibility in the amount of water

1 it retains access to. This is why East Maui Irrigation,
2 on a daily basis, makes 6 million gallons of water a day
3 available to the County, even when it doesn't use that
4 much water.

5 So what does this mean for the Court and
6 what it's supposed to be considering in this case?

7 First and foremost, the County's use of
8 water from the licensed areas is a recognized public
9 trust use because the County provides for drinking water
10 and domestic use in houses.

11 As stated by the Supreme Court in *Waiola O*
12 *Moloka'i*, at 103 Hawaii 401 at 429, there's three
13 distinct classes of public trust usage of water that
14 have been recognized:

15 One is water in its natural state.

16 One is water used in the exercise of
17 traditional and customary Hawaiian rights; and

18 The third is domestic use protection,
19 particularly, drinking water.

20 In addition or because of this, both the
21 BLNR and CWRM have repeatedly recognized the County's
22 usage of water to provide domestic end users as a public
23 trust use in their respective decision making.

24 Even Plaintiff's executive director, Marti
25 Townsend, recognized the County's usage of public trust

1 in her testimony and stated that the BLNR properly
2 considered that in issuing these revocable permits.

3 So plaintiffs here are seeking to
4 invalidate the revocable permits, which the County
5 relies upon for fulfillment of this public trust duty.

6 Indeed, pursuant to the terms of the
7 agreement between EMI and the County of Maui for water
8 delivery, which is in the record as Joint Exhibit J-25,
9 EMI's only obligated to continue providing water to the
10 County if it receives the revocable permits or a
11 long-term lease from the State.

12 In fact, Mr. Vaught testified on behalf of
13 EMI that he has no authority to provide water to the
14 County if the revocable permits are invalidated.

15 Accordingly, plaintiff's relief in the form
16 of invalidating the revocable permits will not be in
17 conformity with the public trust.

18 Similarly, plaintiffs are requesting
19 injunctive relief, which requires the Court to balance
20 success on the merits, the balance of irreparable harm,
21 and the public's interest for or against issuance of the
22 injunction.

23 In undertaking this balance, the outcome
24 should be clear. At the outset, perpetration of
25 agriculture is recognized as important to the State of

1 Hawaii and the County of Maui, as recognized by Article
2 11, Section 3 of the Hawaii State Constitution, the
3 State Water Code, and several portions of the Maui
4 Island Plan, which have been specifically enumerated in
5 the County's proposed findings.

6 In addition, the importance of perpetuation
7 of agriculture has become especially pronounced in
8 recent times as a result of the current Covid-19
9 pandemic.

10 Evidence has shown that since the onset of
11 the pandemic in March of this year, unemployment in Maui
12 County has risen from approximately 2 percent to
13 approximately 31-and-a-half percent.

14 It is generally understood that this is
15 largely related to the County's dependence on the
16 visitor industry, which is extremely susceptible to
17 downturns in visitors coming to Maui.

18 Diversified agriculture, however, is
19 recognized by both the Maui Island Plan and
20 Mayor Victorino's administration as a way to diversify
21 the economy to be less dependent on tourism and less
22 susceptible to downturns in visitors coming, such as
23 those that the County is currently faced with today.

24 Accordingly, the reopening of the central
25 field, Maui fields, to diversified agriculture by Mahi

1 Pono is in the interest of both the State of Hawaii and
2 the County of Maui.

3 Plaintiff is seeking injunctive relief to
4 effectively prevent Mahi Pono from moving forward with
5 its plan to expand diversified agriculture by limiting
6 EMI's access to water to current levels when diversified
7 agriculture has barely begun.

8 Now, let's look at the harm that plaintiff
9 alleges, which is thoroughly discussed by Mr. Wynhoff
10 and Mr. Schulmeister in their closing arguments, and
11 which I won't rehash too much today, but I'll kind of
12 summarize that they mentioned hiking, sightseeing and
13 solitude by members of the Sierra Club.

14 Several of the witnesses from Sierra Club,
15 however, stated that they would continue to suffer these
16 adverse effects, even if plaintiff's injunctive relief
17 is granted, and again, this is more thoroughly gone over
18 by Mr. Schulmeister.

19 Now, let's compare this purported injury to
20 their ability to go hiking, sightseeing and solitude, to
21 what would happen to citizens of Upcountry Maui were
22 their access to water dramatically affected by a loss of
23 their water source, which not only provides water on a
24 daily basis, but backs up the entire distribution system
25 during dry periods.

1 Also compare plaintiff's purported injury
2 to the long-term harm to the County in losing a
3 potential source of secure, non-tourism-dependent jobs
4 and economic recovery in the midst of a pandemic and
5 associated economic downturn.

6 The County believes taking these into
7 consideration, it is clear where the balance of
8 irreparable harm and the public interest comes down, and
9 therefore, this Court should rule that against
10 plaintiff's request for injunctive relief.

11 And that's all I have, Your Honor. Thank
12 you.

13 THE COURT: All right.

14 Thank you, Mr. Rowe.

15 All right. So back to Mr. Frankel. How
16 much time do you have left for your rebuttal?

17 MR. FRANKEL: I think I have half an hour.

18 I'd like -- I didn't use my entire hour,
19 but I don't know how long this is going to take me, I
20 have no idea.

21 THE COURT: No idea?

22 MR. FRANKEL: I've got a lot.

23 THE COURT: All right.

24 MR. FRANKEL: I mean, it will be --

25 THE COURT: I had you ending, like, two

1 minutes early, I mean, before the hour. So I think you
2 have 32 minutes by my count.

3 MR. FRANKEL: We didn't start till 9:15,
4 Your Honor.

5 THE COURT: Was it that late?

6 MR. FRANKEL: Yeah.

7 THE COURT: Okay.

8 MR. FRANKEL: We had to work with technical
9 issues.

10 So I will aim to keep within half hour.

11 THE COURT: All right, if you go over half
12 hour, that's fine, but we'll take a break.

13 MR. FRANKEL: Thank you.

14 THE COURT: All right. Go ahead.

15

16 REBUTTAL

17

18 MR. FRANKEL: There's a hope to respond to,
19 Your Honor, and I'm going to try to organize this. What
20 I'm going to do is first deal with legal principles,
21 then talk about the 13 streams, then talk about the
22 diversion structures, then the reasonable and beneficial
23 uses, some miscellaneous A&B arguments and then talk
24 about the relief at the end, so that's how I want to
25 proceed, trying to organize all the arguments that have

1 been presented.

2 Boiled down, the Board of Land and Natural
3 Resources' argument is, essentially, the Board's
4 decision should be given unfettered discretion, and it's
5 unreviewable. They're doing a good job, don't worry
6 about it. The Court should not stick its nose in the
7 Board's business.

8 A&B's position is, Well the issues in this
9 case can only be resolved by the Water Commission. This
10 Court has no authority whatsoever.

11 A&B's position ignores prior orders of this
12 Court, denying various motions for summary judgment, but
13 we'll address them again.

14 So, the context of this case, again, is
15 that Sierra Club is challenging approvals by the Board
16 of Land and Natural Resources, a decision by the Board,
17 not a decision by the Water Commission, the decision by
18 the Board which allowed A&B to use 33,000 acres of land
19 and take millions of gallons of water from dozens of
20 streams across East Maui.

21 The context is, it's authorizing them to
22 increase the amount of water taken that's been taken
23 over the past two years.

24 Yes, sugar operations have ceased, that's
25 the context. The *Waiahole* case talks about the context

1 that you take is the current situation, and you don't
2 let the past diversions justify themselves, so we're
3 looking at a new status quo.

4 This decision's a consequential one, or the
5 decisions are consequential. There are two decisions in
6 a series of decisions over the course of 20 years.

7 Yeah, the one-year revocable permits that
8 have been reauthorized again and again and again every
9 single year, and this is going to continue, who knows
10 how long, that is the context.

11 Okay. So what are the legal principles?
12 Well, in *Waiahole*, the Supreme Court says:

13 A public trust is a state constitutional
14 doctrine, as in other constitutional guarantees, the
15 ultimate authority to interpret and defend the public
16 trust in Hawaii rests with the courts, not with BLNR,
17 not with the Water Commission, it rests with the courts.

18 The Supreme Court said: The legislative
19 and executive branches are judicially accountable for
20 their dispositions of the public trust, and the Court
21 should exercise close scrutiny or a heightened degree of
22 judicial scrutiny, and that's at 9 P3d. at 455.

23 Here's another interesting tidbit from
24 recent cases. In the second *Maunakea* case,
25 Justice Mc Kenna writes:

1 In our de novo determination of whether
2 these requirements of Article 11, Section 1 have been
3 met, we consider relevant findings.

4 So she uses that de novo standard in that
5 case. In *Ching the Pohakuloa* case, the Court writes:

6 Typically whether a fiduciary acted
7 prudently or, in other words, is a reasonably prudent
8 fiduciary, is a question of fact, and accordingly, the
9 Circuit Court's determination that the State did not
10 reasonably monitor the U.S.'s compliance with lease
11 terms must be upheld if not clearly erroneous. That's
12 145 Hawaii at 179.

13 Mr. Schulmeister said, Well, you know,
14 these principles about needing to act diligently with
15 foresight, protecting water, those are all obligations
16 of the Water Commission.

17 Actually, that's not the case. Yeah, the
18 Water Commission has to do that, but that same language
19 was used by the Hawaii Supreme Court in the *Kelly* case
20 which held that the Department of Health had to do those
21 things.

22 It was also the case in the *Kauai Springs*
23 case in which the Court articulated the same principles
24 with respect to the Kauai Planning Commission. These
25 requirements are not confined to the Water Commission.

1 They are duties imposed on all agencies.

2 In fact, just a few months ago in
3 In re: Gaff and Reliance for Sensible Growth, the
4 Supreme Court found that these public trust duties were
5 imposed on the Land Use Commission and the Public
6 Utilities Commission. These obligations are
7 constitutional requirements imposed on the Board, which
8 the Board has not met.

9 A&B argues that the standard of care is
10 articulated in the *Kelly* -- that the *Kelly* case talks
11 about experts needing to be -- provide testimony in
12 terms of standard of care. That is a gross misreading
13 of the *Kelly* case. That is not what the *Kelly* case said
14 or what it stands for.

15 In fact, in the *Ching v. Case* case, the
16 Supreme Court applied general trust duties, and this
17 Court has already dealt with this issue in denying
18 Alexander & Baldwin's Motion for Summary Judgment as to
19 Count 2.

20 Alexander & Baldwin's convoluted argument
21 mischaracterizes Supreme Court decisions, documents in
22 the record, and the Sierra Club's position.

23 Okay, let's talk about the 13 streams.
24 Kauai Springs says there's a presumption, despite what
25 Mr. Wynhoff thinks, there's a presumption in favor of

1 public use, access, enjoyment and resource protection,
2 that is a presumption.

3 Of course, there may be -- the Board might
4 be able to overcome that presumption, but they have not
5 done so, and there's no evidence they've done. So
6 there's no evidence they made an effort to do so.

7 So, Mr. Wynhoff argues:

8 These 13 streams have the least value.

9 That's not true. It's just not true. The
10 record does not show that.

11 Here's what happened. Na Moku filed a
12 petition for 27 streams, the 27 streams that were most
13 important to them, to their uses, and that's great,
14 that's what they're allowed to do, and that was the
15 focus of the Water Commission's decision.

16 The Water Commission said explicitly, These
17 streams are the subject matter of this petition, not
18 these other 13.

19 And as Chair Case testified, the Water
20 Commission never considered the ecological or biological
21 or recreational value of these other 13 streams. It
22 wasn't part of the Water Commission's subject matter of
23 that case.

24 But we know that some of these 13 streams,
25 in fact, all of these 13 streams have importance. For

1 example, the Division of Aquatic Resources wrote a
2 report about Kolea Stream, and the Division talked about
3 the importance of restoring water to the stream. The
4 diversions are a problem for native species on it, it's
5 important.

6 Dr. Parham, A&B's paid expert, recognized
7 the value of these 13 streams when he talked about how
8 much habitat would be restored if these streams were
9 restored. They are important.

10 The fact is, the Board of Land and Natural
11 Resources didn't take one step to protect these 13
12 streams, and the context, again, is when Alexander &
13 Baldwin, East Maui Irrigation and Mahi Pono are
14 proposing to increase the amount of water diverted. So
15 it's incumbent on the Board to do something to protect
16 these streams.

17 In the second Waihole case, the Supreme
18 Court chastised the Water Commission for not ensuring
19 that at least half the water in the streams there at
20 issue were -- remained in the stream.

21 Here, we're not talking about half the
22 water. All the water is being taken out, 70, 80, some
23 of the time, all the base flow.

24 Alexander & Baldwin suggests that the
25 Sierra Club should petition the Water Commission.

1 Here's the reality, here's what they're talking about.
2 They would like to increase the amount of water taken
3 from the stream, and they want Sierra Club to go off to
4 the Water Commission and spend 17, 18, 19 years getting
5 these instream standards set.

6 There's no -- there doesn't seem to be any
7 deadline for the Water Commission to act, and so while
8 the Water Commission takes decades to determine the
9 instream flow standards for these streams, Alexander &
10 Baldwin will increase the amount of water taken from the
11 streams. That's not appropriate.

12 We have asked this Court to do, and I'll
13 talk about it more at the end is to preserve the status
14 quo until public trust duties are fulfilled. There's
15 some effort to determine how much water should actually
16 be in these streams.

17 Alexander & Baldwin defends the Water
18 Commission's decision by saying, The Water Commission
19 looked at things regionally.

20 Actually it did not. Alexander & Baldwin
21 has continually talked about this case, the Water
22 Commission looked at things regionally, that they
23 restored water in one stream to compensate for other
24 streams.

25 Those words are never used in the decision.

1 If you do a Google, a PDF find search and look under
2 regional or look under compensate, regional comes up
3 about 34 times, but not in the context that Alexander &
4 Baldwin talks about it, most of them are talking about a
5 regional recreation committee.

6 The Water Commission decision was not --
7 they didn't decide, Okay, we're going to restore these
8 nine streams, and to hell with the other 13, they never
9 said anything like that. Never.

10 All right, let's talk about the diversion
11 structures. The Board of Land and Natural Resources is
12 a landlord. It owns the land. It has authority that
13 the Water Commission lacks. The Board knows that
14 diversion structures are harmful. It needs to deal with
15 that issue. It has not.

16 Mr. Wynhoff argues that diversions --
17 there's no proof that diversions are harming native
18 species, just that they may be.

19 Actually, there is definite proof. The
20 e-mails from the Division of Aquatic Resources staff say
21 it and their memorandum say it outright. These
22 diversion structures are causing problems, they need to
23 be dealt.

24 The third issue, I'm sorry not, well, third
25 breach issue that I want to deal with is the issue of

1 reasonable and beneficial uses and water per days.

2 Mr. Wynhoff says, Well, the water's being
3 used to water 30,000 acres of land. Actually, that's
4 the problem. It's not being used to irrigate 30,000
5 acres of land, it's being used to irrigate about a
6 thousand acres of land, about maybe 1,200. So that's
7 what we're looking at.

8 And, in fact, the agricultural needs today
9 are approximately 4 million gallons a day of water or
10 less. So let's think about that, 4 million gallons a
11 day of water are being used for agriculture.

12 At the high end, let's say 4 million
13 gallons a day are being used by the County of Maui .4
14 plus 4 is 8, and yet there's 25, 26, 27, 28 million
15 gallons a day of water being taken out of these streams.

16 The other water is not being used,
17 Your Honor, or in terms of the standard that this Court
18 must apply, the Board of Land and Natural Resources did
19 not make any kind of determination as to whether all the
20 water was being used in a reasonable, beneficial manner.

21 Should it could rely on the Water
22 Commission's decision that 22.7 percent of the water
23 might be lost, but there's a lot more that's not being
24 used, Your Honor, and the Board never investigated.

25 Witness after witness after witness could

1 not explain how the water was being used, what the
2 consumptive use of the water was, and that's what the
3 Board needed to ask.

4 It may not know all the scientific facts
5 about all the streams, but it sure as hell can tell find
6 out how the water's being used, all it needs to do is
7 ask. And Mahi Pono said it would be happy to provide
8 the information.

9 All right, let's deal with some of
10 Alexander & Baldwin's, what I call, miscellaneous
11 arguments.

12 They ask you to -- they rely on Exhibit
13 A&B-7. They forget that A&B-7 was introduced into
14 evidence for a limited purpose, not for the truth of the
15 matter therein. And they admit they completely
16 misread the evidence in any case.

17 That page and that decision, page 2 of
18 A&B-7, does not say that the Board of Land and Natural
19 Resources has concluded that the public trust justified
20 the taking of water from East Maui streams. It doesn't
21 say anything of the sort. It talks about what the
22 hearings officer did, but then it doesn't ratify the
23 hearings officer's decision.

24 It does not say an EIS cannot be done until
25 the interim instream flow standards are set, it says

1 nothing of the sort, that's what Alexander & Baldwin
2 would like it to say, it doesn't say it. It's reliance
3 on that document is unfounded.

4 It claims that public trust is a source of
5 authority for the issuance of the revocable permit, yet
6 reading the documents which are in evidence, I believe
7 it's probably Joint Exhibit 2, 3, 4, somewhere around
8 there, 5, 6, that there's no -- when the first -- when
9 the revocable permit was issued, no one was -- allowed
10 to continue for a year, there's no mention by the Board
11 of public trust analysis, none whatsoever.

12 And the *Carmichael* case is not about the
13 public trust. There is two counts, both deal with
14 HRS Chapter 343.

15 The public trust as a basis for the
16 revocable permits was not articulated in 2001 or 2007,
17 as Mr. Schulmeister believes.

18 Alexander & Baldwin rest a lot on Maui
19 Tomorrow's position in the contested case hearing before
20 the Water Commissioner.

21 Maui Tomorrow is a separate organization.
22 It is a different -- it cannot bind the Sierra Club to
23 positions taken by Maui Tomorrow at all.

24 Okay. Let's look at the relief, which I
25 don't think the defendants have read thoroughly. Yes,

1 the Sierra Club has requested prohibitory relief that
2 maintains the status quo as a way for this Court in
3 balancing the equities.

4 They also asked for mandatory injunctive
5 relief, which will provide more protection in the future
6 to these 13 streams by requiring the Board to file a
7 petition for instream flow standards -- to amend the
8 instream flow standards for these 13 streams, the
9 process will begin to start.

10 In addition, the Sierra Club specifically
11 requested that the Board provide this Court with a plan
12 that outlines the steps they have taken or will take to
13 protect instream uses of these 13 streams.

14 In other words, the order provides relief
15 to the injury the Sierra Club has claimed. There is, I
16 acknowledge, we are a high wire over a fast flowing
17 river in coming up with the relief. We don't want to go
18 too far to the left or too far to the right.

19 We are saying, Preserve the status quo in
20 which none of the defendants are harmed. It may prevent
21 them from increasing the amount of agricultural --
22 amount of crops they plant in the future, but not in an
23 unreasonable manner, because there's still plenty of
24 water, there's plenty of water that's not being used.

25 They have ground water available to them,

1 17 million gallons a day. They have water from the
2 streams west of Honopou Stream.

3 Their interests are protected, and the ball
4 will start moving toward providing more protection to
5 the streams, particularly, if the structures are looked
6 at, particularly because the defendants want more water,
7 and they will have to do more to make sure that water is
8 properly used.

9 And to be clear, crystal clear, we are not
10 asking this Court to set instream flow standards; we're
11 not asking the Board to set instream flow standards;
12 we're asking the Board to file a petition with the
13 Commission to get the ball rolling, so these streams,
14 there is analysis of the ecological, biological,
15 recreational value of these streams.

16 We've provided in the relief alternative
17 forms, either the revocable permits are invalidated, or
18 they will continue with conditions.

19 It is Chicken Little for the County to
20 argue that it will suffer in any way if the revocable
21 permits are invalidated.

22 Between the year 2000 and 2018, 18 years,
23 EMI delivered water to the County, and there was no
24 valid agreement between the two.

25 The new language in the agreement that it

1 will continue to deliver water subject to EMI's
2 continued receipt of permits, was added in 2018 after
3 the *Carmichael* decision.

4 That language was not in the agreement
5 that's found in 1973, or the amendment in 1982, or 1992,
6 or '94, '96, '98, '99, 2000.

7 The memorandum agreement between the County
8 and EMI changed routinely, and that, they never put this
9 language in. This language is in there for one reason,
10 to scare the Court from issuing injunctive relief.

11 I'll leave it at that, Your Honor. Thank
12 you.

13 THE COURT: All right. Thank you.

14 Thank you, everyone, it's been an
15 interesting road to say the least. I want to thank
16 everyone, I mean I understand this issue a lot better
17 than I did before we started, and that's thanks to you
18 all.

19 I wish I could say I'm going to decide this
20 quickly, but I can't. I don't want to make promises I
21 may not be able to keep. I've got three trials between
22 now and the end of the year, I'm just going to juggle
23 things as best I can.

24 I understand the external timing you're
25 under because of the RPs, I really do, but I'm still not

1 sure I'm going to be able to do it, we'll just have to
2 see how it plays out.

3 Does anyone have any logistical type
4 questions about anything that I can help you with? I'm
5 not seeing any affirmative responses.

6 All right. Well, thank you very much,
7 everyone. We're in recess.

8 MR. WYNHOFF: Thank you, Your Honor.

9 MR. ROWE: Thank you, Your Honor.

10 (Proceedings concluded at 2:06 p.m.)

11 --o0o--

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 #

2

3 STATE OF HAWAII)

4 CITY AND COUNTY OF HONOLULU)

5 _____)

6

7

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 25th day of September, 2020.

16

17

OFFICIAL COURT REPORTER

18

19

20

/s/ Nikki Beaver Cheang

21

NIKKI BEAVER CHEANG, CRR, CSR-340

22

23

24

25