

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 24, 2021

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

MAUI

Acceptance of the Final Environmental Impact Statement (FEIS) for Proposed Issuance of a Long-Term Water Lease Via Public Auction for the Nahiku, Keanae, Honomau, and Huelo License Areas included in Revocable Permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) to Alexander and Baldwin, Inc., and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) to East Maui Irrigation Company, Limited for Water Use on the Island of Maui. The Final Environmental Impact Statement is available for review through the following link:

<https://dlnr.hawaii.gov/ld/ab-emi-feis-for-the-proposed-lease-for-the-nahiku-keanae-honomanu-and-huelo-license-area/>

Pursuant to Section 92-5(a)(4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

APPLICANT:

Alexander & Baldwin, Inc. (A&B) and East Maui Irrigation Company, Limited (EMI)

LEGAL REFERENCE:

Hawaii Revised Statutes (HRS) Section 343-5(a) and Hawaii Administrative Rules (HAR) Section 11-200-23.<sup>1</sup>

(1) Propose the use of state or county lands or the use of state or county funds.

LOCATION:

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<sup>1</sup> This FEIS is governed by the prior rules of the Hawaii Environmental Protection Act (HEPA), HAR Chapter 11-200. HAR §11-200.1-32(b) provides in relevant part, "Chapter 11-200 shall continue to apply to environmental review of agency and application actions which began prior to the adoption of chapter 11-200.1." The EISPN for this FEIS was published on February 8, 2017, prior to the adoption of Chapter 11-200.1 in August 2019.

Portion of Government lands situated in East Maui, identified by Tax Map Keys: (2) 1-2-004: 005, 007 (por.); (2) 1-1-002:002; (2) 1-1-001:044 and 050; and (2) 2-9-014: 001, 005, 011, 012, and 017

AREA:

Approximately 33,000 acres, more or less

ZONING:

State Land Use District: Conservation

County of Maui Zoning: Interim (License Areas are completely within the State Conservation District)

CHARACTER OF USE:

Use of State surface water along with access to and use of the proposed License Areas situate on State owned land for the purpose of diverting State surface water.

DESCRIPTION OF PROJECT:

The proposed project would allow for the issuance of a long-term water lease via public auction to allow the lessee to enter upon lands owned by the State of Hawaii, in order to maintain and repair existing access roads and trails used as part of the EMI Aqueduct System and secondarily allow them continued operation of the EMI Aqueduct System to deliver water to the County of Maui Department of Water Supply (DWS) for domestic and agricultural water needs in Upcountry Maui, including the agricultural users at the Kula Agricultural Park (KAP) and KAP expansion, and the continued provision of water to approximately 30,000 acres of important agricultural lands owned by Mahi Pono, LLC (Mahi Pono) in Central Maui.

The subject of this item on the Board's September 24, 2021 meeting agenda is sufficiency of the final FEIS, which is available to the public online at: <https://dlnr.hawaii.gov/ld/ab-emi-feis-for-the-proposed-lease-for-the-nahiku-keanae-honomanu-and-huelo-license-area/>.

STANDARD FOR EVALUATING THE FEIS:

Pursuant to Hawaii Administrative Rules (HAR) Section 11-200-23(b), a statement shall be deemed to be an acceptable document by the accepting authority or approving agency only if all the following criteria are satisfied:

- 1) The procedures for assessment, consultation process, review and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter;

- 2) The content requirements described in this chapter have been satisfied; and
- 3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement.

Pursuant to HAR Section 11-200-2,

“Acceptance” means a formal determination of acceptability that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement. Acceptance does not mean that the action is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of acceptance is required prior to implementing or approving the action.

Accordingly, the Board’s decision regarding the acceptability of this FEIS is *distinct* from any management decisions that the Land Division, the Department of Land and Natural Resources, or the Board may make in the future regarding the issuance of any long-term water lease, including the Applicant’s proposed project requested by this FEIS.

Acceptability of the FEIS is based on the three criteria listed above. An Environmental Impact Statement (EIS) is not intended to resolve conflicts of opinion on the impacts of a proposed action. Rather, an EIS only intends to provide the relevant information to the deciding agency. “[W]hether or not the parties disagree, or even whether there is authority which conflicts with the agency’s decision is not the yardstick by which the sufficiency of an EIS is to be measured. Rather it is whether the EIS as prepared permitted informed decision making by the agency.” *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 181-182, 914 P.2d 1364, 1375 (1996).

In other words, an EIS need not be exhaustive to the

Point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasonable decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

*Id.* at 183 (citing *Life of the Land v. Ariyoshi*, 59 Haw. 156, 164-65, 577 P.2d 1116, 1121 (1978)).

PROPOSED ACTION:

According to the FEIS, the applicant states that the Proposed Action constitutes the issuance of one long-term (30-year) water lease via public auction that grants the lessee the “*right, privilege, and authority to enter and go upon*” the License Areas for the “*purpose of developing, diverting, transporting, and using government owned waters*” through the existing EMI Aqueduct System which supplies water to domestic and agricultural water users.

#### OBJECTIVE OF THE FEIS:

The objective of the FEIS is to comply with applicable law and provide information to the Board of Land and Natural Resources (Board) for when it considers whether to issue a long-term water lease via public auction to allow the lessee to enter upon lands owned by the State of Hawaii, in order to maintain and repair existing access roads and trails used as part of the EMI Aqueduct System and secondarily allow continued operation of the EMI Aqueduct System to deliver water to the DWS for domestic and agricultural water needs in Upcountry Maui, including the agricultural users at the Kula Agricultural Park (KAP) and KAP expansion, and the continued provision of water to approximately 30,000 acres of important agricultural lands owned by Mahi Pono in Central Maui.

#### ALTERNATIVES CONSIDERED:

The FEIS considered two (2) sets of alternatives; alternatives considered but dismissed and “reasonable” alternatives that were analyzed for comparative analysis.

Alternatives Considered, but Dismissed included the following:

**Water Source Alternatives:** This alternative included a groundwater alternative which would require the creation of additional wells; reclaimed water use alternative which would use R-2 or R-1 water from the Wailuku-Kahului Wastewater Reclamation Facility to offset some of the requested surface water amount; an added storage alternative which would involve the use of additional reservoirs for storage of water; and a desalinization alternative which would involve the drilling of additional wells that would pump fully saline groundwater that would then be treated at a desalinization plant for use on the Central Maui agricultural fields; and

**Aqueduct Ownership:** This alternative considers another entity managing the diversion of the water such as the County of Maui, DWS.

Alternatives that were analyzed for comparative analysis considered 4 courses of action: 1) Reduced Water Volume Alternative; 2) Alternative Lease Duration; 3) Modified Lease Area; and 4) No Action.

#### **1. Reduced Water Volume Alternative**

Under the Reduced Water Volume Alternative, the amount of surface water provided through the proposed lease would be less than the approximately 87.95 million gallons per

day (mgd) available pursuant to the Commission of Water Resource Management Findings of Fact, Conclusions of Law & Decision and Order dated June 20, 2018 (CWRM D&O). This amount would also be subject to further reduction in accordance with the reservation held by the Department of Hawaiian Home Lands (DHHL). Under this alternative, for each 21mgd reduction of surface water available to Mahi Pono from the water lease, whether due to the DHHL reservation or otherwise, in Central Maui there would be an estimated reduction by 173 acres of land in crops, a reduction by 15 acres of land in irrigated pasture, and an increase of approximately 188 acres of land in unirrigated pasture. As the existing water delivery agreements with DWS are contingent upon the water lease being issued, if no water lease is issued, it is assumed that the delivery of water to the DWS would terminate. Under the Reduced Water Volume Alternative, depending on the amount of water authorized under the water lease, the DWS may receive no water from the Wailoa Ditch or some amount up to 7.1 mgd. The greater the reduction in the amount authorized under the water lease, proportionally less water will be available to DWS.

## **2. Alternative Lease Duration**

Under the Alternative Lease Duration alternative, the duration of the water lease could be either shorter or longer than the requested 30-year duration, provided, however, that under HRS §171-36, the Board cannot authorize a lease for a term longer than 65-years. Under this alternative, taking a shorter duration approach, a lease shorter than 30 years could limit the ability of Mahi Pono or lessee to obtain financing for the needed investment in establishing successful diversified agricultural operations and crops that may take years to reach economic viability. Additionally, the infrastructure and land management necessary to support a diversified agriculture farm plan is different from what was necessary for sugar cane and thus requires significant infrastructure and land preparation. Given the considerable time and expense it takes to develop a diversified farm plan, a shorter term water lease would likely result in a reduced range of crops, and the reduced cultivation of designated Important Agricultural Land (IAL) in Central Maui.

## **3. Modified Lease Area**

Under the Modified Lease Area alternative, a smaller License Area would be considered as a part of the water lease. The smaller, modified License Area could enable greater public access into the watershed for recreation and cultural purposes. However, potentially adverse impacts of such access could include the introduction and spreading of invasive species and damage to historic resources.

## **4. No Action**

Under the No Action alternative, no water lease would be issued by the State, however, under the 1938 Agreement between the Territory (now the State) of Hawaii and EMI, and a related calculation involving isohyet analysis of rainfall patterns, it is understood approximately 30% of the water in the License Area streams is derived from privately owned lands. Therefore, the EMI Aqueduct system could continue to divert approximately 30% of the water available from the License Areas, plus the 4.37mgd for the privately

owned lands between Honopou Stream and Maliko gulch. Under the No Action alternative, it is assumed that an estimated total of 26.39 mgd is available to be diverted from that portion of the Collection Area east of Honopou stream. Thus, it is estimated that the maximum amount of surface water available to the EMI Aqueduct System would be approximately 30.76 mgd. This reduction in water would significantly limit Mahi Pono's ability to develop robust diversified agriculture in Central Maui, and would have associated detrimental impacts on food production and economic benefits that would have been achieved under the Proposed Action.

Further, the existing water delivery agreements with the DWS are contingent upon the water lease being issued, therefore, if no water lease is issued, it is assumed that the delivery of water to the DWS would terminate for Upcountry Maui and Nahiku. As a consequence, domestic and agricultural water needs in Upcountry Maui would need to be met by alternative water sources that would need to be developed by DWS.

## DISCUSSION:

### **1. The procedures for assessment, consultation process, review and the preparation and submission of the statement, have all be completed satisfactorily as specified in HAR chapter 11-200.**

The Applicant prepared and submitted an Environmental Impact Statement Preparation Notice (EISPN) which was published in the February 8, 2017 edition of Office of Environmental Quality Control's (OEQC) *The Environmental Notice*. The EISPN was circulated for public review and comment and public comments were accepted during a 30-day period following publication. A total of approximately 215 written and verbal responses were received. Comments received during the comment period were considered in assessing the impacts of the proposed action.

A Draft Environmental Impact Statement (DEIS) evaluating the impacts of issuance of a long-term water lease for the Nahiku, Keanae, Honomanu, and Huelo License Areas was published on September 23, 2019. The DEIS included copies of all written comments received during the 30-day public comment period following the publication of the EISPN, as well as the Applicant's written responses. Individuals who requested to be a Consulted Party during the 30-day consultation period were invited to provide input for the DEIS development.

The Applicant's FEIS was properly filed with the OEQC on July 20, 2021 and published in The Environmental Notice on August 8, 2021. Due to certain production related printing and typographical errors, the Applicant withdrew the FEIS for revision. Applicant then refiled the corrected FEIS with the Environmental Review Program (ERP) for publication in the Environmental Notice on September 8, 2021. Additionally, by letter dated August 26, 2021, Land Division requested ERP to provide a recommendation as to the acceptability of the FEIS. Applicant's Distribution List was verified by ERP, and copies of the FEIS were distributed accordingly. Appendix

N of the FEIS includes all comments received on the DEIS during the 45-day public comment period, as well as the Applicant's response to each comment.

The Applicant has therefore satisfactorily complied with the procedures for assessment, consultation process, review, and the preparation and submission of the FEIS.

**2. The technical content requirements described in HAR Chapter 11-200 have been satisfied.**

HAR § 11-200-18 establishes the technical content requirement of a final EIS. The final EIS shall consist of:

- (1) The draft EIS revised to incorporate substantive comments received during the consultation and review process;
- (2) Reproductions of all letters received containing substantive questions, comments, or recommendations and, as applicable, summaries of any scoping meetings held;
- (3) A list of persons, organizations, and public agencies commenting on the draft EIS;
- (4) The responses of the applicant or proposing agency to each substantive question, comment, or recommendation received in the review and consultation process [; and]
- (5) The text of the final EIS which shall be written in a format which allows the reader to easily distinguish changes made to the text of the draft EIS.

A review of the FEIS shows that all of the foregoing technical elements are properly included in the document.

In our review of the FEIS, staff relied upon the following relevant provisions of Chapter 11-200, HAR. First, HAR § 11-200-16, sets forth substantive content requirements for the sufficiency of a final EIS as follows:

The environmental impact statement shall contain an explanation of the environmental consequences of the proposed action. The contents shall fully declare the environmental implications of the proposed action and shall discuss all relevant and feasible consequences of the action. In order that the public can be fully informed and that the agency can make a sound decision based upon the full range of responsible opinion on environmental effects, a statement shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.<sup>2</sup>

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<sup>2</sup> HAR § 11-200-2 provides in relevant part:

Additionally, HAR Section 11-200-17(i) states in part:

The draft EIS shall include a statement of the probable impact of the proposed action on the environment, and impacts of the natural or human environment on the project, which shall include consideration of all phases of the action and consideration of all consequences on the environment; direct and indirect effects shall be included. The interrelationships and cumulative environmental impacts of the proposed action and other related projects shall be discussed in the draft EIS.

Finally, pursuant to HAR Section 11-200-2:

“Cumulative impact” means the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor or collectively significant actions taking place over a period of time.

And

“Secondary impact” or “secondary effect” or “indirect impact” or “indirect effect” means effects which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Land Division staff extensively reviewed the FEIS to determine whether it fully declares all environmental implications of the proposed action and discusses all relevant and feasible consequences. Staff concludes that the FEIS meets the minimum technical requirements of HAR Chapter 11-200. The FEIS extensively analyses the cumulative and secondary impacts resulting from the diversion of water, including the impacts to farming in East Maui. The FEIS identifies the direct impacts of the Proposed Action as the impacts to the natural environment as a result of changes in streamflow in the License Area and impacts to those who would use water from the License Area streams for traditional agriculture, traditional cultural resources and practices related to streamflow in the License Area streams and recreational users of the License Area or

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“Effects” or “impacts” as used in this chapter are synonymous. Effects may include ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects, whether primary, secondary, or cumulative. Effects may also include those effects resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

“Environment” means humanity’s surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.

in the vicinity of the License Area. Staff concludes that the identification of the direct impacts and analysis of the direct impacts are sufficient for acceptance.

The FEIS identifies secondary impacts as the impacts to consumers of water from the EMI Aqueduct System as served by DWS, including residential and agricultural uses in Upcountry Maui, and users in Nahiku whose continued water service is contingent upon the Proposed Action or continued revocable permits. Additional secondary impacts are the impacts of using water from the EMI Aqueduct System to develop diversified agriculture in Central Maui. Cumulative impacts are identified as the impacts of diverting East Maui stream water through the EMI Aqueduct System for the Proposed Action over the long-term as a result of the EMI Aqueduct System's diversion of water from the License Area streams for over a century, but under the Proposed Action the permitted diversions will be less than what was historically diverted from those streams due to the flow restoration requirements under the CWRM D&O.

Staff considers the Applicant's identified cumulative and secondary impacts appropriate. However, although not a pre-requisite for acceptance, the use of water, such as the implementation of the Mahi Pono Farm Plan, which is identified by the Applicant as part of the Proposed Action, could have been more fully analyzed as part of cumulative and secondary impacts. For example, beyond the preparation of the agriculture fields themselves (i.e. impacts from dust and noise, impacts to listed species, etc.), Mahi Pono has stated that their Farm Plan will include approximately 319,000 square feet of building space that will be located within a half mile from the former Hawaii Commercial & Sugar Company (HC&S) mill site. That is equivalent to approximately 7 acres of building space. It is reasonable to infer that these new improvements are contingent upon Mahi Pono being able to access and use the requested 87.95 mgd of surface water. Therefore, staff believes that the FEIS could have benefitted from a more thorough analysis the associated impacts from the implementation of the Farm Plan beyond what is included in the secondary and cumulative impact discussion.<sup>3</sup>

Furthermore, staff notes that other environmental assessments prepared for long-term water leases (HELCO's Wailuku River Hydroelectric Facilities Long-Term Water Lease and Waiiau Repowering FEA, KIUC's Waiahi Hydropower Long-Term Water Lease DEA, and the Waioli Valley Taro Hui Long-Term Water Lease for Traditional Loi Kalo Cultivation DEA) have all discussed the use of the water and the impacts associated in their environmental documents. Although not a pre-requisite for acceptance, staff believes that such analyses provided useful information in those studies and would also be valuable in this instance. Staff further notes that a more extensive review of secondary and cumulative impacts was requested in the Land

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<sup>3</sup> Areas in which staff identified where further analysis could have been done regarding Farm Plan implementation include production timelines, general operating practices, alternative strategies, new structures, utilities and other improvements, traffic and wastewater. The Applicant responded that the extensive scope of the Farm Plan will incur changes and adjustments, and that the information included in the FEIS represents the general plan based on the best information known at the early stages of implementation. The Applicant also noted that the impacts were anticipated to be lower than the previous sugar cultivation.

Division's comment letter on the DEIS.<sup>4</sup> However, staff cannot conclude that the absence of such analysis results in a failure to comply with the content requirements of the FEIS sufficient to justify a recommendation that the Board not accept the FEIS on that basis. Nevertheless, staff believes that the Board should be informed of this issue for consideration as the Board deems appropriate.

**3. Comments submitted during the review process have received satisfactory responses and have been incorporated in the FEIS.**

The environmental review process has provided information from both the Applicant and the public through the commenting process. As noted above, Appendix N of the FEIS includes all comments received on the DEIS during the 45-day public comment period, as well as the Applicant's response to each comment. Upon review of the comments and responses, staff concludes that the Applicant has provided satisfactory responses to the comments. Staff further notes that its conclusion is not contingent on whether staff agrees with the substance of the responses. Rather, staff considered whether the responses contained sufficient information to reasonably address the comments provided. On that basis, staff believes that the Applicant has fulfilled this requirement.

However, staff acknowledges that while the Applicant's responses may be sufficient for the purposes of accepting the FEIS, multiple parties raised issues regarding the reasonable alternatives analysis which staff notes for the Board's attention and consideration as appropriate. Specifically, the DHHL and the Office of Hawaiian Affairs (OHA) commented on the lack of specific detail in the Reduced Water Volume and Alternative Lease Duration alternatives. Staff reviewed the alternative analyses and acknowledges that the FEIS could have analyzed more specific scenarios. For example, for the Reduced Water Volume, the analysis could benefit from a specific reduced water volume amount, such as the amount available in the event DHHL exercises their reservation, rather than a "sliding scale analysis" contained in the FEIS. Additionally, the FEIS' position that diverting less water than the maximum amount in the Proposed Action de facto results in a lower impact may be conclusory without further analysis. For the Alternative Lease Duration, OHA raised concerns that specific lease terms could have been studied, rather than dismiss any duration under the requested 30 years. Finally, the Applicant's response that "the term of the proposed water lease will be set by the BLNR" appears to place the onus on the Board to determine the ultimate length of the lease but provides no finite information or analysis (presumably based on specific durations) that would help the Board determine a reasonable lease duration.

Additionally, in response to staff's comments to the Draft EIS and subsequent repeated requests for additional information or further analysis, the Applicant repeatedly asserts that the Farm Plan is expressly intended to be conceptual, "a fluid and responsive plan that responds to the ever-changing agricultural market demands and the type of

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<sup>4</sup> The Applicant responded that the Farm Plan takes place entirely on private land and its implementation is not an action that requires approval from an agency.

agricultural activity to be pursued... as well as responding to other variables such as the availability and cost of water for crop irrigation, and the need to be sensitive to the existing local farming community.”<sup>5</sup> While staff does not discredit this, there is no information given in the FEIS to provide insight into the current local market nor the method in which Mahi Pono developed its Farm Plan for the Central Maui agricultural fields to give the reader any confidence in the Applicant’s claims. Although staff acknowledges that this issue may be ancillary to the analysis of the impacts of the Proposed Action, the non-disclosure of more specific information could present difficulty in determining what constitutes reasonable and beneficial use of water under the Proposed Action.

However, as with the cumulative and secondary impacts analysis, staff cannot conclude that the foregoing issues provide a sufficient justification to recommend that the Board not accept the FEIS.

RECOMMENDATION:

Recognizing that *no decision or recommendation* on the application for a long-term water lease is being made at this time<sup>6</sup>, the Land Division recommends that the Board:

1. Determine that the FEIS complies with applicable law and adequately discloses the environmental impacts of the proposed issuance of a long-term water lease by public auction to allow the lessee to enter upon lands owned by the State of Hawaii, in order to maintain and repair existing access roads and trails used as part of the EMI Aqueduct System and secondarily allow them continued operation of the EMI Aqueduct System to deliver water to the County of Maui Department of Water Supply (DWS) for domestic and agricultural water needs in Upcountry Maui, including the agricultural users at the Kula Agricultural Park (KAP) and KAP expansion, and the continued provision of water to approximately 30,000 acres of important agricultural lands owned by Mahi Pono, LLC in Central Maui.
2. Accept the FEIS regarding the proposed issuance of a long-term water lease by public auction submitted by A&B.

Respectfully submitted



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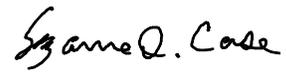
Ian Hirokawa  
Special Projects Coordinator

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<sup>5</sup> As noted previously, the Applicant justifies the sufficiency of the analysis in the FEIS by noting that the proposed action is the issuance of the water lease, and that the implementation of the Farm Plan will take place entirely on private lands and thus is not an action because it does not require approval from an agency.

<sup>6</sup> The Board will need to make a separate determination at a later date regarding whether to approve the application for a water lease and any terms and conditions that may be appropriate.

APPROVED FOR SUBMITTAL:

A handwritten signature in black ink that reads "Suzanne D. Case". The signature is written in a cursive, slightly slanted style.

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Suzanne D. Case, Chairperson *RT*