

IMPLEMENTING AGREEMENT

for the

KAUA'I LAGOONS HABITAT CONSERVATION PLAN

by and between

KAUA'I LAGOONS LLC,

UNITED STATES FISH AND WILDLIFE SERVICE, and

HAWAI'I DEPARTMENT OF LAND AND NATURAL RESOURCES

September, 2012

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1.0 PARTIES

This Implementing Agreement is made by and between Kaua‘i Lagoons LLC (KL), the United States Fish and Wildlife Service (USFWS), and the Hawai‘i Department of Land and Natural Resources (DLNR).

These entities may be referred to as the “Parties” and individually as a “Party.” The USFWS and DLNR may be referred to collectively as the “Wildlife Agencies” and individually as a “Wildlife Agency,” and KL may be referred to as the “Permittee.”

2.0 RECITALS AND PURPOSES

2.1 Recitals. The Parties have entered into this Agreement in consideration of the following facts:

(a) The Kaua‘i Lagoons Resort (Resort) in Līhu‘e, Kaua‘i, built in the 1980’s, encompasses approximately 600 acres, and was originally developed with two 18-hole championship golf courses, a golf and racquet club facility, a network of man-made navigable lagoons, a restaurant, commercial development, and associated parking areas.

(b) The Resort lagoons and golf courses have been colonized by several bird species which are listed as threatened or endangered under the federal Endangered Species Act (ESA), including the Hawaiian Goose or *Nēnē* (*Branta sandvicensis*) (hereafter referred to as Nēnē), the Hawaiian endemic sub-species of the Black-necked Stilt (*Himantopus mexicanus knudseni*) (hereafter referred to as Hawaiian Stilt), Hawaiian Coot (*Fulica alai*), the Hawaiian endemic sub-species of the Common Moorhen (*Gallinula chloropus sandvicensis*) (hereafter referred to as Hawaiian Moorhen), and the Hawaiian Duck (*Anas wyvilliana*). The island of Kaua‘i also provides habitat for two seabird species which are listed under the ESA [Hawaiian Petrel (*Pterodroma sandwichensis*) and the Newell’s Shearwater (*Puffinus auricularis newelli*)], and one seabird species which is a Candidate for listing under the ESA [Band-rumped Storm-Petrel (*Oceanodroma castro*)]. These three seabird species may fly over the Resort when they transit between their inland breeding colonies and the sea.

(c) All eight bird species identified above are listed as threatened or endangered pursuant to Hawai‘i Revised Statutes (HRS) Chapter 195D;

(d) Further development within the Resort, and operation of the Resort, could result in the incidental take of these eight bird species. KL has developed a series of measures, described in the Habitat Conservation Plan (HCP), that will minimize and mitigate to the maximum extent practicable the effects of Take of these Covered Species incidental to KL’s Covered Activities, and that will also increase the likelihood that the Covered Species will survive and recover, and provide a net environmental benefit.

2.2 Purpose. The purpose of this Agreement is to clarify the provisions of the HCP and the processes the Parties intend to follow to ensure the successful implementation of the HCP in accordance with the Permits and applicable Federal and State law.

3.0 DEFINITIONS

The following terms as used in this Agreement will have the meanings set forth below:

3.1 Terms defined in Endangered Species Act and HRS Chapter 195D. Terms used in this Agreement and specifically defined in the Endangered Species Act (ESA) or HRS Chapter 195D, or in regulations adopted by the Wildlife Agencies under the ESA or HRS Chapter 195D, have the same meaning as in the ESA or HRS Chapter 195D and those implementing regulations, unless this Agreement expressly provides otherwise.

3.2 “Adaptive Management” means a flexible approach to the long-term management of fish, wildlife and habitat resources of the project area that is directed over time by the results of ongoing monitoring activities and other information.

3.3 “Agreement” means this Implementing Agreement, which incorporates the HCP and Permits by reference.

3.4 “Changed Circumstances” means changes in circumstances affecting a Covered Species or the geographic area covered by the HCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the HCP (e.g. the listing of a new species, or a fire or other natural catastrophic event in areas prone to such event.) Changed Circumstances and the planned responses to those circumstances are described in section 7.4.2 of the HCP. Changed Circumstances are not Unforeseen Circumstances.

3.5 “Covered Activities” means certain activities carried out by KL that may result in incidental Take of Covered Species, and consists of Resort construction and operation activities as described in Chapter 2 of the HCP.

3.6 “Covered Species” means the following eight species, each of which the HCP addresses in a manner sufficient to meet all of the criteria for the USFWS to issue an Incidental Take Permit under ESA § 10(a)(1)(B) and for DLNR to issue an Incidental Take License under HRS Chapter 195D: Hawaiian Goose or *Nēnē* (*Branta sandvicensis*) (hereafter referred to as Nēnē), the Hawaiian endemic sub-species of the Black-necked Stilt (*Himantopus mexicanus knudseni*) (hereafter referred to as Hawaiian Stilt), Hawaiian Coot (*Fulica alai*), the Hawaiian endemic sub-species of the Common Moorhen (*Gallinula chloropus sandvicensis*) (hereafter referred to as Hawaiian Moorhen), the Hawaiian Duck (*Anas wyvilliana*), Hawaiian Petrel (*Pterodroma sandwichensis*), Newell’s Shearwater (*Puffinus auricularis newelli*), and Band-rumped Storm-Petrel (*Oceanodroma castro*).

3.7 “HCP” means the Habitat Conservation Plan prepared by Kaua‘i Lagoons LLC.

3.8 “Listed Species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the ESA and/or HRS Chapter 195D.

3.9 “Permit” or “Permits” means the Incidental Take Permit issued by the USFWS to KL pursuant to Section 10(a)(1)(B) of the ESA, and the Incidental Take License issued by DLNR to KL pursuant to HRS Chapter 195D, for Take incidental to Covered Activities, as such Permits may be amended from time to time.

3.10 “Permittee” means Kaua‘i Lagoons LLC.

3.11 “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed or unlisted Covered Species. Harm means an act that actually kills or injures a member of a Covered Species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a Covered Species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

3.12 “Unforeseen Circumstances” means changes in circumstances affecting a Covered Species or geographic area covered by the HCP that could not reasonably have been anticipated by plan developers and the Wildlife Agencies at the time of the HCP’s negotiation and development, and that result in a substantial and adverse change in the status of the Covered Species.

3.13 “Unlisted Species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under the ESA or HRS Chapter 195D.

4.0 OBLIGATIONS OF THE PARTIES

4.1 Obligations of Permittee.

4.1.1 Chapters 4 and 6 of the HCP describe the measures KL is obligated to implement in order to avoid, minimize, mitigate and monitor the effects of its Covered Activities on the Covered Species.

4.1.2 Upon issuance of the Permits, KL will fully and faithfully perform all obligations assigned to it under this Agreement, the Permits, and the HCP.

4.2 Obligations of the Wildlife Agencies.

4.2.1 Permit Issuance. Upon approval of the HCP by the Wildlife Agencies and execution of this Agreement by all Parties, and satisfaction of all other applicable legal requirements, the USFWS will issue KL a Permit under Section 10(a)(1)(B) of the ESA, and DLNR will issue KL a Permit under HRS Chapter 195D, authorizing incidental Take by KL of each Covered Species resulting from Covered Activities.

4.2.2 Permit coverage. The Permits will identify all Covered Species. The Permit issued by the USFWS will take effect for those Covered Species which are also Listed Species under the ESA (i.e., all of the Covered Species except for the Band-rumped Storm-Petrel (*Oceanodroma castro*)) in accordance with the terms of the federal

Permit. Subject to compliance with all other terms of this Agreement, the Permit issued by the USFWS will take effect for a Covered Species which is an Unlisted Species (i.e., Band-rumped Storm-Petrel (*Oceanodroma castro*)) upon the listing of that species as threatened or endangered under the ESA. The Permit issued by the DLNR will take effect for all of the Covered Species at the time the Permit is issued.

4.2.3 “No surprises” and “Incentives” assurances. Provided that Permittee has complied with its obligations under the HCP, this Agreement, and the Permits, including any provisions for Changed Circumstances, adaptive management and any other contingency measures provided for in the HCP, the USFWS can require Permittee to provide mitigation beyond that provided for in the HCP only in accordance with the ESA “No Surprises” regulations at 50 C.F.R. §§ 17.22(b)(5) and 17.32(b)(5), and the DLNR can require Permittee to provide mitigation beyond that provided for in the HCP only in accordance with the HRS Chapter 195D “Incentives” provisions at HRS Section 195D-23.

4.3 Interim obligations upon a finding of Unforeseen Circumstances. If either the USFWS or DLNR or both make a finding of Unforeseen Circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, KL will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

5.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be complementary to each other. In the event of any contradiction between the terms of the HCP and the terms of either Permit, the terms of that Permit shall control with regard to the Permit.

6.0 TERM

6.1 Effective date and term. This Agreement and the HCP shall become effective as between KL and DLNR on the date that DLNR issues the Permit under HRS Chapter 195D, and as between KL and USFWS on the date that USFWS issues the Permit under the ESA. This Agreement, the HCP, and the Permits will remain in effect for thirty (30) years from the issuance of the Permits, except as otherwise provided below.

6.2 Surrender of the Permits. Permittee may surrender the Permits in accordance with any applicable statutes or regulations in force on the date of such surrender. (For example, the relevant USFWS regulations are currently codified at 50 C.F.R. § 13.26.) Notwithstanding surrender of the Permits, Permittee will be required to provide post-surrender mitigation for any take of Covered Species that the Wildlife Agencies determine will not have been fully mitigated under the HCP by the time of

surrender. Permittee's obligations under the HCP and this Agreement will continue until the Wildlife Agencies notify Permittee that no post-surrender mitigation is required, or that all post-surrender mitigation required by the Wildlife Agencies is completed. The Permits shall be deemed canceled only upon a determination by the issuing Wildlife Agency that such outstanding mitigation obligations have been implemented. Upon surrender of the Permits, no additional take shall be allowed under the surrendered Permit except as necessary to carry out any outstanding mitigation obligations. Unless the Parties agree otherwise, the Wildlife Agencies may not require more mitigation than would have been provided if Permittee had carried out the full term of the HCP. If Permittee elects to surrender the Permits before expiration of the full term of the HCP, such surrender shall be in accordance with applicable regulations in force at the time of surrender. If such regulations do not specify the procedures for surrender, Permittee will provide notice to the Wildlife Agencies at least 120 days prior to the planned surrender. Such notice will include a status report detailing the nature and amount of take of all Covered Species, the mitigation provided for those species prior to surrender, and the status of Permittee's compliance with all other terms of the HCP. Within 120 days after receiving a notice and status report meeting the requirements of this paragraph, the Wildlife Agencies will give notice to Permittee stating whether any post-surrender mitigation is required and, if so, the amount and terms of such mitigation, and the basis for the Wildlife Agencies' conclusions. If the Wildlife Agencies determine that no post-surrender mitigation is required, all obligations assumed by the Parties under this Agreement will terminate upon issuance by the Wildlife Agencies of such notice. If Permittee disagrees with the Wildlife Agencies' determination, the Parties may choose to use the dispute resolution procedures described in section 12.6 of this Agreement. Permittee will continue to carry out its obligations under the HCP until any such dispute is resolved. If the Parties are unable to agree, the Wildlife Agencies will have the final authority to determine whether Permittee is required to provide post-surrender mitigation.

7.0 FUNDING

7.1 KL warrants that it has, and will expend, the funds identified in Chapters 4 and 6 of the HCP as such funds may be necessary to fulfill its obligations under the HCP. KL commits to including a line item for complete HCP implementation into its annual operating budget for the life of the HCP. KL will promptly notify the Wildlife Agencies of any material change in KL's financial ability to fulfill its obligations. In addition to providing any such notice, KL will provide the Wildlife Agencies with a copy of its annual report each year of the Permits, or with such other reasonably available financial information that the Parties agree will provide adequate evidence of KL's ability to fulfill its obligations.

7.2 Kaua'i Lagoons will also post a bond in a form acceptable to the Wildlife Agencies to ensure that funding will be available to implement the HCP.

- (a) The bond will name DLNR as the obligee. DLNR may make a claim to fund or otherwise pay for any mitigation obligations required by the HCP or the Permits which Kauai Lagoons failed to or is unable to implement. The circumstances under which DLNR may make a claim include, but are not limited to: Kaua'i Lagoons fails to fund or otherwise pay for the monitoring and mitigation

measures when required under the HCP; or the Permit is suspended or terminated early through revocation or surrender and Kauai Lagoons fails to or is unable to implement any required mitigation measures. Whenever DLNR makes a valid claim under the bond, DLNR is entitled to payment of the full cost of implementing the outstanding mitigation obligations, as determined exclusively by DLNR after consultation with the Service, up to the full amount of the bond.

- (b) The bond shall either: (i) continue in force for the term of the Permits; or (ii) take the form of a biennial bond which shall be renewed every two years with a continuation certificate mailed to DLNR with a copy to the Service at least six months prior to expiration of the bond. Failure to renew or obtain a replacement bond six months before the expiration date of the then-existing bond will constitute grounds for suspension or revocation of the Permits.
- (c) The bond will be in the amount of \$153,677 dollars for each of the first 5 years of the Plan which reflects the estimated annual implementation cost as detailed in Section 6.4 of the HCP. Effective on January 1, 2017, and each five-year anniversary thereafter during the term of the Permits, the amount of the bond shall be adjusted for inflation using 2012 dollars as baseline. These are annual amounts and any claim made by DLNR does not diminish the amount that must be assured by the bond in subsequent years.
- (d) DLNR shall consult with FWS in determining whether to make a claim on the bond. Prior to making any claim on the bond, DLNR shall provide written notice to Kauai Lagoons of its alleged failure or inability to implement required obligations under the HCP, and a period of 30 days to demonstrate to DLNR's satisfaction that a claim on the bond is not warranted, unless such 30-day period would extend beyond the term of the bond. In such cases, DLNR may proceed to make a claim on the bond and provide simultaneous notice to Kauai Lagoons.

8.0 MONITORING AND REPORTING

8.1 Planned periodic reports. As described in the HCP, KL will submit periodic reports describing its activities and results of the monitoring program provided for in the HCP.

8.2 Other reports. KL will provide, within 30 days of being requested by either or both of the Wildlife Agencies, any additional information in its possession or control related to implementation of the HCP that is requested by the Wildlife Agencies for the purpose of assessing whether the terms and conditions of the Permits and the HCP, including the HCP's adaptive management plan, are being fully implemented.

8.3 Certification of reports. All reports will include the following certification from a responsible KL official who supervised or directed preparation of the report:

I certify that, to the best of my knowledge, after appropriate inquiries of relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete.

8.4 Monitoring by Wildlife Agencies. The USFWS may conduct inspections and monitoring in connection with the federal Permit in accordance with the ESA and its implementing regulations (see, e.g., 50 CFR §13.47), and DLNR may conduct inspections and monitoring in connection with the state Permit in accordance with HRS Chapter 195D and its implementing regulations.

9.0 CHANGED CIRCUMSTANCES

9.1 Permittee-initiated response to Changed Circumstances. Changed Circumstances identified and planned for in the HCP are specifically listed in section 6.3 of the HCP. KL will give notice to the Wildlife Agencies within seven (7) calendar days after learning that any of the Changed Circumstances has occurred. As soon as practicable thereafter, but no later than thirty (30) calendar days after learning of the Changed Circumstance, KL shall begin implementing the remedial conservation measures identified in section 6.3 for the specific Changed Circumstance to the extent necessary to mitigate the effects of the Changed Circumstance on Covered Species. KL will promptly report to the Wildlife Agencies on its actions, and KL will begin implementing the remedial conservation measures without awaiting notice from the Wildlife Agencies. Such changes are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permits or HCP.

9.2 Wildlife Agency-initiated response to Changed Circumstances. If a Wildlife Agency determines that a Changed Circumstance has occurred and that KL has not responded in accordance with section 6.3 of the HCP, the Wildlife Agency will so notify Permittee and direct Permittee to make the required changes. Within thirty (30) calendar days after receiving such notice, KL will make the required changes and report to the Wildlife Agencies on its actions. Such changes are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permits or HCP.

9.3 Listing of species that are not Covered Species. In the event that a non-Covered Species that may be affected by Covered Activities becomes listed under the ESA or HRS Chapter 195D during the term of this Agreement, the HCP and the Permits, KL will either refrain from conducting Covered Activities which will result in Take or jeopardy of the species or adverse modification of critical habitat, or implement the “no take/no jeopardy/no adverse modification” measures identified by the Wildlife Agencies until the Permits are amended to include such species, or until the Wildlife Agencies notify KL that such measures are no longer needed to avoid jeopardy to, Take of, or adverse modification of the critical habitat of, the non-Covered Species.

10.0 ADAPTIVE MANAGEMENT

10.1 Permittee-initiated adaptive management. KL will implement the adaptive management provisions in Section 4.6 of the HCP when changes in management practices are necessary to achieve the HCP’s biological objectives or to respond to monitoring results or new scientific information. Permittee will make such changes without awaiting notice from the Wildlife Agencies, and will report to the Wildlife Agencies on any actions taken pursuant to this section.

10.2 Wildlife Agency-initiated adaptive management. If the Wildlife Agencies determine that the adaptive management provisions in the HCP have been triggered and that Permittee has not changed its management practices in accordance with Section 4.6 of the HCP, the Wildlife Agencies will so notify KL and direct KL to make the required changes. Within thirty (30) calendar days of receiving such notice, KL will make the required changes and report to the Wildlife Agencies on its actions. Such changes are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permits or HCP.

10.3 Reductions in mitigation. KL will not implement adaptive management changes that may result in less mitigation than provided for Covered Species under the original terms of the HCP, unless the Wildlife Agencies first provide written approval. KL may propose any such adaptive management changes by notice to the Wildlife Agencies, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered Species, and other environmental impacts. Within 120 days of receiving such a notice, the Wildlife Agencies will either approve the proposed adaptive management changes, approve them as modified by the Wildlife Agencies, or notify KL that the proposed changes constitute permit amendments that must be reviewed under Section 11.0 of this Agreement.

10.4 No increase in Take. This section does not authorize any modifications that would result in an increase in the amount and nature of Take, or increase the impacts of Take, of Covered Species beyond that analyzed under the original HCP and any amendments thereto. Any such modification must be reviewed as a permit amendment under Section 11.0 of this Agreement.

11.0 MODIFICATIONS AND AMENDMENTS

11.1 Minor amendments.

(a) Minor Amendments are changes to the HCP provided for under the operating conservation program, including adaptive management changes and responses to Changed Circumstances. They also include revisions which do not significantly modify the scope or nature of activities or actions covered by the incidental take Permits in terms of their effect on the Covered Species. Any Party may propose minor amendments to the HCP or this Agreement by providing notice to all other Parties. Such notice shall include a statement of the reason for the proposed amendment and an analysis of its environmental effects, including its effects on operations under the HCP and on Covered Species. The other Parties shall each use their best efforts to respond in writing to the proposal within sixty (60) calendar days of receipt of the request. The response shall either (1) concur with the proposed Amendment; (2) concur with the proposed Amendment with requested changes; (3) identify additional information necessary to enable evaluation of the proposed Amendment, or (4) disapprove the proposed Amendment, stating reasons for the disapproval. All Parties must agree in writing to any Minor Amendment, including the schedule for implementation, before implementation of such Amendment. Any proposed Minor Amendment which is disapproved by one of the Parties may be resubmitted as a proposed Major Amendment pursuant to Section 11.2 of this Agreement. The Wildlife

Agencies will not propose or approve a Minor Amendment if the Wildlife Agencies determine that such amendment would result in operations under the HCP that are significantly different from those analyzed in connection with the original HCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or additional Take not analyzed in connection with the original HCP.

(b) Minor Amendments may include, but are not limited to, the following:

- (1) Correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the HCP and/or incidental take permits;
- (2) Modifying existing or establishing new measures to further minimize or avoid take of the Covered Species;
- (3) Modifying reporting protocols for Annual Reports;
- (4) Minor changes to monitoring or reporting protocols;
- (5) Minor changes to the amount of authorized take based on the results of monitoring;
- (6) The changes described in Section 4.4.3 of the HCP;
- (7) Revising Covered Species habitat enhancement and management techniques based on new information and/or analyses;
- (8) Any other modifications to the HCP that are consistent with the biological goals and objectives described in the HCP that will not result in operations under the HCP that are significantly different from those analyzed in connection with the HCP as approved, adverse impacts on the environment that are new or significantly different from those analyzed in connection with the HCP as approved, or take of Covered Species not analyzed in connection with the HCP as approved, including but not limited to the approval or execution of agreements to facilitate execution and implementation of the HCP, or actions by KL to delegate (while retaining full responsibility for compliance with) any of its duties under this HCP to a third party under its direct control.

11.2 Major Amendments.

(a) Major Amendments may include, but are not limited to, the following:

- (1) Adding a new species to the list of Covered Species contained in the HCP and/or the incidental take permits;
- (2) Changes to the Covered Activities which were not addressed in the HCP as originally adopted, and which otherwise do not meet the criteria for a Minor Amendment as discussed above; and
- (3) Extending the term of the incidental take permits.

(b) A Major Amendment requires submittal to the USFWS and DLNR of a written application and implementation of all permit processing procedures

applicable to an original incidental take Permit. The specific documentation required to comply with the ESA, HRS Chapter 195D, and the National Environmental Policy Act may vary based on the nature of the Amendment.

12.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION

12.1 In general. Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permits, and the HCP.

12.2 No monetary damages. No Party shall be liable for damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement.

12.3 Injunctive and temporary relief. The Parties acknowledge that the Covered Species are unique and that their loss as species would result in irreparable damage to the environment, and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

12.4 Enforcement authority of the United States and State of Hawai‘i. Nothing contained in this Agreement is intended to limit the authority of the United States or the State of Hawai‘i to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA or HRS Chapter 195D or other applicable law.

12.5 Permit Suspension. The USFWS may suspend or revoke the federal Permit, in whole or in part, in accordance with the ESA, associated implementing regulations, or other applicable laws and regulations in force at the time of such suspension. DLNR may suspend the state Permit, in whole or in part, to the extent allowed by HRS Chapter 195D, associated implementing regulations, or other applicable laws and regulations in force at the time of such suspension.

12.6 Informal dispute resolution process. In the event of a dispute between the Parties regarding this Agreement, the Permits or the HCP, the disputing Party may notify the other Parties of the dispute in writing. The Parties will then confer within thirty (30) calendar days of the receipt of such notification, and the Parties will use their best efforts and good faith to promptly and cooperatively resolve the dispute within an additional thirty (30) calendar days. If at the end of that period the dispute has not been resolved, the dispute shall be elevated to the Executive Director of Kauai Lagoons, the Field Supervisor for the USFWS Pacific Islands Fish and Wildlife Office, and the DLNR Chairperson, who shall personally meet and confer within the next thirty (30) calendar days and who shall exercise their best efforts and good faith to promptly and cooperatively resolve the dispute. If at any time a Party determines that circumstances so warrant, the Party may avail itself of any legal remedies otherwise available.

13.0 CONSULTATIONS WITH OTHER PUBLIC AGENCIES

Nothing in this Agreement is intended to alter the obligation of a federal agency to

consult with the USFWS pursuant to Section 7 of the ESA (16 U.S.C. 1536(a)). To the maximum extent appropriate in any consultation on any Covered Activity with respect to the Covered Species under Section 7(a) of the ESA and regulations issued there under, the USFWS shall ensure that the biological opinion issued in formal consultation, or views expressed by the USFWS in informal consultation, in connection with the proposed activity are consistent with the biological opinion prepared on the Permit and HCP, provided that the Covered Activity as proposed in the consultation is consistent, and will be implemented in accordance with, the HCP, this Agreement, and the Permit. Any reasonable and prudent measures and terms and conditions in the biological opinion, or views expressed by the USFWS in informal consultation, on the proposed activity shall, to the maximum extent appropriate, be consistent with and not in excess of the measures included in the HCP, this Agreement, and the Permit

14.0 MISCELLANEOUS PROVISIONS

14.1 Temporary prevention of performance. In the event that Permittee is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Permittee, including, but not limited to third party actions, sudden actions of the elements not identified as Changed Circumstances, or actions of a non-participating federal agency, state agencies or local jurisdictions, Permittee shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, provided that nothing in this section shall be deemed to authorize any Party to violate the ESA or HRS Chapter 195D, and provided further that:

(a) The suspension of performance is of no greater scope and no longer duration than is required by the unforeseeable cause;

(b) Within fifteen (15) days after the occurrence of the unforeseeable cause Permittee shall give the Wildlife Agencies written notice describing the condition, an estimate of how long Permittee expects it to persist, and how Permittee plans to remedy the effects of the temporary suspension of performance;

(c) Permittee shall use its best efforts to remedy its inability to perform; and

(d) When Permittee is able to resume performance of its obligations, Permittee shall give the Wildlife Agencies written notice to that effect.

14.2 No partnership. Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

14.3 Notices. Any notice permitted or required by this Agreement shall be in writing, delivered personally, or by overnight mail, to the persons listed below, or shall be deemed given five (5) business days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing.

Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by overnight or certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Field Supervisor
United States Fish and Wildlife Service
Pacific Islands Fish and Wildlife Office
300 Ala Moana Blvd., Room 3-122
Honolulu, Hawaii 96850
Telephone: 808-792-9400
Facsimile: 808-792-9580

Chairperson
Board of Land and Natural Resources
1151 Punchbowl Street, Rm 130
Honolulu, Hawaii 96813
Telephone: 808-587-0400
Facsimile: 808-587-0160

Marriott Vacation Club International
Kauai Lagoons Development Office
3351 Hoolaulea Way
Lihue, HI 96766
Telephone: 808-241-2061
Facsimile: 808-241-2065

14.4 No Federal contract. Notwithstanding any language to the contrary in this Agreement, this Agreement is not intended to create, and shall not be construed to create, an enforceable contract between the Parties. The sole purpose of this Agreement is to clarify the provisions of the HCP and the processes the Parties intend to follow to ensure the successful implementation of the HCP in accordance with the Permits.

14.5 Availability of funds. Implementation of this Agreement and the HCP by the USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the USFWS will not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14.6 Duplicate originals. This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

14.7 No third-party beneficiaries. Without limiting the applicability of rights granted to the public pursuant to the ESA, HRS Chapter 195D, or other federal or state law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or damages pursuant to

the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

14.8 Relationship to the ESA, HRS Chapter 195D and other authorities.


The terms of this Agreement shall be governed by and construed in accordance with the ESA, HRS Chapter 195D, and applicable federal and state law. In particular, nothing in this Agreement is intended to limit the authority of the Wildlife Agencies to seek penalties or otherwise fulfill their responsibilities under the ESA or HRS Chapter 195D. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Wildlife Agencies as agencies of the federal government. Nothing in this Agreement will limit the right or obligation of any federal agency to engage in consultation required under Section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of Permittee under the HCP and this Agreement will be considered in any consultation affecting Permittee or its Covered Activities.


14.9 References to regulations. Any reference in this Agreement, the HCP, or the Permits to any regulation or rule of the Wildlife Agencies shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.10 Applicable laws. All activities undertaken pursuant to this Agreement, the HCP, or the Permits must be in compliance with all applicable state and federal laws and regulations.

14.11 Successors and assigns. This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of either of the Permits shall be governed by the Wildlife Agencies' regulations in force at the time.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date the Permits are issued.

BY  Date 11/9/12
Deputy Regional Director
United States Fish and Wildlife Service, Region 1
Portland, Oregon

BY  Date 10/12/12
Chairperson
Board of Land and Natural Resources
Honolulu, Hawaii

BY  Date 9/28/12
Kaua'i Lagoons LLC
Lihue, Hawaii