

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Forestry and Wildlife  
Honolulu, HI, 96813

July 14, 2017

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

Land Board Members:

**SUBJECT:** REQUEST FOR APPROVAL OF A MEMORANDUM OF UNDERSTANDING AND IMPLEMENTATION AGREEMENT BETWEEN HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES (DLNR), DIVISION OF FORESTRY AND WILDLIFE (DOFAW); UNITED STATES FISH AND WILDLIFE SERVICE (USFWS); UNITED STATES DEPARTMENT OF AGRICULTURE (USDA); UNITED STATES COAST GUARD (USCG); ISLAND CONSERVATION (IC); NATIONAL TROPICAL BOTANICAL GARDENS (NTBG); AND THE OWNERS OF NIIHAU REGARDING THE LEHUA ISLAND ECOSYSTEM RESTORATION PROJECT.

SUMMARY:

Submitted for your approval is a memorandum of understanding (MOU) and implementation agreement between the Hawaii Department of Land and Natural Resources (DLNR), Division of Forestry and Wildlife (DOFAW); United States Fish and Wildlife Service (USFWS); United States Department of Agriculture (USDA); United States Coast Guard (USCG); Island Conservation (IC); National Tropical Botanical Gardens (NTBG); and the Owners of Niihau regarding the Lehua Island Ecosystem Restoration Project (LIERP). The MOU and Agreement proposes to eradicate rats from Lehua Island to continue its restoration and improve the Seabird Sanctuary's suitability as habitat for seabirds and other native species.

BACKGROUND:

The island of Lehua is situated north of Niihau and is approximately 115 hectares in size. It was set aside as a Lighthouse Site under the control of the Department of Commerce in proclamation dated August 10, 1928. The island is designated as a State Seabird Sanctuary and DOFAW is responsible for the management of such Sanctuaries and a trustee for seabirds and other native plant and wildlife resources on the Sanctuaries. Restoration efforts of Lehua began in 2005, and in 2006 the rabbits which had been significantly impacting the vegetation on Lehua were eradicated. In 2009, an effort was made to eradicate the only mammal predators on Lehua island, Pacific Rats. That effort was not fully successful at eradication but some of the island's recovery has continued

due to plants continuing to rebound after the rabbit eradication. A number of studies were done to assess why the 2009 was unsuccessful. In 2012 a Feasibility Assessment was conducted by IC regarding the feasibility of attempting a second eradication on Lehua Island. With that effort IC reached out to DOFAW and the Parties of this MOU who eventually came to meet on a regular basis and forming the Lehua Island Restoration Steering Committee (LIRSC).

The efforts described in this MOU and Implementation Agreement are in large part already being carried out under the LIRSC. This Agreement enshrines those efforts in a document to formally set out the cooperative efforts of the Parties.

The MOU and Implementation agreement presented for approval describes the process by which these Parties will jointly plan for and implement the proposed restoration of Lehua Island.

RECOMMENDATION:

The Department recommends that the Board:

1. Authorize the Chairperson of the Board of Land and Natural Resources to approve and sign the Memorandum of Understanding and Implementation Agreement, pending review and edits by the Department of the Attorney General, allowing agency staff to move forward with implementing the restoration of Lehua Island.


Respectfully submitted,



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David G. Smith, Administrator  
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



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SUZANNE D. CASE, Chairperson  
Board of Land and Natural Resources

Attachment: MOU and Implementation Agreement for LIERP

**Memorandum of Understanding and Implementing Agreement**

**Lehua Island Ecosystem Restoration Project**

(Hawaii-Hawaiian Islands-Lehua)

This Agreement is entered into by and among the following:

**Hawaii Department of Land and Natural Resources (DLNR), Division of Forestry and Wildlife (DOFAW); United States Fish and Wildlife Service (USFWS); United States Department of Agriculture (USDA); United States Coast Guard (USCG); Island Conservation (IC); National Tropical Botanical Gardens (NTBG); and the Owners of Niihau**, each of which is sometimes referred to in this Agreement as a “**Party**,” with respect to the following matters:

**RECITALS**

- A. The island of Lehua is situated north of Niihau and is approximately 115 ha in size. It was set aside as a Lighthouse Site under the control of the Department of Commerce in proclamation dated August 10, 1928. The island is designated as a State Seabirds Sanctuary and DOFAW is responsible for the management of such Sanctuaries and a trustee for seabirds and other native plant and wildlife resources on the Sanctuaries.
- B. On June 29, 2004 DLNR entered into a Memorandum of Understanding with the USFWS to develop the Lehua Island Ecosystem Restoration Project. The USCG on November 8, 2005, authorized the USFWS to conduct ecosystem restoration on Lehua through December 31, 2008. On April 14, 2007 DLNR and USCG entered into a license agreement for use of Lehua to conduct ecosystem restoration activities, which is being held-over until a subsequent license is issued.
- C. IC has prepared an **Operational Plan** for the Lehua Island Rat Eradication, which lays out the goals and methodologies for a particular project for eradication of invasive rats on Lehua Island, including the pre-eradication efforts (the **Planning Phase**).
- D. The parties now wish to undertake certain activities to implement the Operational Plan and carry out the Project, and are entering into the Agreement to memorialize their understanding as to such efforts, and their respective roles in providing staffing, funding, support, training, and supervision for such efforts.

## AGREEMENT

Now, therefore, in consideration of the foregoing recitals, the respective promises of the Parties contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Term.** This Agreement is effective as of the last date Parties have signed below and, unless sooner terminated as provided below or extended by a subsequent modification to the Agreement which is entered into by the Parties, shall expire on December 1, 2018. Any Party may elect to terminate their involvement in this Agreement at any time, with or without cause, upon not less than 60 days written notice which is given to all of the other Parties in the manner called for in this Agreement, except for those costs or financial obligations to third parties pursuant to this Agreement shall be entitled to reimbursement by the other Parties of their respective shares with respect to any obligations were undertaken reasonably in carrying out that Party's duties under this Agreement, and providing that the Party seeking reimbursement has made reasonable efforts to terminate such obligations in as expeditious and cost-effective, but reasonable, a manner as may be possible after such a termination notice is given.
  
2. **Project.** The Parties agree that the Project shall proceed as outlined in the Operational Plan, and that each of them shall carry out its responsibilities as set out in previous MOU and agreements, the Operational Plan, and/or this MOU, subject to the fulfillment by each of the other Parties of its respective obligations under previous MOU and agreements, the Operational Plan, and/or this MOU. The following provisions shall also be applicable to the Project:
  - (a) To the extent, if any, that a given aspect of the Project is not adequately described in the Operational Plan, or is not adequately addressed in this MOU such that the Parties are unable to continue with the Project substantially as set forth in this MOU and the Operational Plan, the Parties agree that they and/or this MOU, or (as applicable) one or more further implementing agreements entered into with respect to the MOU and the Project, to negotiate in good faith any such amendments, modifications or further implementing agreements, as and when they become necessary.
  
  - (b) Notwithstanding any other provision in this Agreement, IC may make modifications to the Operational Plan without the approval of the other Parties if (a) the modified operations remain essentially as described in the Operational Plan and (b) the modifications do not result in an increase in the

Operational Budget and (c) IC makes all reasonable efforts to inform all Parties of the modification. Any other modification to the Operational Plan shall require the written approval of all Parties and amendment to the Operational Plan.

- (c) The Project currently has a combined total budget not to exceed \$1,300,000.00 as described in more detail in the Operational Budget. The parties agree that the Project, as described in the Operational Plan and Operational Budget, shall proceed in 2017/2018, with the funding to be provided as set forth below in this Agreement.

3. **Responsibilities of the Parties.** The respective roles of the Parties pursuant to this Agreement in carrying out the Project shall be as follows:

(a) DLNR/DOFAW. The contributions of DLNR to the project shall be as follows:

- Lead compliance processes at state level, including HEPA and all additional permits and licenses.
- Negotiate on behalf of the project with other state agencies to ensure all legal requirements are in place.
- Support Federal compliance processes, including NEPA and any additional permits.
- Approve the Operational Plan.
- Provide logistical support for pre-implementation, implementation, and post-implementation activities as described in the Operational Plan.
- Provide funding in the amount of at least \$150,000 state funds and \$446,500 grant funds for activities related to the Lehua Island Ecosystem Restoration Project (LIERP).
- Purchase bait product, if applicable.
- Chair the Lehua Project Steering Committee.
- Provide capacity for completing the project through partnership with the University of Hawaii, Pacific Cooperative Studies Unit.
- Co-lead implementation of the proposed rat eradication effort according to the operational plan.

(b) USFWS

- As the project's federal sponsor, lead the process for NEPA and ESA compliance.
- Negotiate on behalf of the project with other Federal agencies as appropriate.
- Support state compliance processes, including HEPA and any additional permits, including MBTA.
- Purchase bait product, on a reimbursable basis, if applicable.

(c) USCG

- Maintain the legal agreement with DLNR for the management of Lehua as a seabird sanctuary.
- Allow access to Lehua Island for conservation purposes.
- Issue mariner's notice during operation days.

(d) USDA

- Develop and implement independent monitoring protocols.
- Purchase bait product, on a reimbursable basis, if applicable.

(e) IC

- Support DLNR and USFWS for compliance with all applicable regulatory processes and permits.
- Develop the operational plan for the rat eradication on Lehua.
- Provide technical leadership in implementing the proposed rat eradication
- Conduct pre-eradication monitoring on Lehua prior to and after implementation.
- Provide funding in the amount of \$200,000.00 for specific activities described in the operational plan.
- Co-lead implementation of the proposed rat eradication effort according to the Operational Plan.

(f) NTBG

- Provide technical assistance to the project as applicable.
- Plant pre-monitoring protocols implementation.
- Develop the post-eradication plant restoration plan.

(g) Owners of Niihau

- Provide logistical support to the project, as per contract.
- Provide access to the staging area on Niihau during agreed implementation periods.
- Provide access to equipment and machinery as agreed.
- Provide local community members to support on the ground operations.

(h) Joint Responsibilities. All of the Parties shall share the following responsibilities and/or duties with respect to the project:

- (1) Each party shall have at least one representative present and authorized to speak for such Party at each monthly meeting of the Parties, which is held for purposes of

implementing the Operational Plan and carrying out the Project, and shall use its reasonable best efforts to send such a representative to each other meeting that may be called for such purposes at other times.

(2) All of the Parties agree to continue to cooperatively raise funds through private sources and grants.

4. **Intellectual Property.** The Parties agree that any and all reports, writings, samples, studies, photographs (including all negatives), drawings, calculations, designs, diagrams, maps, surveys, database records, computer programs, and/or other written, graphic, pictorial, or digital works, documents, or other items produced, created, or developed by a given Party in relation to the Project (collectively in each case, that Party's "**Work Product**"), and the supporting materials, data, and/or information gathered, used, or developed by such other than such Party shall provide to each other Party a complete copy of its Work Product; and (2) each Party hereby may republish, print, reprint, reproduce, sell, resell, donate, or otherwise disseminate or distribute all or any portion of the Work Product and/or the Supporting Materials that are owned by the granting Party, and/or analyses pamphlet, brochure, book, magazine, film, video, software, web site, or other form of print, audio, visual, wholly or partially by the disseminating Party), whether alone or in conjunction with co-authors or conservation partners, and to authorize such conservation partners and other researchers and writers to do the same on a royalty-free basis, all as the recipient of such license may deem appropriate from time to time in furthering its conservation mission, in each case without any need to notify the granting Party or obtain any form of permission or consent from the granting Party, or anyone acting for or representing the granting Party, and without having to compensate the granting Party for such use(s).
5. **Notices.** All notices and demands of any kind which any Party may be required or may desire to serve on another Party in connection with this Agreement shall be in writing.
6. **Agreement.** The terms of this Agreement are intended by the Parties as a final expression of their agreement with respect to the subject matter hereof, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Agreement constitute the complete and exclusive statement of its terms, and that no extrinsic evidence of any kind which contradicts the terms of this Agreement may be introduced in any proceedings (judicial or otherwise) involving this Agreement, except for evidence of subsequent written amendment to this Agreement. This Agreement may not be modified, amended or otherwise changed in any manner, except by a written amendment executed by all of the parties hereto, or their successors in interest. This Agreement may not be modified or otherwise changed in any manner, except by a written amendment executed by all of the parties hereto, or their successors in interest. This agreement may be executed in multiple

counterparts, and each executed counterpart of this Agreement shall be deemed an original for all purposes, despite the fact that not all of the Parties are signatories to the same counterpart.

7. **Interpretation.** In this Agreement, personal pronouns shall be construed as though of the gender and number required by the context, the singular including the plural, the plural including the singular, and each gender including other genders, all as may be required by the context. Wherever in this Agreement the term “and/or” is used, it shall mean: “one or the other, both, any one or more, or all: of the things, events, persons or parties in connection with which the term is used. Any and all recitals at the beginning of this Agreement are accurate and shall constitute an integral part of this Agreement, and this Agreement shall be construed in light of those recitals. Any and all exhibits, schedules, and addenda attached to and referred to in this Agreement are hereby incorporated into this Agreement as fully as if set out in their entirety herein. In the event of any conflict or inconsistencies between or among the MOU, the Operational Plan and this Agreement, then the following order of priority shall apply: (i) first, this Agreement; (ii) second the Operational Plan; and (iii) lastly, the MOU. The headings of the various paragraphs of this Agreement are intended solely for reference purposes, and are not intended for any purpose to modify, explain, or place any construction on any of the provisions of this Agreement. The Parties acknowledge that each Party and its counsel have reviewed, revised (where it was deemed appropriate), and approved this Agreement, and that no rule of construction that ambiguities are to be resolved against the drafting party shall be employed in the interpretation of this Agreement. This Agreement shall be governed by, construed in accordance with, and interpreted under, the internal law of the State of Hawaii, except to the extent that federal law governs the role of DLNR.
  
8. **Responsibility for Personnel.** Except to the extent (if any) otherwise explicitly stated in this Agreement, each Party shall retain all responsibility for its own employees, agents, and invitees, which shall include (but not necessarily be limited to) full responsibility for: (i) any and all payments due to its employees or agents, whether denominated as salaries, stipends, contract payments, or otherwise; (ii) any and all applicable health care coverage, worker’s compensation insurance, other insurance, and other benefits for such employees or agents; and (iii) any and all travel, expense, or other reimbursements due to such employees or agents.
  
9. **Indemnification.** Each Party shall be responsible for damage or personal injury resulting from the acts or omissions of its own employees, agents, or invitees while acting within the scope of their employment, agency, or invitation.



The State of Hawaii (DLNR/DOFAW) shall be responsible for damage or personal injury resulting from the acts or omissions of state employees while acting within the scope of their employment to the extent that the State's liability for such damage or injury has been determined by a court or otherwise agreed to by the State. The State shall pay for such damages and injury to the extent that funds have been authorized and appropriated by the Legislature for such purpose, and the funds have been allocated by the executive budget process.

10. **No Agency or Third Party Beneficiaries.** No person or entity not a Party to this Agreement shall have any rights under this Agreement, whether as an alleged third-party beneficiary or otherwise. No partnership, joint venture, or agency is intended to be, nor shall it be, established by this Agreement, and no Party to this Agreement, or to transact business or incur obligations in the name of any such other Party or for the account of such other Party, and no Party to this Agreement shall be in any manner or to any extent bound by or responsible for any acts, representations, or conduct of any other Party, to this Agreement, except to the extent (if any) explicitly set out in this Agreement.
11. **No Commitments Beyond Agreement.** The Parties acknowledge and agree that nothing in this Agreement shall obligate any of the Parties to expend or provide funds or staffing, or to take any other actions, beyond those which are explicitly called for in this Agreement, and that any additional funding, staffing, or other obligations of a Party in furtherance of the goals of the Project may be created only pursuant to a written amendment to this Agreement which is signed by all affected Parties, or by means of a further written agreement entered into by the affected Parties in implementing the Project.

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**RECOMMEND APPROVAL:**

Approved by the Board of Land and Natural Resources at its meeting on: \_\_\_\_\_

STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES

By: \_\_\_\_\_

\_\_\_\_\_ Date

UNITED STATES FISH AND WILDLIFE SERVICE, PACIFIC ISLANDS FISH AND WILDLIFE OFFICE

By: \_\_\_\_\_

\_\_\_\_\_ Date

UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, WILDLIFE SERVICES

By: \_\_\_\_\_

\_\_\_\_\_ Date

UNITED STATES COAST GUARD

By: \_\_\_\_\_

\_\_\_\_\_ Date

ISLAND CONSERVATON

By: \_\_\_\_\_

\_\_\_\_\_

Date

NATIONAL TROPICAL BOTANICAL GARDENS

By: \_\_\_\_\_

\_\_\_\_\_

Date

OWNERS OF NIIHAU

By: \_\_\_\_\_

\_\_\_\_\_

Date