

management or restrict use of their land, this fails to address the breadth of federal activities that affect private property in Hawaii and the extent to which private landowners are required to obtain Federal approval before they can use their property. These requirements extend to all State agencies using Federal funds in connection with a proposed action and community actions for which Federal approval or review is necessary. The requirements also extend to loan and grant programs such as National Resources Conservation Service loans and grants. In addition, the Service has taken the position in other States that it has a right to intervene in local land use proceedings if they affect endangered species on private property, as evidenced by the Service petition to the local zoning board in Arizona to postpone approval of a rezoning petition pending a survey to determine the extent to which an endangered plant was present on the property even though no Federal approval was being sought.

*Our Response:* Private landowners are not required to obtain Federal approval before using their property. When State or private landowners seek a Federal permit or Federal funding, the Federal agency must consult with the Service on actions that may affect listed species or designated critical habitat. The draft Economic Analysis identifies the potential Federal actions that may result in consultations on listed plants and critical habitat on Lanai over the next ten years. Finally, the Service has never intervened in local land use proceedings in the State of Hawaii and does not anticipate doing so in the future.

(57) *Comment:* One commenter said that the Service failed to give the public adequate opportunity to comment on the memorandum of agreement (MOA) draft being used to possibly form the basis of a decision to exclude proposed unit Lanai D from the final critical habitat.

*Our Response:* The Service posted a notice of availability of the draft MOA in the **Federal Register** on November 15, 2002. Letters were sent to interested parties that same day, notifying the recipients of the availability of the draft MOA at the Honolulu office of the Service. Electronic versions of the draft agreement were also available upon request. The comment period was opened for 10 days to allow the public to make comments.

(58) *Comment:* One commenter said that the draft MOA made available for comment is non-binding and only in draft form with vague terms. He said the draft does not make clear what the

species in question would receive *in lieu* of critical habitat protection. He also said that the draft MOA does not require any real financial commitments on the part of Castle and Cooke Resorts, LLC, relying, instead on in-kind contributions, nor would any new funds be committed to conservation efforts during the first nine years of the agreement.

*Our Response:* Much planning is necessary to execute successful plant restoration efforts of the type and scale covered by the draft MOA. The area covered by the draft MOA is a large, rugged terrain covering thousands of acres where no one has worked before. The development of precise propagation and planting plans will require site-specific and species-specific evaluations and require consultation and additional input of expert biologists. Some efforts will also likely involve experimentation, for example investigating plant survival in certain areas, the feasibility of providing water to a particular site, or a test of deer hunting methods in different terrains. It is difficult to set specific numeric targets of plants propagated and reintroduced without first conducting the necessary evaluation of specific landscape conditions and logistical constraints and opportunities. More precise goal-setting is appropriate after these more basic planning activities are completed. The draft MOA references the Service's recovery plans and the actions called for therein; these plans will provide the basic guidance for these draft MOA future actions, with adaptive management. The draft MOA makes it clear that the company will be implementing conservation actions that benefit all these listed species, *e.g.* putting up enclosure fences around more than just the proposed plant critical habitat area, they will be removing ungulates, and they will be planting native plants (including listed species). It is impossible to provide precise figures on these actions at this point. But given the past positive record of action by the company in fulfilling voluntary agreements, we believe it is reasonable to expect these overall commitments will be met.

In reference to the funding portion of the draft MOA, it is a longstanding policy of the Service to accept and encourage in-kind contributions for our cost-share partnership programs. These type of contributions provide local, on-the-ground expertise; they encourage greater local "ownership" in a successful outcome; and many partners often provide greater in-kind services than for which they receive credit. The commenter is correct that there are no

explicit guarantees regarding exactly how much the company would spend over the life of this agreement, but this is a voluntary agreement based on good faith, past performance, and a reasonable expectation of future performance.

Preserving Castle and Cooke Resorts, LLC's current commitment to voluntary conservation is one of our fundamental goals in the critical habitat exclusion. Regardless of any additional commitments from the company, this accomplishment alone establishes an important benefit of approval of the draft MOA and excluding proposed Lanai Unit D, when compared with a critical habitat designation. In our opinion, loss of these existing voluntary commitments, which is made more likely by a critical habitat designation, would have a much greater negative impact on these plants than would the proposed critical habitat exclusion. These plants are benefitting more from these ongoing, interventionist actions than they would from the critical habitat designation. We have outlined our reasoning for excluding land from critical habitat below (see *Exclusions Under Section 4(b)(2)*).

(59) *Comment:* One commenter stated that the draft MOA stipulation that Castle and Cooke Resorts, LLC would not seek Federal assistance and/or authorization from any Federal agency for activities that may adversely affect habitat found in some areas of proposed unit Lanai D falls short of protection that critical habitat provides. He also stated that even if Castle and Cooke Resorts, LLC does not apply for Federal assistance and/or authorization, that does not mean that the Federal government would not initiate any projects on Lanai that may affect the proposed critical habitat that may be excluded from final designation and designation would provide more protection under the Act.

*Our Response:* To improve the current condition of the endangered and threatened species on Lanai, it is insufficient simply to prohibit harmful activities. Rather, it is necessary to carry out active management measures to confer a positive benefit on the species of concern, such as habitat manipulation, exotic species control, or simply allowing access for the purposes of reintroduction (Bean 2002). We feel the likelihood of federally-initiated projects on Lanai that may affect listed species is very low, and therefore critical habitat would have little regulatory benefit to the species other than those listed below in section *Exclusions Under Section 4(b)(2)*.