

should be designated, even if they are currently being managed for conservation. Designation of these areas would be in accordance with the mandatory duty to designate critical habitat “to the maximum extent prudent and determinable” (16 U.S.C. 1533(a)(3)). Also, designation will provide an additional measure of protection by preventing Federal agencies from carrying out, funding, or approving any activity likely to result in adverse modification or destruction of critical habitat—whether directly or indirectly, regardless of the location of the activity. Furthermore, areas that may have adequate management in place may not be safe from even direct threats from Federal activities, which can arise with little warning.

*Our Response:* Section 3(5)(A)(i) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) defines critical habitat as areas on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. In order to give meaning to the last clause of the definition, we have previously considered that, if an area was already adequately managed, then there would be no requirement for special management considerations or protection. We believed that adequate special management or protection would be provided by a legally operative plan that addresses the maintenance and improvement of essential habitat elements and that provides for the long-term conservation of the species. We considered a plan adequate when it: (1) Provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species’ population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) provides assurances that the management plan will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, have an implementation schedule in place, and/or have adequate funding for the management plan); and (3) provides assurances that the conservation plan will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan’s goals and objectives). Therefore, if an area provides physical and biological features essential to the conservation of the species, and also is covered by a plan that meets these criteria, then such an area would not have constituted

critical habitat as defined by the Act because the physical and biological features found there do not require special management.

However, in a recent opinion (*Center for Biological Diversity v. Norton*, Civ. No. 01–409 TUC DCB D. Ariz. Jan. 13, 2003), a Federal district court determined that our definition of critical habitat, as it applies to special management, is not correct. The court stated that “whether habitat does or does not require special management by defendant or FWS is not determinative on whether or not the habitat is ‘critical’ to a threatened or endangered species (pages 13–14 of the court’s decision).” We continue to believe that our interpretation was reasonable. However, we nevertheless have not declined to include areas from this final designation because they are adequately managed.

(15) *Comment:* Critical habitat designation, and the underlying decision to list as endangered the species that are the subject of the designation, exceed the constitutional limits of the Service’s delegated authority. Congress enacted the Endangered Species Act as an exercise of its commerce clause power and delegated exercise of that Commerce Clause power to the Service to apply the Act by regulation. The listed species are not interstate. They exist only in Hawaii and do not cross state lines. Nor are they in commerce as the subject of any economic endeavor. They lack any commercial value. Therefore, the Service’s regulations listing these species and designating critical habitat for them within Hawaii exceed the Federal power to regulate interstate commerce under the governing precedents interpreting the Commerce Clause.

*Our Response:* The Federal government has the authority under the Commerce Clause of the U.S. Constitution to protect these species, for the reasons given in Judge Wald’s opinion and Judge Henderson’s concurring opinion in *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 1185 S. Ct. 2340 (1998). *See also Gibbs v. Babbitt*, No.99–1218 (4th Cir. 2000). The *Home Builders* case involved a challenge to application of ESA prohibitions to protect the listed Delhi Sands flower-loving fly. As with the species at issue here, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the ESA to this fly was a proper exercise of Commerce Clause power because it prevented loss of biodiversity and destructive interstate competition.

(16) *Comment:* With regard to the Draft Economic Analysis (DEA), a commenter stated that since State law prohibits taking of endangered plants, a court could follow Federal precedents and say that an action that degrades critical habitat injures the plant and so is an “illegal” taking of the plant. The economic impact of a landowner not being able to use his own land for fear of injuring species needs to be taken into account.

*Our Response:* Possible costs resulting from interplay of the Federal Endangered Species Act and Hawaii State law were discussed in the economic analysis under indirect costs (*e.g.*, possible conservation management mandate for the private landowner and reduction in game mammal populations). The economic analysis considers the economic impacts of section 7 consultations related to critical habitat even if they are attributable co-extensively to the listed status of the species. In addition, the economic analysis examines any indirect costs of critical habitat designation, such as where critical habitat triggers the applicability of a State or local statute. However, where it is the listing of a species that prompts action at the State or local level, the impacts are not attributable to critical habitat designation and are not appropriately considered in the economic analysis of critical habitat designation. Take prohibitions under Hawaii law are purely attributable to a listing decision and do not co-extensively occur because of critical habitat designations. There are no take prohibitions associated with critical habitat.

#### Issue 5: Economic Issues

(17) *Comment:* A commenter stated that the DEA must take into account the unique local circumstances of landownership and limited economic base of Molokai, which are especially susceptible to detrimental impacts of regulations.

*Our Response:* The DEA considers all activities that are reasonably foreseeable to affect the proposed critical habitat areas over the next 10 years. The analysis first considers the impact of preexisting State and local land-use restrictions and the likely presence or absence of a Federal nexus on these activities. Subsequently, the analysis estimates the likely direct effects of implementation of section 7 of the Act on the identified reasonably foreseeable activities, as well as discusses the indirect effects associated with potential changes in land use regulations, property values, and other changes. Based on this comprehensive review of