

to threatened or endangered species or trust resources, when asked to do so.

(31) *Comment:* A commenter stated that the DEA fails to consider economic impacts of critical habitat that result through interaction with State law, specifically the State Water Code. HRS Sec. 174C-2 states that “adequate provision shall be made for protection of fish and wildlife.” HRS Sec. 174C-71 instructs the Commission of Water Resource Management to establish an instream use protection program to protect fish and wildlife. Since landowners may depend on water pumped from other watersheds, these effects can be far-reaching. It is impossible to tell from the descriptions in the proposal whether any water diversions will have to be reduced as a result of listing and critical habitat designation. The Service has an obligation to thoroughly investigate this issue and refrain from designating critical habitat until it has determined whether its actions will affect water use and balance this against any benefit to the species. Another commenter stated that if the critical habitat proposal would require reducing water diversions from any stream, the Service should investigate whether that would take anyone’s vested water rights.

*Our Response:* No costs are expected to occur from such impacts to water systems, because none of the 41 species are stream-dependent for their survival and therefore would not cause a reduction in water diversion. In addition, water infrastructure is considered a manmade feature and therefore its operation and maintenance are not subject to the critical habitat provisions of section 7, because these features and structures normally do not contain, and are not likely to develop, any primary constituent elements.

(32) *Comment:* One commenter stated that the DEA fails to discuss economic impacts that may occur if opponents of water diversions use critical habitat designations to delay and confuse water use decisions on the grounds that any water diversion upstream of critical habitat may increase an endangered plant’s risk of extinction. Furthermore, the burden of proof that diversions will not cause extinction will be placed on those diverting water. Proof will be difficult because so little is known about the needs of these species.

*Our Response:* Chapter VI, Section 3.g.(1) of the DEA states that it is highly unlikely that a new ditch system or major expansion to an existing one (including new diversions) would be proposed or approved in the proposed critical habitat. This assessment is made due to the existing protections provided

by the baseline environmental regulations, current environmental and cultural concerns, current economic and financial constraints, probable public opposition to stream diversions, and difficulties in obtaining permits.

(33) *Comment:* One commenter stated that the cost of potential citizen lawsuits preventing certain activities or requiring some sort of management in critical habitat was not discussed in the DEA. Another commenter stated that critical habitat designation will bring unnecessary and costly litigation. One commenter stated that the proposed critical habitat could entail considerable cost to both the State and private landowners. One commenter stated that critical habitat designation could indirectly result in limitations or special management requirements (such as fencing or control of invasive species) being established on private lands. The commenter pointed out that the DEA estimates that the Palila court decision may be interpreted to mandate private conservation and therefore the proposed critical habitat designation could cost Molokai landowners \$840,000 to \$2,240,000 per year, or \$8.4 million to \$22.4 million over 10 years. However, Table VI-3 of the DEA dismisses these costs as minor and does not add them to the total cost estimate. The commenter suggested that these costs be considered.

*Our Response:* The Act does not obligate landowners to manage their land to protect critical habitat, nor would landowners and managers be obligated under the Act to participate in projects to recover a species for which critical habitat has been established. However, Chapter VI, Section 4.c. of the DEA does discuss the potential mandate for conservation management pursuant to litigation and the resulting costs for the proposed designation on Molokai. Specifically, adverse impacts on development, including delays for additional studies and agency reviews, increased costs for environmental studies, increased risk of project denials, increased risk of costly mitigation measures, increased risk of litigation over approvals, etc., are not expected since there are no known development plans within the proposed designation, as modified. Furthermore, the following factors make future development projects in the designated critical habitat highly unlikely: (1) As modified, approximately 89 percent of the proposed critical habitat is in the Conservation District where development is already limited; (2) the approximately 11 percent of the proposed critical habitat in the Agricultural District are in arid areas or

areas lined with gulches or steep cliffs that generally host only limited, if any, grazing; (3) there are no known plans for development within the proposed critical habitat as modified; and (4) as modified, most of the land being designated as critical habitat in the Special Management Area is also within the Conservation District. While it is conceivable that there may initially be an increase in subsequent lawsuits related to the critical habitat designation, it is not possible to predict their number, degree of complexity, or any other associated effect due to scant historical evidence for the 41 plant species.

(34) *Comment:* Several commenters stated that the cost of potential citizen suits preventing certain activities or requiring some sort of management in critical habitat was not discussed in the DEA. Litigation regarding land management requirements is not only foreseeable, but is likely. Critical habitat designation will bring unnecessary and costly litigation, thus creating an economic disaster that would severely challenge one private landowner’s economic viability. Another commenter also stated that even if litigation is unrealistic, expectations of litigation alone can lower property values.

*Our Response:* As discussed in the DEA and in the Addendum, an undetermined probability exists that a Federal or State court could mandate certain indirect impacts as a result of critical habitat. While the economic analysis did not assess the legal merits of the arguments for or against the various indirect impacts, the DEA and the Addendum present the worst-case scenario of the costs associated with the potential outcomes of third-party lawsuits whenever possible. For example, for the sake of illustration, the DEA and Addendum assume a worst-case scenario whereupon mountainous areas (approximately 95 percent of the designated area) are subject to required conservation management. While the illustrative cost of such a scenario is estimated to be \$695,000 to \$1.85 million per year, the probability of such a conservation mandate is unclear due to the inability to predict whether a suit would be filed, its likelihood of success, or the extent of its coverage if successful. The Service believes the likelihood of the worst case scenario occurring is extremely low, and has not occurred in areas designated as critical habitat in Hawaii.

(35) *Comment:* One commenter stated that the Service did not adequately address the takings of private property as a result of designating critical habitat for the Molokai plant species. In