

The commenter requested assurance that long term improvements to the irrigation system will not be precluded by critical habitat designation.

*Our Response:* Chapter VI, Section 3.g. of the DEA and Section 4.g. of the Addendum address impacts of the proposed critical habitat designation on the Molokai Irrigation System. The economic analysis indicates that the lack of any current plan for new improvements, coupled with the difficulty of obtaining funding, completing impact studies, and securing permits were new improvements to be envisioned, makes it extremely unlikely that any new water improvements will be proposed or approved within the next 10 years. In addition, this final rule, existing man-made features and structures within the critical habitat units, including but not limited to aqueducts and other water system features such as diversions, flumes, pumping stations, irrigation ditches, pipelines, siphons, tunnels, water tanks, gaging stations, intakes, and wells do not contain the primary constituent elements essential for the conservation of each species and, therefore, are not included in the critical habitat designations.

Even if new projects were proposed, a number of circumstances must occur before there would be any direct impact of section 7 on water improvement proposals. Chapter III of the DEA noted that section 7(a)(2) of the Act requires Federal agencies to consult with us to ensure that activities they fund, authorize, permit, or carry out do not result in destruction or adverse modification of critical habitat. Further, the DEA noted that we do not have jurisdiction under section 7 to consult on activities occurring on non-Federal lands when the activities are not federally funded, authorized, or carried out. Thus, because the Molokai Irrigation System is not located on Federal land, critical habitat designation will have no direct impact on any long-term improvements constructed by the State unless the improvements involve Federal funding or require Federal permits. In addition, even if Federal funding or permitting is identified and a consultation is initiated, no direct impacts will result unless the Service (1) finds that the activity may jeopardize the continued existence of a listed species and/or destroy or adversely modify the critical habitat; and (2) can identify reasonable and prudent alternatives that will keep the action below the thresholds of jeopardy and/or adverse modification.

Thus, long-term improvements to the Molokai Irrigation System will not be

precluded by critical habitat designation, but under a worst-case scenario, long-term improvements to the Molokai Irrigation System may involve the development of reasonable and prudent alternatives to prevent adverse modification of the critical habitat.

(39) *Comment:* One commenter stated that the designation of critical habitat in unoccupied areas may effectively extinguish the potential for intensive or extensive agricultural use or irrigation water resource development.

*Our Response:* As noted above, Chapter III of the DEA noted that section 7(a)(2) of the Act requires Federal agencies to consult with the Service to ensure that activities they fund, authorize, permit, or carry out do not result in destruction or adverse modification of critical habitat. Further, the DEA noted that the Service does not have jurisdiction under section 7 to consult on activities occurring on non-Federal lands when the activities are not federally funded, authorized, or carried out.

As a result, future intensive or extensive agricultural use or irrigation water resource development in unoccupied areas of designated critical habitat will not be subject to section 7 consultation unless it involves Federal funding or requires Federal permits.

The involvement of Federal funding and/or Federal permits will not extinguish the potential for intensive or extensive agricultural use or irrigation water resource development. Instead, the Federal agency with the nexus to the activity initiates consultation with the Service. The consultation between the Federal Action agency and the Service may involve informal consultation, formal consultation in the case of adverse impacts, or both. If during informal consultation the Federal Action agency determines that its action (as originally proposed or revised and taking into account direct and indirect effects) "is not likely to adversely affect" listed species or critical habitat (e.g., the effects are beneficial, insignificant or discountable), and the Service agrees with that determination, then the Service provides concurrence in writing, and no further consultation is required.

If, however, the proposed action, as revised during informal consultation, is still likely to adversely affect listed species or critical habitat, the Action agency must request in writing initiation of formal consultation with the Service. If the Service finds, in its biological opinion, that a proposed action is not likely to jeopardize the continued existence of a listed species, or destroy or adversely modify the

critical habitat, even though the action may adversely affect listed species or critical habitat, then the action likely can be carried out without violating section 7(a)(2) of the Act.

On the other hand, if the Service finds that a proposed action is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify the critical habitat, then the Service provides the Action agency with reasonable and prudent alternatives that will keep the action below the thresholds of jeopardy and/or adverse modification, if any can be identified. The Service works with Action agencies and Applicants in developing reasonable and prudent alternatives. A reasonable and prudent alternative is one that: (1) Can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the Action agency's legal authority and jurisdiction; and (3) is economically and technologically feasible. The Service will, in most cases, defer to the Action agency's expertise and judgment as to the feasibility of an alternative. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of a project. Costs associated with implementing reasonable and prudent alternatives vary accordingly.

In summary, the potential for intensive or extensive agricultural use or irrigation water resource development will not be extinguished as a direct result of critical habitat designation. Rather, and only if Federal funding or Federal permits are involved, the Federal Action agency will consult with the Service to determine if the activity "is likely to adversely affect" the critical habitat. In the worst case, the proposed agricultural use or irrigation water development may involve the development of reasonable and prudent alternatives to prevent adverse modification of the critical habitat.

Chapter VI, Section 4.e. of the DEA and Section 5.c. of the Addendum discuss the indirect impacts resulting from the redistricting of private land in the Agricultural District into the Conservation District. The DEA noted that under a worst-case scenario, areas designated as critical habitat could be placed in the Protective Subzone with the most severe restrictions, which could prevent a new agricultural use or interfere with irrigation water development. As indicated in the Addendum, the likelihood of mandated redistricting is undetermined, but is expected to be small. The assessment of the probabilities of certain indirect impacts in the DEA is based on State