

At the time each plant was listed, we found that designation of critical habitat was prudent for six of these plants (*Clermontia samuelii*, *Cyanea copelandii* ssp. *haleakalaensis*, *Cyanea glabra*, *Cyanea hamatiflora* ssp. *hamatiflora*, *Dubautia plantaginea* ssp. *humilis*, and *Kanaloa kahoolawensis*) and not prudent for the other 64 plants because it would not benefit the plant or would increase the degree of threat to the species. The not prudent determinations for these species, along with others, were challenged in *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998). On March 9, 1998, the United States District Court for the District of Hawaii directed us to review the prudence findings for 245 listed plant species in Hawaii, including 64 of the 70 listed species reported from Maui. Among other things, the court held that in most cases we did not sufficiently demonstrate that the species are threatened by human activity or that such threats would increase with the designation of critical habitat. The court also held that we failed to balance any risks of designating critical habitat against any benefits (*id.* at 1283–85).

Regarding our determination that designating critical habitat would have no additional benefits to the species above and beyond those already provided through the section 7 consultation requirement of the Act, the court ruled that we failed to consider the specific effect of the consultation requirement on each species (*id.* at 1286–88). In addition, the court stated that we did not consider benefits outside of the consultation requirements. In the court's view, these potential benefits include substantive and procedural protections. The court held that, substantively, designation establishes a "uniform protection plan" prior to consultation and indicates where compliance with section 7 of the Act is required. Procedurally, the court stated that the designation of critical habitat educates the public, State, and local governments and affords them an opportunity to participate in the designation (*id.* at 1288). The court also stated that private lands may not be excluded from critical habitat designation even though section 7 requirements apply only to Federal agencies. In addition to the potential benefit of informing the public, State, and local governments of the listing and of the areas that are essential to the species' conservation, the court found that there may be Federal activity on private property in the future, even though no such activity may be

occurring there at the present (*id.* at 1285–88).

On August 10, 1998, the court ordered us to publish proposed critical habitat designations or nondesignations for at least 100 species by November 30, 2000, and to publish proposed designations or nondesignations for the remaining 145 species by April 30, 2002 (*Conservation Council for Hawaii v. Babbitt*, 24 F. Supp. 2d 1074 (D. Haw. 1998)).

At the time we listed *Clermontia samuelii*, *Cyanea copelandii* ssp. *haleakalaensis*, *Cyanea glabra*, *Cyanea hamatiflora* ssp. *hamatiflora*, *Dubautia plantaginea* ssp. *humilis*, and *Kanaloa kahoolawensis* (64 FR 48307), we found that designation of critical habitat was prudent and stated that we would develop critical habitat designations for these six taxa, along with four others, by the time we completed designations for the 245 Hawaiian plant species. This timetable was challenged in *Conservation Council for Hawaii v. Babbitt*, Civ. No. 99–00283 HG (D. Haw. Aug. 19, 1999, Feb. 16, 2000, and March 28, 2000). The court agreed that it was reasonable for us to integrate these 10 Maui Nui (Maui, Lanai, Molokai, and Kahoolawe) plant taxa into the schedule established for designating critical habitat for the other 245 Hawaiian plants, but ordered us to publish proposed critical habitat designations for the 10 Maui Nui species by November 30, 2000, and to publish final critical habitat designations by November 30, 2001.

On November 30, 1998, we published a notice in the **Federal Register** requesting public comments on our reevaluation of whether designation of critical habitat is prudent for the 245 Hawaiian plants at issue (63 FR 65805). The comment period closed on March 1, 1999, and was reopened from March 24, 1999, to May 24, 1999 (64 FR 14209). We received more than 100 responses from individuals, non-profit organizations, the State Division of Forestry and Wildlife (DOFAW), county governments, and Federal agencies (U.S. Department of Defense-Army, Navy, Air Force). Only a few responses offered information on the status of individual plant species or on current management actions for one or more of the 245 Hawaiian plants. While some of the respondents expressed support for the designation of critical habitat for 245 Hawaiian plants, more than 80 percent opposed the designation of critical habitat for these plants. In general, these respondents opposed designation because they believed it would cause economic hardship, discourage cooperative projects, polarize relationships with hunters, or

potentially increase trespass or vandalism on private lands. In addition, commenters also cited a lack of information on the biological and ecological needs of these plants which, they suggested, may lead to designation based on guesswork. The respondents who supported the designation of critical habitat cited that designation would provide a uniform protection plan for the Hawaiian Islands; promote funding for management of these plants; educate the public and State government; and protect partnerships with landowners and build trust.

On December 29, 1999, we provided information to landowners on the islands of Maui and Kahoolawe, regarding our requirement to designate critical habitat for 70 plant species. This information included a copy of the November 30, 1998, **Federal Register** notice, a map showing the general locations of the species that may be on his/her property, and a handout containing general information on critical habitat. We held two open houses on the island of Maui, at the Lahaina Civic Center and the Wailuku Community Center on January 11 and 12, 2000, respectively, to meet with local landowners and other interested members of the public. A total of 30 people attended the two open houses. In addition, we met with Maui County DOFAW staff to discuss their management activities on Maui.

On December 18, 2000, we published the second of the court-ordered proposed critical habitat designations or nondesignations for 61 Maui and Kahoolawe plants (65 FR 79192). The proposed critical habitat designations for Kauai and Niihau plants were published on November 7, 2000 (65 FR 66808), for Molokai plants on December 29, 2000 (65 FR 83158), and for Lanai plants on December 27, 2000 (65 FR 82086). All of these proposed rules were sent to the **Federal Register** by or on November 30, 2000, as required by the court orders. In those proposals we proposed that critical habitat was prudent for 61 species (*Alectryon macrococcus*, *Argyroxiphium sandwicense* ssp. *macrocephalum*, *Adenophorus perians*, *Bidens micrantha* ssp. *kalealaha*, *Bonamia menziesii*, *Brighamia rockii*, *Cenchrus agrimonoides*, *Centaurium sebaeoides*, *Clermontia lindseyana*, *Clermontia oblongifolia* ssp. *mauiensis*, *Clermontia samuelii*, *Colubrina oppositifolia*, *Ctenitis squamigera*, *Cyanea copelandii* ssp. *haleakalaensis*, *Cyanea glabra*, *Cyanea grimesiana* ssp. *grimesiana*, *Cyanea hamatiflora* ssp. *hamatiflora*, *Cyanea lobata*, *Cyanea mceldowneyi*, *Cyrtandra munroi*, *Delissea undulata*,