

Hawaii ESA law because the Federal Act defines "take" as "harm" while the State law defines "take" as "injure." "Harm" and "injure" are generally synonymous. The cost of such special management should be considered prior to a final determination on the proposed designations. Where costs are likely to outweigh the benefits of the proposed designation, designation of critical habitat should be determined not to be prudent, or at a minimum, areas proposed for designation should be significantly reduced so that any special management measures that may eventually be mandated through litigation are of a scale that is reasonable and cost-effective to implement.

Another commenter expressed concerns that the proposed critical habitat would bring private party lawsuits resulting in mandated protection for critical habitat. Another commenter also stated that in Hawaii it has long been established that landowners own all feral animals on their property. The commenter expressed concerns that plaintiffs who seek to compel a private landowner to spend money to protect critical habitat could argue that the landowner has a positive obligation to ensure that such animals do not harm the habitat.

Our Response: Section 4(a)(3)(A) of the Act directs the Secretary to designate critical habitat to the "maximum extent prudent and determinable." Critical habitat is not prudent when one or both the following situations exist: (1) A species is threatened by taking or other human activity and identification of critical habitat would increase the degree of threat; or (2) designation would not be beneficial to the species (50 CFR 424.12(a)(1)). Thus the costs of designation are not considered in analyzing whether critical habitat is prudent. However, such costs are considered under section 4(b)(2) of the Act, which directs the Secretary to take into consideration the economic and other impacts of designation and authorizes the Secretary to exclude any area if she determines that the benefits of exclusion outweigh the benefits of designating it as critical habitat, unless it will result in extinction of the species.

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 Maui. In addition, Chapter VI, Section 4.f. of the DEA, discusses the potential for 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. The DEA concludes that it is impossible to quantify these potential costs, because there are no known development plans within the proposed designation. Furthermore, the following factors make future development projects in the proposed critical habitat highly unlikely: (1) 86 percent of the critical habitat is in Conservation District where development is severely limited; (2) the approximately 14 percent of the critical habitat in the Agricultural District is in remote areas, areas lined with gulches or steep cliffs, or areas with limited access to water; (3) there are no known plans for development within the designation; and (4) most of the 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, chance of success, or any other associated effect due to scant historical evidence for the plants.

(59) *Comment:* Several commenters were concerned that critical habitat designation will lead to unnecessary and costly litigation. Another commenter was concerned about the likelihood of private party lawsuits limiting current ranch operations.

Our Response: As discussed in the DEA and the Addendum, an undetermined probability exists that a Federal or State court could mandate certain indirect impacts as a result of critical habitat. However, it is beyond the scope of the economic analysis to assess the legal merits of the arguments for or against the various indirect impacts, to assess the probability that a lawsuit will be filed, and, if filed, to identify possible outcomes of a court decision and the associated probabilities. However, whenever possible, the DEA and the Addendum present the worst-case scenario of the costs associated with the potential outcomes of third party lawsuits.

(60) *Comment:* ML&P believes that designation of critical habitat would adversely impact the value of agricultural lands and lands proposed for future development, reduce the collateralized value of land holdings, and (due to State and county law)

reduce the ability to develop lands previously planned for development. The impacted lands include areas described in the proposed units A, C1, C2 and C3.

Our Response: As discussed above, the Service removed Units C1 and C2 and reduced Units A and C3. After this modification, less than one acre of ML&P's land in Units A and C3 remains within the designation. As such, minimal impacts are anticipated for ML&P's Agricultural land in Units A and C3.

(61) *Comment:* The Maui County Department of Water Supply provided the following information on planned projects occurring in proposed units L, G, and B2. These projects include access improvements, intake improvements, reservoir design and construction, well construction, flume repair and maintenance, water distribution system maintenance, and identification of potential sources for future groundwater. Whether these or other projects would involve Federal lands, funding, or permits, it is important that water treatment plants, sources, and collection and distribution systems can continue to be established and maintained within these areas where they are needed for hydrogeological and security reasons.

Our Response: Maui County and Department of Water Supply (DWS) submitted specific information regarding planned projects in the proposed critical habitat during the public comment period. Possible and planned projects include water source development in Unit B2, construction of a water reservoir adjacent to Unit L, access and intake improvements in Unit L, and repair and maintenance of existing flumes in Unit L. As noted earlier, the Service removed Unit B2 from the final designation. Thus, no section 7 costs would be anticipated to result from future DWS projects in that area. Moreover, most of the identified DWS projects in Unit L involve repair and maintenance of existing manmade features and structures, and as such, would not be subject to section 7 consultation. However, to the extent that the planned improvements go beyond repair and maintenance and would be subject to section 7 consultation due to Federal funding or permitting, the DEA's estimate of zero to two consultations reasonably reflects the potential number of section 7 consultations over the next 10 years (see Chapter VI, Section 3.k. of the DEA). The DEA estimates that the consultations can cost up to \$68,000 with project modification that can range up to \$200,000.