

Issue 2: Effects of Critical Habitat Designation

(2) *Comment:* One peer reviewer noted that while the designation of critical habitat is unlikely to have a major impact on the future of NWHI plant species, it would increase awareness of the unique biological attributes of these islands and ultimately increase the likelihood that these species will persist. Another reviewer supported the designation of critical habitat stating that such designation would provide an added, and much needed, layer of protection for plant habitat insofar as: (1) The Departments of the Interior and Commerce disagree on the seaward boundaries of the HINWR; (2) the State of Hawaii has overlapping jurisdiction with the HINWR; (3) a public process is currently in motion to establish a National Marine Sanctuary in the NWHI, which could create an increased commercial interest in eco-tourism in the area; and (4) the native Hawaiian community has expressed a desire for access to Nihoa and Necker Islands for ceremonial purposes. A final reviewer stated that, although the protection afforded by the designation of critical habitat is unclear, such designation has advocacy value because the courts are more likely to find violations of the Act for listed species within such habitat.

Our Response: Critical habitat is one of a number of conservation tools established in the Act.

(3) *Comment:* One reviewer commented that the Service should consider unoccupied, historic habitat that falls outside of the HINWR (*i.e.*, Kure Atoll) for designation as critical habitat as some plant species may need to be re-introduced into such habitat to avoid extinction. Another reviewer expressed concern that the Service was restricting the designation of critical habitat to areas within the HINWR in order to avoid public controversy.

Our Response: We recognize that the long-term conservation of the NWHI species is dependent upon the protection of existing populations and the establishment and protection of additional populations within the historic range (*i.e.*, unoccupied habitat) of each species or within areas identified in the recovery plans for conservation of the species. As such, we examined the current and historically occupied habitat, and areas identified in the recovery plans for conservation of the species. For *Amaranthus brownii*, *Pritchardia remota*, and *Schiedea verticillata*, species known only from the islands within the NWHI, we were able to locate sites within the HINWR

that: (1) Contain the primary constituent elements that are essential to the conservation of one or more of the species; (2) are within the historical range or are identified in the recovery plans for conservation of one or more of the species; and (3) are sufficient to meet our overall recovery goals for these species. For *Mariscus pennatifolius*, the only subspecies known from the NWHI is *M. p. ssp. bryanii*. Critical habitat also is designated for this taxon on Laysan Island. Critical habitat also was designated for *M. p. ssp. pennatifolius* on Kauai and Maui (68 FR 9116, 68 FR 25934, May 14, 2003) and is proposed on Oahu (67 FR 37108). Critical habitat was designated on Nihoa and Necker for *Sesbania tomentosa* as well as Kauai, Molokai, and Maui (68 FR 9116, 68 FR 12982, 68 FR 25934, May 14, 2003) and is proposed on Oahu and the island of Hawaii (67 FR 37108, 67 FR 36968).

We are not designating critical habitat for *Cenchrus agrimonioides* at this time for the following reasons: *C. a. var. laysanensis*, the only variety of this species known from the NWHI, is historically known from Laysan, Midway, and Kure Atoll. This plant has not been reported on Laysan and Midway for over 70 and 100 years, respectively. A permanent year-round camp on Laysan, staffed by paid employees and volunteers, conducts periodic monitoring of both native and nonnative plant species, and *C. a. var. laysanensis* has not been seen during these monitoring efforts. On Midway, *C. a. var. laysanensis* was not seen during the most recent botanical surveys of 1995 and 1999. *Cenchrus agrimonioides* var. *laysanensis* has not been seen on Kure Atoll for over 20 years though the State DOWA conducts annual seabird surveys and a botanical survey was conducted there as recently as 2001. In addition, no viable genetic material of this variety is known to exist (see D. *Criteria Used to Identify Critical Habitat*). The rediscovery of currently unknown individual plants on these three islands and atolls is believed to be extremely unlikely.

(4) *Comment:* The Office of Hawaiian Affairs, a State agency, commented that critical habitat must allow traditional cultural gathering rights of Native Hawaiians as reflected in Article XII of the State constitution and upheld by the Hawaii Supreme Court in the Public Access Shoreline Hawaii and Ka Paakai o Ka Aina decisions.

Our Response: We understand and support the cultural significance of these islands to the Native Hawaiian people, and it is our policy to permit religious and ceremonial gatherings as long as they do not result in effects that

are deleterious to habitat for listed species or biota of the islands or that could compromise human safety. Typically, access to Federal lands that are designated as critical habitat is not restricted unless access is determined to result in the destruction or adverse modification of the critical habitat. However, Nihoa, Necker, and Laysan Islands, and their surrounding reefs, are part of the HINWR, which we manage in accordance with the National Wildlife Refuge System Administration Act of 1966. There is no general public or recreational use allowed at HINWR. Access is strictly regulated through a permit system because of the sensitivity of the organisms on these islands to human disturbance and the high risk of importation of nonnative plant and invertebrate species. Other than the refuge staff, only individuals conducting scientific research or undertaking natural history film recording have been granted official permission to visit the HINWR, and these persons are required to apply for a Special Use Permit and abide by the terms and conditions set forth in this permit in order to ensure that the biological integrity, diversity, and environmental health of the refuge are maintained for the benefit of present and future generations of Americans (E. Flint, pers. comm., 2002). Examples of preventative measures put in place by the Special Use Permit program include quarantine protocols to prevent introduction of unwanted plants or insects, and a limitation on the number of people on the island(s) at any one time. In addition, through the Special Use Permit program, we are able to protect the cultural artifacts present on these islands.

Issue 3: Species-Specific Biological Comments

(5) *Comment:* One peer reviewer found it unlikely that the species of *Pritchardia* that once occurred on Laysan Island would have been *Pritchardia remota*. Species of this genus are single-island endemics, and no collections of *Pritchardia remota* are known from Laysan Island. This reviewer did feel that the introduction of *Pritchardia remota* to Laysan Island was ecologically appropriate given that there is suitable habitat for the species and that the species of *Pritchardia* that once occurred on Laysan Island is no longer extant.

Our Response: The now extinct species of *Pritchardia* that once occurred on Laysan Island was not clearly identified; however, the idea that *P. remota* did occur on Laysan was suggested by Joseph Rock in 1921. We have revised the text in the final rule to