

reclassification on “the preservation or maintenance of important natural systems or habitats,” it is also specifically directed to consider five other impacts in its decision: (1) “Maintenance of valued cultural, historical, or natural resources;” (2) “maintenance of other natural resources relevant to Hawaii’s economy, including, but not limited to, agricultural resources;” (3) “commitment of state funds and resources;” (4) “provision for employment opportunities and economic development;” and (5) “provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups.” HRS 205.17. Approval of redistricting requires six affirmative votes from the nine commissioners, with the decision based on a “clear preponderance of the evidence that the proposed boundary is reasonable.” HRS 205–4.

Thus, even if all federally designated critical habitat is petitioned for redistricting, the likelihood of redistricting will vary parcel by parcel. While the LUC may redistrict some parcels, it is unlikely that lands with a high economic value to the community, such as lands with significant State investments, prime agricultural land, land planned for the economic and community development, and land planned for the provision of housing, would be redistricted. By way of illustration, in the last State district boundary review only five privately owned parcels were redistricted to Conservation even though several hundred parcels were proposed for redistricting. While concern has been expressed that a third party would challenge a decision by the LUC not to redistrict a critical habitat parcel in State court, State courts have been deferential to the LUC decisions if they are supported by the record, consistent with statutory provisions, and not affected by errors. *See, e.g., Kilauea Neighborhood Ass’n v. Land Use Comm’n*, 751 P.2d 1031, 1035 (Haw. Ct. App. 1988) (finding that, although LUC’s findings were poorly drawn, the record provided sufficient support for the decision); *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 675 P.2d 784, 793 (Haw. Ct. App. 1983) (upholding LUC’s decision as consistent with statutory provisions and not affected by errors).

In summary, while it is possible that the designation of critical habitat could trigger a petition to redistrict land designated as critical habitat to the Conservation District, the likelihood appears small, absent litigation, that these lands would be redistricted.

(29b) *Comment*: Multiple commenters stated that the Service did not adequately address the direct or indirect “takings” of private property as a result of designating critical habitat for the Blackburn’s sphinx moth. If the proposed designation of critical habitat precipitates conversion of agricultural lands to conservation land that has no economically beneficial use, then the Federal and State governments will have taken private property. Also, the incremental impact of designating critical habitat, over and above the original listing, is that it creates a presumption that modification of the land will “take” members of the species. The Service is obliged to calculate the impact of deterring landowners use of their land. If any economic use of the land not already developed is prevented, the Service is liable to compensate the private landowner for such losses.

*Our Response*: Any redistricting of land to Conservation and any corresponding loss of economically beneficial use would be decided by the State Land Use Commission, not the Service, based on an array of state laws and other factors, including the extent to which the proposed reclassification conforms to the applicable goals, objectives, and policies of the Hawaii state plan (*see* our response to comment 29a); the extent to which the proposed reclassification conforms to the applicable district standards; and the impacts of the proposed reclassification on the following: preservation or maintenance of important natural systems or habitats; maintenance of valued cultural, historical, or natural resources; maintenance of other natural resources relevant to Hawaii’s economy; commitment of state funds and resources; provision for employment opportunities and economic development; and provision for housing opportunities for all income groups; and the representations and commitments made by the petitioner in securing a boundary change.

In chapter VI, section 4 of the November 2002 DEA under indirect costs and in section 4 of the Addendum, they examined the indirect costs of critical habitat designation, such as where critical habitat triggers the applicability of a State or local statute. The economic analysis did not conclude that designation of critical habitat on Agricultural lands would prevent a rancher from using those lands. Rather, the economic analysis recognized that many areas within the critical habitat designation have been grazed for tens or hundreds of years, yet still contain the primary constituent elements for

Blackburn’s sphinx moth. The DEA concluded that sustainable grazing does not adversely affect the moth, and in fact, may indirectly benefit the species by reducing fire danger and controlling nonnative weeds. Moreover, the DEA concluded that areas historically subject to grazing were unlikely to meet the standards of a natural ecosystem required to be put in the Protective Subzone (HAR § 13–5–11). As a result, even if Agricultural land within the critical habitat designation were redistricted to Conservation, the DEA anticipated that agricultural activities could continue because typical agricultural activities are allowed in all subzones, except the Protective Subzone, with permission of the State Board of Land and Natural Resources (BLNR).

(30) *Comment*: Multiple commenters stated the proposal fails to properly consider the importance of cooperation and goodwill between the Service and private landowners, and the impact critical habitat designations will have in discouraging voluntary partnerships on private lands.

*Our Response*: We recognize the importance of landowner cooperation for conservation of listed species. This is true for many of the lands designated for the Blackburn’s sphinx moth that are under private ownership. We also recognize that critical habitat designations could potentially have a negative impact on voluntary partnerships with private landowners. Conservation of the moth requires control of threats from alien species and fire, and outplanting of host plant species that have been extirpated from the wild. Several owners have indicated that including their lands in a critical habitat designation would have a negative impact on their existing and future voluntary conservation efforts for the moth and other species. After weighing the benefits of including these areas as critical habitat with the benefits of excluding them, we concluded that the designation of critical habitat would have a net negative conservation effect in some situations, and we excluded some of these areas from the final designation of critical habitat. *See* our discussion under the Exclusions Under Section 4(b)(2) section.

(31) *Comment*: One commenter stated that although they support protection for endangered species, they are also concerned about protecting nonnative species. The current interpretation of critical habitat allows the Federal government and its partners to utilize any methodology they wish in dealing with feral animals, even though such