

Federal and State governments will have taken private property.

Our Response: Chapter VI, Section 4.g. of the DEA and Section 5.e. of the addendum address costs involved in redistricting lands from the Agricultural District to the Conservation District. About 3,319 acres of the intended designation are in the agricultural district, 2,070 acres of which are privately owned. In the event that all of these lands are redistricted to the conservation district, the loss in land value would be approximately \$18.6 million.

However, as discussed more fully in Chapter VI, Section 4.g. of the DEA and Section 5.e. of the addendum, agency-initiated and court-ordered redistricting of some of the privately owned land is reasonably foreseeable (moderate to high probability). But more to the point, any redistricting of land to Conservation, and any corresponding loss of economically beneficial use, would be decided by the LUC and the courts, not the Service, based on an array of State statutory factors. As such, the Federal government would not have taken private property.

(58) *Comment:* Several commenters stated the following: While the Service has stated that critical habitat affects only activities that require Federal permits or funding, and does not require landowners to carry out special management or restrict use of their land, this fails to address the breadth of Federal activities that affect private property in Hawaii and the extent to which private landowners are required to obtain Federal approval before they can use their property. These requirements also extend to State agencies requiring Federal funds or approvals.

Our Response: As discussed in Chapter V, Section 2.b. of the DEA, not every single project, land use, and activity that has a Federal involvement has historically been subject to section 7 consultation with the Service (*e.g.*, a federally guaranteed mortgage). Thus, the analysis was confined to those projects, land uses, and activities that are, in practice, likely to be subject to consultation. The analysis based this assessment on a review of past consultations, current practices, and the professional judgments of Service staff and other Federal agency staff.

(59) *Comment:* Several commenters stated the following: The impact of the proposed designations under State law is potentially more extensive than under Federal law since the Act contains at least general criteria for determining when alteration of critical habitat constitutes "destruction or adverse

modification." The lack of analogous provisions under State law lends itself to a much broader interpretation of what activities might be considered injurious to the species (and therefore prohibited). One commenter asked if, to the extent that the Service has considered the potential interplay between the Act and State statutes, whether the Service is aware of any circumstances where similar issues have been raised under other State conservation statutes when critical habitat was designated. Another commenter noted, however, that because Hawaii's land use laws are uniquely onerous, precedent from other States is of little value. The current wave of proposals to designate critical habitat are the first time that the Act has been applied to significant areas of private land in Hawaii. Consequently, even prior experience in Hawaii is of little relevance.

Our Response: The DEA and the addendum discuss costs resulting from the interplay of the Endangered Species Act and Hawaii State law in the sections on Indirect Costs. The uncertainties regarding the occurrence of many indirect costs and their magnitudes reflect the lack of extensive experience in Hawaii with critical habitat.

(60) *Comment:* Several commenters stated the following: The DEA fails to consider economic impacts of critical habitat that result through interaction with State law, specifically Hawaii's Environmental Impact Statement Law. HRS § 343–5 applies to any use of conservation land, and a full Environmental Impact Statement is required if any of the significance criteria listed in Hawaii Administrative Rule 11–200–12 apply. One of these criteria is that an action is significant if it "substantially affects a rare, threatened or endangered species or its habitat." This will result in costly procedural requirements and delays. However, the DEA does not acknowledge that any impact on endangered species habitat will be deemed to be "significant." In addition, multiple commenters stated that the DEA fails to evaluate the practical effect critical habitat designation will have on development. Special Management Area permits administered by the City & County of Honolulu, as required by Hawaii's Coastal Zone Management Act, will be harder to obtain, will result in delays, will cause a decline in property values, and might make it impossible to develop. This economic impact disappears because the DEA's bottom line erroneously counts only so-called "direct" costs of consultation. The Service has taken the position in other States that it has a right to intervene in

local land use proceedings if they affect endangered species on private property, as evidenced by the Service's petition to the local zoning board in Arizona to postpone approval of a rezoning petition pending a survey to determine the extent to which an endangered plant was present on the property even though no Federal approval was being sought. That the Service does not address these activities in the DEA is a fundamental error of the analysis.

Our Response: Chapter VI, Section 4.h. of the DEA discussed additional State and county environmental review that would be required for projects in critical habitat. However, as mentioned in the addendum, even with the added State and county environmental review, the intended designation will have little or no practical effect on residential, resort, commercial, or industrial development because the analysis anticipates that no such development will occur in the intended critical habitat. Reasons for this are: (1) Most of the intended critical habitat is in mountainous areas that are unsuitable for development due to difficult access and terrain; (2) approximately 96 percent of the intended designation is in the State Conservation District where existing land-use controls severely limit development; (3) almost all of the remaining agricultural land in the intended designation is in areas that are not subject to development pressure because of steep slopes and little or no nearby infrastructure; (4) the small amount of land in the urban district (0.6 acre) is on steep slopes that cannot support development; and (5) all of the land intended for critical habitat designation that is in the Special Management Area is also within the conservation district.

(61) *Comment:* Several commenters stated the following: The DEA fails to consider economic impacts of critical habitat that result through interaction with State law, specifically the State Water Code. HRS § 174C–2 states that "adequate provision shall be made for protection of fish and wildlife". HRS § 174C–71 instructs the Commission of Water Resource Management to establish an instream use protection program to protect fish and wildlife. Since landowners might depend on water pumped from other watersheds, these effects can be far-reaching. It is impossible to tell from the descriptions in the proposal whether any water diversions will have to be reduced as a result of listing and critical habitat designation. It is unfair to dismiss costly but vital sources of energy and inexpensive irrigation water while maintaining the highest level of effort to