

designation, such as, grazing, farming, hunting or recreational use?

Our Response: The term “consult” refers to consultation between the Service and other Federal agencies under the provisions of section 7 of the Act. Under this provision of the Act all Federal agencies must consult with the Service to insure that any action that they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. If the Service finds that the proposed actions are likely to jeopardize the continued existence of an endangered or threatened species or result in destruction or adverse modification of critical habitat, we suggest reasonable and prudent alternatives that would allow the Federal agency to implement their proposed action without such adverse consequences. Every consultation is unique and it is impossible to comment on what the results of a future consultation will be without details on the proposed activity and the status of the species and its critical habitat at the time of the consultation.

Issue 5: Mapping and PCEs

(47) *Comment:* Although the text in the proposed rule appears to indicate that unit F in Lawai Valley is restricted to land owned by the National Tropical Botanical Garden, a map provided by the Service shows some overlap between this unit and McBryde land above Lawai Stream, near Luawai Reservoir. The Service should clarify whether unit F is intended to include portions of the McBryde land, as suggested by the map, or if any overlap is purely due to mapping inaccuracies. If the proposal is intended to include McBryde land in this area, the Service should consider conducting a biological survey of the area to confirm whether the area in question actually contain any individuals of *Schiedea spergulina* var. *leipoda* and/or whether this area is essential.

Our Response: The majority of the unit is within the lands owned by the National Tropical Botanical Garden. However, some of the McBryde land does fall within the unit. Efforts were made to exclude lands currently used for cultivation. This unit is important to the conservation of *Schiedea spergulina* var. *leipoda* because it supports an extant colony of this species and includes habitat that is important for the expansion of the present population, which is currently considered non-viable. The habitat features contained in this unit that are important for this

species include, but are not limited to, bare rock outcrops or sparsely vegetated portions of rocky cliff faces or cliff bases in diverse lowland dry to mesic forests. Although we do not feel that there is enough habitat designated to reach the recovery goal of 8 to 10 populations, this species is a very narrow endemic and probably never naturally occurred in more than a single or a few populations.

(48) *Comment:* The draft economic analysis dismisses concerns about impacts on the use of structures and features already placed in areas to be designated as critical habitat. Although manmade features and structures are excluded from critical habitat because they lack the primary constituent elements, greater precision in pinning down these “unmapped holes” is needed to avoid a chilling effect on legitimate uses that necessarily approach a fuzzy boundary line.

Our Response: Existing features and structures within critical habitat areas, buildings; roads; aqueducts and other water system features—including but not limited to pumping stations, irrigation ditches, pipelines, siphons, tunnels, water tanks, gaging stations, intakes, reservoirs, diversions, flumes, and wells; existing trails; campgrounds and their immediate surrounding landscaped area; scenic lookouts; remote helicopter landing sites; existing fences; telecommunications equipment towers and associated structures and equipment; electrical power transmission lines and distribution, and communication facilities and regularly maintained associated rights-of-way and access ways; radars, telemetry antennas; missile launch sites; arboreta and gardens; heiau (indigenous places of worship or shrines) and other archaeological sites; airports; other paved areas; and lawns and other rural residential landscaped areas and other manmade features do not contain, and are not likely to develop, primary constituent elements, and are specifically excluded from designation under this rule. Therefore, unless a Federal action related to such features or structures indirectly affects nearby habitat containing the primary constituent elements, operation and maintenance of such features or structures generally would not be impacted by the designation of critical habitat. We have attempted to exclude manmade structures using aerial photos, our own field experience on Kauai and that of other expert field botanists from DOFAW and the University of Hawaii at Manoa. However, we were not always able to successfully exclude these structures from the critical habitat maps

because the resolution of our imagery does not allow us to locate small structures. Higher resolution imagery is currently unavailable on a State-wide basis.

Issue 6: Effects of Designation

(49) *Comment:* One commenter stated that the designation of critical habitat would almost certainly make its private endangered species reserve the target of a government takeover attempt.

Our Response: Section 3(5) of the Act defines critical habitat as those specific areas which contain physical or biological features essential to the conservation of the species and which may require special management considerations or protection (16 U.S.C. 1532(5)). Designations of critical habitat are to be made on the basis of the best scientific and commercial data available, after taking into account the economic and other relevant impacts of specifying any area as critical habitat (16 U.S.C. 1533(b)(2)). An area may be excluded from designation as critical habitat if the Secretary determines the benefits of excluding the area outweigh the benefits of designating the area as critical habitat (and provided the exclusion would not result in the extinction of the species).

To a property owner, the designation of critical habitat becomes important when viewed in the context of section 7 of the Act, which requires all Federal agencies to ensure, in consultation with the Service, that any action authorized, funded, or carried out by the agency does not result in the destruction or adverse modification of designated critical habitat. If, after consultation, our biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action which would avoid the destruction or adverse modification of the critical habitat (16 U.S.C. 1536(b)(3)(A)). If we cannot suggest acceptable reasonable and prudent alternatives, the agency (or the applicant) may apply for an exemption from the Endangered Species Committee under section 7(e)–(p) of the Act.

The mere promulgation of a regulation, like the enactment of a statute, does not take private property unless the regulation on its face denies the property owners all economically beneficial or productive use of their land (*Agins v. City of Tiburon*, 447 U.S. 255, 260–263 (1980); *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 195 (1981); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)). The designation of