

Urban District to Conservation District could result in a loss of \$178,500 in property values on Niihau. The loss of the economic activity from ranching and the increase in property taxes is estimated at \$4,070 per year. Under this scenario, even if a landowner has no plans to sell the land, the loss in land value could reduce potential mortgage financing.

(65) *Comment:* One commenter stated the following: The State currently leases some of its lands for agriculture or ranching uses. There is uncertainty whether any endangered plant species exists on these lands, which have historically been used for agricultural and ranching purposes, and have been subject to grazing and cultivation activities. If such species do exist, State law would completely prohibit or substantially restrict the continued use of these lands for agriculture or ranching purposes and would clearly have an adverse impact on the operations of the lessees and lease revenues. The DEA fails to establish that the benefits of including specific leased parcels outweigh the costs.

Our Response: Approximately 37 acres of State owned land are included in critical habitat Units H1 and M, as modified in the final rule. The 33 acres in Unit H1 comprise a sliver of land that is makai (toward the ocean) of the existing road in the northern portion of the unit and does not include any fields or grazing land. The State does not have any agricultural leases for the four acres of Agricultural land in Unit M. As such, the designation of critical habitat is not anticipated to have adverse effects on agricultural activities on State land.

(66) *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 HAR 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 Kauai County as required by Hawaii's Coastal Zone

Management Act will be harder to get, will result in delays, will cause a decline in property values and may make it impossible to develop. This economic impact disappears because the DEA's bottom line erroneously counts only so-called "direct" costs of consultation.

Several commenters also stated the following: 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.f.(2) of the DEA discusses State and county environmental review, with and emphasis on Hawaii's Environmental Impact Statement Law. This section indicates that if a project is required to do an Environmental Assessment (EA) and is located in critical habitat, a more expensive EIS may have to be prepared. The estimated increase in costs to prepare an EIS is \$25,000 to \$75,000 per project. There is one project that may require an EA and is located in critical habitat, as modified. As such, the additional environmental review cost potentially attributable to critical habitat is \$25,000 to \$75,000.

However, there are no planned development projects that will require State and county development approvals and are located in critical habitat, as modified in this final rule. The following factors make future development projects in the proposed critical habitat highly unlikely: (1) As modified, 99 percent of the proposed critical habitat is in Conservation District where development is severely limited; (2) almost all of the remaining agricultural land is on Niihau in an area not subject to development pressure; and (3) all of the land in the Urban District is on steep ocean cliffs that cannot support development. Thus, the probability that the Service will intervene in State and county development approvals is regarded as negligible because there is no development planned and almost no development potential in critical habitat.

(67) *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 may 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 protect primary constituent element for species that do not physically reside in the area but may somehow be transported. If the critical habitat proposal would require reducing water diversions from any stream, the Service should investigate whether that would take anyone's vested water rights. The Service has an obligation to thoroughly investigate this issue and refrain from designating critical habitat until it has determined whether its actions will affect water use. Water sources and irrigation ditches that are part of the former Kekaha irrigation system for the former Kekaha Sugar Plantation should be removed from designation. At minimum, portions of specific parcels that include water sources or water systems should be removed.

Our Response: No costs are expected to occur from such impacts to water systems, because none of the listed plants are aquatic and therefore would not cause a reduction in water diversion. In addition, water infrastructure, including the Kekaha irrigation system, is considered a manmade feature and therefore would not be included in critical habitat pursuant to the rule, because these features and structures normally do not contain, and are not likely to develop, any primary constituent elements. Thus, unless its operation and maintenance would indirectly affect critical habitat, which is not anticipated, it should not be affected by section 7 of the Act. (See comment 7.m. of the Economic Analysis for a discussion of the impacts of the proposed designation on potential new water diversions.)

(68) *Comment:* Several commenters stated the following: The irrigation system stemming from the North Fork diversion of the Wailua River and the hydropower plant located in Wainiha Valley are necessary for the continued viability and possible expansion of agricultural activities on Kauai.