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A DISCUSSION OF THE IMPACTS AND IMPLICATIONS OF CRITICAL HABITAT DESIGNATION IN HAWAII

A Position Paper by the Hawaii Cattlemen's Council[1]

INTRODUCTION

The designation of critical habitat is quickly becoming a major issue for the people of Hawaii. As a result of pending designations to protect endangered and threatened Hawaiian plants, nearly a quarter of the Islands may become critical habitat under implementation of the federal Endangered Species Act (ESA).[2]

While the Hawaii Cattlemen's Council strongly supports the protection and recovery of these plant species, it is very concerned that the proposed designations may go far beyond what is really necessary for the protection of the plants. It is further concerned that the U.S. Fish & Wildlife Service (FWS) may not adequately be considering the adverse impact of extensive critical habitat designation upon Hawaii's people and economy.

The issue of critical habitat under the ESA should be of great concern to Hawaii's citizens. Hawaii has the greatest concentration of endangered and threatened species in the United States. The designation of critical habitat has the potential for adversely affecting the use of private property as well as land belonging to the federal and state governments. At its worst, areas designated as critical habitat may not be able to be used at all.

EXECUTIVE SUMMARY

The implications of critical habitat designation presently are not well understood by the general public. A substantial amount of misinformation is being disseminated that implies that designation would only have minimal impacts on private property and the economy of the State.

In fact, designation of critical habitat will have a significant deleterious effect on private property rights and the ability to use land for productive use. This will result in substantial economic damage to the State of Hawaii.

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[1] ©2002 Hawaii Cattlemen's Council. The Hawaii Cattlemen's Council was assisted in the preparation of this paper by James K. Mee, Esq., a partner with the law firm of Ashford & Wriston.

[2] This paper primarily deals with flora because this is the largest proceeding being processed by FWS at present. Most of the information contained in this paper is also pertinent to proposed designations of fauna.

This is an issue of overwhelming importance. Hawaii is known as the "endangered species capital of the world."[3] There are more than 10,000 plant and animal species that are found nowhere else in the world.[4] Hawaii is reported to have more endangered species than the rest of the United States combined.[5] Therefore, application of the ESA is likely to have a much more dramatic effect here than in other States on the Mainland.

There is a unique interplay between the federal ESA and the State environmental laws which magnifies the effects of the ESA. Critical habitat designation brings other laws into play which may result in large areas of land becoming unusable.

Although the ESA requires FWS to weigh the adverse economic impact of critical habitat designation against potential benefits to the species, neither FWS nor the public have yet adequately focused on the substantial adverse economic impacts that will result from critical habitat designation. It is essential that the public become informed about these impacts and make their concerns known.

The Hawaii Cattlemen's Council believes that there are alternatives to extensive habitat designation that would result in a greater net benefit to the species. These involve "proactive" cooperative efforts among the federal and state governments and private property owners, including providing monetary and other incentives to engage in species protection and recovery.

WHAT IS CRITICAL HABITAT?

The federal courts have held that any time a species is determined to be endangered or threatened, the federal government must proceed promptly to determine whether critical habitat should be designated for the species. The ESA defines "critical habitat" as geographical areas "essential to the conservation of the species . . . which may require special management considerations or protection." Designation of at least some critical habitat is virtually assured, because the courts have repeatedly held that a determination not to designate would be a "rare exception, not the rule."

In considering where to designate critical habitat, the federal government considers not only those areas where the species presently exists, but also can include other areas considered to be "essential to the conservation of the species." Thus, an area could be designated critical habitat where the plant species has never been observed, provided it has characteristics that are "essential" to the plant's recovery. These could include, for example, a certain soil type, or necessary precipitation standards.

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[3] Bishop Museum. See "Hawaii's Endangered and Threatened Species Web Site (http://hbs.bishopmuseum.org/endangered/endangered.html) for a listing of Hawaii species that have been listed as endangered or threatened, or are candidates for listing.

[4] The Nature Conservancy, Hawaii Chapter, http://nature.org/wherewework/northamerica/states/hawaii.

[5] San Diego Zoo, http://www.sandiegozoo.org/wildideas/conservation/hotspot_hawaii.html.

For plants found only in a few isolated locations, determination of these additional "unoccupied" areas can be crucial to a plant species' chances of recovery. This is because of the concern that without dispersion to other areas a plant species could face extinction because of a single ecological disaster such as a wildfire or hurricane.

The flip side is that in many cases there simply is not enough good scientific data to make a determination, and the process becomes one of guesswork. The strong temptation is to over-designate, even if it means including areas that are in fact not essential to the species' recovery. The result, however, is that a property owner's rights in its property have been diminished without any appreciable benefit to the species. This is surely not what the ESA prescribes.

The ESA requires that in evaluating whether to designate critical habitat and in determining how big that habitat should be, FWS must utilize the best scientific data available. Guesswork is not sufficient. It must also weigh any adverse economic impacts of designating critical habitat against the benefits that would result to the species. FWS may exclude an area from critical habitat if "the benefits of such exclusion outweigh the benefits of designating that area, unless such exclusion will result in extinction of the species."[6]

BACKGROUND

In 1997, a lawsuit was commenced by several environmental organizations against FWS in the Hawaii federal district court to force it to designate critical habitat for 245 species of endangered and threatened Hawaiian plants. The court agreed with the environmental groups, and set a timetable within which FWS would need to designate critical habitat for these species.

FWS is presently going through the process mandated by the court, which requires publication of proposed "rules" for each island that delineate proposed habitat. After a period for public comment, FWS will publish a final rule for each island that will legally establish critical habitat areas for each of the plants in question.

In addition, and in part because of the legal principles established in the plant case, FWS is also now considering adopting critical habitats for other endangered and threatened animal species, such as the Blackburn's sphinx moth (*Manduca blackburni*).[7]

WILL DESIGNATION OF CRITICAL HABITAT AFFECT HAWAII'S PEOPLE?

The Hawaii Cattlemen's Council is concerned that there has been substantial misinformation distributed to the public regarding the impact that critical habitat could have upon private property owners. For example, one conservation organization has taken the position that "critical habitat . . . restricts only the federal government. Activities on state or

[6] *Conservation Council v. Babbitt*, 2 F.Supp. 2d 1280, 1283 (D. Haw. 1998).

[7] The federal government has proposed designating close to 100,000 acres on Maui, the Big Island, Molokai and Kahoolawe as critical habitat for this moth.

private land that do not involve federal funds, federal permits or partnerships with federal agencies are not affected in any way."[8]

Further, FWS' own letters sent to landowners who may be affected by critical habitat similarly minimize the impacts of critical habitat designation. For example, in one typical recent letter sent out by FWS, it stated the following:

> Activities on State or private land that do not require Federal permits or funding are not affected by a critical habitat designation. Critical habitat does not require landowners to carry out any special management actions or restrict the use of their land.[9]

Some news media accounts have picked up on these statements and have taken the position that concerns regarding critical habitat are overblown. A recent editorial in the *Honolulu Star Bulletin* stated that

> while significant portions of Hawaii lands have been proposed for designation as critical habitats for threatened and endangered species, there is little cause for alarm because such designations are directed only at federal agencies and at activity that may involve federal funds.
>
> Further, designations are not hard rules, but part of an adaptive process in which social and economic issues are weighed should federal-related projects or uses be desired for any site. Hunters, gatherers, outdoor enthusiasts and private property owners would not likely experience any effects of the designations.[10]

These statements fail to address two major concerns. First is the breadth of federal activities that in fact affect private property in Hawaii, and the extent to which private landowners are required to obtain federal approval before they can take certain actions to use their property. Second, the statements do not recognize the unique interplay in Hawaii between federal and state laws. Hawaii, more than most other States, has extremely broad environmental laws. Further, interlocking provisions of the federal ESA and Hawaii endangered species laws virtually assure that a violation of the federal ESA will also be a violation of Hawaii state law, and vice versa.

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[8] "Preserve Paradise: Learn More About Critical Habitat," http://www.protectparadise.com (Earthjustice Legal Foundation)

[9] Letter dated April 5, 2002, from FWS to "all interested parties" regarding "Notice of Revised Designations of Critical Habitat for Plant Species From the Islands of Maui and Kahoolawe, Hawaii."

[10] "Habitat plans don't warrant dire concerns," *Honolulu Star Bulletin*, May 31, 2002.

As an example, another half-truth being disseminated by advocates of critical habitat designation states that since the federal ESA does not apply to plants on private property, the landowner is free to adversely modify critical habitat so long as federal government approval is not involved. It is true that the ESA itself does not prohibit damage or destruction of plants on private property, and only prohibits such actions on federal property.[11] But this assertion again ignores the interplay between the ESA and Hawaii state law. State law prohibits any action on private property which "harms" an endangered plant that has been listed on the federal endangered species list. The word "harm" has an extremely broad meaning under environmental law, and has already been interpreted on the Mainland as doing anything that would be adverse to the species' welfare. This includes adversely modifying critical habitat. In other words, although the ESA itself does not prohibit adverse habitat modification for plants, the interlocking provisions of Hawaii state law do.

In order to analyze the potential impacts upon Hawaii's private landowners, one needs to examine both the impacts that will occur under federal law and those that will occur under State law.

Federal Law Impacts

Once critical habitat is designated on private land, the ESA prohibits all federal agencies from authorizing, funding, or carrying out any action that adversely affects critical habitat without first engaging in a "consultation" with FWS as to whether the agency's actions will jeopardize the protected species. Under federal regulations, this includes the following:

- Actions intended to conserve listed species or their habitat
- Promulgation of any rules or regulations
- The granting of any licenses, contracts, leases, easements rights-of-way, permits, or grants-in-aid
- Actions directly, or indirectly causing modifications to the land, water, or air.[12]

Further, these requirements also extend to all state agencies who are utilizing federal funds in connection with a proposed action.[13]

These actions extend to all sorts of community actions for which federal approval or review is necessary. For example, if the federal government approves a community's eligibility for flood insurance, the community's flood plain development programs become subject to the ESA consultation process.[14]

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[11] The rule is different for animals, where the prohibition against harm applies both to federal and non-federal lands.

[12] 50 C.F.R. § 402.02

[13] *National Wildlife Federation v. Coleman*, 529 F.2d 359, n. 21 (5th Cir.), *cert. denied sub nom. Boteler v. National Wildlife Fed'n*, 429 U.S. 979 (1976).

[14] *See* Letter from Associate Solicitor, Conservation and Wildlife, Department of Interior, to Regional Director, Region 4, Fish and Wildlife Service, entitled, "Application of Section 7 of the Endangered Species Act to Federal Flood Insurance" (Aug. 21, 1984); *Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D. Fla. 1994).

The requirements also apply to various loan and grant programs maintained by the federal government. For example, consultation would be triggered by a farmer's application for a loan or grant from the Natural Resources Conservation Service of the United States Department of Agriculture, if the money would be used for a project that could affect critical habitat.

Apart from federal requirements that consultation must be engaged in before any federal action is taken which adversely modifies critical habitat, the FWS has also taken the position in other States that it has a right to intervene into local land use proceedings where the proceedings may affect endangered or threatened plants on private property. For example, in Arizona the FWS petitioned the local zoning board to postpone approval of a rezoning petition pending a survey to determine the extent to which the Pima pineapple cactus, an endangered plant, was present on the property. As discussed above, and as asserted by certain environmental groups, supposedly the ESA does not apply to plants located on private property where no federal approval is being sought. Nevertheless, the zoning board put the zoning petition on hold because of the FWS's action.[15]

Hawaii Law Impacts

Of equal or greater concern, however, are the increased impacts that will be caused by the interrelationship between the ESA and a number of provisions of Hawaii's state laws. These, separately and in conjunction, greatly magnify the effects of critical habitat designation.

A. The Interplay between the Federal ESA and the State Endangered Species Act

Under the federal ESA, states are free to pass their own endangered species laws. So long as they do not conflict with the federal ESA, states are free to pass laws that are even more restrictive than the federal law.[16] Further, the federal ESA includes a provision that if something violates a state's law regarding protecting species, it is also considered to be a violation of the federal ESA. Thus, the ESA provides it is a violation of the federal ESA "to remove, cut, dig up, or damage or destroy any such species of any other area [i.e., private property] in knowing violation of any law or regulation of any State . . . ."[17] (Emphasis added.)

Hawaii has passed its own version of the federal ESA, which indeed is more restrictive than the federal law. First, it automatically provides that any animal or plant that is included on the federal endangered species list is automatically also included on the State's list.[18] Second,

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[15] "Summary of Abuses of the Endangered Species Act Perpetrated by the Arizona Ecological Services Office of the United States Fish and Wildlife Service," (Arizona Cattlemen's Association / Arizona Beef Council), www.arizonabeef.org/esa_usfws.htm.

[16] 16 U.S.C. § 1535 (f).

[17] 16 U.S.C. § 1538(a)(2)(B).

[18] Haw. Rev. Stat. § 195D-4(a).

and perhaps most important, is the State law's treatment of plants. The federal ESA only expressly applies to prohibit damaging plants when the plants are present on federal property. The Hawaii endangered species act, on the other hand, applies to protect plants even when they are on private property. The Hawaii law specifically states that "[w]ith respect to any endangered species of aquatic life, wildlife, or land plant, it is unlawful . . . for any person . . . to [t]ake any such species within this State . . . ."[19]

Like the federal ESA, the State endangered species act adopts a broad definition of what constitutes "taking" an endangered species. Under the State law, taking means any actions that

> harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants . . . .[20]

This broad definition is virtually identical to that found in the federal ESA. Further, under the federal ESA, this definition has already been found to include "adverse modification" of critical habitat, and it seems likely that Hawaii courts would adopt the same rationale.

The bottom line is this. Because the State of Hawaii prohibits harming endangered and threatened plants, even on private property, such conduct is also prohibited under the federal ESA. This is unlike many other states which do not have state law provisions covering the protection of plants.

Further, because it is likely that adverse modification of critical habitat would be prohibited under the State law prohibitions against "taking" plants, the impact of designating federal critical habitat would make it extremely difficult to engage in activities in critical habitat areas without violating the State's endangered species laws.

The difficulties extend to obtaining any necessary State permit or approval in connection with use of designated critical habitat. Under the State's endangered species laws, State agencies must take such action as "may be necessary to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of threatened or endangered species."[21]

The result is to create an extremely restrictive regulatory overlay on private property in Hawaii when critical habitat is designated by FWS.

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[19] Haw. Rev. Stat. § 195D-4(e).

[20] Haw. Rev. Stat. § 195D-2.

[21] Haw. Rev. Stat. § 195D-5(b)(2).

B. Designation of Critical Habitat Triggers Further Zoning Actions Under State Law.

The impacts of designation are caused not only by the interplay of the federal ESA and the State's endangered species laws. Designation also triggers rezoning procedures under State law to reclassify those areas which have been designated as critical habitat.

Chapter 226 of the Hawaii Revised Statutes sets forth the State Plan. The State Plan contains set forth goals, objectives and policies of the State. These goals, objectives and policies are supposed to be embodied in all planning activities undertaken by the State and counties.[22]

The State Plan provides that all planning for the State's physical environment shall "[e]ncourage the protection of rare or endangered plant and animal species and habitats native to Hawaii."[23] (Emphasis added.) Thus, there is an overriding directive under State law that endangered plant species are to be protected in the State's planning and zoning process.

Under the State's Land Use Law, all land is classified into four categories: Conservation, Agricultural, Rural, and Urban. Land classified "Conservation" is subject to the most restrictions on use. The State's endangered species act specifically provides that the State Department of Land and Natural Resources (DLNR) is responsible for taking steps to have federal critical habitat lands reclassified as Conservation:

> The [Hawaii state] department of land and natural resources shall initiate amendments to the conservation district boundaries . . . in order to include high quality native forests and the habitat of rare native species of flora and fauna within the conservation district.[24]

(Emphasis added.) The State's land use law similarly states that "conservation districts shall include areas necessary for . . . conserving indigenous or endemic plants, fish and wildlife including those which are threatened or endangered."[25] Even if DLNR were to take the position that, despite the seemingly mandatory language, it is not required to initiate such reclassification, it is plausible, if not likely, that environmental groups would then again go to state court to force DLNR to take such steps.

Further, once the land is reclassified as Conservation, the State's restrictions on use of conservation land would make it extremely difficult to use. Under Hawaii law, "[a]reas necessary for preserving natural ecosystems of native plants, fish, and wildlife, particularly those which are endangered," are supposed to be placed in the "protective subzone" of the Conservation district.[26] Permitted uses in the protective subzone are extremely limited, mainly

[22] Haw. Rev. Stat. § 226-52.

[23] Haw Rev. Stat. § 226-11(a)(6).

[24] Haw. Rev. Stat. 195D-5.1.

[25] Haw. Rev. Stat. 205-2(e).

[26] Haw. Administrative Rules § 13-5-11.

limited to conservation and preservation activities. Except for traditional *kuleanas*, agricultural or residential uses are not allowed.[27] The landowner may also be required to restore endemic plant species and remove alien species:

> Natural vegetative plant cover, where disturbed, shall be restored or replaced with endemic or indigenous planting. The introduction of alien plant species is prohibited in the protective subzone.[28]

Needless to say, downzoning of private property into the protective subzone would have severe impacts on the landowner. It will likely also make any productive use of the property extremely difficult. It will also have a dramatic effect on the value of the property, because the value of a property generally is determined by what productive use can be made of it. Indeed, many may see such property to be a liability, since the area has been "red-flagged" as potentially containing endangered or threatened species, which, if harmed, could lead to imposition of civil and criminal penalties upon the landowner.

C. Critical Habitat Triggers Need for Preparation of Conservation District Use Applications and Environmental Impact Statements Under State Law.

If private land is reclassified as Conservation because of the establishment of critical habitat, that will in turn trigger other provisions of Hawaii law that will burden the use of the property. Under Chapter 183C of the Hawaii Revised Statutes, a landowner may not use land in the Conservation District (or change a pre-existing grandfathered use) without first applying for and obtaining a Conservation District Use Permit (CDUP) from the State Department of Land and Natural Resources. Before the application can be granted, there must be a public hearing upon at least thirty days' public notice. DLNR has six months within which to consider granting the permit and permitting the use.

Under Chapter 343 of the Hawaii Revised Statutes, no use can be made of any land that has been classified as Conservation without first preparing an environmental assessment or environmental impact statement evaluating whether the use may have a significant impact on the environment.[29] Further, because of the existence of critical habitat, the requirement for completing a full environmental impact statement, rather than a less comprehensive environmental assessment, is automatically triggered. Under Hawaii law, an environmental impact statement (EIS) must be prepared any time an action "significantly affects a rare, threatened or endangered species or its habitat."[30]

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[27] Haw. Administrative Rules § 13-5-22. There are procedures to get a "temporary variance," but this is probably of little comfort to a landowner who finds they can no longer use their land for their contemplated purpose because it has been placed in the protective subzone. If the landowner has been fortunate enough to be using the land as of 1994, the landowner may be able to continue the use as a "nonconforming use," but would not be able to modify the use. See Haw. Rev. Stat. § 183C-5.

[28] Haw. Administrative Rules § 13-5-22(b).

[29] Haw. Rev. Stat. § 343-5.

[30] Haw. Administrative Rules § 11-200-12(b)(9).

Preparing an EIS under Hawaii's requirements is an extremely expensive and time-consuming process. Depending upon the complexity of issues that must be considered, an EIS can cost anywhere between $10,000 to more than $300,000, and can take anywhere from six months to more than two years to complete.

The EIS must disclose the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects. A draft EIS must first be published, and then the preparer of the EIS must respond to any public comments that are filed during a 45-day comment period and prepare a final EIS. The agency involved (in this case likely DLNR) then has an additional 30 days to consider whether it will accept or reject the final EIS.[31]

D. Impacts on Water Availability and Other Water Issues

On the Mainland, the ESA has been a major source of contention regarding water rights and water use. Where water use for agricultural or other purposes is incompatible with the protection of endangered species, the federal government has taken steps to dramatically reduce or entirely cut off human access to water.

These same scenarios could occur here as the result of designation of critical habitat. In many areas of the State, water users are dependent upon water originating many miles away in upland watersheds. Hawaii water use is presently governed by the State Water Code. A number of provisions of the Water Code could adversely affect water use upon designation of critical habitat.

The Commission on Water Resource Management (Water Commission) which administers the Code is given broad powers to regulate the use of all waters of the State. In particular, the Water Commission is tasked with establishing instream flow standards for streams in the State whenever necessary to protect the public interest. In considering setting such standards, the Water Commission is to consider such values as maintenance of fish and wildlife habitats, and maintenance of ecosystems such as estuaries, wetlands, and stream vegetation. In doing so, the Water Commission shall cooperate with the United States government and any of its agencies.[32] This would, of course, include the FWS.

The Hawaii Supreme Court has held that instream flow standards may take precedence over diversion of water for other purposes such as agriculture, domestic or commercial use. In implementing instream flow standards, the Water Commission may reduce the use of water for other purposes.[33]

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[31] Haw. Rev. Stat. § 343-5.

[32] Haw. Rev. Stat. §§ 174C-3, 174C-71.

[33] *In re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (2000).

Although we will not know until it happens, given Hawaii water law it is quite possible that the Water Commission could take steps to reduce off-stream water usage where it competes with water necessary to sustain endangered or threatened plants or to maintain critical habitat for those species.

An additional interplay between state and federal law may adversely affect land use because of the *disposal* or *drainage* of water into a critical habitat area. Of particular concern in recent years is what is known as "nonpoint source pollution," which is controlled under the federal Clean Water Act as implemented by the State of Hawaii.

Federal approval of Hawaii's nonpoint source pollution program makes it expressly subject to the requirements of the federal ESA.[34] The State's regulations for discharge of waters specifically provide that protected areas include those that have been designated as critical habitat under the ESA.[35] Before anyone can conduct any activities that may result in a nonpoint discharge into protected areas, they must obtain a water quality certification from the State Department of Health. The filing fee for the water quality certification application is $1,000. If the discharge does not meet applicable water quality standards, it may be denied, and if the operator discharging into a protected area does not in fact meet necessary requirements, the permit may be terminated.[36]

E. Impact of Critical Habitat on the Hawaii Coastal Zone Management Act

Pursuant to the federal Coastal Zone Management Act, the State of Hawaii has adopted its own Hawaii Coastal Zone Management Act (CZMA) implementing the federal law. Under the CZMA, changed use or development in the coastal zone must go through extra procedures to obtain a Special Management Area (SMA) permit.

One of the factors governing whether an SMA permit should be granted is whether the use or development will "adversely affect . . . wildlife habitats . . . ."[37] Once critical habitat is designated on private property, it will make it much more difficult for an applicant to get an SMA permit to change the use on the property or develop the property.

FWS MUST CONSIDER THE ECONOMIC IMPACTS OF HABITAT DESIGNATION

The ESA sets forth specific requirements that must be met by FWS before it can designate critical habitat. The law requires that the FWS shall only designate "on the basis of the

[34] See "Hawaii Nonpoint Source Program Letter of Transmittal of Findings," Letter dated June 30, 1998, from U.S. Department of Commerce, National Oceanic and Atmospheric Administration, and U.S. Environmental Protection Agency to Seiji Naya, Director, State of Hawaii Department of Business, Economic Development & Tourism, and Dr. Lawrence Miike, Director, State of Hawaii Department of Health.

[35] Haw. Administrative Rule § 11-54-05.1.

[36] Haw. Administrative Rule § 11-54-09.1.02.

[37] Haw. Rev. Stat. § 205A-26(3)(E).

best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[38] (Emphasis added.)

The FWS is required to engage in a weighing of the benefits of inclusion of an area into critical habitat against the negative economic impact that could occur. Thus, the agency "may exclude" a particular area from critical habitat if it determines that "the benefits of such exclusions outweigh the benefits of specifying such area as part of the critical habitat, unless . . . the failure to designate such area . . . will result in the extinction of the species concerned."[39] This formulation presumes that designation of a specific area will not occur where the economic impact outweighs the benefits of designation, except in those rare instances where extinction may be the result.

In *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), the federal appeals court invalidated designations of critical habitat where it had been demonstrated that FWS has not adequately considered the economic impacts of designation. Based in part on the *New Mexico Cattle Growers* case, other federal courts around the country have been overturning designations of critical habitat where it can similarly be demonstrated that in inadequate economic impact analysis has been done.

As can be seen in this paper, designation of critical habitat will have direct and substantial impacts on private property. FWS's analysis must take the full value of these impacts into account. A proper economic analysis is all the more important given the speculative protections that would accrue to designating critical habitat for these plant species. We agree with the comments of Hawaii State Forester Mike Buck, who has written that

> The designation of critical habitat, even if scientifically based, does not necessarily ensure benefit or recovery to a plant species. It may do no more than place a restrictive label on a piece of land. It does not promise that the support for species conservation will be there, nor does it necessarily provide the basis for a process in which a species' recovery can be planned and integrated into the wide range of uses and demands that are placed on most of our lands in Hawaii.
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> Past experience has shown that just because an endangered species is now found in a certain habitat, it is not necessarily an indication that the present location is the best place for it to thrive and reproduce. This has been the case with the Nene (Hawaiian goose) and the past perception that they favored the mountain uplands. Later knowledge has proven the earlier guesses wrong and we now know that Nene actually prefer lower elevations.

[38] 16 U.S.C. § 1533(b)(2).

[39] Id.

> This process is further complicated by the fact the habitat for many plant species simply no longer exists because they've already been developed or severely altered. If a plant's natural habitat is gone, the basic concept of critical habitat may need to be considered differently in Hawaii. The recently discovered and expanding populations of the endangered plant, *Abutilon menziesii,* in former Kapolei sugar lands on Oahu provides us with an example to consider. Because this rare plant is struggling to survive here, should this urbanized area become critical habitat or should designation be given to the new locations where the species is currently being planted with greater hope that the species will survive? This kind of 'kipuka' or 'refugia' approach is often the most realistic and cost-effective strategy to saving plants when they occur only within degraded or severely altered habitats.[40]

The fact remains that very little is known about many of these plant species. The Hawaii Cattlemen's Council is concerned that the various proposals put forward by the FWS contain substantial acreage where the plant species either has never been known to exist, or has not been present for many, many years. For example, the FWS has proposed habitat for *Phlegmariurus nutans* on Kauai even though it has not been present on that island for more than a century. Similarly, the FWS proposes to designate substantial areas on the Island of Lanai, even though many of the species have not been present within living memory. These include *Adenophorus periens*, last seen on Lanai in the 1860s, and *Isodendrion pyrifolium*, which was last observed on Lanai in 1870.

Instead of establishing such broad-ranging and speculative areas of critical habitat, which in themselves do nothing to recover the species, the Hawaii Cattlemen's Council believes that it would be more beneficial to encourage voluntary propagation and outplanting. This would have a more positive effect on recovering these plant species and would avoid the substantial negative economic and other impacts of over-inclusive habitat designation.

The mechanism for such species recovery is already in place under Hawaii law. Chapter 13-107 of the Hawaii Administrative Rules, adopted in 1997, provides for a program, monitored by DLNR, for propagation and distribution of endangered and threatened plants. We believe that support of such efforts by the FWS would provide much more hope for the recovery of these species.

Further, we would encourage creative alternatives that provide incentives for landowners to recover species, not penalties. Those property owners that have land which is suitable as habitat should not be penalized for that fact. Indeed, it is the actions of the rest of society that has caused the diminution of available habitat and that is now benefiting from laws that would prohibit remaining landowners from taking the same action.

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[40] Michael G. Buck, *A Critical time for Hawaii and its Endangered Species*, which can be found at www.state.hi.us/dlnr/dofaw/crithab/buckview.htm.

It is a fundamental principle of our legal system that government should not "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[41] Instead of perpetuating a system that continues to put the burden on the private landowner, we would urge that the federal and state governments develop and fund more programs that reward landowners for assisting in the preservation and recovery of endangered species. Such programs include grants for undertaking actions that promote species recovery, and compensation to landowners in return for "conservation easements" that would protect habitat areas. Not only would this help mitigate the adverse economic impacts of endangered species habitat protection, in the end it would likely be more cost-effective and would provide a greater net benefit to the species than exists under present law.

As discussed in this paper, contrary to assertions that have been made, critical habitat does substantially impact on the right to use private property. We believe the magnitude of economic impact could be in the hundreds of millions, if not billions, of dollars. Not only will large areas of land be unavailable for productive use, there will also be substantial diminution of property values.

We believe it is imperative for the public to become knowledgeable as to the full range of the potential impacts and implications of designated critical habitat in Hawaii and to take an active part in making their concerns known. The FWS should similarly take the lead in explaining to the public that they do stand to be impacted by the designation of critical habitat due to its implications under Hawaii law even if there is no federal nexus. And finally, the public should insist that the FWS make its determination only after carefully weighing adverse economic impacts. This will insure that the FWS will act prudently, seeking an equitable balance between the needs of the public and the need to protect these plant species.

[41] *Armstrong v. United States*, 364 U.S. 40 (1960).