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(VIA E-MAIL WITH HARD COPY TO FOLLOW)

February 17, 2006

The Honorable Lincoln Chafee, Senator
415 Hart Office Building
Washington, D.C. 20510

The Honorable Hillary Rodham Clinton, Senator
476 Senate Russell Building
Washington, D.C. 20510

The Honorable Mike Crapo, Senator
239 Senate Dirksen Building
Washington, D.C. 20510

The Honorable James M. Inhofe, Senator
415 Senate Hart Building
Washington, D.C. 20510

The Honorable James M. Jeffords, Senator
456 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Blanche L. Lincoln, Senator
355 Senate Dirksen Building
Washington, D.C. 20510

Dear Senators Chafee, Clinton, Crapo, Inhofe, Jeffords, and Lincoln:

On May 18th, 2005, you asked us to convene a working group to address issues related to the habitat provisions contained in the Endangered Species Act (ESA). Following a period of interviews, fundraising, and project organization, we brought together a high-caliber and diverse group from the environmental and regulated communities to tackle the issues. For the past four months, twenty-three individuals have been striving toward consensus recommendations regarding habitat issues in the federal ESA. As you know, this is one of the most contentious and complex environmental issues Americans face today. While the participants came to the table in their individual capacities, and with distinctly different experiences and perspectives, they all share a passion to make the ESA work better.

This letter summarizes our discussions over the course of three plenary sessions and a number of subcommittee meetings. We apologize for the length but believe it accurately captures important ideas that you may choose to pursue further. The Keystone Center commends the group to you for the many selfless hours of work it dedicated to grappling with issues of scientific and legal complexity and that also give rise to strongly-held feelings and values. Despite genuine and often significant differences of opinion, the group worked together civilly, collaboratively and with an absence of the rancor that on occasion characterizes discussions about the ESA. We cannot overstate our admiration for the quality of their effort in dealing with a fundamentally difficult issue.

In this letter, then, we are pleased to present an overview of the group's discussions and some of its conclusions and recommendations. The Keystone Center's full report will follow in several weeks. While we attempt here to convey the "sense of the group" as accurately as possible, it is difficult in a letter of this sort to fully satisfy each participant's preferences as to content and presentation. Any errors or mischaracterizations, therefore, while unintentional, are wholly The Keystone Center's responsibility and will be corrected in the full report to follow.

In essence, the group believes that it should be possible for you and your Congressional colleagues to take steps that would improve the law's effectiveness for the species at risk, make government activities more efficient, and reduce the concerns of regulated parties. It is the opinion of the group that addressing all three of these issues—the biological needs of the species, the efficiency of government, and the concerns of those most directly affected by the Act's provisions—is the only practical way to move forward if the goal is to do so in a more consensus-based manner. Quite clearly it would not be difficult to recommend measures to address one set of interests without regard to the other two. The challenge has been to search for those areas of common ground on which these diverse interests can stand given the powerful forces at play on the habitat issues of the ESA.

The group presents its recommendations, therefore, with a certain sense of restraint and realism borne of long experience with the ESA. No *deus ex machina* will enter stage left or right to leave all parties fully satisfied or to make political and legal disputes about the habitat provisions of the ESA things of the past. Conflict will continue as competing interests rub and chafe against each other. Specifically, this letter also comes with three caveats.

1. We readily acknowledge that not all knowledgeable and thoughtful voices from either the regulated or the environmental communities (or from other interest groups) participated in these discussions. To keep the group to a reasonable size, we tried to find strong voices that could speak their minds, knowing that many shades and variations of such views could easily also have joined the discussions. The working group understands that others can and should offer valuable critiques of their own, and encourages those voices to be heard by you.

2. This effort, limited by time and available resources, did not include the usual joint fact-finding that The Keystone Center normally employs in its policy dialogues. We believe a technical, scientific, and economic empirical foundation is generally of great

value in discussions like this. In this case, time and funding did not permit a longer exercise, and the participants in the group had also already immersed themselves in factual discussions and debates in many other forums.

3. Finally, The Keystone Center and the working group itself acknowledge that the ideas contained in this letter are largely conceptual. They offer several promising intellectual and political trails rather than a set of word-smithed agreements directly translatable into legislation. Should you find some of the ideas in this letter worthy, they will require further thinking and elaboration in order to be fully practicable. To that end, we have encouraged the working group members to feel free to contact you directly with their individual thoughts and ideas about the future of the ESA. Please don't be surprised when their views differ.

As explained more fully below, the group focused its time and energy toward exploring whether a consensus concept could be developed that it could recommend to replace the current critical habitat framework. Due to a combination of factors and pressures, it was not able to craft one comprehensive consensus-based approach although it did clarify the elements that would need to be addressed to reach agreement. In addition, the group did reach agreement in several areas as described below. Perspectives varied within the group regarding how significant the differences were regarding those issues that remained unsettled. Some felt the agreement might be within reach with more time and work while others believed that some key areas could not be resolved at this juncture.

I. The Process

The Keystone Center began its work by identifying potential candidates to comprise the ESA Working Group on Habitat and securing funding for the project. A carefully selected group of twenty-three individuals (Attachment A) accepted The Keystone Center's invitation to join the working group. In order to help frame the issues, draft meeting protocols, and craft the process, Keystone conducted interviews with most of the confirmed participants. The initial meeting scheduled for September had to be postponed because an important segment of the group would have been unable to participate. Rescheduling proved difficult, but the first meeting took place on November 2-4, 2005 in Keystone, Colorado. A second meeting of the full working group took place on December 5-7, 2005 in Shepherdstown, West Virginia. Three subgroups formed at the first meeting (one considering "recovery plan mechanics," another "legal implications," and the third "incentives") and then met several times between the two meetings. The third and final full group meeting took place on January 24, 2006 in Washington, D.C. Finally, a subgroup met on February 13, 2006 to discuss and attempt resolution of several issues related to §7. Our final report will provide a more complete description of the process, the funders, and a copy of the meeting protocols.[1]

[1] We recognize that this process has taken longer than expected (The Keystone Center originally indicated that its full report would be available in December 2005). Complications with securing adequate funding from industry and determining final group composition, combined with the need to postpone the initial meeting by two months, slowed progress at the outset.

II. Key Principles

A set of seven key principles emerged from the working group discussions. Some of these principles were articulated at the outset during the first meeting in Keystone; others took shape as discussions progressed and upon probing interests and aspirations further. They may be modified or updated further prior to completion of the final report based on further input from the work group. Some principles relate to substantive desired directions (e.g., greater focus on recovery). Others pertain to implementation issues (e.g., cooperation and adaptability). Still others note the plain realities that are needed to make any consensus-based concept work (e.g., funding). The titles of the principles are:

- Applying Three Tests
    - Enhance recovery of listed species
    - Reduce regulatory burdens and costs
    - Increase participation of non-federal parties in species recovery
- Providing Greater Focus on Recovery
- Optimizing Regulations and Incentives
- Improving Cooperation
- Distinguishing Risk Analysis from Risk Management
- Ensuring Adaptability
- Providing Agencies with Money

Attachment B contains a more complete description of each of these principles as they stand currently.

III. Response to Questions Posed in the Senate Letter

In the letter to The Keystone Center, you requested the working group's "best consensual guidance" to the following questions:

1. *As currently written and implemented, is the ESA adequately protecting and conserving the habitat listed species' need to recover?*

2. *If not, how can the ESA be improved to better conserve habitat and help species recover?*

3. *What specific changes and recommendations can the regulated and NGO [communities] recommend, advocate for and help implement?*

The working group addressed the first question as a threshold matter and then devoted its energy toward exploring the possibility of developing a concept aimed at being responsive to the second and third questions. The group agreed in short order that the ESA could do a more effective job of protecting and conserving the habitat that species need to recover. In so responding, the group does not in any way diminish the numerous accomplishments of the ESA to date or belittle the diligent work of those charged with implementing this challenging law. While the group reached a fairly quick consensus on the first question, perspectives varied on the reasons why. Since diagnoses differ, so do the favored remedies. This, in turn, has made reaching consensus that the *status quo* should be improved far easier than agreeing on how that ought to be accomplished.

Those with a conservation perspective emphasize the fact that existing or potentially restorable habitat for listed species is being lost or degraded despite the provisions of the ESA, with the result that some species continue to decline and the prospect for recovery of others is less than it should otherwise be. Those with a landowner or regulated interest emphasize the burden – in terms of cost, delay, and uncertainty – that they sometimes bear as a result of efforts under the ESA to conserve habitats that they own or rely upon for various uses.[2] All agree, at least in principle, that if new approaches could be identified that would both improve the effectiveness of habitat conservation efforts for species and reduce the burden upon landowners and other regulated interests, those new approaches should be embraced. The working group made a concerted effort to identify and evaluate ideas that could achieve these twin objectives.

The group also noted several significant contextual issues beyond the scope of its discussions that nevertheless have a bearing on the three questions posed above. At several junctures, a number of participants underscored the importance of adequate funding, feeling that even conceptually-sound recommendations would in most cases be of little practical value if not sufficiently underwritten. Some in the group also emphasized that the ESA is in some ways ill-equipped by itself to address the bedrock habitat needs of species, likening such attempts to practicing preventative medicine in the intensive care unit. If an objective is to list fewer and de-list more species, then it will be important to look beyond the ESA in isolation toward additional conservation measures by state and local governments, private sector efforts, and other regulatory and non-regulatory programs. The ESA in its current form cannot shoulder this burden alone.

After contemplating the merits of replying to the second and third questions above by proposing adjustments in the current system or through recommending a more significant conceptual change of approach within the ESA, the group chose to attempt the more difficult latter option. The group emerged from its first meeting in Keystone with the view that, if it were possible, the benefits of "building a better mousetrap" might yield substantially bolder and more important benefits than "tweaks" to the existing ESA regime.

[2] Referring to the "environmental interests" and the "regulated sector interests," which we do at points as convenient shorthand, may be too facile. Neither the environmental nor the regulated perspective is monolithic and during the course of the dialogue a number of "mixed marriages" occurred as various issues and options were discussed.

IV. Concepts Considered by the Working Group

Having concluded for a variety of reasons that the ESA's provisions for protecting the habitat listed species' need to recover could be improved, the group began to examine an approach that would move away from the current critical habitat framework to one which has three interdependent components: 1) it would centralize the role of recovery and recovery planning; 2) it would significantly boost the role of incentives; and 3) it would revise the §7 consultation standard.

The group discussed various aspects of these three points in considerable detail and largely did so in the context that they were contingent and interconnected elements. Agreement in one area was predicated on the outcome of the other two. This was particularly true with respect to the §7 consultation standard and the role of recovery. That said, most of the group felt that any concept that had the best prospects for the greatest consensus would likely include the following elements:

- New provisions for integrating habitat protection and conservation into the ESA.
- Greater focus on the function, content, scope, and mechanics of recovery plans.
- Clarification or modification of the §7 standard.
- More effective incentives for non-federal parties.
- New sources of funding for better coordinated and more workable ESA provisions pertaining to habitat.
- A clearer, more effective role for the states.

From its initial meeting in November until the subgroup meeting of this past week, the group worked to see if a viable and acceptable new concept could be built along these lines. Specifically, the working group explored whether it would be possible to replace the current critical habitat provisions with three main elements:

- Increase the extent and effectiveness of incentives.
- Make the recovery plan the "hub" to guide efforts to improve the status of threatened and endangered species, promote down- or de-listing when possible, appropriately inform the full spectrum of ESA §6, §7, and §10 decisions with differing standards of their own, and to allocate available incentives.
- Reword §7 to remove the adverse modification concept and develop a new standard that focuses on species recovery issues and ensuring that any new formulation sets the test for violation of the standard at a level that ensures focused, reasonable and appropriate application.

Included in this approach would be a need to define the meaning of "recovery," develop more specific guidance to recovery planning teams, and provide more attention to the means of identifying the habitat necessary for species recovery. Moreover, significant uncertainties existed within the group regarding how various aspects of the draft concept would operate in practice or be translated into agency regulation or guidance, let alone how it might be interpreted judicially. Should a concept along these lines ultimately prove viable, a number of details will need to be worked out for purposes of achieving greater clarity and preventing unintended ambiguities.

A. Incentives

An attractive incentives program is integral to advancing the goals of both the conservation interests and the regulated sector. In this regard, the group's final report and recommendations will offer a number of specific suggestions related to Farm Bill measures, voluntary cooperative agreements, tax incentives, and streamlining. We discuss the first two categories in somewhat greater detail below; we will provide more information on all four categories in the final report. Effective incentives would expand the prospects for improving the biological status of listed species and potentially reduce (though likely not eliminate) the extent to which regulatory measures will need to be relied upon to achieve recovery. Conversely, advancing the joint goals of the group absent an effective incentives program becomes markedly more difficult as it requires a greater reliance on regulatory methods that have certain limitations and tend to engender greater conflict.

Although the ESA notes the need for incentives in its introductory findings, its core provisions are largely regulatory in nature, seeking to prevent harmful impacts to the species at risk by prohibiting certain activities. While such regulatory prohibitions have kept some number of those species from becoming further endangered, they may not, by themselves, be capable of making imperiled species more abundant, widespread, or secure. To accomplish those objectives – some or all of which will be required in order to recover listed species – incentives that go beyond simple compliance with the law are highly desirable. Our full report will provide specific recommendations regarding incentives but we highlight two areas of interest here.

First, strengthening provisions in the 2007 Farm Bill can provide key mechanisms for enhancing habitat protection by private landowners. For example, the Conservation Reserve Program (CRP), with refinements in the selection criteria and re-enrollment considerations, can serve as an important tool for conserving habitat. Congress made wildlife one of the goals of the Environmental Quality Incentives Program (EQIP), and United States Department of Agriculture (USDA) responded at the national level by making at-risk species a national conservation priority. However, only six-tenths of one percent of EQIP dollars has flowed to specific wildlife practices and only a portion of that has been for at-risk species. A number of common sense improvements would make EQIP a far more successful tool for species conservation. Dollar for dollar, the Wildlife Habitat Incentives Program (WHIP) has done more to enhance habitat for at-risk species than any other program. Nonetheless, low funding limits the program's ability to provide strong conservation incentives and limits the technical support available to landowners.

A highly promising program for endangered wildlife is the Healthy Forest Reserve Program (HFRP), which specifically targets endangered wildlife.

Second, current law does not explicitly authorize cooperative conservation agreements between landowners and the federal government for the conservation or improvement of habitat and species under the Endangered Species Act. With more than 80% of listed species found on private lands for some or all of their lives, landowner cooperation is essential for the recovery of listed species. Several innovative programs have been developed to provide incentives for private landowners to enhance the survival of listed species on their lands. There is a need to authorize these legislatively and to provide a framework for the other cooperative conservation programs that might be developed in the future. Legislation needs to be flexible to both allow innovation and provide flexibility in existing programs. Legislation to authorize such programs will hopefully provide encouragement for agencies to enter into more cooperative conservation arrangements than they have thus far.

B. Recovery Planning

The group consistently underscored the need for development of scientifically sound, financially reasonable, adaptive and politically credible recovery plans. Scientifically, recovery may be defined and described in reference to the degree of risk of extinction. The task of establishing the appropriate level of risk distinguishing protected species from those deemed recovered should be informed by scientific judgments. However, the final decision of how much risk a species must face before it receives protection under the ESA remains primarily a value judgment driven by various policy factors. Hence, recovery plans and the recovery planning process must involve intelligent consideration and decision-making that integrate scientific and policy choices, in keeping with the goals of the ESA.

If lawmakers choose to focus on recovery and recovery planning rather than critical habitat designations as a centerpiece of the ESA's strategy to conserve listed species, the group felt it important that Congress articulate its general policy as to what "recovery" means under the Act. Federal agencies would then need to translate this articulation into regulation, guidance, and practice. At an operational level, defining recovery will typically mean establishing some acceptable level of risk, or some approach to risk that can be adapted on the ground in different places and for different species but remains explicit and transparent.

The group did not reach consensus on the precise role of recovery plans in managing and protecting listed species. However, the group recognized that recovery planning involves addressing occupied and unoccupied habitat needs. There was considerable though not universal sentiment within the group that while recovery plans should not be stand-alone, enforceable regulatory documents, they should, to the degree appropriate, inform and serve as a reference document for other required and voluntary ESA actions such as consultations under §7(a)(1) and §7(a)(2); avoidance of prohibitions under §9, issuance of incidental take permits and agreements under §10; approval of state programs under §6; and approval of participation and qualification in landowner incentives programs (i.e., obtaining the greatest good for the money).

The Keystone Center's final report will identify and discuss in greater detail the group's thoughts and ideas related to recovery planning.

C. Regulatory Issues

While the group reached a solid consensus on many aspects of the incentives topic and identified issues needing to be addressed in recovery planning, it encountered far more difficulty when it came to the question of whether changes to the ESA's regulatory requirements could achieve the twin goals of producing a more effective and less burdensome conservation program. The group devoted considerable effort toward developing a recommendation aimed at reorienting the §7(a)(2) standard to a focus on species recovery. While the group again felt it important that Congress articulate its intentions for what "recovery" is to mean, the group grappled with various ways of repealing the current adverse modification standard and rewording the remaining jeopardy standard to encompass the "recovery" concept. Much of the discussion centered around whether it would be desirable and possible to devise language that would ensure that the test for an effect on recovery would be of sufficient certainty and significance to advance the ESA's goals without imposing undue burdens. The group engaged in detailed and difficult discussions about whether and how this might be best accomplished and felt it possible to address some key points if agreement could also be reached on other related issues; however, some of these other issues remained unresolved.

1. Context

The principal regulatory prohibitions of the Act are: (1) the prohibition against "taking" endangered (and sometimes threatened) wildlife, (2) the prohibition against federal agencies authorizing, funding, or carrying out actions that are likely to jeopardize the continued existence of any listed species, and (3) the prohibition against federal agencies authorizing, funding, or carrying out actions that are likely to result in the destruction or adverse modification of critical habitat of any listed species.

The take prohibition applies to everyone, including private persons, federal agencies, and others. The other two prohibitions set forth in §7(a)(2) of the Act apply only to actions authorized, funded, or carried out by federal agencies.

The statute does not define the phrase "jeopardize the continued existence of," although regulations of the Interior and Commerce Secretaries have long defined this phrase with reference to the expected impacts of a federal action on "the survival and recovery" of a listed species in the wild. "Survival" remains undefined in the statute and the implementing regulations, while current regulations define recovery only very generally as the point at which listing is no longer appropriate. Ambiguities in the meaning of these key terms, coupled with the use of the conjunctive "and" rather than the disjunctive "or" in the phrase "survival and recovery" have given rise to some uncertainty about the meaning and application of the standard.

The final habitat-related prohibition of the ESA is the further requirement of §7(a)(2) that federal agencies ensure that the actions they authorize, fund, or carry out are not likely to result in the destruction or adverse modification of areas designated as "critical habitat" of any listed

species. When Congress enacted the ESA in 1973, it used but did not define the term "critical habitat." In 1978, Congress provided a complex and not altogether self-explanatory definition requiring that critical habitat for occupied areas contain physical or biological features essential to conservation and requiring special management or protection and that unoccupied habitat could be designated only if essential to conservation. Congress also determined that critical habitat designations were the one area in the ESA where economic considerations and other relevant impacts could be considered. Thus Congress permitted the Secretaries of Interior and Commerce to exclude areas from critical habitat upon finding that the economic benefits, national security benefits, or other benefits of excluding an area outweigh the benefits of designating the area. Hence, in some cases, the designation process may protect some but not necessarily all habitat that a species may need for conservation or recovery.

The precise meaning of the requirement to avoid destruction or adverse modification of critical habitat remains uncertain. The joint regulations of the two Secretaries define the term "destruction or adverse modification" so as to require a negative impact on both the survival and recovery of a listed species, just as the definition of "jeopardize the continued existence" does. Because of this, the conservation agencies have frequently struggled to explain how these two standards differ. Indeed, the agencies frequently sought to justify their failure to designate critical habitat for many listed species by arguing that there was so little (or no) difference between the two standards that designation of critical habitat was unnecessary or of little utility.

The holdings and reasoning of several recent court decisions have concluded or suggested that the regulatory definition of adverse modification is not valid because it does not include any consideration of effects on conservation or recovery. In response to those decisions, the Interior Department has issued interim guidance and is believed to be working on a revision to the current regulatory definition.

Critical habitat designations focus attention on particular areas, and to both good and ill effect. They have also drawn criticism both for being too broad or too narrow. Some designations involve millions of acres and others just a few. To the extent that critical habitat designations identify particular areas especially important to the conservation of listed species, they increase the prospect of closer scrutiny of actions proposed to be carried out in such areas. Because the definition of critical habitat allows under certain circumstances the designation of areas not currently occupied by the species (such as those areas into which a species must expand if it is to recover), a critical habitat designation which does so may help ensure that federal agency actions affecting such designated, unoccupied areas undergo the inter-agency consultation process of §7. Without such designation, such actions may never undergo inter-agency consultation (though actual practice with respect to this matter appears to vary). Conversely, overly broad critical habitat designations run the risk of diverting scarce agency resources toward large-scale consultations and away from other efforts aimed at species recovery. Finally, others have challenged the failure to strictly apply all the modifiers in the ESA's lengthy definition of "critical habitat" to certain habitat designations.

For many reasons, therefore, critical habitat designations have become a litigation battleground for those who own, use, or wish to influence the use of those particular areas. Some suits challenge the failure to designate critical habitat for particular species. Others challenge

particular designations as being too broad or too narrow. Still others have challenged the adequacy of the economic analysis that the Secretaries are required to undertake when considering whether to exclude areas from a critical habitat designation. Both the regulated and conservation communities widely acknowledge that the effect of these lawsuits has, among other things, consumed a portion of the conservation agencies' resources which might otherwise be allocated directly towards species recovery efforts throughout the country.

2. Key Discussion Issues

With that as background, the working group focused much of its attention on a few key issues which we summarize below. The group recognized that all of these issues are inter-related. No implication is intended that the group reached a stand-alone consensus on any of the individual issues discussed below.

A. Should habitats necessary for recovery be mapped and, if so, should this mapping be integrated with recovery planning?

The notion underlying "critical habitat" is that particular habitat areas, subject to certain limited exemptions, require special attention in order to achieve recovery. As the current definition of "critical habitat" makes clear, these areas may include both currently unoccupied and occupied areas provided the applicable regulatory standards are met. Critical habitat designations have been the mechanism for identifying such areas, and the special duty of federal agencies under §7(a)(2) to avoid adversely modifying or destroying such areas represents the special attention that the Act gives to such areas. The working group generally agreed on the need for long-term mechanisms to identify those particular areas that are necessary to the recovery of a listed species, though the willingness of some to support this idea was contingent upon agreement being reached on the related question of what the consequence of such identification would be.

If one accepts – as is widely agreed – that habitat loss or degradation is the single greatest factor contributing to the endangerment of species, then recovery efforts should include some mechanism or strategy to secure the appropriate management of sufficient habitat to attain the statute's goal of species recovery. Whether that strategy emphasizes acquisition, regulation, incentives, or other measures, it will almost certainly be necessary to identify those areas most important to effectuating the strategy. The working group generally referred to these areas with the shorthand phrase "recovery habitat," although the group did not define this term.

B. Should habitats identified as necessary for recovery receive explicit protection, receive implicit protection in the consultation process, or receive no regulatory protection at all?

If recovery plans identify "recovery habitat," how, if at all, should the identification of such habitat factor into the assessment of the compatibility of a federal action with the requirements of §7(a)(2)? The working group discussed several potential options ranging from explicit protection of recovery habitat to no protection of recovery habitat as well as to those where the identification of recovery habitat had no definite regulatory implications to others that might implicitly protect recovery habitat (e.g., such as directing that in consulting on a proposed federal action the conservation agency be required to consider the impact of the action on any identified

recovery habitat). The group did not reach a consensus about this issue, although it did not conclusively rule out the possibility of doing so.

C. Should the substantive standards of §7(a)(2) refer to expected impacts on recovery, survival, conservation, likelihood of extinction, or something else?

As discussed above, §7(a)(2) of the Act requires federal agencies to ensure that their actions are not likely to "jeopardize the continued existence" of any listed species and to ensure their actions are not likely to destroy or adversely modify critical habitat. These two standards are defined by regulation as requiring an assessment of the impacts of federal actions on both the "survival" and "recovery" of a listed species. The working group considered whether either (or both) of these concepts should continue to be the focus of the §7 inquiry, or whether some other formulation would offer a better touchstone. As described below, the participants struggled to develop a new standard that relates directly to recovery.

One of the goals of the ESA is to bring endangered and threatened species "to the point at which the measures provided" by the Act "are no longer necessary."[3] Some in the group felt that in light of this goal, it makes sense to base the standard governing federal agency actions on the impact of those actions on the recovery of a species.

Another of the goals of the ESA is avoidance of extinction. Some participants expressed concerns that this goal would be shortchanged were a new standard to focus solely on the impact of federal actions on recovery. These participants advocated for a standard, to be combined with a recovery standard, which would ensure no increase in the likelihood of extinction.

D. Should those standard(s) be qualified in some manner?

Were one to say that the standard applied to federal agency actions under § 7(a)(2) should focus on recovery and avoidance of extinction, that would still leave unanswered the important further question of how much (if any) negative impact on recovery and extinction risk is acceptable.

The working group considered a wide range of possibilities for addressing impacts to recovery. At one end of that range, the standard would require federal agencies to ensure that their actions not reduce the likelihood of recovery at all. At the other end is a standard that would require federal agencies to ensure that their actions simply not preclude the possibility of recovery. Proponents of the former argued that to allow federal agencies to reduce the likelihood of recovery will make achieving the ESA's goals less likely rather than more likely. If species recovery is, in fact, the goal, it should not allow the federal government itself to make that more difficult. Others viewed this formulation as too demanding and problematic as there would likely be many otherwise desirable federal actions unable to meet this standard.

Proponents of a standard that would only bar those federal actions that preclude the possibility of recovery suggested that such a standard was appropriate because it left open the possibility of achieving the Act's recovery goals through incentives, financial aid, and voluntary conservation efforts; and therefore was consistent with the Act's core purpose. Others felt such a standard

[3] See ESA Sections 3(3) (definition of conservation) and 2(b) (purposes of the ESA).

would allow a series of federal actions, each of which would make the goal of recovery more and more unlikely, provided only that the possibility of recovery was not altogether precluded. That, they felt, would prevent the Act from ever recovering most species.

Neither of these formulations provided a basis for consensus within the group and it consequently devoted considerable effort to examining various options between "no reduction in the likelihood" of recovery and "not precluding" recovery. Despite significant efforts exploring various options, the group did not arrive at specific language.

E. In assessing compliance with the standard, what consideration should be given to indirect or cumulative effects of the action under consideration?

The group believed that whatever standard ultimately governs federal actions under §7(a)(2), it will be important to clarify whether, in applying that standard, one considers only the direct and singular effects of a particular federal action, or whether one should take into account its indirect effects (such as the development induced by the construction of an interstate highway interchange, for example) as well as its cumulative effects (including the effects of other foreseeable developments in the same area). The working group generally supported the view that the evaluation of federal actions under §7(a)(2) should consider both indirect and cumulative effects although it did not discuss the issue in depth or consider analytical methods of doing so.

F. What, if anything, should be said about mitigation in §7(a)(2)?

Some participants believed that since at least the 1980s, the U.S. Fish and Wildlife Service has held the view that a listed species, even though in danger of extinction, nevertheless can safely withstand some amount of further decline without causing jeopardy to it (which some have characterized as a "resource cushion"). Some have expressed concern that this reasoning may allow already imperiled species to become more precariously situated. Apart from the concern about the effect to listed species, there may be fairness considerations affecting regulated interests as well since identical parties may be treated differently based solely on when their permit applications are considered depending on how much resource cushion is deemed to exist.

Some in the group proposed that the negative consequences to listed species could be eliminated, and the treatment of federal permit applicants equalized, if §7 embodied a duty to offset or mitigate for the detrimental impacts of federal actions upon listed species. The working group discussed the idea of incorporating a mitigation requirement in §7, either as the basic duty of §7 (thus allowing any federal action to proceed, regardless of the gravity of its impact, provided it is mitigated), or as a supplementary duty to some more basic §7 duty (thus, for example, barring federal actions that significantly reduce the likelihood of recovering a listed species, while allowing those that do not do so to go forward with mitigation of their negative impacts). Some strongly opposed any approach under which mitigation would be mandatory because of concerns about costs, lack of fair and workable standards and appropriate controls to guide federal agency staff. In addition, some expressed the concern that any sort of obligation to mitigate might constrain the flexibility to do effective voluntary mitigation. While the group clearly did not reach agreement about whether and under what circumstances mitigation should be part of any

new §7 standard, widespread support existed to encourage the use of voluntary mitigation that had a clear nexus to species recovery.

G. Should any change in the standards applicable to federal actions under §7(a)(2) be accompanied by a change in the standard for approval of habitat conservation plans under §10?

Much of the working group discussion focused on whether the standards of §7(a)(2) should be changed and, if so, how. A related issue is whether, if agreement on §7(a)(2) were reached, the standards for approval of habitat conservation plans in §10 should also be changed. At present, §10(a)(2)(B)(iv) provides that an incidental taking permit for a habitat conservation plan may be approved only if "the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild." This language was taken verbatim from the regulatory definition of "jeopardize the continued existence" as it stood in 1982, when the amendments authorizing habitat conservation plans were added to the Act. Thus, although Congress in 1982 chose to import the then-existing regulatory definition of "jeopardize" into §10 rather than use the term itself, it clearly meant to subject habitat conservation plans to the same standard as federal actions were subjected to by the jeopardy language of §7(a)(2). Whether that parallelism should continue if §7(a)(2) is revised so as to make federal agency actions subject to a new standard (particularly a standard focused on the impacts on recovery) was an issue the group did not resolve.

V. Conclusion

The above represents The Keystone Center's best summary of the complex, challenging, and robust discussions held by the working group. Although our final report will summarize more explicitly the agreements reached on incentives and explain the group's thinking regarding other aspects of the habitat provisions in the ESA, this letter seeks to map out the conceptual trail we followed for whatever guidance it may provide you and others, and as a record for the members themselves.

Once again, we commend the members of the working group to you, individually and collectively, and look forward to hearing the results of your own deliberations. We stand ready if we can be of further assistance to you as you move forward in considering these difficult and complex issues.

Sincerely yours,

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ATTACHMENT A

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ATTACHMENT B

KEY PRINCIPLES UNDERLYING THE SEARCH FOR AGREEMENT

1. **Applying Three Tests**. A consensus-based set of revisions to the ESA should improve current law in three ways:

    a. Enhance the recovery of listed species;

    b. Reduce regulatory burdens and costs (including the time and money needed for making decisions) for impacted parties.

    c. Increase the willingness and ability of non-federal parties to promote the recovery of listed species.

2. **Providing Greater Focus on Recovery**. Currently, critical habitat is supposed to be designated at the time of listing. Identification of the habitat species require to recover is better done in the context of recovery planning after more rigorous analysis and deliberation has been completed.

3. **Optimizing Regulations and Incentives.** Regulation is necessary and worthwhile, but can be made less burdensome for the regulator and the regulated and more effective for the species. When possible, the goals of species protection and recovery should be achieved through incentives rather than regulation. Robust incentives are needed to conserve the habitat species need to recover; they also serve to decrease the potential reliance on regulation. Incentives need further refinement, augmentation, and expansion if species recovery is to be effective and successful. Both incentives and regulation should be complemented by a scientifically sound and publicly credible recovery planning process.

4. **Improving Cooperation**. Prevention of extinction along with recovery is the goal of the Act and the criterion by which the Act's success or failure is ultimately gauged. Improving cooperation and reducing friction between private, governmental and NGO interests in implementation will contribute to the Act's ongoing success. Measures that detract from or are inconsistent with achieving such cooperation should be a major focus of reform efforts.

5. **Distinguishing Risk Analysis from Risk Management**. While recovery planning is as a whole an iterative process, the question of <u>what</u> the risks of extinction are for a given species should be based upon the best available scientific data and judgments; the question of <u>how much</u> risk should be taken or avoided is a policy decision informed by economic, social, and cultural factors as well as scientific considerations. This distinction applies to decisions related to the habitat that species need to achieve recovery.

6. **Ensuring Adaptability.** Recovery planning is not a once and forever activity but typically changes depending on the state of the species and the availability of information. Various

forms of adaptive management are therefore essential to effective and intelligent recovery planning. At the same time, it is important to provide some level of certainty to those who participate either voluntarily or through regulation. When recovery plans are revised, the process must again incorporate the highest level of deliberation.

7. **Providing Agencies with Money**. An effective ESA will require adequate funding for operation and implementation of the Act. Coupled with sufficient baseline funding, efficiencies should be sought through strengthening partnerships between the federal government, tribes and states. If accomplished successfully, this will free time, dollars, and personnel to focus on the biological needs of species with the further salutary benefit of reducing litigation.