

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**HEARTWOOD; SOUTHERN APPALACHIAN
BIODIVERSITY PROJECT; KENTUCKY
HEARTWOOD; INDIANA FOREST
ALLIANCE; BUCKEYE FOREST COUNCIL;
VIRGINIA FOREST WATCH;
NATIONAL FOREST PROTECTION
ALLIANCE; and WILD VIRGINIA,**

Civil Action No. _____

Plaintiffs,

vs.

Magistrate Judge _____

District Judge _____

**GALE NORTON, Secretary, United States
Department of Interior;
UNITED STATES FISH AND WILDLIFE
SERVICE, and STEVE WILLIAMS, Director,
United States Fish and Wildlife Service;
DALE BOSWORTH, Chief, United States
Forest Service, and UNITED STATES
FOREST SERVICE,**

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Preliminary Statement

1. This is a civil action pursuant to the Endangered Species Act and the Administrative Procedure Act. This is an action designed to protect the critically endangered Indiana bat, *Myotis Sodalis*. Plaintiffs allege that Defendants, acting in their official capacity, are acting in an arbitrary and capricious manner and contrary to law in failing to properly respond to the Plaintiffs' petition to designate critical habitat for the Indiana bat's non-hibernation cycle and by continually

finding that agency actions will not jeopardize the continued existence of the bat.

Jurisdiction and Venue

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. §§ 2201 & 2202 (Declaratory Judgment); 5 U.S.C. § 702 *et seq* (Administrative Procedures Act); 16 U.S.C. § 1531 *et seq.* (Endangered Species).

3. This Court is the appropriate venue for this action pursuant to 28 U.S.C. § 1391.

Parties

4. Plaintiff Heartwood is a not-for-profit corporation with a focus on environmental issues, particularly the protection of forests in the eastern United States. Heartwood is active in the protection of forests and native species of the eastern United States. Plaintiff Heartwood maintains an office at 521 West Kirkwood Ave., Suite No. 1, Bloomington, IN 47404. Plaintiff Heartwood is involved in a broad range of environmental issues, and its members have dedicated themselves to preserving and enhancing the environment in Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Virginia, and West Virginia. Plaintiff's members regularly use and enjoy the environment, waters, forests, air and lands of these states, including lands and forests within the National Forests native to the Indiana bat. Plaintiff's members include amateur biologist, photographers, and wildlife enthusiasts who enjoy knowing the Indiana bat is alive and well, who study and enjoy the Indiana bat's habitat, and who will be harmed if the Indiana bat is extirpated from its home range. Plaintiff's members intend to continue using the national forests across the region area regularly in the future and will be harmed if Indiana bats disappear from this forest.

5. Plaintiff Southern Appalachian Biodiversity Project (SABP) is a not-for-profit environmental corporation based in Asheville, North Carolina. Plaintiff SABP maintains an office at 191 Merrimon Ave. Asheville, North Carolina 28801. Plaintiff SABP has a strong interest in the protection of national forests and endangered species in the Appalachian mountains and elsewhere in the eastern United States. Plaintiff SABP has members that use and enjoy national forests through the eastern United States and will continue to use these forests into the future. These members will be harmed if the Indiana bat disappears from these forests.

6. Plaintiff National Forest Protection Alliance (NFPA) is a not-for-profit corporation

based in Missoula, Montana. Plaintiff NFPA maintains an office in Missoula, Montana. Plaintiff NFPA is an organization with a strong interest in the protection of national forests and in the protection and maintenance of biodiversity and native species in national forests across the country, including those within the range of the Indiana bat. Plaintiff NFPA has members that use and enjoy the forests in which the Indiana bat occurs, and will continue to use those forests into the future. Those members will be harmed if the Indiana bat disappears from these forests.

7. Plaintiff Indiana Forest Alliance (IFA) is a not - for - profit grassroots environmental corporation based in Bloomington, Indiana, and maintains an office at 521 West Kirkwood Ave., Suite No. 1, Bloomington, IN 47404. Plaintiff IFA is an organization with an interest in the maintenance of biodiversity and native species in the Hoosier National Forests. The Hoosier is within the range of the Indiana bat. Plaintiff IFA has members that use and enjoy the forests in which the Indiana bat occurs and will continue to use those forests into the future. Those members will be harmed if the Indiana bat disappears from the Hoosier National Forest.

8. Plaintiff Kentucky Heartwood is a not - for - profit grassroots environmental corporation based in Lexington, Kentucky. Kentucky Heartwood maintains an address at 323 S. Upper St. Lexington, KY 40508. Plaintiff Kentucky Heartwood is an organization that has a strong interest in the protection of biodiversity and native species in national forests in the Appalachian mountain range and elsewhere in the eastern United States, including those within the range of the Indiana bat. Plaintiff Kentucky Heartwood has members that use and enjoy the Daniel Boone National Forest in which the Indiana bat occurs and will continue to use those forests into the future. Those members will be harmed if the Indiana bat disappears from these forests.

9. Plaintiff Buckeye Forest Council (BFC) is a not - for - profit grassroots environmental corporation based in Athens, Ohio. Plaintiff BFC maintains an office address at P.O. Box 99, Athens, OH 45701. Plaintiff BFC is an organization with a strong interest in the protection and maintenance of biodiversity and native species in national forests across the country, including those within the range of the Indiana bat. Plaintiff BFC has members that use and enjoy the forests in which the Indiana bat occurs – particularly the Wayne National Forest – and will

continue to use those forests into the future. Those members will be harmed if the Indiana bat disappears from these forests.

10. Plaintiff Virginia Forest Watch (VAFW) is a not - for - profit grassroots environmental corporation with a physical address at Rt. 2, Box 471, Nickelsville, VA 24271. Plaintiff VAFW has a strong interest in the protection of national forests and native species in the Appalachian region and elsewhere in the eastern U.S., including those within the range of the Indiana bat. Plaintiff VAFW has members that use and enjoy the forests – particularly the George Washington and the Jefferson – in which the Indiana bat occurs and will continue to use those forests into the future. Those members will be harmed if the Indiana bat disappears from these forests.

11. Plaintiff Wild Virginia is a not - for - profit grassroots environmental based in Staunton and Charlottesville, Virginia. Plaintiff Wild Virginia maintains a mailing address at P.O. Box 1891, Charlottesville, VA 22903. Plaintiff Wild Virginia has a strong interest in the protection of national forests and native species in the Appalachian region and elsewhere in the eastern United States, including those within the range of the Indiana bat. Plaintiff Wild Virginia has members that use and enjoy the forests in which the Indiana bat occurs, and will continue to use those forests into the future. Those members will be harmed if the Indiana bat disappears from these forests.

12. Defendant Gale Norton, being sued in her official capacity, is Secretary of the United State Department of the Interior and has been delegated the responsibility by Congress to conserve endangered species and to insure that federal agency actions will not jeopardize the continued existence of an endangered species. Defendant Norton maintains an office at 1849 C Street, NW, Washington, DC 20240.

13. Defendant United States Fish and Wildlife Service is an agency of the United States Department of Interior. Defendant United States Fish and Wildlife Service maintains a headquarters office at 1849 C St., N.W., Washington, D.C. 20240. The Defendant United States Fish and Wildlife Service is the agency designated by the Secretary of Interior, as authorized by Congress under the Endangered Species Act, to consult with other federal agencies to insure that federal actions will not jeopardize the continued existence of a federally listed species.

14. Defendant Steven A. Williams, being sued in his official capacity, is Director of the Defendant United States Fish and Wildlife Service. Defendant Williams maintains his office at the Washington D.C. headquarters. The Director is the top-ranking official in the United States Fish and Wildlife Service.

15. Defendant Dale Bosworth, being sued in his official capacity, is Chief of the United States Forest Service. The United States Forest Service is an agency of the United States Department of Agriculture. The Forest Service has been granted jurisdiction by Congress over the National Forest System. The Chief is the top ranking official in the Forest Service, and, thus, has responsibility to conserve endangered species on national forests. The Chief maintains an office at 14th and Independence, SW, Washington, D.C. 20090-6090.

16. Defendant U.S. Forest Service is an agency of the U.S. government executive branch. The U.S. Forest Service is an agency of the U.S. Department of Agriculture. The U.S. Forest Service has been granted jurisdiction by Congress over the U.S. National Forest System. The Chief is the top ranking official in the Forest Service, and thus, has responsibility to conserve endangered species on national forests. The agency maintains its headquarter's office at 14th and Independence, SW, Washington, D.C. 20090-6090.

Background

17. The Indiana bat, *myotis sodalis*, is a small brown bat species that is endangered throughout its range, (52 FR 7426, March 11, 1967). The Indiana bat is a medium-sized *myotis*, or "mouse-eared" bat, the largest and most widely distributed genus of bats in the United States. The Indiana bat closely resembles the little brown bat (*Myotis lucifugus*) but differing in coloration. Its fur is a dull grayish chestnut rather than bronze, with the basal portion of the hairs of the back dull lead colored. The Indiana bat's underparts are pinkish to cinnamon, and its hind feet smaller and more delicate than in the little brown bat. The calcar (heel of the foot) is strongly keeled.

18. On October 14, 1983, the Recovery Team for the Indiana Bat, in conjunction with the U.S. Fish and Wildlife Service, approved and issued a final Recovery Plan for the Indiana bat. The Endangered Species Act, Section 4(f) requires such plans, and the Recovery Team and the

U.S. Fish and Wildlife Service approved the Indiana bat Recovery Plan with the objective of removing the Indiana bat from Endangered status.

19. This Recovery Plan purportedly used the best available science in 1983 and has not been challenged. However, the Recovery Plan was issued before most of the current scientific information about the summer habitat requirements of the species was developed. In addition, detailed information about the hibernacula requirements of the species has been developed since 1983. Also, the population figures in the 1983 plan are not up to date and do not reflect the continued population declines since that time.

20. In 1993 the U.S. Fish and Wildlife Service wrote to the Indiana Bat Recovery Team, informing them about the discrepancies between the 1983 Recovery plan and their current knowledge of the species' summer habitat requirements. The U.S. Fish and Wildlife Service requested that the Indiana bat Recovery Team meet to consider this information and update management guidelines.

21. The Recovery Team did not meet for several years. An official draft of the Indiana bat Revised Recovery Plan was not released for the required public comment until March 1999.

22. This draft of the Indiana Bat Revised Recovery Plan was so thoroughly rejected by the public, including the scientific community, that it was withdrawn as an official proposal and no further official efforts have been undertaken by the Defendants to revise the outdated Indiana Bat Recovery Plan.

23. From the estimates provided by the Fish and Wildlife Service, the current population for the Indiana Bat is less than half of the species' population in 1960.

24. From the estimates provided by the Fish and Wildlife Service, the population for the species has declined approximately forty percent since 1980. In spite of this troubling trend, the Defendants have not revised the 1983 Indiana bat Recovery Plan.

25. Indiana bats hibernate in caves, or, occasionally, abandoned mines or other structures that mimic the environmental conditions of caves during the winter. Indiana bats require cool, humid caves with stable temperatures for hibernation. There are very few caves within the range of the species that have conditions suitable for hibernation. Hibernation is an adaptation for survival

during the cold winter months when there are no insects available for bats to eat. Bats must store energy, in the form of fat, prior to hibernation. The stored fat is the only source of energy available during the six months of hibernation. Disturbance by humans or increased cave temperatures increase the energy needed for hibernation and may result in starvation of hibernating bats. In past decades, cave vandals destroyed many hundreds of thousands of Indiana bats. Consequently, early conservation efforts focused on protecting cave habitat. However, in spite of the fact that most of the important caves have been protected, the species' population continues to decrease.

26. In the weeks before hibernation, Indiana bats swarm together in the forest surrounding the cave or old mine. In those weeks, they both mate and slowly auto-regulate the temperature of their bodies to prepare for hibernation. During warm autumn days and nights, bats roost in the trees around the cave and feed in the forest to gain weight for hibernation.

27. After hibernation, Indiana bats migrate to their traditional summer habitats where they usually roost under loose tree bark on dead, dying, and live trees. During summer, males roost alone or in small groups, while females roost in larger maternity colonies of up to 100 bats or more. Maternity colony territories consist of a number of different roost trees scattered across a thousand or more acres. Large dead or dying trees within the forest and with exfoliating bark (peeling or hanging off) and proper solar exposures are the preferred "primary roost trees."

28. An Indiana bat colony may have one or more such primary roost trees. However, depending on differing weather conditions throughout the season, individuals from colonies leave the primary roosts and move to alternate roost trees - often live hickory, white oak, sugar maple, or some other variety of the three with suitable exfoliating bark. These alternate roosts provide critical shelter from storms, heat, and cold. Maternity colonies loyally return to these territories year after year. In these maternity colonies, each female has one pup, nurses it, and teaches it to fly. An Indiana bat maternity colony territory must have sufficient numbers of a variety of aged trees, including large dead and live trees, and younger trees, so that the colony can have a continuous supply available, as primary roost trees are ephemeral by nature.

29. Indiana bats eat a variety of primarily terrestrial (and some aquatic) flying insects as they forage primarily over forests, both along rivers or lakes and in upland areas. Insect types

include primarily, but are not limited to, *Lepidoptera*, *Diptera*, *Coleoptera*, *Plecoptera*, and *Homoptera*. Indiana bats, like all insect-eating bats, benefit people by consuming insects that are considered pests or are otherwise harmful to humans. Their role in insect control is not insignificant; Indiana bats eat up to half their body weight in insects each night. Almost of all of the foraging flights of Indiana bats take place in, around and above forested habitat, although they also forage over ponds and lakes, and on occasion over open areas or forest edge.

30. Indiana bats are known to occur in the states of Alabama, Arkansas, Georgia, Iowa, Illinois, Indiana, Kentucky, Kansas, Maryland, Missouri, Michigan, Mississippi, North Carolina, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, Vermont, West Virginia, and New Hampshire.

31. Eighty-five percent of the total population hibernates in nine caves, which have been designated as “critical habitat” for the species, and those caves are thus protected under the ESA. These caves’ populations are counted every two years in a systematic manner by a consistent team of scientists. Other, less-populated hibernacula that also occur across the species’ range contain the rest of the population and are monitored by state agencies and universities in a less systematic manner.

32. Although there is written scientific documentation that the entire, rangewide population of the species was over 800,000 in the 1960s, there are no good historical records prior to that of the entire, rangewide species population. However, there is anecdotal evidence that the entire, rangewide population of the species once numbered over one million across its range.

33. At the time of the 1983 Recovery Plan, the entire, rangewide population was documented at 550,000. Today, the entire, rangewide population of Indiana bats is approximately 325,000.

34. There has been a precipitous – greater than fifty percent drop – in the entire, rangewide population of Indiana bats since the 1970s, and every population count of the entire, rangewide population since the Recovery Plan has documented a continuing decline of the entire, rangewide population of the species.

Claim 1:

**NONCOMPLIANT PROCEDURES IN DESIGNATING
INDIANA BAT CRITICAL HABITAT**

35. Plaintiffs reassert, reallege, and incorporate by reference all information contained in paragraphs 1 - 34 above.

36. The Administrative Procedure Act (APA) authorizes this Court to review final agency action and mandates that this Court hold unlawful and set aside such action, findings, and conclusions when they are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 702(2)(A). An arbitrary and capricious decision is one in which there is an absence of a rational connection between the facts found and the choice made.

37. Critical habitat designations (or the failure to do so in response to a legal petition) issued pursuant to Section 7 of the Endangered Species Act (ESA) by the Secretary of Interior through the U.S. Fish and Wildlife Service are final agency actions and are reviewed under provisions of the Administrative Procedures Act.

38. “Critical habitat” for a threatened or endangered species refers to the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection.

39. Only major hibernaculum have been designated as “critical habitat” for Indiana bats. No habitat which is used by the species during non-hibernation times is designated as “critical habitat.”

40. 16 U.S.C. 1533 §(b)(3)(D)(i) states: “To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.”

41. 16 U.S.C. §1533(b)(3)(D)(ii) states: “Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision

may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.”

42. On December 11, 1989, the Field Supervisor for United States Fish and Wildlife Service’s Cookeville, Tennessee office wrote to the Forest Supervisor of the Shawnee National Forest in Illinois indicating concern about the loss of summer habitat, that Indiana bat populations were declining 10-15 ten to fifteen percent every two years, and that “some action must be taken to protect maternity colonies and habitat, and prevent declines in population numbers.”

43. On April 9, 1993, the Field Supervisor for the Columbia, Missouri United States Fish and Wildlife Service office wrote to Indiana Bat Recovery Team Leader Clawson, asking for input on designating critical habitat for summer maternity sites.

44. On October 18, 2002, the United Fish and Wildlife Service received a Petition to revise critical habitat for the Indiana Bat from several of the Plaintiffs in this action (“Petitioners”). The petition asked the United States Fish and Wildlife Service to add critical habitat for summer roosting, foraging and maternity sites, as well as the areas surrounding hibernacula used for swarming and foraging.

45. On December 2, 2002, the United States Fish and Wildlife Service sent a letter to Petitioners indicating that it had no intention of taking any action on the October 18, 2002 Petition.

46. On January 16, 2003, Petitioners sent a letter to the United States Fish and Wildlife Service objecting to the lack of a 90-Day finding as required by 16 U.S.C. § 1533(b)(3)(D)(i).

47. On July 8, 2003, Ron Refsnider, a United Fish and Wildlife Service biologist, stated in an email to Shawn Finley, also of United States Fish and Wildlife Service, “At this time we have no plans to take any action on their petition in FY 03.”

48. On October 1, 2003, Petitioners sent a 60-Day Notice of Intent to Sue United States Fish and Wildlife Service for failure to address their petition as required by 16 U.S.C. §1533(b)(3)(D).

49. Despite their stated intent to ignore the Petition, on November 4, 2003, United States Fish and Wildlife Service personnel held a Conference Call regarding the Petition to Revise Critical Habitat for the Indiana Bat.

50. On March 15, 2004, Plaintiffs filed an additional 60-Day Notice of Intent to Sue United States Fish and Wildlife Service for (1) Failure to adequately consult with the U.S. Forest Service in order to prevent Jeopardy to the Indiana bat (2) Failure to consider the Petition to Revise Critical Habitat for the Indiana Bat (3) Failure to revise the Recovery Plan for the Indiana Bat. The Notice is also addressed to the U.S. Forest Service for failure to adequately consult with United States Fish and Wildlife Service and for approving actions which are jeopardizing the Indiana Bat.

51. At the time this Complaint was filed, United States Fish and Wildlife Service has not taken any official action on the Petition to Revise Critical Habitat for the Indiana Bat. Failure to take the required actions to respond to Plaintiff's petition and to designate warm weather Indiana bat critical habitat is arbitrary and capricious, contrary to law, and an abuse of discretion.

Claim 2:

“NO-JEOPARDY” OPINION ARBITRARY AND CAPRICIOUS

52. Plaintiffs reassert, reallege, and incorporate by reference all information contained in paragraphs 1 - 52 of this complaint.

53. The Administrative Procedure Act (APA) authorizes this Court to review final agency action and mandates that this Court hold unlawful and set aside such action, findings, and conclusions when they are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 702(2)(A). An arbitrary and capricious decision is one in which there is an absence of a rational connection between the facts found and the choice made.

54. Biological opinions issued pursuant to Section 7 of the Endangered Species Act (ESA), and the findings arising from those opinions, are final agency actions and are reviewed under this provision of the APA.

55. Section 7 of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species: “Each Federal agency shall, in consultation with and with the assistance of the Secretary [of FWS], insure that any [agency] action . . . is not likely to jeopardize the continued existence of any endangered species.” 16 U.S.C. § 1536(a)(2). By definition, to “jeopardize” is to reduce appreciably the likelihood of both the survival and recovery of a listed

species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. 402.2. This is the definition of “jeopardy” that is being applied in this case. The ESA provides exemptions from the prohibition that an action must not jeopardize the continued existence of a species, 16 U.S.C. § 1536(h), but no such exemption is at issue in this case.

56. Section 7 of the ESA also establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. Under this process, a federal agency (here, the U.S. Forest Service) proposing an action that “may affect” a listed species (here, Forest Plans and other site specific actions that may affect the Indiana bat) must prepare and provide to the appropriate expert agency (here, United States Fish and Wildlife Service) a “biological assessment” of the effects of the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

57. For those actions that may adversely affect a species, the United States Fish and Wildlife Service must review all information provided by the action agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3). This determination is set forth in a biological opinion (BO) from the United States Fish and Wildlife Service. *Id.*; 16 U.S.C. § 1536(b)(3)(A), which sets forth the agency’s opinion as to whether or not an agency action will jeopardize the continued existence of a listed species based on the impacts of the action on both the survival and recovery of the species.

58. In formulating its biological opinion, The United States Fish and Wildlife Service must evaluate the “effects of the action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4). This multi-step analysis requires The United States Fish and Wildlife Service to consider:

- a. the direct, indirect, interrelated and interdependent effects of the proposed action;
- b. the “environmental baseline,” to which the proposed action will be added. This baseline includes “all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7

consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress;” and

c. any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02.

59. “Action area” is defined as: “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

60. If, based upon an analysis of the effects of the action and the cumulative effects, the United States Fish and Wildlife Service concludes that the proposed action is likely to jeopardize a listed species, the United States Fish and Wildlife Service must identify and describe any reasonable and prudent alternative (RPA) to the proposed action that it believes would avoid jeopardy. 16 U.S.C. § 1536(b)(3)(B). If the United States Fish and Wildlife Service believes that there is no RPA to the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

61. Section 9 of the ESA prohibits “take” of listed species by anyone, include federal agencies. 16 U.S.C. § 1538. “Take” is broadly defined to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or [] attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Harm and harassment in turn include significant disruptions to behavioral patterns such as breeding. 50 C.F.R. § 17.3.

62. “Take” by a federal agency is permitted only if the agency receives an Incidental Take Statement (ITS) pursuant to Section 7(b)(4), upon completion of formal consultation. 16 U.S.C. § 1536(b)(4):

If after consultation, the Secretary concludes that –

(A) the agency action will not violate [the no jeopardy] subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; [and]

(B) the taking of an endangered species . . . incidental to the agency action will not violate such subsection . . . the Secretary shall provide the Federal agency . . . with a written

statement that –

- (i) specifies the impact of such incidental taking on the species,
- (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,
... and
- (iv) sets forth the terms and conditions . . . that must be complied with by the Federal agency . . . to implement the measures specified. 16 U.S.C. § 1536(b)(4).

63. If the action agency exceeds the amount or extent of taking specified in the ITS, it is required to reinitiate formal consultation with the United States Fish and Wildlife Service. 50 C.F.R. § 402.14(i)(4); 402.16.

64. There have been numerous such consultations between the U.S. Forest Service and the U.S. Fish and Wildlife Service pursuant to Section 7 of the ESA regarding actions that adversely affect the Indiana Bat. There also have been consultations with the U.S. Fish and Wildlife Service and other U.S. agencies regarding actions that adversely affect the Indiana bat. All of those actions that resulted in significant destruction or alteration of forest habitat were granted incidental take statements pursuant to Section 10 of the ESA, although none of the projects destroyed or degraded any designated “critical habitat” because there is no non-hibernaculum “critical habitat” designated. Some of these incidental take statements measured the take in acres of habitat, and some in numbers of individuals. The Forest Service actions in which there were formal consultations and incidental take statements authorizing take of Indiana bats include, but is not limited to, the following: (1) September 20, 2001, Biological Opinion on the Land and Resource Management Plan of the Wayne National Forest, Ohio (WNF BO) ; (2) June 12, 2003 biological opinion (BO) on the Programmatic Biological Assessment of the Huron-Manistee National Forests Land and Resource Management Plan. (HMNF BO); (3) 2002 biological opinion on the Forest Plan for the Monongahela National Forest in West Virginia; (4) July 31, 2001, biological opinion on the Land and Resource Management Plan of the Hoosier National Forest, Indiana (HNF BO); (5) March 9, 2001 Biological Opinion for the Mark Twain National Forest in Missouri; (6) the January 23, 2001 amendment to the Biological Opinion for the National Forests in Alabama; (7)

June 28, 2000 Biological Opinion for Removal/Salvage of Storm Damaged Trees on the Daniel Boone National Forest in Kentucky; (8) May 25, 2000 Biological Opinion for the Revision of the Daniel Boone National Forest Management Plan with Special Amendment; (9) April 7, 2000 Biological Opinion for the Pisgah National Forest Management Plan in North Carolina; (10) February 24, 2000 Biological Opinion for the White Mountain National Forest Management Plan in New Hampshire; (11) February 16, 2000 Biological Opinion for the Green Mountain National Forest in Vermont; (12) June 1, 1999 Biological Opinion for the Allegheny National Forest in Pennsylvania; (13) April 26, 1999 Biological Opinion for the Ouachita National Forest in Arkansas, (14) June 25, 1998 Biological Opinion for the Ozark-St. Francis National Forests in Arkansas; (15) June 2, 1992 Biological Opinion for the Shawnee National Forest in Illinois; (16) January 13, 2004 Biological Opinion for the Jefferson National Forest Plan revision; (17) September 16, 1997 Biological Opinion for the George Washington and Jefferson National Forests; (18) March 20, 2004 Biological Opinion for the Daniel Boone National Forest; and (19) March 8, 2004 Approval for additional take exceeding that authorized under the September 20, 2001 Wayne National Forest Biological Opinion.

65. There have also been some consultations in which the United States Fish and Wildlife Service purports to have prepared biological opinions recently for site specific projects, although those figures for take should have been accounted for in the programmatic take statements. At least one national forest, the Wayne, has requested to exceed their take permit. There also have been numerous informal consultations regarding the impact of specific projects on Indiana bats on the national forests listed above.

66. Other actions resulting in the authorization of incidental take statements for Indiana bats in biological opinions by the U.S. Fish and Wildlife Service for agencies other than the U.S. Forest Service (there could others Plaintiffs are not aware) include biological opinions for the National Park Service, the U.S. Corps of Engineers, The U.S. Office of Surface Mining, the Federal Highway Administration, the Tennessee Valley Authority, the Indiana National Guard, the U.S. Army, the Chicago Airport District, and others.

67. These Biological Opinions, all issued by the U.S. Fish and Wildlife Service, are not

consistent in how they measure the take authorized in the incidental take statements. In some statements they authorize the take by harming the bat through allowing the significant alteration of thousands of acres of habitat. In other statements, they authorize the take by the number of individuals permitted for taking. In addition, there are additional takes allowed for scientific research. The combined impacts of this taking is that thousands of acres of habitat are being significantly degraded and many dozens of individuals are being allowed to be taken by federal agencies. However, because of the inconsistency of the measurement of take, it is impossible to determine the exact impact on the species overall.

68. Nonetheless, the overall population of the species continues to decline even though the major hibernacula is protected. No non-hibernacula critical habitat has been designated. The current official “Recovery Plan” is out-of-date and in urgent need of revising. Yet, the Fish and Wildlife Service has, on every occasion that a federal agency has requested consultation on a project that may affect Indiana bats, determined that the action, in disregard of the taking of additional bats or habitat, is not likely to jeopardize the continued existence of Indiana bats. Yet all of these consultations have only considered the action area to be the area of direct impacts and have not considered the indirect impacts on the species as a whole outside the area of direct effects. In addition, none of the above mentioned Biological Opinions consider the cumulative impact of all of the previously granted incidental take statements to the Defendant Forest Service and other agencies. Such information is required to be considered during preparation of a Biological Opinion and when granting an incidental take statement to another federal agency. Neither does it consider the many thousands of acres of logging on state and private land that are not permitted and do not contain the same requirements as on federal lands with incidental take statements. This information is relevant to the cumulative impacts of any action within bat habitat and is relevant to the impact of each individual incidental take statement as it affects the overall population of the bat.

69. The ESA consultation regulations as quoted above require that any biological opinions consider certain factors in making the “jeopardy” or “no jeopardy” and incidental take determinations. Those include (1) the direct, indirect, interrelated and interdependent effects of

the proposed action; (2) the “environmental baseline,” to which the proposed action will be added. This baseline includes “all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress;” (3) any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02; and, (4) the impact of such incidental taking on the species. 16 U.S.C. § 1536(b)(4).

70. None of the biological opinions above discuss in any relevant detail the impact of all of this take together on the overall population of the species. Nowhere in the Defendants’ planning record can they point to any determination of how low the population can go before the species becomes jeopardized, of how the combined effect of all the authorized taking is affecting the population of the species as a whole, and as to how the continued and significant alteration, destruction, and degradation of habitat on state and private land is contributing to the sustained and serious population decline. There also is no meaningful or relevant discussion in any of the Biological Opinions about the ongoing and sustained population crash which is taking this species toward extinction. In addition, each individual Biological Opinion has only considered the area to be directly impacted, and not that area which might be indirectly impacted, which should include how such take will affect the entire population. A proper and accurate environmental baseline would address such issues. The defendants have failed to properly establish, analyze and consider the “environmental baseline” for the Indiana bat.

71. Issuing “no jeopardy” determinations in a Biological Opinion while not considering the cumulative, combined impact of all of the incidental takes across the range of the entire population, plus the impact of habitat degradation and taking of individuals occurring on state and private lands, plus the takings occurring as a result of scientific research, plus not attempting to establish a level at which Indiana bats would be jeopardized, while continuing to issue rubber stamp, programmatic authorization to take Indiana bats to virtually every agency that asks for it is arbitrary and capricious.

72. The defendants “no jeopardy” determinations in this case illegally ignored the impacts of the approved actions on the “recovery” of the Indiana bat from its “endangered” status. Under the ESA defendants are obligated to protect and insure both the species survival and recovery. Defendants however have defined “jeopardy” in 50 C.F.R. Sec. 502.02 so that a species is in jeopardy only if both its survival and recovery are at risk. Many types of activities, including activities such as those at issue here, while not imminently threatening a species “survival”, would nevertheless directly threaten a species ability to recover. Requiring that activities threaten both a species survival and recovery in order create “jeopardy” for a species, allows the defendants to ignore and thus authorize activities that in fact likely jeopardize a species, as that term should be applied under the ESA, by threatening its recovery. Applying the defendants’ unduly narrow definition to the Biological Opinions subject to challenge in this case where no non-hibernation critical habitat exists has resulted in the Defendants not adequately considering the impact of these projects on just the recovery of the species. The Endangered Species Act contains a duty for each federal agency to conserve species, which, by definition, includes the duty to insure the species recovery so that they no longer need the protection of the act. By applying a definition of “jeopardy” that does not provide for the consideration of the effects of the action on the recovery of the species, but only, in effect, considers the impacts on the survival of the species, the Defendant Fish and Wildlife Service is acting in a manner that is inconsistent with the express requirements of the Endangered Species Act, and as such, is arbitrary and capricious and contrary to law. Without such consideration, and in light of the fact that the Recovery Plan for the Indiana bat is so far out-of-date, and there is no designated non-hibernacula critical habitat, the Defendants are not properly considering the steps necessary to recover the Indiana bat.

73. Yet, many of the above listed Biological Opinions are currently being implemented or projects are in planning to implement them on the ground. These include the Wayne National Forest Biological Opinion, the Monongahela National Forest Biological Opinion, the Huron Manistee National Forest Biological Opinion, the Shawnee National Forest Biological Opinion, the Jefferson National Forest Biological Opinion, the George Washington National Forest Biological Opinion, the Allegheny National Forest Biological Opinion, the Mark Twain National

Forest Biological Opinion, the Daniel Boone National Forest, the Pisgah and Nantahala National Forests, and others. Plaintiffs and Plaintiff members, and the Indiana bat are being irreparable harmed by these actions which are jeopardizing the continued existence of the Indiana bat.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that this Court:

- A. Declare that the Defendants have violated and continue to violate the Endangered Species Act and the Administrative Procedure Act;
- B. Declare that the United States Fish and Wildlife Service's biological opinions violate the ESA and APA by making no-jeopardy findings without adequately addressing the impacts on the Indiana bat of other Biological Opinions and Incidental Take Statements and by failing to consider the impact of state and private actions in combination with federal actions;
- C. Declare that the Incidental Take Statements issued by the United States Fish and Wildlife Service are invalid because they violate the ESA and APA by jeopardizing the continued existence of the Indiana bat;
- D. Direct the Defendants to comply with Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by requesting formal consultation regarding the total impacts of federal activities on the Indiana bat, together with all other impacts adversely affecting the species;
- E. Direct the United States Fish and Wildlife Service to comply with Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by preparing a biological opinion that considers the total impacts of federal activities on the Indiana bat, together with all other impacts adversely affecting the species;
- F. Declare that the Defendant Fish and Wildlife Service's definition of the term "jeopardize the continued existence of" found at 50 C.F.R. 402.02, as applied to the challenged actions in this case, to be in violation of the Endangered Species Act for inadequately considering the impacts of the actions on the recovery of the species, and thus be arbitrary and capricious and contrary to law;
- G. Order the Defendant the United States Fish and Wildlife Service to respond to Plaintiffs'

petition to designate non-hibernacula habitat as critical;

- H. Enjoin all of the Defendants' activities that will foreclose the formulation or implementation of measures that are necessary either to avoid jeopardizing either the continued existence of the Indiana bat or for the recovery of the species, until they have completed lawful consultation as required by Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2);
- I. Enjoin all of the Defendants' activities that "take" Indiana bats in violation of the ESA until such time as the Defendants properly consider the impact of all authorized taking in combination with other cumulative effects on the total population of the species;
- J. Retain jurisdiction of this matter until the Defendants have fulfilled all of their legal obligations regarding the Indiana bat;
- K. Award the Plaintiffs their costs, attorneys' fees, and other disbursements for this action, including any expert witness fees; and
- L. Grant the Plaintiffs any and all other relief to which this Court believes they may be entitled.

Respectfully submitted this _____ day of April, 2004.

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STATE OF LOUISIANA
PARISH OF LAFAYETTE

VERIFICATION OF COMPLAINT

Personally before the undersigned notary public of said state and county, duly authorized by law to administer oaths therein, appeared Leigh Haynie, who being duly sworn deposes, says and verifies that the facts set forth in the foregoing Complaint are true to the best of her knowledge.

LEIGH HAYNIE,
Attorney for Plaintiffs

Sworn to and subscribed before me this _____ day of April, 2005.

Notary Public