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Those Darn Little Bats: How The Endangered Species Act Halted Timber Salvage Harvests on National Forestland Once Again

*Bensman v. United States Forest Service*¹

by Benjamin A. Joplin

I. INTRODUCTION

Timber salvage harvests are today very controversial subjects. Environmental groups who claim the salvage sales damage national forestland timber stands and wildlife habitats often use provisions within the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) to halt harvests. Timber industry groups contend that the salvage harvests clear the forests of wildfire fuel, and put dead and dying timber to their highest and best use.² In addition, they claim salvage harvests are essential to many rural economies that rely upon

the logging industry as a source of livelihood.³

If left to rot, these dead timber stands may damage, if not destroy, the living habitat critical to many endangered species. Dead and dying timber was partially responsible for the 5.8 million acres burned by wildfires in 1996, the worst fire season since 1957.⁴ Salvage harvesting targets such timber.

II. FACTS AND HOLDING

In March 1997, a windstorm in the Mark Twain National Forest (MTNF)⁵ near Alton, Missouri, damaged nearly 700 acres of tim-

ber.⁶ As a result, after a period of public comment and after consultation with the Fish and Wildlife Service, the National Forest Service sold contracts on approximately 700,000 board/feet of lumber to three family-owned logging companies.⁷ Pursuant to the agreement, the companies planned to harvest trees that were blown down, leaning, or uprooted by the March windstorm.⁸ The salvage operation would affect areas at least two miles from White's Cave, the home of between 20 and 30 Indiana Bats.⁹ Congress first listed Indiana bats on the endangered species list in 1967. Indiana bat populations have declined continually since then, despite numerous efforts at preserving the species.¹⁰

In late September, 1997, three members of the environmental group Heartwood filed a pro se action against the Forest Service and the Fish and Wildlife Service in

¹ 84 F.Supp. 1242 (W.D. Mo. 1997).

² Steven C. Bennet. *At Loggerheads Salvage Cutting Would Improve Health of Forests*, THE ARIZONA REPUBLIC, Oct. 27, 1996, at H1.

³ *Id.*

⁴ *Wildfire Season Worst in 39 Years*, SAN DIEGO UNION TRIBUNE, Sept. 5, 1996, at A4.

⁵ The MTNF is a one and one half million acre national forest occupying central and southern Missouri. It is the only such national forest in Missouri. *Id.* at 1244.

⁶ *Id.* The windstorm affected an area of approximately one mile by twelve miles.

⁷ Telephone Interview with Terry Miller, Forest Service Regional Forester, Doniphan, Missouri (February 10, 1998). The three logging companies were Gray Logging, Thompson Sawmill, and David Watson Sawmill.

⁸ Interview with Terry Miller, *supra*, note 7; *Bensman*, 984 F.Supp. 1242, at 1245. According to the plan, any trees, branches or limbs less than 30 inches in length were to be left on the forest floor. Furthermore, in order to obtain Fish and Wildlife Service endorsement, the logging companies were instructed to leave standing any green tree or sapling, even if only the top of the tree was damaged by the windstorm. Normally, as part of forest stand improvement, any harvester of national forest timber will also remove small, living saplings to improve the forest ecosystem. Too many such trees deplete soil resources and adversely affect larger more developed trees.

⁹ Official counts of the bats range from a high of 39 bats, counted before the March windstorm, to 22 counted the week of February 2, 1998. Indiana bat specialists from the Missouri Department of Conservation and the Forest Service conducted the counts. Interview with Terry Miller, *supra*, note 7.

¹⁰ *Id.* The name Indiana bat is somewhat of a misnomer. Over half the world's population of Indiana bats live in Missouri.

the Federal District Court, Western District of Missouri. It alleged that the two agencies did not follow guidelines set forth within NEPA and the ESA with respect to the three salvage contracts sold after the March windstorm.¹¹ Upon filing, the court issued a temporary restraining order (TRO) to halt the proposed salvaging.¹²

Less than a month later, Judge Russell Clark of the Western District held a hearing on a preliminary injunction.¹³ The court allowed the three logging companies that purchased contracts and two timber industry associations to intervene.¹⁴

Plaintiffs first argued that the

Forest Service violated the ESA by failing to place top priority on the conservation of the Indiana bat.¹⁵ They next argued that the Forest Service failed to consider a previous study discussing the bats and which times of the year harvesting timber would most affect them.¹⁶ They then argued that harvesting the timber would harm or harass the bats.¹⁷ They also argued that the Forest Service did not enter into formal consultation with the Fish and Wildlife Service.¹⁸ Finally, they argued that the Forest Service and the Fish and Wildlife Service failed to fully examine the consequences of the harvest as required by NEPA.¹⁹

Defendants countered that the

court lacked jurisdiction because Heartwood failed to give the statutory 60-day notice.²⁰ They then argued that the court should apply a traditional balancing test, weighing four elements: the threat of irreparable harm to the species, the harm created by granting an injunction, the probability of the movant's success and the public interest.²¹

In granting the preliminary injunction, Judge Clark declared that Heartwood satisfied the 60-day notice requirement by informing the Regional Forester of its intention "to promptly file a lawsuit challenging both decisions" if the project continued.²² Heartwood also informed the Fish and Wildlife Ser-

¹¹ *Bensman*, 984 F.Supp. 1242, at 1244. The complaint also referred to something known as the "Panther Hollow project," although no indication was given as to the nature of the project. The court did not further discuss the project. Presumably it is another salvage project.

¹² *Id.* One of the logging companies had already completed the first day of harvesting when the injunction was issued. Interview with Mark Garnett, Chairman, Mark Twain Timber Purchasers Group (February 10, 1998).

¹³ *Id.*

¹⁴ *Id.* and interview with Mark Garnett, *supra* note 12. The Mark Twain Timber Purchasers Group was one of the two associations that intervened.

¹⁵ *Bensman*, 984 F.Supp. 1242, at 1246. The Indiana bat was the target of another, similar action intended to stop a salvage harvest in Kentucky's Daniel Boone National Forest. The court held that the actions by the Forest Service in letting the contracts were not arbitrary and capricious as was claimed by the plaintiff, *Kentucky Heartwood, Inc. v. United States Forest Service*, 906 F.Supp. 410 (E.D. Ken., 1995).

¹⁶ *Id.*

¹⁷ *Id.* Between 1960 and 1975, the population of Indiana bats decreased 28%. As a result, in 1983, the Fish and Wildlife Service instituted an extensive 20-year recovery plan to prevent further population decline. The plan was unsuccessful, and since its inception the population has declined more than 80%. Efforts at preservation were made first by protecting their hibernation habitat or hibernaculum — caves. Prior to hibernation in October or November, the bats swarm about the entrance to the cave in a mating ritual. They also forage nearby forests and water for insects to increase their hibernation fat stores. Initial preservation efforts centered on preventing human entrance to the caves, but the population still declined. Attention has now shifted to spring and summer behavior in determining preservation strategy. The female bats fly to Northern Missouri and Southern Iowa where they raise their young. The male bats remain near the hibernaculum. It is thought that both male and female bats roost in dead or dying trees during the summer. The females prefer to burrow under the treebark. Additional efforts at preservation now focus on preventing disturbances that occur during the hibernation cycle and might cause the bats to burn precious fat supply. Too many disturbances might force the bats to leave the hibernaculum prematurely causing death. *Id.* at 1245.

¹⁸ *Id.*

¹⁹ *Id.* at 1249. NEPA is found at 42 U.S.C. § 4332 (1995).

²⁰ *Id.* at 1246.

²¹ *Id.* at 1245 (citing *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 190, 113 (8th Cir. 1981)).

vice that it intended to “sue over rubber-stamping the two projects.”²³ The court then decided that, contrary to the Forest Service’s argument for using a balancing test, the proper standard was to determine whether selling the salvage contracts was arbitrary and capricious.

In adopting this standard, the court explained that by enacting the ESA, Congress intended that federal agencies place endangered species “at the top of their priority list, [but] that the actions of the Forest Service indicated [it had done otherwise].”²⁴ Furthermore, the court noted that even if it applied the balancing test as suggested by the Forest Service, the value of protecting the bat outweighed the value of harvesting the timber.²⁵ The court also said that the Forest Service failed to formally consult with the Fish and Wildlife Service.²⁶ Finally, the court decided that there was no “hard look” given to the proposed harvest by the Fish and Wildlife Service as required by

NEPA.²⁷

Ultimately, the court held that Forest Service and the Fish and Wildlife Service’s actions in permitting the timber salvage operations did not meet the requirements of the ESA, and the habitat of the Indiana bat was in jeopardy. Thus, the court determined that contrary to the beliefs of the Forest Service and the Fish and Wildlife Service the habitat of the Indiana bat would be adversely affected by timber salvage operations, and that granting an injunction was appropriate to halt the harvest.

III. Legal Background

A. Precursors to Comprehensive National Environmental Policy

Environmental regulations in the United States have existed since the mid- to late-1800s.²⁸ President Grant established the nation’s first wildlife refuge in 1872.²⁹ That ref-

uge later became Yellowstone Park.³⁰ Four years later, Congress took its first steps toward the formation of a national forest system.³¹ Congress also directed the Secretary of Agriculture to employ staff to help shape federal forest policy.³² The Division of Forestry, later to be known as the Forest Service, grew out of those policy recommendations.³³ In 1885, Congress created the first agency charged with protecting our nation’s wildlife.³⁴ That agency is now the Fish and Wildlife Service.³⁵

The early efforts at forest and wildlife management bore little resemblance to the methods and structure currently in place.³⁶ Prior to World War II, timber needs were fulfilled largely from private land — the Forest Service did little more than protect national forests from fire, infestation and overzealous developers.³⁷ Likewise, in the forests and streams, wildlife was abundant, so there was little need for aggressive wildlife protection.³⁸ Any such wildlife protection was limited both

²² *Bensman*, 984 F.Supp. 1242, at 1246. Heartwood also demanded remand of the “Panther Hollow project,” but the court did not discuss the issue.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1247.

²⁶ *Id.* at 1249.

²⁷ *Id.*

²⁸ Stanley H. Anderson, *The Evolution and Use of the Endangered Species Act*, 32 LAND & WATER L. REV. 487 (1997).

²⁹ *Id.*

³⁰ *Id.*

³¹ CHARLES F. WILKERSON AND H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 15 (1987).

³² *Id.*

³³ *Id.* The Forest Service is now the largest bureau in the Department of Agriculture, administering more than 190 million acres of National Forest.

³⁴ Stanley H. Anderson, *supra* note 28, at 32.

³⁵ *Id.*

³⁶ CHARLES F. WILKERSON AND H. MICHAEL ANDERSON, *supra* note 31, at 3.

in the number of species protected and the type of protection available.³⁹

During the 1960s and 1970s, Congress enacted a variety of statutes that had an impact on the management of national forestland.⁴⁰ Today, all agencies of federal and state government must comply with myriad environmental rules and regulations.⁴¹ Often these rules create overlapping jurisdictions for federal agencies, and a seemingly insurmountable morass of regulations for affected parties, both governmental and non-governmental.⁴²

B. The National Environmental Policy Act

Referred to as the "most sweeping environmental law ever enacted by a United States Con-

gress,"⁴³ NEPA has been hailed by proponents and damned by critics.⁴⁴ NEPA directs the government to account for environmental considerations

in all federal actions that might have an environmental impact.⁴⁵ Its application has forced the expenditure of millions of taxpayer dollars, and lawsuits based on violations of NEPA have halted the progress of many federal actions.⁴⁶ At the same time, it "has done more to protect the environment than all of the previous environmental protection measures combined."⁴⁷

NEPA requires many things of federal agencies.⁴⁸ Most important is the requirement that prior to undertaking any "major" federal action that "significantly affect[s] the quality of the human environ-

ment,"⁴⁹ the involved agencies must prepare an Environmental Impact Statement (EIS).⁵⁰ Agencies may avoid preparation of an EIS if, after preparing an Environmental Assessment (EA),⁵¹ they determine that the proposed action would have no "significant" impact.⁵² The agency must then issue a Finding of No Significant Impact (FONSI).⁵³ Courts have held that unless a "hard look" is taken at the foreseeable environmental consequences, the proposed action may not proceed.⁵⁴

If a FONSI is issued, an aggrieved party may challenge the finding under the Administrative Procedures Act.⁵⁵ The FONSI standard of review is whether the agency acted "arbitrarily and capriciously" in declining to issue an

³⁷ *Id.*

³⁸ *Id.*

³⁹ MICHAEL BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW - REVISED AND EXPANDED 318 (1983).

⁴⁰ CHARLES F. WILKERSON AND H. MICHAEL ANDERSON, *supra* note 31, at 3.

⁴¹ Stanley H. Anderson, *supra* note 28, at 488.

⁴² *Id.*

⁴³ RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT 3 (1976).

⁴⁴ *Id.* at 4.

⁴⁵ FREDERICK R. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT V (1973).

⁴⁶ RICHARD A. LIROFF, *supra* note 43, at 4.

⁴⁷ *Id.*

⁴⁸ MICHAEL BEAN, *supra* note 39, at 196.

⁴⁹ 42 U.S.C. § 4332 (2)(c) (1995).

⁵⁰ WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW (HORNBOOK SERIES) 750 - 76 (1990). One of the major problems associated with the creation of an EIS is what constitutes a major federal action. *Id.* Once it is determined that the proposed action has the potential to be "major," the agency must begin formation of an EIS. *Id.* An EIS must discuss possible adverse effects of the proposed action and potential alternatives with lesser impact. MICHAEL BEAN, *supra* note 39, at 198. *See also*, RODGERS, *supra* note 51, at 725 - 38. Initially, a draft EIS (DEIS) must be constructed "in order to permit agency decision-makers and outside reviewers to give meaningful consideration to the environmental issues involved." 40 CFR § 1500.9(f) (1998).

⁵¹ An EA is "a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement - which is very costly and time consuming to prepare and has been the kiss of death to many a federal project - is necessary." Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990).

⁵² 40 C.F.R. § 1507.3 (b)(2) (1998).

EIS.⁵⁶ Under this highly deferential standard of review, a reviewing court has the “least latitude in finding grounds for reversal.”⁵⁷ The court “may not substitute its judgment for that of the agency.”⁵⁸ It may only “studiously review the record” to ensure that the agency’s judgment was well founded in evidence and that the agency “arrived at a reasonable judgment based on a consideration and application of the relevant standards.”⁵⁹

C. The Endangered Species Act

The concept of protecting wildlife on the brink of extinction traces its roots to the Lacey Act of 1900, which addressed the rapidly decreasing population of the carrier pigeon and many other birds.⁶⁰ However, not until the 1960s did subsequent legislation or target spe-

cific species and limited in terms of the protection provided each species.⁶¹ The first comprehensive federal effort at protecting wildlife came with passage of the Endangered Species Preservation Act of 1966 (the 1966 Act).⁶²

The 1966 Act created a system, under the control of the Secretary of the Interior, to conserve, protect, restore and ensure the continued survival of species of fish and wildlife on the brink of extinction.⁶³ The Act directed the Secretary to protect the habitat of endangered species by acquiring such habitat and preventing its destruction.⁶⁴ Three years later, Congress expanded the 1966 Act to clarify specifics and overcome omissions. Most notably, the Endangered Species Conservation Act of 1969 authorized the Secretary to create a list of wildlife threatened with worldwide extinction and to imple-

ment rules preventing importation of the species into the United States.⁶⁵ The 1969 Act also prohibited interstate commerce in unlawfully taken animals.⁶⁶

The most comprehensive effort at protecting wildlife came with passage of the Endangered Species Act of 1973 (ESA).⁶⁷ Congress passed the ESA to address the shortcomings of the two previous Acts,⁶⁸ to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,”⁶⁹ and to establish methods through which those species would be protected.⁷⁰ If the Secretary lists a species, it is automatically afforded stringent protection such that no person subject to the jurisdiction of the United States may “take” the species.⁷¹ Taking need not be an intentional act.⁷²

⁵³ 40 C.F.R. § 1508.13 (1998).

⁵⁴ See, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669 (5th Cir. 1992).

⁵⁵ *Sabine River Authority*, 951 F.2d at 677; 5 U.S.C. § 706 (2)(a) (1998).

⁵⁶ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Sabine River Authority*, 951 F.2d at 677 - 78.

⁵⁷ *Sabine River Authority*, 951 F.2d at 678 (quoting *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, at 1538 (11th Cir. 1990)).

⁵⁸ *Sabine River Authority*, 951 F.2d at 678. See also, *Marsh*, 490 U.S. 360; *North Buckhead Civic Ass’n*, 903 F.2d 1538.

⁵⁹ *Id.* The court must defer to the agencies expertise in assessing the evidence and making a judgment. *Id.*

⁶⁰ MICHAEL BEAN, *supra* note 39, at 318.

⁶¹ *Id.*

⁶² *Id.*, (citing Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (repealed 1973)).

⁶³ MICHAEL BEAN, *supra* note 39, at 319.

⁶⁴ *Id.*

⁶⁵ *Id.* Importation was allowed for certain purposes, most ostensibly research and for presentation at zoos.

⁶⁶ *Id.*

⁶⁷ 16 U.S.C. §§ 1531 - 1543 (1995) and MICHAEL BEAN, *supra* note 39, at 330.

⁶⁸ MICHAEL BEAN, *supra* note 39, at 330.

Unintentional harassment is within the definition of a taking.⁷³

In order to ensure that no taking occurs, every Federal agency must consult with the Department of the Interior to determine whether any action carried out by the agency is "likely to jeopardize the continued existence" of any endangered or threatened species.⁷⁴ Agencies must follow rigorous guidelines that adequate consultation take place in a timely manner.⁷⁵ Should the agencies not meet these guidelines, or if the Secretary determines that a taking will result from the proposed federal action, the responsible agency must halt or modify the action.⁷⁶

D. National Forest Manage-

ment Act

The National Forest Management Act (NMFA) was enacted in 1976.⁷⁷ The most important provision of the NMFA is the mandate that each National Forest Division prepare a comprehensive plan for management of each national forest.⁷⁸ These Land and Resource Manuals are intended to guide all resource activities on individual forests.⁷⁹

In the manuals, Forest Service officials must identify critical habitat for endangered species and plan for the protection of those species by preventing the modification or destruction of their habitat throughout the respective forests.⁸⁰ The Forest Service follows the manuals' guidelines by controlling the

various permits, contracts and other activities allowed on national forestland.⁸¹ For example, timber contracts on national forest timber must comply with the policies outlined in the manual.⁸²

IV. Instant Decision

In the instant decision, the court first addressed the Forest Service's argument that Heartwood failed to give adequate notice to the action.⁸³ Under the ESA, potential plaintiffs must give the offending agency 60 days' written notice of their intention to file suit.⁸⁴ Without such notice the District Court has no jurisdiction, and no injunction may issue.

The court determined that Heartwood met the 60-day notice

⁶⁹ 16 U.S.C. § 1531(b) (1995). The ESA creates three fundamental classifications: endangered species, threatened species, and critical habitat. Endangered denotes species in danger of extinction throughout part or all of the species' habitat. Threatened includes those species that are on the brink of endangered, and also those endangered species whose recovery is progressing. Critical habitat was not defined in the 1973 Act, but is generally assumed to constitute the area of inhabitation essential to the conservation of the species." BEAN, *supra* note 40, at 331-341 (quoting 16 U.S.C. § 1532 (6) (Supp. V 1981); 16 U.S.C. § 1532 (20) (Supp. V 1981); 16 U.S.C. § 1533 (d) (1976))

⁷⁰ *Id.*

⁷¹ MICHAEL BEAN, *supra* note 39, at 342. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532 (1995).

⁷² MICHAEL BEAN, *supra* note 39, at 342.

⁷³ *Id.*

⁷⁴ 16 U.S.C. § 1532(3) (1998); *see also*, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976). "Jeopardize" is considered to include the destruction or adverse modification of the species' habitat. *Id.*

⁷⁵ 16 U.S.C. § 1532(3) (1998).

⁷⁶ WILLIAM H. RODGERS, JR., *supra* note 50, at 830.

⁷⁷ CHARLES F. WILKERSON AND H. MICHAEL ANDERSON, *supra* note 31, at 7.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.*

⁸⁰ *Id.* at 9; Murry D. Feldman, *National Forest Management Under the Endangered Species Act*, 9 Nat. Resources & Env't 32, 32 (Winter 1995).

⁸¹ *Id.*

⁸² *Id.* at 12.

requirement.⁸⁵ The group stated in two separate appeals to the Regional Forester regarding the March windstorm sale first that it “plan[ned] to promptly file a lawsuit challenging” decision and second that it had “informed the USFWS that they will be sued over rubber-stamping the BEs [Biological Evaluations] for the . . . sale.”⁸⁶

The court then turned to analysis of the Endangered Species Act.⁸⁷ The court first discussed the Eighth Circuit’s four-part balancing test for preliminary injunctions, the *Dataphase* test.⁸⁸ Defendants maintained that the court should have used the *Dataphase* balanc-

ing test in determining that the project would not harm the bat.⁸⁹ The court noted, however, that the *Dataphase* test is inapplicable when evaluating injunctions directed at the protection of endangered species, and instead the court applied the arbitrary and capricious test.⁹⁰

The court looked to the United States Supreme Court for the proper test. The Supreme Court has held that because Congress intended to “halt and reverse the trend toward species extinction, whatever the cost,” agencies must “afford first priority to the declared national policy of saving endangered

species.”⁹¹ The instant court then noted that the Mark Twain National Forest Land and Resource Manual echoed the Supreme Court’s holding in *Tennessee Valley Authority*.⁹² The manual mandates that protection of endangered species takes priority over any competing project.⁹³

The court next analyzed the Forest Service’s actions with respect to the Indiana bat.⁹⁴ The Forest Service listed four factors “significant in their decision to allow the sale[s]: (1) to reduce fuel accumulation; (2) to facilitate new tree growth; (3) to remove the hazards to the safety of the public; and

⁸³ *Id.* at 1246.

⁸⁴ 16 U.S.C. § 1540(g) (1998). The court does not discuss whether Heartwood gave adequate notice to the Secretary of the Interior as required by the statute.

⁸⁵ *Bensman*, 984 F.Supp. 1242, at 1247.

⁸⁶ *Bensman*, 984 F.Supp. 1242, at 1247. A Biological Evaluation is a study performed by the agency in question to determine whether endangered species will be harmed by the proposed action. *Bean*, *supra* note 40, at 366.

⁸⁷ *Id.* The court actually had a cursory discussion of the standard of review before it addressed the ESA, but for purposes of this Note, that discussion will be combined with analysis of the ESA standard of review.

⁸⁸ “Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

⁸⁹ The statute states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (b) contrary to constitutional right, power, privilege, or immunity;
 - (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (d) without observance of procedure required by law;
 - (e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. 5 U.S.C. § 706 (1997).

⁹⁰ *Bensman*, 984 F.Supp. 1242, at 1245-46.

⁹¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978).

⁹² *Bensman*, 984 F.Supp. 1242, at 1247.

(4) to utilize the “naturally harvested” trees to meet the public demand for wood products.”⁹⁵ Upon examining the factors, the court noted that it could “imagine no better fire source than dead tree limbs stacked 30 inches tall on the forest floor.”⁹⁶ The court further noted that the likelihood of a windstorm-damaged tree falling on a hiker was remote.⁹⁷ In essence, the court discounted the Forest Service’s reasoning behind permitting the sale of timber salvage contracts.

The court then discussed the impact the salvage operations could have on the Indiana bat. The ESA prohibits the taking of any endangered species.⁹⁸ Courts have construed “taking” broadly to include “nearly any activity which might adversely affect protected species.”⁹⁹ Thus, any activity that harms or harasses the endangered species may constitute a taking.¹⁰⁰

The court concluded that the salvage could harm or harass the bats in several ways.¹⁰¹ First, it decided that the removal of dead or dying trees could destroy roosting habitat for male bats.¹⁰² Second it concluded that the salvage operation would take place near the hibernaculum during the fall, the season in which much of the mating occurs.¹⁰³ Third, the court concluded that the bats would suffer fat reserve depletion from the disturbances caused by conducting the salvage operation near the hibernaculum.¹⁰⁴

The court then disputed the Forest Service’s claim that no known Indiana bat habitat would be affected by the sale.¹⁰⁵ The court relied upon the Fish and Wildlife Service’s Recover Plan, written in 1983.¹⁰⁶ The plan noted that the Forest Service knew little about the summer habitat of the Indiana bat in 1983, but that “the destruction of forest habitat could have a seri-

ous impact” on bat populations.¹⁰⁷ A recent study, which the court relied on, stated that the male bats often roost within ten miles of the hibernaculum.¹⁰⁸

The court found that although the Forest Service knew of no bat population in the harvest area, the Forest Service still had an “affirmative duty to identify the habitat of the Indiana bat and conduct further research if necessary.”¹⁰⁹ The court noted that the salvage area was within two to four miles of the hibernaculum so the summer roosting area of the bats located in White’s Cave could be affected.¹¹⁰ The court also criticized the description of the trees to be harvested, concluding that the very type of tree to be removed might be the type of tree where the male bats would roost.

The court then discussed the potential for direct harm that timber harvesting near White’s Cave

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 16 U.S.C. § 1538 (a)(1)(B) (1998).

⁹⁹ *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989).

¹⁰⁰ 16 U.S.C. § 1532 (1998).

¹⁰¹ *Bensman*, 984 F.Supp. 1242, at 1248.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1248.

¹⁰⁷ *Id.* The court notes that only a few subsequent studies have been published regarding the summer habitat of the male Indiana bat.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

could cause the bats.¹¹¹ The court concluded that the harvest would occur at the worst possible time for fat depletion, just before and during hibernation.¹¹² The court noted that timber harvesting requires the use of heavy machinery, trucks and chain saws to cut and move the logs, all of which “generate a significant amount of noise.”¹¹³ That noise, concluded the court, could cause disturbances sufficient to deplete the bats’ precious fat reserves.¹¹⁴ The court found that although one of the harvest sites was four miles from the hibernaculum and thus unlikely to disturb the hibernation of the bats, the other site was just two miles away where disturbance was more likely.¹¹⁵

The court next addressed Heartwood’s contention that the Forest Service failed to enter into the appropriate level of consultation with the Fish and Wildlife Service as required by the ESA.¹¹⁶ The court decided that the agencies in-

correctly determined that the salvage sales were unlikely to adversely affect the species.¹¹⁷ Because the court felt the determination was incorrect, it concluded that the Forest Service and the Fish and Wildlife Service did not properly consult with each other. As a result, the court concluded the agency decisions were arbitrary and capricious.¹¹⁸

After balancing the benefits derived from harvesting the timber against the potential damage to the bats and assessing the degree of consultation between the Forest Service and the Fish and Wildlife Service, the court concluded that the Forest Service “gave only a cursory nod to the existence of the Indiana bat within the proposed sale area.”¹¹⁹ Furthermore, concluded the court, the agencies acted arbitrarily and capriciously in choosing to continue with the sale despite the potential for harm to the bat or its habitat.¹²⁰ Therefore, the

court found that the Forest Service and the Fish and Wildlife Services violated the ESA.

The court then analyzed the Forest Service’s and the Fish and Wildlife Service’s compliance with the NEPA.¹²¹ The court limited its review to whether the agency took a hard look at the environmental issues associated with the sale.¹²² The court concluded that the Forest Service failed to “gather research on the presence of the Indiana bat in the salvage area and ignor[ed] the possible adverse effects on the bat demonstrated in the administrative record.”¹²³ Relying upon that conclusion, the court decided that the Forest Service’s consultation with the Fish and Wildlife Service did not constitute a hard look.¹²⁴

Ultimately, the court held that in light of Congress’ intent to protect endangered species, the public interest was best served by granting the preliminary injunction—preventing the salvage op-

¹¹⁰ *Id.* at 1248.

¹¹¹ *Id.* at 1249.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* The court stated that there is no judicial power to alter the conditions of the salvage harvest, and thus it could not restrict the salvage operation to the area farther away from the cave. *Id.*

¹¹⁶ *Id.* When agency actions may affect an endangered or threatened species, that agency must consult with the Fish and Wildlife Service to ensure the species in question is not endangered. The level of consultation depends upon the severity of the potential impact upon the species. If after informal consultation, the two agencies conclude that the action is “not likely to adversely affect” the species, the consultation process is complete. If it is determined that there are adverse effects, a formal consultation must be entered into. 50 C.F.R. §§ 402.13, 402.14 (a)-(b) (1998).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1247.

¹²⁰ *Id.*

¹²¹ *Id.* at 1249.

¹²² *Id.*

eration.¹²⁵

V. COMMENT

The defendants in the instant case chose not to appeal the Western District's order only because by the time the order was entered, the salvage timber had deteriorated to an unmarketable state. For all practical purposes, the controversy was therefore moot. However, this case might have presented an opportunity for the Eighth Circuit and perhaps the Supreme Court to further clarify the standard by which such salvage sales are allowed to proceed, or potentially strengthen the requirements for opposing a sale. Unfortunately, this order does little service to either interest.

The Western District criticized the Forest Service's decision to leave limbs and cuttings less than 30 inches tall on the forest floor.¹²⁶ The court clearly misunderstood the import of that decision by the Forest Service. The court assumed that limbs were stacked 30 inches high on the forest floor. The limbs are not stacked 30 inches tall as the court assumed, but rather any limb less than 30 inches in length is left

on the floor to serve as habitat for wildlife.¹²⁷ Leaving such limbs on the forest floor is standard procedure when timber salvage harvests occur.¹²⁸ Furthermore, the standard logging companies use to cut trees is more specific than the court described.¹²⁹ According to the salvage plan, only dead or dying trees were to be cut.¹³⁰ Normally, salvage-harvesting plans allow the taking of suitable green trees within the salvage area.¹³¹

In addition, the court neglected to discuss the approval of the harvest by the Missouri Department of Conservation officials, Forest Service officials, and Fish and Wildlife Service officials who are experts on the Indiana Bat.¹³² One of those experts is stationed in the Winona, Missouri Forest Service District Office, less than 20 miles from the location of the harvest area.¹³³ Before granting consent to the harvest, the officials imposed several restrictions on the type of cutting, the time of cutting and the type of trees slated for removal.¹³⁴ The official specifically required that no green trees would be harvested, which is normally allowed in timber

salvage harvests.¹³⁵

In reaching its decision, the court contravened NEPA and essentially substituted its judgment of whether harassment of the bats would occur in place of the judgment of the Forest Service and the Fish and Wildlife Service. This is inconsistent with the import of the ESA, the NFMA, and NEPA and Supreme Court interpretations of the acts.

Salvage sales are vitally important to the preservation of both our national and state forests, and the endangered species within.¹³⁶ Even still, logging on national forestland has fallen from 12 billion board feet per year as was harvested during the 1980s to about 4 billion board feet harvested currently.¹³⁷ Clearly, then, the impact of salvage harvests on national forestland has decreased dramatically. Now the question is whether it has decreased so much that wildfires pose a greater threat to the sanctity of our national forests than does the threat of environmental harm from salvage harvests.

There is no easy answer to the timber salvage quandary. Who can

¹²³*Id.* at 1250.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.* at 1247.

¹²⁷*Id.*

¹²⁸Telephone interview with Terry Miller, *supra* note 7.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

say, and truly believe, that endangered species should not be protected. At the same time, when wildfires consistently burn millions of acres of forestland each year, accommodations must be made. If properly seeded, a salvage area can mature in 10 years.¹³⁸ Perhaps then, the best answer comes with intensified court scrutiny of ESA-based citizen challenges to salvage sales and with stricter regulation of the reseeded of salvage areas once the harvest has occurred. Environmental protection and salvage sales can live in harmony.

¹³⁶ Bennett. *supra* note 2. at H1.

¹³⁷ Ken Olsen. *Timber Blames Fires on Lack of Logging but UI Professor Says Viewpoint Just Oversimplifies the Problem*. THE SPOKESMAN REVIEW. Aug. 29, 1996. at B1.

¹³⁸ *Twisted Timber Tornado-Rravaged Forests Will Take Years to Recover*. THE COURIER-JOURNAL. May 6, 1996, at 2B.