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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE,

Plaintiff,

v.

SALLY JEWELL, Secretary, U.S. Department of the Interior, in her official capacity; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service, in his official capacity; and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants,

and

IDAHO FARM BUREAU FEDERATION; WYOMING FARM BUREAU; MONTANA FARM BUREAU FEDERATION; WASHINGTON FARM BUREAU; IDAHO STATE SNOWMOBILE ASSOCIATION; COLORADO SNOWMOBILE ASSOCIATION; COLORADO OFF-HIGHWAY VEHICLE COALITION; AMERICAN PETROLEUM INSTITUTE;

CV 14-246-M-DLC

(Consolidated with Case Nos. 14-247-M-DLC and 14-250-M-DLC)

NON-GOVERNMENTAL DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MONTANA PETROLEUM ASSOCIATION; WESTERN ENERGY ALLIANCE; GOVERNOR C.L. "BUTCH" OTTER; STATE OF MONTANA; MONTANA FISH, WILDLIFE AND PARKS; and STATE OF WYOMING,

Defendant-Intervenors.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 1

1. Distinct Population Segments Under the Endangered Species Act 1

2. Withdrawal of the Proposed Listing of the North American Wolverine 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE PLAIN LANGUAGE OF THE ENDANGERED SPECIES ACT PRECLUDES THE LISTING OF A DISTINCT POPULATION SEGMENT OF A SUBSPECIES 5

II. CANONS OF STATUTORY CONSTRUCTION CONFIRM THAT THE DEFINITION OF "SPECIES" LIMITS DISTINCT POPULATION SEGMENTS TO SPECIES ONLY 7

A. The Phrase "Distinct Population Segment of Any Species" Implies the Exclusion of Distinct Population Segments of Subspecies 7

B. The Phrase "Of Any Species" Loses All Meaning Unless It Excludes Subspecies 8

C. This Court Should Give Meaning to the Difference in Language Between the Endangered Species Act and the Marine Mammal Protection Act by Limiting Distinct Population Segments to Species 9

Page

D. The 1978 Amendment to the Endangered Species Act Made a Substantive Change to the Language Defining "Species" Which Demonstrated That Only a Distinct Population Segment of a Species May Be Listed 10

E. This Court Should Favor an Interpretation of Any Ambiguous Terms in the Statutory Definition That Align the Definition More Closely with Its Ordinary Meaning 11

F. The Term "Including" as Used in the ESA's Definition of "Species" Is Not a Term of Enlargement 12

III. CONTRARY INTERPRETATIONS BY THE SERVICE OR OTHER AGENCIES DO NOT MERIT DEFERENCE 14

IV. THE DEFINITION OF "SPECIES" PLACES A KEY RESTRICTION ON AGENCY DISCRETION DESIGNED TO PREVENT ABUSE OF THE ENDANGERED SPECIES ACT 14

CONCLUSION 17

CERTIFICATES OF SERVICE AND COMPLIANCE 19

TABLE OF AUTHORITIES

Page

Cases

Adams v. Dole, 927 F.2d 771 (4th Cir. 1991) 12-13

Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001) 13, 16

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995) 11

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 4, 5

Ford v. United States, 273 U.S. 593 (1927) 7

MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) 14

Mitchell v. Univ. of Montana, 783 P.2d 1337 (Mont. 1989) 12

Moskal v. United States, 498 U.S. 103 (1990) 5

Setser v. United States, 132 S. Ct. 1463 (2012) 8

United States v. Butler, 297 U.S. 1 (1936) 8

United States v. Menasche, 348 U.S. 528 (1955) 8

United States v. Ressam, 553 U.S. 272 (2008) 9

Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427(2014) 14

United States Statutes

16 U.S.C. § 1362(11) 4, 9

16 U.S.C. §§ 1531-1544 . . . . 1, 4, 10

§ 1532(16) 1, 4-5, 7, 13

§ 1533(b)(1)(A) 1-2

United States Regulations

12-Month Finding on a Petition to List the North American Wolverine, 73 Fed. Reg. 12,929 (Mar. 11, 2008) 2, 6

12-Month Finding on a Petition to List the North American Wolverine, 75 Fed. Reg. 78,030 (Dec. 14, 2010) 3

Page

Establishment of a Nonessential Experimental Population of the North American Wolverine in Colorado, Wyoming, and New Mexico, 78 Fed. Reg. 7890 (Feb. 4, 2013) 3

Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996) 2

Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 79 Fed. Reg. 47,522 (Aug. 13, 2014) 3, 17

Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 78 Fed. Reg. 7864 (Feb. 4, 2013) 3, 6

Miscellaneous

H.R. Conf. Rep. No. 95-1804 (1978) 16

S. Rep. No. 96-151 (1979) 16

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INTRODUCTION

This Court need not grapple with best available science to resolve this dispute. Regardless of the status of the North American wolverine in the lower forty-eight states, the U.S. Fish and Wildlife Service lacks the statutory authority to list them. The definition of "species" in the Endangered Species Act limits agency discretion to list certain wildlife populations. The proposed listing here would exceed agency authority by listing a distinct population segment of a subspecies contrary to the plain language of the Endangered Species Act.

BACKGROUND

1. Distinct Population Segments Under the Endangered Species Act

The Endangered Species Act (ESA) authorizes the U.S. Fish and Wildlife Service (Service) to list species as threatened or endangered based on statutory criteria, instructing that

> [t]he Secretary shall make [listing] determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts . . . to protect such species . . . .

16 U.S.C. § 1533(b)(1)(A). The ESA's original definition of "species" that can be listed included "any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(11), 87 Stat. 884, 886 (codified as amended at 16 U.S.C. §§ 1531-1544). In 1978, however, Congress amended that definition to instead include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The Service can list a "species" as threatened or endangered based on five factors: threats to the species' habitat, overutilization of the species, disease or predation, inadequacy of

current regulatory protection, and other natural or manmade threats. 16 U.S.C. § 1533(a)(1).

The 1978 amendment to the definition of "species" did not define the phrase "distinct population segment of any species." However, an interagency policy statement has interpreted "distinct population segment." *See* Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). The statement recognized Congress's intention that distinct population segments be used "sparingly and only when the biological evidence indicates that such action is warranted." *Id.* at 4722. The policy statement also outlined three factors for evaluating possible distinct population segments:

> 1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;
>
> 2. The significance of the population segment to the species to which it belongs; and
>
> 3. The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

Id. at 4725.

2. Withdrawal of the Proposed Listing of the North American Wolverine

The Service has declined numerous petitions to list the North American wolverine subspecies in the contiguous United States as threatened or endangered. *See* 12-Month Finding on a Petition to List the North American Wolverine, 73 Fed. Reg. 12,929, 12,929-30 (Mar. 11, 2008). In 2008, the Service found that most North American wolverines live and thrive in Canada and Alaska. *Id.* at 12,931-32. The Service also concluded the contiguous U.S. population did not meet the criteria outlined in the distinct population segment policy. *Id.* at 12,941.

In 2010, the Service changed its mind and decided the North American wolverine in the lower forty-eight is a valid distinct population segment. *See* 12-Month Finding on a Petition to List the North American Wolverine, 75 Fed. Reg. 78,030, 78,030 (Dec. 14, 2010). The Service found that "in Canada-Alaska, wolverines exist in well-distributed, interconnected, large populations." In the lower forty-eight states, however, wolverines maintained only a small, scattered population. *Id.* at 78,037.

The Service began a more thorough review of the wolverine distinct population segment in 2013. *See* Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 78 Fed. Reg. 7864 (Feb. 4, 2013); Establishment of a Nonessential Experimental Population of the North American Wolverine in Colorado, Wyoming, and New Mexico, 78 Fed. Reg. 7890 (Feb. 4, 2013). After a period of study, public comment, and peer review, the Service declined to list it. *See* Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 79 Fed. Reg. 47,522, 47,522 (Aug. 13, 2014). The Service concluded that "the current and future factors affecting the wolverine are not of sufficient imminence, intensity, or magnitude to indicate that the wolverine is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout all or a significant portion of its range." *Id.* at 47,543. The Plaintiffs challenge this conclusion as an improper evaluation of the best available science in violation of the ESA. Pl.'s Mem. Supp. Summ. J. 8, June 4, 2015, Case 9:14-cv-00246-DLC.

SUMMARY OF THE ARGUMENT

The Service cannot list a wildlife population that does not constitute a "species" under the ESA. The statutory definition of "species" allows the Service to list only three discrete classes of organisms: An entire species, an entire subspecies, or a

distinct population segment of an entire species. The North American wolverine in the contiguous United States fits into none of these groups.

The ESA defines "species" as including "any subspecies of fish or wildlife or plants, and any distinct population segment *of any species* of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16) (emphasis added). This language grants the Service the authority to list wildlife based on biological subcategories (subspecies) or geographical subcategories (distinct population segments) of species, but not both. Listing a distinct population segment of a wolverine subspecies would violate the express terms of the ESA. Agency interpretation to the contrary does not merit deference under *Chevron*.

Allowing the Service to list distinct population segments of subspecies would disregard multiple canons of statutory construction. The maxim that the express inclusion of one thing implies the exclusion of another thing indicates that the phrase "of any species" following "distinct population segment" necessarily excludes distinct population segments of subspecies. Reading the definition to include subspecies would also render the phrase "of any species" meaningless.

Furthermore, comparisons to previous and similar statutory language reveal that Congress forbade the listing of distinct population segments of subspecies. The original pre-amendment version of the ESA included any group "of the same species or smaller taxa in common spatial arrangement that interbreed when mature" in its definition of species. Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(11), 87 Stat. 884, 886 (codified as amended at 16 U.S.C. §§ 1531-1544). The Marine Mammal Protection Act also uses the "smaller taxa" with regard to population segments. 16 U.S.C. § 1362(11). Rather than adopt this more open-ended "or smaller taxa" language into the ESA's amended definition of "species," Congress furnished an exhaustive list confined to species, subspecies, and distinct population segments of species.

This statutory limit on agency discretion does not mean the North American wolverine must forever remain outside the purview of the ESA. Rather, the Service must examine the subspecies in its entirety and include the health of the Alaskan and Canadian populations in its analysis of whether the subspecies merits listing. This approach would help to avoid listings that impose costly and unnecessary burdens on American taxpayers, businesses, and property owners.

This Court should enforce the plain language of the ESA and grant summary judgment for Defendants.

ARGUMENT

I
THE PLAIN LANGUAGE OF THE ENDANGERED SPECIES ACT PRECLUDES THE LISTING OF A DISTINCT POPULATION SEGMENT OF A SUBSPECIES

Regardless of the North American wolverine's status in the contiguous United States, this Court "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). "In determining the scope of a statute, [courts] look first to its language, giving the words their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation and internal quotation marks omitted). Here, the plain language of the ESA forbids the Service from listing the proposed distinct population segment of the North American wolverine.

Despite a gargantuan record, this case should begin and end with a single sentence. "The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The statutory definition of species establishes the three classes of organisms that can qualify for listing: species, subspecies, and distinct populations segments of species. The statute allows for broad listings of species generally, as well as two separate subcategories of species based on

biological and geographical distinctions, respectively. However, the statutory language does not allow for classifications beneath these subcategories, i.e, classifications based on biological and geographic variations within a single species.

The Service lacks authority to issue the rule proposed here because the population considered for protection does not fit within the statutory definition of "species." All parties agree that the proposed rule would list a distinct population segment of a subspecies of wolverine. *See, e.g.*, 73 Fed. Reg. 12,929, 12,930; Center for Biological Diversity (CBD) complaint 6; Defenders of Wildlife (DOW) complaint 33. The wolverine has two subspecies: *gulo gulo gulo*, found in Europe, and *gulo gulo luscus*, or the North American wolverine, found in the United States and Canada. 73 Fed. Reg. 12,929, 12,930; DOW complaint 33. The proposed listing at issue here only involves the North American wolverine. 78 Fed. Reg. 7864, 7864, 7866. Federal protection would only extend to the North American wolverine in the lower forty-eight states under the proposed rule, excluding larger populations in Canada and Alaska. *Id.* at 7864. Thus, the listing would combine a biological subgroup of the species with a geographical subgroup. The Service cannot list a distinct population segment of a subspecies in this manner. The plain language of the ESA does not allow the Service to divide up a species along both biological and geographical dimensions.

This limitation on the Service's authority does not forever banish the North American wolverine from the shelter of the ESA. Rather, this modest check on agency discretion requires the Service to consider the status of the entire subspecies of the North American wolverine.

II
CANONS OF STATUTORY CONSTRUCTION CONFIRM THAT THE DEFINITION OF "SPECIES" LIMITS DISTINCT POPULATION SEGMENTS TO SPECIES ONLY

A. The Phrase "Distinct Population Segment of Any Species" Implies the Exclusion of Distinct Population Segments of Subspecies

Settled principles of statutory interpretation affirm the ESA's language. The maxim that the expression of one thing implies the exclusion of the other (*expressio unius est exclusio alterius*) applies to the statutory definition of species. This negative-implication canon offers the only permissible reading of "any distinct population segment of any species."

The negative-implication canon applies when the text "can reasonably be thought to be an expression of all that shares in the grant or prohibition involved." Antonin Scalia & Bryan A. Garner, Reading Law 107 (2012). A negative implication is warranted when "the natural association of ideas in the mind of the reader" creates a contrast between the expressed thing and the excluded thing. *Ford v. United States*, 273 U.S. 593, 611 (1927). This contrast "enforces the affirmative inference" that the omitted matter "must be intended to have opposite and contrary treatment." *Id.*

The negative-implication canon limits distinct population segments to species only. The definition of "species" sets forth the Service's authority to list "subspecies," followed immediately by the authority to list "any distinct population segment of any species." 16 U.S.C. § 1532(16). The proximity of the terms "subspecies" and "species" creates a "natural association in the mind of the reader." *Ford*, 273 U.S. at 611. This association invokes a contrast that underscores the absence of the word "subspecies" in relation to "distinct population segment." The contrast sparks the inference that subspecies "must be intended to have opposite and contrary treatment" with respect to distinct population segments. *Id.* The phrase "of

any species" thus operates to exclude subspecies from the distinct population segment classification.

B. The Phrase "Of Any Species" Loses All Meaning Unless It Excludes Subspecies

The surplusage canon also confirms this common-sense reading of the statute. If the express mention of "species" does not exclude "subspecies" by implication, then the phrase "of any species" would become meaningless.

Courts must "give effect . . . to every clause and word" of a statute. *Setser v. United States*, 132 S. Ct. 1463, 1470 (2012) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). An interpretation that gives meaning to all of the language employed by Congress embraces the separate roles of lawmakers and adjudicators. An interpretation that renders language meaningless, however, upends the legislative process. "[I]t is no more the court's function to revise by subtraction than by addition." Scalia & Garner, *supra*, at 174; *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) ("[A judge] must not read out except to avoid patent nonsense or internal contradiction."). Courts should not write with red ink.

If the phrase "of any species" does not exclude subspecies, then those three words play no meaningful role in the statute. If Congress intended to permit the listing of a distinct population segment of either species or subspecies, Congress could have omitted those three words. "These words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). This Court should preserve the meaning of these three words by holding that they rule out distinct population segments of subspecies.

C. This Court Should Give Meaning to the Difference in Language Between the Endangered Species Act and the Marine Mammal Protection Act by Limiting Distinct Population Segments to Species

The differences in language between the Endangered Species Act and the related Marine Mammal Protection Act demonstrate that the distinct population segment classification is limited to species. The language used by Congress in related statutes can illuminate the meaning of otherwise ambiguous text. "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Frankfurter, *supra*, at 539; *see also* Scalia & Garner, *supra*, at 252-55.

For example, in *United States v. Ressam*, 553 U.S. 272 (2008), the Supreme Court relied on a firearms statute to interpret a similar explosives statute. In *Ressam*, a criminal defendant had lied about his identity to a customs officer while carrying explosives in his car. *Id.* at 273. Lying to customs officials is a felony, and Ressam was charged with carrying an explosive "during the commission of" a felony. *Id.* Ressam argued the statute only forbade carrying an explosive during and in relation to the commission of the underlying felony. *See id.* In rejecting Ressam's interpretation, the Court turned to a related statute. A similar firearms statute prohibited carrying a firearm "during and in relation to" an underlying felony. *Id.* at 275-76. The Court concluded that "the stark difference" between the language in the otherwise similar statutes "virtually commands" the inference that "in relation to" is not an element of the crime in the explosives statute. *Id.* at 277.

A similar conclusion arises from comparison of the Marine Mammal Protection Act to the Endangered Species Act. The Marine Mammal Protection Act uses a category of organisms called a "population stock," a term similar to the ESA's "distinct population segment." *Compare* 16 U.S.C. § 1362(11) *with id.* § 1352(16). The Act defined "population stock" as "a group of marine mammals of the same species *or smaller taxa* in a common spatial arrangement, that interbreed when mature." *Id.* (emphasis added). The Marine Mammal Protection Act thus

unambiguously created classifications that included population segments of organisms below the taxonomic level of species (i.e., subspecies). By contrast, the ESA does not include "or smaller taxa" after the words "distinct population segment of any species." The Supreme Court gave meaning to Congress's omission of "in relation to" where that phrase was expressly used in a similar statute. Likewise, this Court should give meaning to the omission of "or smaller taxa" in the ESA where that phrase was expressly used in the Marine Mammal Protection Act.

D. The 1978 Amendment to the Endangered Species Act Made a Substantive Change to the Language Defining "Species" Which Demonstrated That Only a Distinct Population Segment of a Species May Be Listed

The ESA's statutory history further confirms that the Service lacks authority to list a distinct population segment of a subspecies. "[A] change in the language of a prior statute presumably connotes a change in meaning." Scalia & Garner, *supra*, at 256. The 1978 amendment's omission of language in the original act implies distinct population segments apply to species only.

The original ESA contained a different definition of species. It stated: "The term 'species' includes any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(11), 87 Stat. 884, 886 (codified as amended at 16 U.S.C. §§ 1531-1544). Like the definition of "population stock" in the Marine Mammal Protection Act, this language wed taxonomic and spatial subgroups by allowing "subspecies" and "smaller taxa" that are in "common spatial arrangement" to be listed.

Amendments in 1978 signaled a change. Instead of "common spatial arrangement," the operative language regarding geographic subgroups became "distinct population segment." The language removed "or smaller taxa" and added the qualifier "of any species" to "distinct population segment." This change in

language entails a change in meaning. The amendment indicates geographic subgroups of "smaller taxa" are disallowed.

E. This Court Should Favor an Interpretation of Any Ambiguous Terms in the Statutory Definition That Align the Definition More Closely with Its Ordinary Meaning

A definition of "species" that includes distinct population segments of subspecies ignores the context of the term being defined. When interpreting the statutory definition of a word, "[t]he normal sense of that word and its associations bear significantly on the meaning of ambiguous words or phrases in the definition." *See* Scalia & Garner, *supra*, at 232. For this reason, courts should apply a presumption against counterintuitive definitions. *Id.*; *see also Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 718 (1995) (Scalia, J., dissenting) ("[I]f the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of 'take' . . . , and one of which does not, . . . the latter reading [is] necessarily unreasonable, for it reads the defined term . . . out of the statute."). While Congress may define a term however it pleases, ambiguous language within a statutory definition should be interpreted to point the statutory definition toward ordinary meaning.

Any ambiguity in Congress's definition of "species" should be interpreted to avoid deviations from ordinary meaning. Webster's defines "species" as "a category of biological classification ranking immediately below the genus or subgenus, comprising related organisms or populations potentially capable of interbreeding." Webster's Ninth New Collegiate Dictionary 1132 (1988). "Species," in its ordinary meaning, refers to a classification "immediately below" the genus or subgenus.

The specific ranking of the classification is a key component of the word's meaning. "Species" by definition refers to a whole category and not just to a component part. This means subspecies and population segments of species do not fit into the ordinary meaning of species. However, the ESA expressly includes

subspecies and distinct population segments in the definition of "species." Thus, this departure from ordinary meaning is permissible.

However, the definition should not be read to permit more subcategories beneath subspecies and population segments. As agencies define "species" to include smaller sub-subcategories, the term deviates farther from its everyday meaning. Yet subcategories beyond those of "subspecies" and "distinct population segment of any species" are not clearly expressed in the definition. Thus, an interpretation of "species" that would include within its definition a population segment of a subspecies violates the presumption against counterintuitive definitions. This Court should not read any ambiguous term in a manner that causes the statutory definition to stray farther from the ordinary meaning of "species."

F. The Term "Including" as Used in the ESA's Definition of "Species" Is Not a Term of Enlargement

The use of the term "including" in the definition of "species" does not create an open-ended definition. While "including" often introduces a non-exhaustive list, it can also indicate the expressly enumerated items imply exclusion of anything else. *Adams v. Dole*, 927 F.2d 771, 777 (4th Cir. 1991) ("However, the term 'including' can also introduce restrictive or definitional terms."); *Mitchell v. Univ. of Montana*, 783 P.2d 1337, 1339-40 (Mont. 1989) ("[T]he legislature could have easily used the phrase 'including, but is not limited to' in defining governmental entities. Because the legislature chose not to use such language, we apply the familiar maxim of statutory construction: *expressio unius est exclusio alterius*.").

Context determines how to interpret the term "including." In *Adams v. Dole*, the Fourth Circuit had to decide whether the term "employer" in a whistle-blower provision of the Energy Reorganization Act included Department of Energy contractors operating nuclear facilities. *Adams*, 927 F.2d at 773. The definition of "employer" included, among others, licensees of the Nuclear Regulatory Commission,

applicants for a license from the Nuclear Regulatory Commission, as well as contractors for these entities. *Id.* at 776. The list did not include Department of Energy contractors. *See id.* The court concluded that, despite the word "including," the enumerated list operated to exclude such contractors from the definition of "employer." *See id.* at 777. The court reasoned that "employer" in this context would not naturally include a license applicant. *Id.* Congress thus had to expressly include license applicants for that counterintuitive meaning to be clear. The court thus read the law as "no employer, *by which we mean to include* an applicant, etc." rather than "no employer, including but not limited to an applicant, etc." *Id.*

This common-sense approach applies with even greater force here. Just as "employer" would not naturally refer to license applicants, "species" does not by its ordinary meaning refer to smaller taxonomic groups or segments of the overall population of the species. Thus, "including" in this context, as in *Adams*, means "by which we mean to include," thereby creating an exhaustive definition.

The manner in which Congress used the term "including" in other parts of the ESA's definition section confirms this interpretation. When Congress used "including" as an open-ended term in other definitions under the ESA, it did so expressly. For example, the ESA defines the phrase "fish or wildlife" to mean "any member of the animal kingdom, including *without limitation* any mammal, fish, bird," etc. 16 U.S.C. § 1532(8) (emphasis added). Additionally, the ESA defines "foreign commerce" as a phrase that "includes, *among other things*, any transaction . . . ." 16 U.S.C. § 1532(9) (emphasis added). These clarifying phrases imply that the use of "includes" by itself in other nearby subsections does not create an open-ended definition.

Other courts have already interpreted the definition of "species" to be exhaustive. In *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001), the United States District Court of Oregon evaluated whether the National Marine

Fisheries Service could list only naturally spawned populations of salmon while omitting intermingled hatchery salmon. *Id.* at 1156-58. The Court determined that the statutory definition of "species" limited the Service's authority to list organisms in this manner. "Congress expressly limited the Secretary's ability to make listing distinctions among species below that of subspecies or a [distinct population segment] of a species." *Id.* at 1163. This natural reading of the statute prevents the Service from interpreting the definition of "species" as an open-ended term.

III
CONTRARY INTERPRETATIONS BY THE SERVICE OR OTHER AGENCIES DO NOT MERIT DEFERENCE

When an agency adopts an interpretation of a statute that does not represent a permissible reading of statutory language, courts do not defer to their judgment. "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation.") (internal quotation marks omitted).

The statutory definition of "species" is clear. It includes distinct population segments of species only. Principles of statutory construction affirm that no contrary reading of the statute is permissible. Federal agencies cannot adopt the opposite conclusion without ignoring basic inferences, wresting meaning from statutory text, and contorting ordinary language.

VI
THE DEFINITION OF "SPECIES" PLACES A KEY RESTRICTION ON AGENCY DISCRETION DESIGNED TO PREVENT ABUSE OF THE ENDANGERED SPECIES ACT

The listing of a species under the ESA has widespread and penetrating effects on businesses, governments, and ordinary people. The history of ESA enforcement

has demonstrated the Act's power and potential for abuse. A listing can cripple infrastructure and development plans, industrial projects, agricultural activities, and everyday use of private and public property. *See, e.g.*, Valerie Richardson, *Protected Utah prairie dogs fight for home on the range*, The Washington Times, Apr. 22, 2013[1] (describing a community's inability to protect cemeteries, landing strips, and golf courses from ruinous prairie dog infestations due to federal listing); Felicity Barringer, *New Battle of Logging vs. Spotted Owls Looms in West*, New York Times, Oct. 18, 2007[2] (describing the impact of the northern spotted owl listing on the regional timber industry). Ominous civil and criminal penalties await those who harm a protected species, even inadvertently. Thus, the dangers of overregulation under the ESA merit careful observance of the balance struck by Congress between species and human interests.

Limits on the kinds of groups of organisms that can be listed under the ESA form an important bulwark against overregulation. When federal agencies can establish listings based on small groups of organisms, federal power to regulate people and property expands correspondingly. "Because smaller categories result in smaller total numbers, it becomes easier to list a smaller category as threatened under the ESA." Leslie Marshall Lewallen & Russell C. Brooks, Alsea Valley Alliance v. Evans *and the Meaning of "Species" Under the Endangered Species Act: A Return to Congressional Intent*, 25 Seattle U. L. Rev. 731, 733 (2002). The more federal agencies can gerrymander narrow groups of organisms for listing, the more federal control can expand under the ESA.

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[1] *Available at* http://www.washingtontimes.com/news/2013/apr/22/protected-utah-prairie-dogs-fight-for-home-on-the-/?page=all.

[2] *Available at* http://www.nytimes.com/2007/10/18/us/18owl.html?_r=0.

Congress was aware of this danger and the importance of defining "species" to avoid it. Congress said the amended definition of "species" would "exclude taxonomic categories below subspecies from the definition," communicating the intent to limit the Service's power to divide species into ever smaller listable entities. H.R. Conf. Rep. No. 95-1804, at 17 (1978). A Senate report soothed the Government Accountability Office's concern that the "distinct population segment" authority "could result in the listing of squirrels in a specific city park even though there is an abundance of squirrels in other parks in the same city, or elsewhere in the country." S. Rep. No. 96-151, at 7-12 (1979). The Senate report confirmed that Congress did not intend to allow for this kind of overregulation, noting the "great potential abuse" of the distinct population segment listing authority and an expectation that the Service would "use the ability to list populations sparingly and only when the biological evidence indicates that such action is warranted." *Id.* at 7. These assurances reveal an intent to constrain the power of the ESA through the definition of "species."

The history of coho salmon regulation under the ESA serves as an apt example of what can happen when a government agency carves out segments of otherwise stable species in defiance of the statutory definition of "species." The National Marine Fisheries Service, under the auspices of its distinct population segment authority, listed as threatened a coastal population of "naturally spawned" coho salmon—disregarding the ample and flourishing presence of hatchery-born coho salmon swimming in their midst. *Alsea Valley Alliance*, 161 F. Supp. 2d at 1159. To protect this listed class of salmon, bureaucrats clubbed genetically indistinguishable hatchery salmon to death, destroyed their eggs, and spent hundreds of millions of dollars in salmon protection measures and land-use restrictions. Lewallen & Brooks, *supra*, at 736.

Here, allowing the Service to simultaneously use geographical and biological distinctions would empower the federal government to make more and more minute

classes of organisms. The Service found that the distinct population segment here "has much less wolverine habitat than Canada and Alaska, and the habitat that does exist occurs in semi-isolated patches at high elevations, whereas habitat in Canada and Alaska is much more extensive and well connected." *See* Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States; Withdrawal, 79 Fed. Reg. 47,522, 47,531 (Aug. 13, 2014). Listing this distinct population segment of wolverine subspecies could lead to onerous regulations on American businesses and property owners without regard for the subspecies living in more sustainable populations elsewhere.

Fidelity to the statutory definition of species will preserve meaningful limits on agency discretion and prevent the proliferation of unnecessary rulemaking.

CONCLUSION

The Service lacks discretion to list the proposed distinct population segment of the North American Wolverine. Therefore, the Non-Governmental Defendant-Intervenors respectfully request that this Court grant summary judgment in favor of Defendants and deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Aug. 17, 2015, the foregoing MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT was filed with the Clerk of the Court for the United States District Court for the District of Montana by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

/s/ ETHAN W. BLEVINS
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing memorandum contains 4,979 words, as determined by the word count function of Corel WordPerfect X5.

/s/ ETHAN W. BLEVINS
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