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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

9  
10 Center for Biological Diversity,  
11 Plaintiff,  
12 v.  
13 Deb Haaland,<sup>1</sup> et al.,  
14 Defendants.

No. CV-18-00404-TUC-JGZ  
**ORDER**

15  
16 Over seventeen years ago, Plaintiff Center for Biological Diversity (CBD)  
17 petitioned the Fish and Wildlife Service (FWS or the Service) to list the distinct population  
18 segment (DPS) of the lower Colorado River basin roundtail chub as an endangered or  
19 threatened species under the Endangered Species Act (ESA ), 16 U.S.C. § 1531 et. seq. In  
20 2015, after two court actions initiated by CBD concerning FWS’s delays acting on the  
21 petition, FWS ultimately proposed to extend the protections of the ESA to the lower  
22 Colorado River basin roundtail chub DPS as a threatened species. However, in 2017, FWS  
23 withdrew the rule based on FWS’s adoption of a taxonomic revision concerning the fish.  
24 According to FWS, withdrawal of the proposed rule was necessary because, after the  
25 taxonomic revision, the lower Colorado River basin roundtail chub DPS no longer met  
26 ESA’s definition of a species. FWS also stated that under ESA’s deadlines, it was required  
27 to make a listing decision at that time.

28 <sup>1</sup> Newly-confirmed Secretary of the Interior Deb Haaland is substituted in place of Defendant Ryan Zinke. *See* Fed. R. Civ. P. 25(d).

1 CBD filed the instant action against the Secretary of the Interior and FWS,  
2 challenging FWS's withdrawal of the proposed rule. CBD claims that even after the  
3 taxonomic revision, the Colorado River basin roundtail chub is a listable entity and FWS's  
4 decision not to list it as a DPS was arbitrary and capricious in violation of the  
5 Administrative Procedure Act and ESA. (Doc. 1.) CBD requests that the Court order FWS  
6 to vacate the withdrawal of the proposed rule and to make a final determination regarding  
7 the Lower Colorado River basin roundtail chub's status.

8 Pending before the Court are the parties' Cross-Motions for Summary Judgment,  
9 which are fully briefed. (Docs. 25, 26, 28, 29, 32, 34.) The parties also filed supplemental  
10 briefing based on the Supreme Court's recent decision in *Dep't of Homeland Sec. v.*  
11 *Regents of the Univ. of Cal.*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1891, (June 18, 2020). (Docs. 35, 36.)  
12 Upon consideration of the parties' filings, the Court will grant CBD's Motion for Summary  
13 Judgment and deny Defendants' Cross-Motion for Summary Judgment.<sup>2</sup>

#### 14 **I. Applicable Standards**

##### 15 **A. Summary Judgment**

16 Summary judgment is appropriate if the pleadings and supporting documents "show  
17 that there is no genuine issue as to any material fact and that the moving party is entitled  
18 to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S.  
19 317, 322 (1986). A court presented with cross-motions for summary judgment should  
20 review each motion separately, giving the nonmoving party for each motion the benefit of  
21 all reasonable inferences from the record. *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles*  
22 *Cnty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008). "Summary judgment is a  
23 particularly appropriate tool for resolving claims challenging agency action." *Defenders of*  
24 *Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1215 (D. Mont. 2010). In such cases the Court's  
25 role is not to resolve facts, but to "determine whether or not as a matter of law the evidence  
26 in the administrative record permitted the agency to make the decision it did." *Occidental*  
27 *Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

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28 <sup>2</sup> This case is suitable for decision without oral argument. See LRCiv. 7.2(f).

## 1           **B. The Administrative Procedure Act**

2           Judicial review of agency actions under the ESA is governed by the Administrative  
3 Procedure Act (APA). *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th  
4 Cir. 2002). Under the APA, the court may set aside agency action where it is found to be  
5 arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable  
6 law. 5 U.S.C. § 706(2)(A). “Normally, an agency rule would be arbitrary and capricious if  
7 the agency has relied on factors which Congress has not intended it to consider, entirely  
8 failed to consider an important aspect of the problem, offered an explanation for its decision  
9 that runs counter to the evidence before the agency, or is so implausible that it could not  
10 be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs.*  
11 *Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

12           In order to determine whether an agency action is arbitrary and capricious, a  
13 reviewing court looks to the evidence the agency has provided to support its conclusions,  
14 along with other materials in the record, to ensure the agency made no clear error of  
15 judgment. *See Judulang v. Holder*, 565 U.S. 42, 52–53 (2011); *Lands Council v. McNair*,  
16 537 F.3d 981, 993 (9th Cir. 2008), *overruled on other grounds by Am. Trucking Assns.,*  
17 *Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). That task involves  
18 examining the reasons for agency decisions, which must be based on non-arbitrary,  
19 relevant factors that are tied to the purpose of the underlying statute. *See Judulang*, 565  
20 U.S. at 53, 55. The agency must articulate a rational connection between the facts found  
21 and the choice made. *Forest Guardians v. United States Forest Serv.*, 329 F.3d 1089, 1099  
22 (9th Cir. 2003).

23           “An agency must defend its actions based on the reasons it gave when it acted.”  
24 *Dep’t of Homeland Security*, 140 S.Ct. at 1909. An agency seeking to justify its action  
25 may not offer a new explanation for the action during the course of litigation, but must be  
26 judged on the rationale and record that led to the decision. *Ctr. for Biological Diversity v.*  
27 *Lohn*, 296 F.Supp.2d 1223, 1231 (W.D. Wash. 2003), *vacated on other grounds as moot*,  
28 511 F.3d. 960 (9th Cir. 2007). Under this standard, post hoc explanations of agency action

1 cannot substitute for the agency’s own articulation of the basis for its decision. *Arrington*  
2 *v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (citing *Fed. Power Comm’n v. Texaco*,  
3 *Inc.*, 417 U.S. 380, 397 (1974)). Similarly, the reviewing court “may not supply a reasoned  
4 basis for the agency’s action that the agency itself has not given.” *Motor Vehicle Mfrs.*  
5 *Ass’n*, 463 U.S. at 43. Rather, the court’s review is “limited to the explanations offered by  
6 the agency in the administrative record.” *Arrington*, 516 F.3d at 1113.

7 “The arbitrary and capricious standard is ‘highly deferential, presuming the agency  
8 action to be valid and [requires] affirming the agency action if a reasonable basis exists for  
9 its decision.’” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006)  
10 (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)). When  
11 examining scientific determinations, as opposed to simple findings of fact, a reviewing  
12 court must generally be at its most deferential. *Baltimore Gas & Elec. Co. v. Natural Res.*  
13 *Def. Council, Inc.*, 462 U.S. 87, 103 (1983). This is particularly true when the scientific  
14 findings are within the agency’s area of expertise. *See Ctr. for Biological Diversity v. Zinke*,  
15 900 F.3d. 1053, 1067 (9th Cir. 2018); *Lands Council*, 537 F.3d at 993. Moreover, “[w]hen  
16 not dictated by statute or regulation, the manner in which an agency resolves conflicting  
17 evidence is entitled to deference so long as it is not arbitrary and capricious.” *Trout*  
18 *Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009).

19 Nevertheless, the APA requires a “substantial inquiry” to determine whether the  
20 agency acted within the scope of its authority. *Citizens to Pres. Overton Park, Inc. v. Volpe*,  
21 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S.  
22 99 (1977). Thus, although the agency is entitled to a “presumption of regularity,” the effect  
23 of that presumption is not to shield the agency’s action from a “thorough, probing, in-depth  
24 review,” and the court’s inquiry into facts should be “searching and careful.” *Id.*

## 25 **II. Statutory and regulatory framework: The Endangered Species Act**

26 The Endangered Species Act (ESA or “the Act”), 16 U.S.C. § 1531, *et seq.*, sets  
27 forth a comprehensive scheme for the protection of endangered and threatened species in  
28 the United States. *Cal. ex rel. Lockyer v. United States Dep’t of Agriculture*, 575 F.3d 999,

1 1018 (9th Cir. 2009). To achieve its objectives, the ESA directs the Secretary of the Interior  
2 to determine which species of plants and animals are “threatened” or “endangered.” 16  
3 U.S.C. § 1533.<sup>3</sup> The ESA defines “species” as including “any subspecies of fish or wildlife  
4 or plants, and *any distinct population segment* of any species of vertebrate fish or wildlife  
5 which interbreeds when mature.”<sup>4</sup> 16 U.S.C. § 1532(16) (emphasis added). An  
6 “endangered species” is “any species which is in danger of extinction throughout all or a  
7 significant portion of its range.” 16 U.S.C. § 1532(6). A “threatened species” is “any  
8 species which is likely to become an endangered species within the foreseeable future  
9 throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

10 **Distinct population segment.** The ESA permits FWS to “designate a particular  
11 population segment of a species as a DPS [distinct population segment] and then consider  
12 that DPS as a species for listing purposes.” *Nat’l Ass’n of Home Builders v. Norton*, 340  
13 F.3d 835, 842 (9th Cir. 2002) (citing 16 U.S.C. §§ 1532(16), 1533(a)(1)). Because the  
14 ESA does not define “distinct population segment,” FWS follows a binding policy  
15 statement<sup>5</sup> to guide determinations of whether a DPS warrants listing under the ESA. (*See*  
16 *D000752-55*.)<sup>6</sup> The DPS Policy requires that a DPS must be “discrete” and “significant.”  
17 (*D000755*.) The DPS Policy requires evaluation of three elements when determining  
18 whether a population is a DPS that meets the definition of an endangered or threatened  
19 species:

20 <sup>3</sup> The Secretary’s duties under the ESA are delegated to FWS pursuant to 50 C.F.R.  
21 § 402.01(b).

22 <sup>4</sup> FWS’s implementing regulations further clarify that “[a]ny species or taxonomic  
23 group of species (e.g., genus, subgenus) ... is eligible for listing under the [ESA].” 50  
C.F.R. § 424.11(a).

24 <sup>5</sup> The DPS Policy was jointly promulgated by FWS and National Marine Fisheries  
25 Service, which is responsible for implementing the ESA with respect to marine and  
anadromous species. *Nat’l Ass’n of Home Builders*, 340 F.3d at 842.

26 <sup>6</sup> All citations to exhibits in this Order are to the administrative record unless  
27 otherwise noted. The parties categorized the materials in the administrative record as  
28 Emails (E), Documents (D) and References (R), and these designations are reflected in the  
Court’s citations. Many of the documents in the administrative record are also published  
in the Federal Register. For the purposes of this Order, the Court has elected to include  
only the administrative record citation.

- 1 (1) Discreteness of the population segment in relation to the remainder of
- 2 the species to which it belongs<sup>[7]</sup>;
- 3 (2) The significance of the population segment to the species to which it
- 4 belongs; and
- 5 (3) The population segment's conservation status in relation to the Act's
- 6 standards for listing (i.e., is the population segment, when treated as
- 7 if it were a species, endangered or threatened?).

8 (*Id.*)

9 Additionally, in determining whether to list a species, including a DPS, as

10 threatened or endangered, the ESA requires FWS to consider:

- 11 (A) the present or threatened destruction, modification, or curtailment of
- 12 its habitat or range;
- 13 (B) overutilization for commercial, recreational, scientific, or educational
- 14 purposes;
- 15 (C) disease or predation;
- 16 (D) the inadequacy of existing regulatory mechanisms; or
- 17 (E) other natural or manmade factors affecting its continued existence.

18 16 U.S.C. § 1533(a)(1). Any one of these five factors, or combination of them, may support

19 a listing determination. *Kern Cnty. Farm Bureau*, 450 F.3d at 1075. Listing decisions,

20 including withdrawals, must be based “solely on the best scientific and commercial data

21 available . . . after conducting a review of the status of the species. . . .” 16 U.S.C. §

22 1533(b)(1)(A).

23 The ESA provides two methods for listing species for protection as endangered or

24 threatened. 16 U.S.C. § 1553. The first allows the Secretary to act on his own initiative to

25 identify species for protection. 16 U.S.C. § 1533(a). The second “allows interested citizens

26 to compel the Secretary's consideration of a species by filing a petition.” *Coos Cnty. Bd.*

27 *of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792, 804 (9th Cir. 2008) (citation omitted); *see*

28 *also* 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14. There are important differences

between the two methods that dictate how and when the Secretary must act. *Coos Cnty.*

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<sup>7</sup> A population is “discrete” if it is “markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors.” (D000755.) “Quantitative measures of genetic or morphological discontinuity may provide evidence of separation.” (*Id.*)



1 *Bd. of Cnty. Comm'rs*, 531 F.3d at 804. Under the first method, the Secretary has  
2 considerable discretion to consider whether a species is eligible for listing and to set a  
3 schedule for listing it. *Id.* The second method, by contrast, “replace[s] the Secretary’s  
4 discretion with mandatory nondiscretionary duties.” *Id.* at 808 (internal quotation marks  
5 and citation omitted). The Secretary must act on a petition within certain mandatory  
6 deadlines. 16 U.S.C. § 1533(b)(3).

7 **90-day finding requirement upon the filing of a petition.** Upon receipt of a petition,  
8 the Secretary must review the petition and, “[t]o the maximum extent practicable,” within  
9 90 days make a finding (90-day finding) as to whether the petition presents “substantial  
10 scientific or commercial information indicating that the petitioned action may be  
11 warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). “Substantial  
12 information” refers to credible scientific or commercial information that would lead a  
13 reasonable person to conclude that the measure proposed in the petition may be warranted.  
14 50 C.F.R. § 424.14(h)(i).

15 **12-month finding requirement.** If the Secretary concludes that the petition presents  
16 substantial information indicating that a listing may be warranted, the Secretary must  
17 “promptly commence a review of the status of the species concerned[,]” and promptly  
18 publish its findings. 16 U.S.C. § 1533(b)(3)(A)-(B). Within twelve months of receipt of the  
19 petition, the Secretary must determine whether listing of the species is “not warranted,”  
20 “warranted,” or “warranted . . . but precluded” by other listing priorities. 16 U.S.C. §  
21 1533(b)(3)(B). The 90-day and 12-month findings are not subject to notice-and-comment  
22 rulemaking. *See* 16 U.S.C. § 1533(b)(3).

23 **Process when action is warranted.** If the Secretary concludes that the petitioned  
24 action is warranted, FWS must, publish in the Federal Register a general notice and the  
25 complete text of the proposed regulation. 16 U.S.C. §§ 1533(b)(3)(B)(ii), 1533(b)(5)(A)(i).  
26 Publication must occur at least ninety days before the effective date of the regulation. 16  
27 U.S.C. § 1533(b)(5)(A). A period of public comment follows. 16 U.S.C. § 1533(b).

28 Within one year of the date of the notice of publication, the Secretary must either

1 publish a final rule designating the species for protection or, if it finds that “available  
2 evidence does not justify the action,” withdraw the proposed rule. 50 C.F.R. §  
3 424.17(a)(iii); *see also* 16 U.S.C. § 1533(b)(6). The Secretary may, however, extend the  
4 one-year period up to six months “for purposes of soliciting additional data” in cases where  
5 “there is substantial disagreement regarding the sufficiency or accuracy of the available  
6 data relevant to the determination or revision concerned.” 16 U.S.C. §§  
7 1533(b)(6)(A)(i)(III), (b)(6)(B)(i). If the one-year period is extended, and the agency  
8 decides to withdraw the regulation because “there is not sufficient evidence to justify the  
9 action proposed by the regulation,” the agency must publish notice of the withdrawal  
10 together with the finding on which the withdrawal is based. 16 U.S.C. § 1533(b)(6)(B)(i)-  
11 (iii). The agency’s finding in support of withdrawal is judicially reviewable. 16 U.S.C. §  
12 1533(b)(6)(B)(ii).

### 13 **III. Background**

#### 14 **A. Factual Background**

##### 15 **1. The Lower Colorado River Basin Roundtail Chub**

16 Roundtail chub (*Gila robusta*) are minnows of the family Cyprinidae. (Doc. 27, ¶  
17 1; Doc. 31, ¶ 1.) Within that family, the roundtail chub is part of the *Gila robusta* complex  
18 or species group. (Doc. 27, ¶ 2; Doc. 31, ¶ 2.) The taxonomic history of the various species  
19 within the *Gila robusta* complex has been a source of longstanding and ongoing debate.  
20 (Doc. 27, ¶ 9; Doc. 31, ¶ 9.) Endemic to the Colorado River basin, the complex was  
21 comprised of seven taxa: bonytail chub (*Gila elegans*); humpback chub (*Gila cypha*);  
22 Virgin chub (*Gila seminuda*); Pahrnagat roundtail chub (*Gila jordani*); Gila chub (*Gila*  
23 *intermedia*); roundtail chub (*Gila robusta*); and headwater chub (*Gila nigra*). (Doc. 27, ¶¶  
24 3, 10; Doc. 31, ¶¶ 3, 10.) Currently, the bonytail, humpback, Virgin, Pahrnagat, and Gila  
25 chub are all listed under the ESA. (Doc. 27, ¶ 11; Doc. 31, 11¶.)

26 Researchers over the decades have variously classified the *Gila* entities as “full  
27 species, . . . as different species, [as] subspecies of *Gila robusta*, or as part of a ‘*Gila*  
28 *robusta complex*.’” (Doc. 30, ¶ 5; Doc. 33, ¶ 5.) From the 1800s until 2016, the roundtail



1 chub, headwater chub, and Gila chub were formally recognized as distinct taxonomic  
2 species. (Doc. 27 ¶¶ 12, 13; Doc. 31, ¶¶ 12, 13.) In 2015, FWS recognized the headwater  
3 chub and lower Colorado river basin roundtail chub DPS as separate species when  
4 proposing to list them as threatened species. (Doc. 27, ¶ 13; Doc. 31, ¶13.)

5 Following the proposed rule, at the request of the State of Arizona Game and Fish  
6 Department (AGFD), the American Fisheries Society and American Society of  
7 Ichthyologists and Herpetologists Joint Committee on the Names of Fishes (“Joint  
8 Committee”) met to determine whether the Gila chub, headwater chub, and roundtail chub  
9 remained discrete species.<sup>8</sup> (Doc. 27, ¶ 14; Doc. 31, ¶ 14.) This resulted in a report  
10 concluding that “the data available support recognition of only one species of *Gila*, the  
11 Roundtail Chub” and “do not support recognition of three species . . . , i.e., the Roundtail  
12 Chub, *Gila robusta*; Gila chub, *Gila intermedia*; and Headwater Chub, *Gila nigra*.” (Doc.  
13 27, ¶ 15; Doc. 31, ¶ 15.) The report relied primarily on two sources: Carter et al. (2016)  
14 and Copus et al. (2016). (Doc. 27, ¶ 16; Doc. 31, ¶ 16.) Peer reviewers of the withdrawal  
15 noted serious concerns with both sources including that the sources had not undergone peer  
16 review; were not available for public consideration at the time; and there existed conflicting  
17 data and conclusions in other reports pertaining to morphological identification, DNA  
18 analysis, and ecological equivalency. (Doc. 27, ¶ 17; Doc. 31, ¶ 17.) The peer reviewers  
19 also criticized Copus et al.’s “methods and conclusions, particularly small sample size, lack  
20 of key analytical and laboratory steps, the study’s DNA sequence data filtering and  
21 analyses that failed to follow best practices for phylogenetic analysis, and specimen  
22 shrinkage associated with duration of preservation impacting morphological diagnostics.”  
23 (Doc. 27, ¶ 17 (quoting D000748); Doc. 31, ¶ 17.) The Service, after internal deliberation,  
24 adopted the Joint Committee’s finding; the Service then withdrew the proposed rule to list  
25 the headwater chub and lower Colorado River basin roundtail chub DPS. (Doc. 27, ¶ 17;  
26 Doc. 31, ¶ 17; *see also* D000744-000750.)

27  
28 <sup>8</sup> The Joint Committee is the recognized authority in establishing the taxonomic  
status of fish. (Doc. 30, ¶ 35; Doc. 33, ¶ 35.)

1                   **2. The population and range of the roundtail, headwater, and Gila**  
2                   **chubs in the lower Colorado River basin**

3                   The roundtail chub, headwater chub, and Gila chub are all found in the lower  
4 Colorado River basin, with the latter two species limited to the lower basin. (Doc. 26, p.  
5 13.) Roundtail chub in the lower Colorado River basin occupied the drainage basins of the  
6 Bill Williams, Gila, Little Colorado, Salt, and Verde rivers, while the headwater chub was  
7 found only in the Gila, Salt, and Verde river drainages. (Doc. 27, ¶ 18; Doc. 31, ¶ 18.)  
8 Gila chub were found in Gila, Salt, Verde, Santa Cruz, San Pedro, San Carlos, San Simon,  
9 San Francisco, and Aqua Fria drainages across Arizona and New Mexico. (Doc. 27, ¶ 19;  
10 Doc. 31, ¶ 19.)

11                   From the 1800s to 2016, the roundtail chub’s historic range in the lower Colorado  
12 River basin was found to have been greatly reduced and damaged. (Doc. 27, ¶ 20; Doc. 31,  
13 ¶ 20 (citing pre-2016 findings that the headwater chub has been eliminated from 52% of  
14 its historic range; the lower Colorado River basin roundtail chub DPS has been eliminated  
15 from 57% of its historic range; and the Gila chub has been eliminated from 85% to 90% of  
16 its range).) During this same time period, it was found that livestock grazing damaged a  
17 significant majority of the lower Colorado River basin roundtail chub’s range by removing  
18 riparian vegetation, increasing erosion and decreasing bank stability, and generally  
19 degrading the roundtail chub’s natural habitat.<sup>9</sup> (Doc. 27, ¶ 21; Doc. 31, ¶ 21.) Similarly,  
20 non-native fish, introduced for various reasons, have “led to significant losses of Gila chub”  
21 due to competition and predation. (D000775; *See also* Doc. 27, ¶ 22 (citing D000775);  
22 Doc. 33, ¶ 22 (citing D000775).)

23 \_\_\_\_\_  
24 <sup>9</sup> Defendants acknowledge that the 2015 Species Status Assessment Report for the  
25 Headwater Chub and Lower Colorado River Distinct Population Segment of Roundtail  
26 Chub found that poorly managed livestock grazing in the past has caused such damage, but  
27 note that the Assessment also found “the capability exists to create livestock grazing  
28 strategies that are compatible, and even complimentary to maintaining fisheries habitat,  
although more research is needed in this regard.” (Doc. 31, ¶ 21.) The Assessment  
recognized that livestock grazing on federal and tribal lands has been modified to reduce  
or eliminate long-term adverse effects. (*Id.*) “Consequently, even though all streams  
containing chub populations are surrounded by grazing allotments, impacts from grazing  
are limited and data does not indicate population level impacts are occurring or will occur.”  
(*Id.*)

1           The 2015 proposed rule for the Threatened Species Status for the Headwater Chub  
2 and Roundtail Chub DPS states that: ““changes in water flows caused by human activities  
3 (either surface water diversion or groundwater pumping) and climate change, leading to a  
4 reductions [sic] in water availability, have led to reduction in chub abundance and habitat  
5 quality and quantity.”” (Doc. 31, ¶ 23 (quoting D000570); Doc. 27, ¶ 23 (citing D000570.))

6           Defendants generally agree with CBD’s assertion that the lower Colorado River  
7 basin roundtail chub populations have become fragmented and small. (Doc. 31, ¶ 24; *see*  
8 *also* Doc. 27, ¶ 24.) However, Defendants contend that “not all remaining populations are  
9 small” and that CBD’s statement was based on information prior to the Joint Committee’s  
10 2016 taxonomic revision. (Doc. 31, ¶ 24.)

### 11                   **3. Various threats imperil the roundtail, headwater and Gila chub’s** 12                   **existence**

13           CBD asserts that the lower Colorado River basin roundtail chub, headwater chub,  
14 and Gila chub’s continued existence in their remaining range is threatened by the same  
15 underlying threats. Specifically, non-native aquatic species are the current primary threat  
16 to the chubs, as they prey on young chubs and outcompete them for resources in all life  
17 stages. (Doc. 27, ¶ 25 (noting non-native species pose the primary threat to roundtail and  
18 headwater chubs, and noting impacts on the Gila chub from non-native species); Doc. 31  
19 ¶ 25.)) The parties agree that non-native species have led to significant declines in native  
20 fish. (Doc. 27, ¶ 27; Doc. 31 ¶ 27.). The parties also generally agree that climate change  
21 is expected to increase the threat of non-natives because decreased water availability  
22 increases interactions and competition between native and non-native fish. (Doc. 27, ¶ 28;  
23 Doc. 31, ¶ 28.)

24           Water is the chubs’ basic habitat component. (Doc. 27, ¶ 29; Doc. 31, ¶ 29.)  
25 Reduction in water availability can lead to increased fragmentation as streams dry up and  
26 contract. (Doc. 27, ¶ 30; Doc. 31, ¶30.) Human water withdrawals, either through surface  
27 water diversions or alluvial groundwater pumping, decrease the availability of water. (Doc.  
28 27, ¶ 31; Doc. 31, ¶ 31). As the human population in the chubs’ range continues to grow,

1 these withdrawals are expected to increase. (Doc. 27, ¶ 32; Doc. 31 ¶ 32.) Additionally,  
2 man-made dams, which the chubs cannot cross, create reservoirs that are uninhabitable.  
3 (Doc. 27, ¶ 33; Doc. 31, ¶ 33.)

4 “Chubs are impacted not only by the quantity and quality of water, but also by the  
5 timing and spatial distribution of water. There is a strong temporal component to the  
6 amount of water available in a stream.” (Doc. 31, ¶ 34 (quoting D000350); *see also* Doc.  
7 27, ¶ 34.) Climate change is expected to change both the timing and amount of snowmelt  
8 as well as the amount of precipitation from monsoons. (Doc. 27, ¶ 35; Doc. 31, ¶ 35.)  
9 Changes in the timing or amount of water can prevent spawning, limit access to critical  
10 breeding areas, and increase genetic isolation resulting in potential inbreeding among other  
11 things. (Doc. 27, ¶ 36; Doc. 31, ¶ 36.)

12 The parties agree that several of the categories of risk listed by CBD threatened  
13 population levels in the past, but Defendants assert that not all categories listed are  
14 currently affecting the species because new and future management directions are  
15 considering these risks, particularly livestock grazing, roads management, channelization  
16 of streams, and forestry practices. (Doc. 31, ¶ 37.) Defendants concede, however, that the  
17 final rule listing the Gila chub noted that “[e]xisting regulatory mechanisms have not been  
18 adequate to prevent the continuing decline of Gila chub.” (Doc. 31, ¶ 38 (quoting  
19 D000776).) Defendants note that the proposed rule to list the headwater chub and lower  
20 Colorado River basin roundtail chub DPS did not make an explicit finding related to  
21 regulatory mechanisms. (Doc. 31, ¶ 38.)

## 22 **B. Procedural Background**

23 As set forth below, efforts to obtain ESA protection for the Gila, headwater, and  
24 lower Colorado River basin roundtail chub DPS have been fraught with delay.

### 25 **1. Gila Chub**

26 As early as 1982, FWS placed the Gila chub on the list of candidate species under  
27 category 1. “Category 1 [a term no longer used] comprise[d] taxa for which the  
28 Service . . . ha[d] substantial information on hand to support the biological appropriateness

1 of proposing to list the species as Endangered or Threatened. . . . Development and  
 2 publication of proposed rules on such species [was] anticipated.”<sup>10</sup> 47 Fed. Reg. 58454  
 3 (Dec. 30, 1982). In 1998, after more than 15 years passed without FWS making a decision  
 4 whether to list the Gila Chub on its own initiative, CBD petitioned FWS to list the Gila  
 5 chub as endangered. (Doc. 27, ¶ 40; Doc. 31, ¶ 40.) In response, FWS informed CBD that  
 6 it considered the Gila chub’s listing warranted but precluded by other higher priority  
 7 actions. (Doc. 27, ¶ 41; Doc. 31, ¶ 41.) CBD challenged this determination, and the Ninth  
 8 Circuit Court of Appeals rejected FWS’s finding. (Doc. 27, ¶ 42; Doc. 31, ¶ 42.) In 2001,  
 9 CBD and FWS settled subsequent litigation further addressing the Ninth Circuit’s ruling.  
 10 (Doc. 27, ¶ 43; Doc. 31, ¶ 33.) The settlement agreement required FWS to publish a  
 11 proposed rule to list the Gila chub as endangered by July 31, 2002. (Doc. 27, ¶ 43, Doc.  
 12 31, ¶ 43.) On August 9, 2002, FWS published the proposed rule, which constituted its 12-  
 13 month finding for the petition to list the Gila chub. (Doc. 27, ¶ 43; Doc. 31, ¶ 43.) In  
 14 November 2005, FWS listed the Gila chub as endangered and designated critical habitat  
 15 for that species. (Doc. 27, ¶ 44; Doc. 31, ¶ 44.)

16 In light of the 2016 taxonomic revision, the AGFD requested that FWS delist the  
 17 Gila chub as it is no longer recognized as a separate species. (Doc. 27, ¶ 70; Doc. 31, ¶  
 18 70.) Additionally, in 2017, internal FWS memoranda recommended delisting the Gila  
 19 chub. (Doc. 000741.) In the withdrawal of the proposed rule at issue here, FWS stated  
 20 that it intended to reevaluate the status of the currently-listed Gila chub. (D000750.)

## 21 2. The roundtail chub and headwater chub

22 FWS recognized the possibility that the roundtail and headwater chubs might  
 23 qualify for ESA protection as early as 1982 when FWS placed both species on the list of  
 24 candidate species as category 2 species. (Doc. 27, ¶ 39; Doc. 31, ¶ 39.) “Category 2 species

25 \_\_\_\_\_  
 26 <sup>10</sup> Beginning in 1996, FWS discontinued the designation of multiple categories of  
 27 candidates, and only those taxa meeting the definition for former category 1 candidates,  
 28 like the Gila chub, were considered candidates for listing purposes. Endangered and  
 Threatened Wildlife and Plants; Listing the Gila Chub as Endangered With Critical Habitat,  
 67 Fed. Reg. 51948, 51,949-50 (Aug. 9, 2002). The Gila chub was approved as a candidate  
 on August 17, 1997, and was included in the candidate Notices of Review published in  
 1997, 1999, 2001, and 2002. *Id.* at 51,950.

1 were those for which information in the Service’s possession indicated that proposing to  
2 list was possibly appropriate, but for which substantial biological data to support a  
3 proposed rule were lacking.” (D000563.) The roundtail and headwater chubs maintained  
4 this status until the practice of identifying candidate 2 species was discontinued in 1996.  
5 (D000563.) At that time, they were “removed from the candidate list and no longer  
6 recognized under the Act.” (*Id.*)

7 **a. CBD’s petition to list the roundtail chub and the headwater**  
8 **chub**

9 In 2003, CBD petitioned (the Petition) to list the lower Colorado River basin  
10 roundtail chub distinct population segment (LCR roundtail chub DPS) and the headwater  
11 chub—the only chubs within the *Gila robusta* complex lacking ESA protection. (Doc. 27,  
12 ¶¶ 45, 46; Doc. 31, ¶¶ 45, 46; Doc. 30, ¶ 9; Doc. 33, ¶ 9.) FWS agrees that CBD’s petition  
13 demonstrated that the headwater chub and lower Colorado River basin roundtail chub DPS  
14 experienced severe declines from “habitat loss and degradation related to livestock grazing,  
15 dams, diversions, groundwater pumping, mining, recreation, and human population  
16 growth, competition and predation from non-native fish, and inadequate existing laws and  
17 regulations.” (Doc. 27, ¶ 46; Doc. 31, ¶ 46.)

18 **b. Litigation to compel FWS to respond to CBD’s petition**

19 Due to funding constraints, FWS failed to make a timely 90-day finding concerning  
20 CBD’s Petition. (Doc. 27, ¶ 47; Doc. 31, ¶ 47; Doc. 30, ¶ 12; Doc. 33 ¶ 12.) After more  
21 than a year passed following the Petition’s submission, CBD filed suit against the Service  
22 for failing to make the required 90-day finding. (Doc. 27, ¶ 48; Doc. 31, ¶ 48.) The parties  
23 subsequently entered into a stipulated settlement agreement in which FWS agreed to issue  
24 a 90-day finding by June 30, 2005 and a 12-month finding by April 6, 2006. (Doc. 27, ¶¶  
25 49, 50; Doc. 31, ¶¶ 49, 50; Doc. 30 ¶ 13; Doc. 33, ¶ 13.) FWS issued a 90-day finding that  
26 the Petition presented substantial scientific information demonstrating that listing the LCR  
27 roundtail chub DPS and headwater chub may be warranted. (Doc. 27, ¶ 49; Doc. 31 ¶ 49.)

28 After conducting a status review, FWS issued the 12-month finding that listing was



1 “warranted but precluded” for the headwater chub and “not warranted” for the lower  
2 Colorado River basin roundtail chub DPS. (Doc. 27, ¶ 51; Doc. 31, ¶ 51.) CBD filed suit  
3 challenging this finding. (Doc. 27, ¶ 52; Doc. 31, ¶ 52; Doc. 30, ¶ 18; Doc. 33, ¶ 18.) In  
4 2007, the parties entered into a stipulated settlement agreement in which FWS agreed to  
5 commence another status review of the LCR roundtail chub DPS and make a 12-month  
6 finding by June 30, 2009. (Doc. 27, ¶ 52; Doc. 31, ¶ 52; Doc. 30, ¶ 19; Doc. 33, ¶ 19.)

7 In July 2009, FWS found that listing the LCR roundtail chub was “‘warranted but  
8 precluded’ by other ‘higher priority actions.’”<sup>11</sup> (Doc. 27, ¶ 53 (quoting D000139); Doc.  
9 31, ¶ 53.) In concluding that the listing was warranted, FWS found “‘that the lower  
10 Colorado River populations are discrete from the upper Colorado River basin populations  
11 on the basis of their present and historical geographic separation of 275 river mi (444 km)  
12 and because few historical records have been detected in the mainstem Colorado River  
13 between the two populations centers that would confirm significant connectivity  
14 historically.’” (Doc. 33, ¶ 20 (quoting D000142); Doc. 30, ¶ 20.) FWS also found “‘that  
15 the lower Colorado River basin roundtail chub is significant because of its unique  
16 ecological setting compared to the upper basin, and because the loss of the species from  
17 the lower basin would result in a significant gap in the range of the species.’” (Doc. 33, ¶  
18 20 (quoting D000142).) FWS stated that the species would be added to the candidate  
19 species list and that it would develop a proposed rule to list the roundtail chub DPS pursuant  
20 to the Listing Priority System. (Doc. 30, ¶ 21; Doc. 33, ¶ 21.) Over two years passed and  
21 FWS did not develop the proposed rule.

22 **c. The October 2015 proposed rule to list the Lower Colorado**  
23 **River basin roundtail chub DPS and headwater chub**

24 In 2011, CBD and FWS reached a stipulated settlement agreement in multi-district  
25

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26 <sup>11</sup> Although Defendants agree with this statement, they clarify that CBD’s assertion  
27 “fails to differentiate that the Service’s 2009 finding was based on the taxonomy of the  
28 species at the time and fails to acknowledge that this DPS finding occurred before the Joint  
Committee’s 2016 taxonomic revision.” (Doc. 31, ¶ 53.) Defendants raise similar  
objections to many of CBD’s statements of fact describing the factual and procedural  
background. In setting forth and discussing the historical facts, the Court recognizes that  
certain findings preceded the 2016 taxonomic revision.

1 litigation requiring the agency to make overdue decisions pertaining to hundreds of species,  
2 including the headwater chub and LCR roundtail chub DPS by 2015. (Doc. 27, ¶ 55; Doc.  
3 31, ¶ 55; Doc. 30, ¶ 22; Doc. 33, ¶ 22.)

4 In October 2015, over a decade after CBD filed its petition, the Service proposed to  
5 list both species as threatened. (Doc. 30, ¶ 23; Doc. 33, ¶ 23; *see also* Doc. 27, ¶ 56; Doc.  
6 31, ¶ 56.) In the proposed rule, the Service determined that:

7 . . . headwater chub and lower Colorado River basin roundtail chub DPS meet  
8 the definition of threatened species primarily because of the present or  
9 threatened destruction of their habitat or range and other natural or manmade  
10 factors resulting mainly from impacts from nonnative aquatic species,  
reduction of habitat (*i.e.*, water availability), and climate change.

11 (Doc. 27, ¶ 56 (quoting D000562); Doc. 31, ¶ 56.)

12 FWS also reaffirmed that the lower Colorado River basin roundtail chub constituted  
13 a DPS. (Doc. 27, ¶ 57; Doc. 31, ¶ 57.) Specifically, the Service determined that “[t]he  
14 lower Colorado River basin roundtail chub population segment meets the element of  
15 discreteness because it was separate historically, and continues to be markedly separate  
16 today.” (Doc. 27, ¶ 58; Doc. 31, ¶ 58.) FWS also found that “the lower Colorado River  
17 basin roundtail chub is significant because of its unique genetic lineage, which differs  
18 markedly from the upper basin, and that the loss of the species from the lower basin would  
19 result in a significant gap in the range of the species.” (Doc. 27, ¶ 59; Doc. 31, ¶ 31.)  
20 Therefore, “[b]ecause this population segment meets both the discreteness and significance  
21 elements of [the Service’s] DPS policy, the lower Colorado River population segment of  
22 the roundtail chub qualifies as a DPS . . . and, as such, is a listable entity under the ESA.”  
23 (Doc. 27, ¶ 60; Doc. 31, ¶60.)

24 **d. Delay between the proposed rule and the withdrawal**

25 On October 7, 2015, FWS published the proposed rule, reaffirming the July 7, 2009  
26 12-month finding that the roundtail chub in the lower Colorado River basin met the  
27 definition of a DPS, and proposed adding that DPS to the list as a threatened species. (Doc.  
28 30, ¶ 23; Doc. 33, ¶ 23; *see also* D000562-D000591.) The proposed rule provided for a

1 two-month period to “seek comments from independent specialists to ensure that our  
2 determinations are based on scientifically sound data, assumptions, and analysis.” (Doc.  
3 30, ¶ 24 (quoting D000562); Doc. 33, ¶ 24; *see also* D000561.) FWS sent the species status  
4 assessment and proposed rule to various specialists for peer review. (Doc. 30, ¶ 25; Doc.  
5 33, ¶ 25.)

6 On October 7, 2015, the same day the proposed rule was published, AGFD sent a  
7 letter to FWS stating that it had “staff working long hours” to review the proposed rule  
8 and the accompanying species status assessment. (Doc. 27, ¶ 65 (quoting E020352); Doc.  
9 31, ¶ 65.) Citing the complexity of the species status review, which contained “modeling  
10 that . . . staff is unfamiliar with,” AGFD requested at least an additional 60-days to  
11 comment. (E020352; *see also* Doc. 27, ¶ 65 (noting request for extension); Doc. 31, ¶ 65.)

12 Some commenters, including the New Mexico Department of Game and Fish,  
13 requested that the Service delay publication of the final rule pending completion of  
14 additional taxonomic analyses of the chub complex, noting recent studies documenting  
15 “significant overlap among taxa[.]” (Doc. 30, ¶ 27; Doc. 33, ¶ 27.) In October 2015,  
16 AGFD requested that the Joint Committee evaluate the taxonomy of the three *Gila* species  
17 in the lower Colorado River basin.<sup>12</sup> (Doc. 30, ¶ 29; Doc. 33, ¶ 29.) AGFD agreed to cover  
18 the travel expenses of Committee members “in an effort to assist assembling the maximum  
19 number of members as possible to ensure a thorough evaluation was conducted; no  
20 remuneration was provided for Committee members.” (Doc. 30, ¶ 30 (quoting D000727);  
21 Doc. 33 ¶ 30.)

22 During this time period, FWS engaged in discussion about alternative DPS  
23 configurations and the effect of such. In March 2016, FWS personnel discussed whether  
24 there were three distinct population segments of roundtail chub (Little Colorado, Bill  
25

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26 <sup>12</sup> The record shows that in May 2015, AGFD informed the Joint Committee of  
27 AGFD’s position that the chub complex should be classified as a single species. (D000300-  
28 06.) AGFD requested that the Joint Committee convene a workshop or panel to determine,  
among other things, whether the three species classification (roundtail, headwater, and *Gila*  
chub) remained valid. (D000306.)

1 Williams and Gila Basin) instead of one in the lower Colorado River Basin. (E031301<sup>13</sup>;  
2 see also Doc. 34, p. 13 (citing E031301).) Additionally, in July 2016, FWS personnel  
3 discussed comments received concerning the configuration of the DPS for the roundtail  
4 chub. (E031340-E031341.) In discussing possible alternative DPS configurations,  
5 including “separate DPS for the LCR populations” they noted that additional analysis  
6 would be necessary to determine if a potential LCR DPS could be significant and any  
7 change in DPS boundaries would require republication of a proposed rule for notice and  
8 comment. (*Id.*) It was decided “to stay the course for now with one the DPS. . . . We have  
9 some time to make a final decision, but if we were going to propose changing the DPS  
10 boundaries we should decide fairly soon as it would require a fair amount of  
11 reconsideration of our processes in terms of public notices, management briefings, etc.”  
12 (E031341.)<sup>14</sup>

13 On April 4, 2016, the Joint Committee met with a panel of experts, who presented  
14 their recent findings on genetics and morphological studies conducted over the past ten  
15 years. (Doc. 30, ¶ 31; Doc. 33, ¶ 31.)

16 **FWS’s 6-month extension of determination and comment period.**

17 On August 15, 2016, FWS announced a six-month extension of the determination  
18 whether the headwater chub and roundtail chub DPS are threatened species, and reopened  
19 the comment period for 30 days. (Doc. 30, ¶ 32; Doc. 33, ¶ 32.) FWS reopened the  
20 comment period for the proposed rule based on its “finding that there is substantial  
21 disagreement regarding the sufficiency or accuracy of the available data relevant to our  
22 proposed regulations to add these species to the List of Endangered and Threatened  
23

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24 <sup>13</sup> Defendants state that these discussions occurred “after the issuance of the  
25 proposed rule but before the taxonomic revision.” (Doc. 34, p. 13.) In the index of  
documents E031295-E031301, “Roundtail chub (*Gila robusta*) DRAFT DPS White  
Paper”, is dated March 28, 2016.

26 <sup>14</sup> Defendants cite the documents discussed in this paragraph in their Reply and  
27 request that the Court excuse their non-compliance with LRCiv 56.1(e) (requiring factual  
28 citation in the briefs to the specific paragraph number of the statement of facts). (Doc. 34,  
p. 13.) Because the documents were contained in the administrative record and are relevant  
to the issues presented, the Court will consider the materials.

1 Wildlife[.]” (Doc. 30, ¶ 33; Doc. 33, ¶ 33.) FWS explained that, during the initial public  
2 comment period for the proposed rule, it received comments questioning the taxonomic  
3 distinctness of the headwater chub and the roundtail chub DPS. (Doc. 30, ¶ 34; Doc. 33, ¶  
4 34.) FWS also noted that the recognized authority in establishing the taxonomic status of  
5 fish, the Joint Committee, had agreed to evaluate the roundtail, headwater, and Gila chub  
6 taxonomy and that a report was forthcoming. (Doc. 30, ¶ 35; Doc. 33, ¶ 34.)

7 **The Joint Committee’s taxonomic revision.**

8 On September 1, 2016, the Joint Committee released its final report on the taxonomy  
9 of Gila in the Lower Colorado River basin of Arizona and New Mexico, concluding that  
10 “the data available support recognition of only one species of *Gila*, the Roundtail Chub,  
11 *G. robusta*,” and “do not support recognition of three species . . . ., i.e., the Roundtail  
12 Chub, *Gila robusta*; Gila Chub, *Gila intermedia*; . . . and the Headwater Chub, *Gila*  
13 *nigra*.” (Doc. 27, ¶ 15 (quoting E028932); Doc. 31, ¶ 15; *see also* Doc. 30, ¶ 36; Doc. 33,  
14 ¶ 36.) The Joint Committee explained that this conclusion was based on the review of data  
15 and analyses published in studies and information from previous and ongoing studies  
16 presented at a meeting in Arizona on April 4, 2016. (Doc. 30, ¶ 37; Doc. 33 ¶ 37.) The  
17 Joint Committee’s report primarily relied on two sources: Carter et al. (2016) (Carter  
18 Report) and Copus, et. al. (2016) (Copus Report).<sup>15</sup> (Doc. 27, ¶ 16; Doc. 31, ¶ 16.) Neither  
19 the Carter Report nor the Copus Report were peer-reviewed at the time the Joint Committee  
20 issued its final report. (Doc. 27, ¶ 89; Doc. 31, ¶ 89.)

21 **FWS reopens the comment period a second time.**

22 On September 9, 2016, shortly after the Joint Committee’s report, AGFD requested  
23 that FWS withdraw the proposed rule because the headwater chub no longer met the  
24 definition of species under the Act and because the lower Colorado River basin roundtail  
25

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26 <sup>15</sup> The Joint Committee’s Report reflects that Copus was contracted by AGFD with  
27 the Joint Committee’s encouragement to analyze morphological variation and to conduct a  
28 genetic analysis using next-generation sequencing on samples of Gila from the lower  
Colorado River basin. (E028005.) Additionally, four of the five authors of the Carter  
report, including Carter, were AGFD employees at the time the report was written. (*See*  
R002727.)

1 chub DPS's range was increased by the inclusion of the headwater chub and Gila chub.  
2 (Doc. 27, ¶ 69; Doc. 31, ¶ 69.) AGFD also sought delisting of the Gila chub because it was  
3 no longer recognized as a separate species. (Doc. 27, ¶ 70; Doc. 31, ¶ 70.)

4 In a September 14, 2016 internal document, FWS identified a number of scenarios  
5 for moving forward. (Doc. 27, ¶ 71; Doc. 31, ¶ 71; *see also* E031346 (“Scenario planning  
6 for chubs based on AFS [the Joint Committee’s] new taxonomic classification.”).) The  
7 parties agree that all of the scenarios included withdrawing the proposed rule for listing the  
8 headwater and LCR roundtail chub DPS if the agency accepted the taxonomic revision.  
9 (Doc. 27, ¶ 72; Doc. 31, ¶ 72.) CBD asserts that FWS identified the scenarios prior to  
10 submission of other substantive comments, including comments from CBD. (Doc. 27, ¶  
11 71.) FWS points out that one of the scenarios, Option 2, addressed the possibility that:  
12 “Additional credible information is received that refutes the AFS decision to a degree that  
13 we decide to continue to treat the complex as 3 species.” (Doc. 31, ¶ 71.)

14 In a September 2016 email discussing “[d]raft scenarios of path forward for chubs,”  
15 one FWS staff member recognized that a listing could still be warranted under the revised  
16 taxonomy:

17 We are in the late stages of a proposed listing that could likely have put all  
18 three of these “entities” on the list, and there is at least some concern that  
19 even if combined the larger entity would warrant listing, as threatened at  
20 least. Thus, it seems imprudent to delist the Gila chub before a status review  
21 of the larger entity. As noted, if that review were to determine a need for  
22 listing the entire entity, either due to SPR<sup>16</sup> or across its entire range, years  
23 may be lost in terms of conservation due to the new national listing workplan.  
24 If the status review were to result in a determine [sic] the entire entity  
warrants listing, we would have at least one part of the entity listed and may  
be able to do a revised listing for the entire entity more quickly than waiting  
for years to cycle through the listing workplan, losing precious conservation

25 <sup>16</sup> “SPR” stands for “significant portion of its range.” 16 U.S.C. § 1532(6), (20).  
26 SPR is another basis on which to list a species as endangered or threatened. It shares some  
27 similarities with a DPS analysis. *See* Draft Policy on Interpretation of the Phrase  
28 “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of  
“Endangered Species” and “Threatened Species,” 76 Fed. Reg. 76,987, 97,997–99 (Dec.  
9, 2011) (explaining the difference between a “significant portion its range analysis” and a  
DPS analysis).



1 time and options.

2 \*\*\*

3 Even if we accept that the 3 comprise only one taxon, it is still entirely  
4 possible that one or more of these entities could constitute a SPR, leading to  
5 the need to list the entire taxon.

6 (E0031405-6; *see also* Doc. 33, ¶ 76 (citing E0031406).)

7 In September 2016, FWS also sought the opinion of Dr. Thomas Dowling, a leading  
8 roundtail chub expert, concerning the Joint Committee's and Copus's reports. (Doc. 30 ¶  
9 52 (citing E028178); Doc. 33, ¶ 52; *see also* Doc. 27, ¶ 89; Doc. 31, ¶ 89.) Dr. Dowling  
10 responded that "[t]he Copus report is flawed in both the morphological and molecular  
11 analyses[,]” and that he was “perplexed that the committee focused their report on  
12 presentations and non-peer reviewed literature (like the Carter and Copus reports) that  
13 supported their viewpoint but did not address others<sup>[17]</sup> that were not consistent with their  
14 case.” (Doc. 33, ¶ 52 (quoting E028176–77).) Dr. Dowling concluded: “The bottom line  
15 is that I think that this is a snap decision that has not really addressed all of the available  
16 (or best) scientific data. Given, the significance of the action, I think it is essential that the  
17 species continue to be recognized as distinct and more information be gathered.” (*Id.*  
18 (quoting E028177).)

19 In October 2016, Arizona FWS Field Supervisor Steven Spangle acknowledged  
20 disagreement within the FWS itself, stating “we have one camp who says the chub should  
21 be one species, and another camp who says they should be separate.” (Doc. 27, ¶ 101  
22 (quoting E028674); Doc. 31, ¶ 101.)

23 On October 31, 2016 or November 1, 2017,<sup>18</sup> FWS reopened the comment period

24 <sup>17</sup> Dr. Dowling identified the “[o]ther” information not addressed by the Joint  
25 Committee as Tyler Chafin’s presentation to the Joint Committee “where he was able to  
26 find differences,” Matt O’Neill’s presentation of a “morphological study where he showed  
27 he could discriminate among them,” and Dr. Dowling’s presentation of his work in Fossil  
28 Creek showing that *robusta* and *nigra* are not ecologically equivalent in that stream and  
exhibit some reproductive isolation which are two hallmarks of valid species. (E028176-  
E028177.) Dr. Dowling also mentioned that his work had been accepted for publication in  
Transactions of the American Fisheries Society. (E028177.)

<sup>18</sup> The parties agree that the comment period was reopened on one of these dates.  
(Doc. 30, ¶ 47 (citing D000693); Doc. 33, ¶ 47; Doc. 27, ¶ 63 (citing D000695); Doc. 31,

1 for another 45 days to provide the public with additional time to review and consider the  
2 proposed rulemaking in light of the Joint Committee’s taxonomic revision. (Doc. 30, ¶ 47;  
3 Doc. 33 ¶ 47; Doc. 27, ¶ 63; Doc. 31, ¶ 63.) FWS stated in the notice of reopening that  
4 “[t]his new information could be of significant consequence in our final listing  
5 determination because our proposed rule reviewed these entities as separate species. Given  
6 the new information, we must now review the proposed entities’ validity as recognized  
7 species. Further, this information was not previously included or considered in our  
8 proposed rulemaking or made available to the public.” (D000696.)

9 **Information FWS received during the comment period.**

10 Some commenters supported the taxonomic revision and requested that FWS  
11 withdraw the proposed rule. (Doc. 30, ¶ 48; Doc. 33, ¶ 48.) The State of New Mexico  
12 Department of Fish and Game “urge[d] the Service to reinitiate the Species Status  
13 Assessment (SSA) process to reevaluate the current status of the Roundtail Chub in the  
14 [lower Colorado River] basin” in light of the new single species taxonomic revision. (Doc.  
15 33, ¶ 48 (quoting D000703).) Other commenters criticized the taxonomic revision and  
16 requested that FWS issue a final rule listing the roundtail chub DPS. (Doc. 30, ¶ 49; Doc.  
17 33, ¶ 49.)

18 FWS sought the assistance of the Service’s Conservation Genetics Community of  
19 Practice (Community of Practice or COP) in evaluating the Joint Committee’s taxonomic  
20 report.<sup>19</sup> (Doc. 30 ¶ 51; Doc. 33. ¶ 51.) In response, in December 2016, the Community  
21 of Practice sent FWS a report stating in part:

22 The long history of these species being identified as a “species complex”  
23 should not be discounted – it’s likely that incomplete lineage sorting is  
24 confounding how people interpret the genetic data. Effects of habitat  
25 alteration and climate change may also exacerbate the interpretation. The

26 ¶ 63.)

27 <sup>19</sup> The Community of Practice is “an interactive forum to facilitate the exchange of  
28 information and technologies to strengthen the use and understanding of the conservation  
genetics within the [Service].” (Doc. 29, p. 15 n. 4 (internal quotation marks and citation  
omitted).)

1 decision to lump the species into a single species may be premature given  
2 that there are genetic studies ready for peer review. In view of the  
3 consequences of a decision to lump the species together, it would be prudent  
4 to consider new genetic information before issuing a final decision that  
5 combines these different entities into one taxonomic unit. The process of  
6 peer-review in terms of the additional literature should be allowed to progress  
7 before FWS makes a decision as there appears to be genetic data suggesting  
8 differentiation.<sup>[20]</sup>

9 (Doc. 31, ¶¶ 95, 96 (both quoting E029478); Doc. 27, ¶¶ 95, 96.) The parties agree that  
10 the Community of Practice criticized the great weight the Joint Committee placed on  
11 morphological analysis despite several studies suggesting “genetic divergence among the  
12 species in question.” (Doc. 27, ¶ 97; Doc. 31, ¶ 97.)

13 CBD highlights criticism from various commenters about the taxonomic revision.  
14 CBD, itself, commented that if FWS no longer recognized the roundtail chub, headwater  
15 chub, and Gila chub as distinct, the ESA still requires the agency to provide a determination  
16 as to whether listing the lower Colorado River basin population of roundtail chub as a  
17 threatened or endangered DPS is warranted, “as the Service has already recognized the  
18 species as being distinct in the lower and upper basins and it faces threats such that it  
19 warrants listing as a threatened or endangered species.” (Doc. 27, ¶ 64 (quoting  
20 D000714); Doc. 33, ¶ 64.)

21 Other comments cited by CBD include Dr. Dowling’s criticism of the Copus and  
22 Carter reports on which the Joint Committee based its finding. (Doc. 27, ¶ 89; Doc. 31, ¶  
23 89.) Dr. Dowling concluded that even if the three taxa are considered to be a single species,  
24 the single species would still be entitled to ESA protection. (Doc. 27, ¶¶ 115, 116; Doc.  
25 31, ¶¶ 115, 116.) In fact, Dr. Dowling stressed that the taxonomic revision “does not  
26 negate the fact that the complex as a whole has lost 85-95% of its range.” (Doc. 27, ¶ 115;  
27 Doc. 31, ¶ 115.)

28 <sup>20</sup> Because Defendants contend CBD’s statements of fact at paragraphs 95 and 96,  
concerning the Community of Practice’s report are inaccurate and incomplete, the Court  
sets forth the pertinent portion of the report as quoted in Defendants’ Controverting  
Statement of Facts. (Doc. 31, ¶¶ 95, 96.)

1 University of Arizona ecology professor Dr. Peter N. Reinthal commented that  
2 “regardless of one (*Gila robusta*) or three species, all populations of the Gila chub  
3 complex warrant being listed as threatened.” (Doc. 27, ¶ 116 (quoting D000699); Doc. 31,  
4 ¶ 116.) Dr. Reinthal further stated, ““There is no question that the entire Gila chub complex  
5 is under great threat from a combination of habitat alteration, de-watering, population  
6 segmentation, exotic species, and a variety of threats’ which continue to threaten the lower  
7 Colorado River basin roundtail chub’s continued persistence in the wild.” (Doc. 27, ¶ 116  
8 (quoting D000699); Doc. 31, ¶ 116.) Dr. Reinthal found “that the whole case reaches the  
9 irreversible decision that these populations of all chub are extremely threatened,” and that  
10 “[t]here is no escape from the conclusion that all populations, regardless of the number of  
11 species (taxa) within the chub complex, should be afforded protection as threatened  
12 species.” (D000700; Doc. 27, ¶ 116 (quoting D000700); Doc. 31, ¶ 116.)

13 CBD also cites a statement from a senior forensic scientist within FWS, Dr. Mary  
14 Kay Burnham Curtis, who wrote:

15 It seems like the decision to lump the species into one might be a little  
16 premature given that there are genetic studies ready for peer review. In my  
17 opinion, that process should be allowed to progress before FWS makes a  
18 decision.

18 (Doc. 27, ¶ 99; Doc. 31, ¶ 99 (quoting E029410).)

19 Defendants generally agree with CBD’s assertion that FWS “experts cautioned  
20 against discounting the long history of the three species being a part of a species complex  
21 and the evidence of genetic divergence amongst the three species.” (Doc. 27, ¶ 100; Doc.  
22 31, ¶ 100.) Defendants object only to CBD’s use of the word “cautioned.” (Doc. 31, ¶  
23 100.)

24 **e. FWS’s decision to withdraw the proposed rule.**

25 On January 9 and 10, 2017, FWS met “to discuss and evaluate the various genetic  
26 reports to determine the best available science” and to finalize a recommendation to the  
27 Regional Director on how to proceed regarding the chub taxonomy.<sup>21</sup> (Doc. 33, ¶ 55; *see*  
28

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<sup>21</sup> Defendants state that at the meeting, FWS considered “the Community of

1 also Doc. 30, ¶ 55.) At this meeting, eight of the eleven FWS staff members voted to  
 2 accept the single-species recommendation presented in the Joint Committee’s report.  
 3 (Doc. 30, ¶ 56; Doc. 33, ¶ 56.) After the decision to adopt the Joint Committee’s  
 4 taxonomic revision, FWS considered whether to delist the Gila chub. (See Doc. 27, ¶ 88;  
 5 Doc. 31, ¶ 88.)<sup>22</sup>

6 In a January 27, 2017 briefing letter for the Assistant Regional Director, Field  
 7 Supervisors Susan Milsap of New Mexico and Steve Spangle of Arizona recommended

8 Practice’s report, and all other information and comments it had received on the taxonomic  
 9 revision . . . .” (Doc. 30, ¶ 55 (citing E029507, E029496).) CBD disputes this statement  
 10 as “generalized” because the supporting evidence offered by FWS is the edited draft agenda  
 11 for the meeting. (Doc. 33, ¶ 55.) The draft agenda identified the following documents as  
 12 “Key Pre-Reading[:]” an unidentified “Guidance document”; the Joint Committee’s  
 13 September 1, 2016 report; a draft manuscript titled “Taxonomy of *Gila* in the Lower  
 14 Colorado River basin of Arizona and New Mexico or (Recent decisions on taxonomy of  
 15 North American fishes by the AFS/ASIH Joint Committee on the Names of Fishes)”; the  
 Community of Practice’s December 14, 2016 report; Marsh et al 2016, *Molecular genetics  
 informs spatial segregation of two desert stream Gila*, Transactions of the American  
 Fisheries Society; and comments from CBD (dated December 12, 2016), Peter Reinthal  
 (dated December 2, 2016), AGFD (dated December 16, 2016), New Mexico Department  
 of Game and Fish (dated December 6, 2016), and Dowling (dated December 10 and 17,  
 2016). (E029506-8.) The record also contains a shorter version of the agenda which,  
 according to CBD, may be an earlier draft. (E029496-7; Doc. 33, ¶ 55.)

16 <sup>22</sup> In an internal communication, FWS identified four possible scenarios for  
 17 resolving the status of the currently-listed Gila chub, including advantages and  
 18 disadvantages for each approach. (E031421-23.) The options ranged from delisting the  
 19 Gila chub and withdrawing the proposed listing for the headwater chub and LCR roundtail  
 20 chub DPS to publishing a “correction” to the list of threatened and endangered wildlife  
 changing the Gila chub from a full species to a DPS of the roundtail chub. (*Id.*) Upon  
 consideration of all listed options, FWS field supervisors recommended to withdraw the  
 proposed rule and to delist the Gila chub at the same time or as soon as possible thereafter.  
 (*Id.*)

21 An early draft of the withdrawal of the proposed rule included FWS’s  
 22 recommendation to publish “a proposed rule to delist Gila chub either concurrently with or  
 23 as soon as possible thereafter, our withdrawal of the proposed rules for the headwater chub  
 24 and the roundtail chub DPS.” (E030631.) A later draft stated: “Following publication of  
 25 this withdrawal, we intend to reevaluate Gila chub status under the Act in the near future  
 26 and initiate a range-wide species status assessment (SSA) of the newly-recognized  
 27 roundtail chub (*Gila robusta*).” (*Id.*) A March 2017 email shows “that the regional director  
 28 of the Service wanted a ‘stronger’ statement regarding the Gila chub’s withdrawal than that  
 the Service would ‘reevaluate the status of the Gila chub.’” (*Id.*) The email continues:  
 “[A]nd that whomever altered the language from a previous draft ‘should plan on chatting  
 with the RD.’” (Doc. 27, ¶ 88 (quoting E030631).) Ultimately, the published notice  
 withdrawing the proposed listing for the headwater chub and lower Colorado River basin  
 roundtail chub DPS stated that FWS intended to “reevaluate the status of the Gila chub  
 (currently listed as endangered) in the near future” and to “initiate a range-wide species  
 status assessment (SSA) of the newly recognized roundtail chub (*Gila robusta*).” (Doc.  
 30, ¶ 70 (quoting D000750); Doc. 33, ¶ 70.)

1 that the Regional Director withdraw the proposed rule, writing:

2 The Service listing team recently met to discuss all available commercial and  
3 scientific information (including the AFS/ASIH’s final report, public  
4 comments, and the COP report), and although there was some dissent, the  
5 Field Supervisors recommend accepting the “single species”  
6 recommendation. All agreed that AFS/ASIH is the recognized authority in  
7 establishing fish taxonomic status (as we stated inin [sic] the October 7, 2015  
8 proposed rule); and therefore, we relied heavily on their final conclusion.

9 (Doc. 30, ¶ 57 (quoting D000741); Doc. 33, ¶ 57.) The briefing letter recommended  
10 delisting the Gila Chub. (D000741.)

11 **f. FWS’s Withdrawal of the Proposed Listing in 2017.**

12 On April 7, 2017, almost 15 years after CBD filed its petition, FWS withdrew the  
13 proposed rule to list the headwater chub and LCR basin roundtail chub DPS as threatened  
14 species under the ESA. (Doc. 30, ¶ 58; Doc. 33, ¶ 58.) The FWS stated: ““These fish are  
15 now recognized as a part of a single taxonomic species—the roundtail chub (*Gila robusta*).  
16 Because the entities previously proposed for listing are no longer recognized as species, as  
17 defined by the Act, we have determined that they are not listable entities and we are  
18 withdrawing our proposed rule to add them to the List of Endangered and Threatened  
19 Wildlife.”” (Doc. 30, ¶¶ 59 (quoting D000745); Doc. 33, ¶ 59; Doc. 27, ¶¶ 74, 105; Doc.  
20 31, ¶¶ 74, 105; *see also* Doc. 30, ¶ 60 (quoting D000750); Doc. 33, ¶ 60.)

21 The withdrawal of the proposed rule included a summary of the data underlying the  
22 taxonomic revision, including data relating to the species history, morphology, genetics,  
23 speciation, and conservation implications, and addressed peer review and public  
24 comments.<sup>23</sup> (Doc. 30, ¶ 61; Doc. 33, ¶ 61.)

25 In the withdrawal of the proposed rule, FWS explained that the Service lacked  
26 confidence in the taxonomic classification of three *Gila* species because the classification

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27 <sup>23</sup> While CBD agrees that the withdrawal of the proposed rule contained the  
28 summary of data included in ¶ 61 of Defendants’ Statement of Fact, CBD contends that the  
withdrawal failed to include an adequate summary of the conservation implications of the  
taxonomic revision and failed to meaningfully address comments regarding listing  
alternatives. (Doc. 33, ¶ 61.)



1 was based on an assumption (that none of the species occurred in the same locality) that  
2 has since been called into question. (Doc. 30, ¶ 63; Doc. 33, ¶ 63; *see also* D000750.) More  
3 recent studies show that the three entities ““overlap geographically or occur adjacent to one  
4 another’ and that the key for identification of the three entities did ‘not reliably differentiate  
5 among these three fish’ and that recent genetic studies were also unable to ‘identify genetic  
6 markers distinguishing between the three fish.’” (Doc. 30, ¶ 64 (quoting D000750); Doc.  
7 33, ¶ 64.) FWS acknowledged: ““As noted by nearly all researchers investigating the  
8 systematics of *Gila* spp., the taxonomic situation is complicated and problematic”;  
9 ““[r]ecent and ongoing genetic and morphologic analyses of chubs in the Gila River basin  
10 continue to yield conflicting results.”” (Doc. 30, ¶ 65 (quoting D000745 (citing to genetic  
11 and morphologic studies done by experts, including Dr. Dowling, that show “conflicting  
12 results” to those relied upon by the Joint Committee)); Doc. 33, ¶ 65; *see also* Doc. 27, ¶  
13 76; Doc. 31, ¶ 76.)<sup>24</sup> FWS noted that the three chubs had been recognized as “full species,  
14 . . . as different species, subspecies of *Gila robusta*, or as part of a ‘*Gila robusta* complex.’”  
15 (Doc. 27, ¶ 75 (quoting D000745); Doc. 31, ¶ 75.)

16 In the withdrawal of the proposed rule, FWS addressed conflicts and limitations  
17 with the taxonomic data in response to comments regarding taxonomic issues. (Doc. 30, ¶  
18 67; Doc. 33, ¶ 67.) FWS contends that it also addressed comments regarding conservation  
19 implications, pointing to the following sentences:

20 The Service recognizes that multiple experts agree that conservation actions  
21 must be directed at the population level and must include consideration of  
22 the complex as a whole[.] . . . The Service’s withdrawal of our proposed rule  
23 to list the headwater and roundtail chub based on new taxonomic  
24 classification does not diminish the conservation efforts of our partners to  
25 conserve this species and habitat, nor does our decision affect the State’s  
26 ability to conserve this species under its own authority. The Arizona Game  
and Fish Department recognizes the importance of conserving the currently  
recognized roundtail chub population rangewide (including the formerly

27 <sup>24</sup> The withdrawal of the proposed rule summarized the conflicting data for each  
28 section on the history, morphology, genetics, and speciation of the roundtail chub. (Doc.  
30, ¶ 66; Doc. 33, ¶ 66.)

1 known headwater chub and Gila chub) and is committed to the conservation  
2 agreements and practices that have been in place since 2006[.]

3 (Doc. 27, ¶ 119 (quoting D000748); Doc. 31, ¶ 119; *see also* Doc. 27, ¶ 78; Doc. 31, ¶ 78  
4 (quoting D000748).) FWS declined to address other comments, such as those concerning  
5 threats to the fish, stating that, “because our withdrawal is due to taxonomic revision, such  
6 comments are outside the scope of this withdrawal” (D000747; Doc. 27, ¶ 79 (quoting  
7 D000747); Doc. 31, ¶ 79.) FWS also noted that the ESA time limits required it to make a  
8 listing or delisting decision at that time. (Doc. 27, ¶ 103; Doc. 31, ¶ 103.)<sup>25</sup>

9 In the withdrawal of the proposed rule, FWS recognized that the Gila chub (*Gila*  
10 *intermedia*) – already listed as an endangered species under the ESA – is also part of the  
11 same taxonomic species, roundtail chub (*Gila robusta*). (Doc. 30, ¶ 68; Doc. 33, ¶ 68.)  
12 FWS indicated that: “An assessment of the entire range of the new taxonomic group of  
13 roundtail chub is planned. We are initiating a status review of the new taxonomic entity in  
14 2 to 4 years. Following that review, we will take action as appropriate.” (Doc. 30, ¶ 71  
15 (quoting D000749); Doc. 33, ¶ 71.)

16 An earlier draft of the withdrawal included discussion of the Community of  
17 Practice’s recommendation, including the following statement:

18 The COP identified some genetic divergence among roundtail, headwater,  
19

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20  
21 <sup>25</sup> The notice stated:

22 The Act requires that we finalize, modify, or withdraw the proposed rule  
23 within 12 months. The Act provides for one 6-month extension for scientific  
24 uncertainty, which we have used. As such, we are required to make a decision  
25 regarding the entities’ eligibility for listing at this time. In addition, section  
26 4(b)(1)(A) of the Act requires the Service to make listing or delisting  
27 decisions based on the best scientific and commercial data available. . . .  
28 After reviewing the best available scientific and commercial information (as  
described above in the *Taxonomy* section and summarized below) and  
applying statutory and regulatory guidance, we determined that the Societies’  
report considered the best commercial and scientific data available.

(D000749-50.)

1 and Gila chub. Specifically, the COP identified that some populations of  
2 these fish are clearly genetically variable, even though the variation is greater  
3 within individual populations of fish than between the three formerly  
4 recognized species, meaning more similarities were found between species  
5 than within a given population of one species. The COP also suggested that  
6 the long history of these species being identified as a “species complex” (a  
7 group of similar fish) should not be discounted because it is likely that  
8 incomplete-lineage sorting (incomplete lineage sorting can produce  
9 discrepancies between the evolutionary tree for a specific gene or a genomic  
10 segment and the overall species-level evolutionary tree) is confounding the  
11 interpretation of the genetic data. The COP also noted that several of the  
12 reports relied on by AFS/ASIH are unpublished.

13 (E030965; *see also* Doc. 27, ¶ 102 (citing E030965); Doc. 31, ¶ 102.) This language was  
14 omitted from the final version at the direction of FWS headquarters. (*See* E030972.)

15 In 2018, Copus et al. (2018) stated that the taxonomic revision “do[es] not indicate  
16 that protection for [*Gila robusta*] should cease.” (Doc. 33, ¶ 74 (quoting R002947).)  
17 Copus et. al. (2018) found that the taxonomic revision did not undermine “the need for  
18 protection at a population level[,]’ and recommended that *Gila robusta* be managed as a  
19 DPS.” (*Id.* at ¶ 75 (quoting R002947).)

#### 20 **IV. Argument**

21 FWS seeks summary judgment arguing that its decision to withdraw the proposed rule  
22 was reasonable because there was insufficient evidence to justify the proposed rule. (Doc.  
23 29, p. 18.) FWS asserts that (1) it was not obligated under the ESA to proceed with the  
24 listing process after the taxonomic revision because the petitioned-for DPS was no longer  
25 recognized as a species, (2) FWS’s explanation for the withdrawal is adequate because the  
26 entity considered by the Service was no longer an applicable listing option under the ESA  
27 and withdrawing the proposed rule and re-assessing the newly-revised species was the only  
28 viable option for the Service, and (3) FWS could not have completed a new DPS analysis  
in the amount of time statutorily allowed. (Doc. 29, pp. 30-38.)

In its Motion for Summary Judgment, CBD asserts that FWS’s withdrawal of the  
proposed rule to list the LCR roundtail chub DPS rests entirely on FWS’s acceptance of  
the taxonomic revision concluding that the Gila chub, headwater chub, and roundtail chub

1 are all roundtail chub. (Doc. 26, p. 22.) CBD argues that this taxonomic revision does not  
2 provide a reasoned, rational basis for abandoning the listing process because the LCR  
3 roundtail chub remains a listable entity and is in danger of extinction.<sup>26</sup> (*Id.*) CBD asserts  
4 that FWS’s failure at the time of the withdrawal to explain why it did not consider listing  
5 the LCR roundtail chub renders the withdrawal arbitrary and capricious. (Doc. 26, pp. 31-  
6 34.) The Court agrees with CBD.

## 7 **V. Analysis**

### 8 **A. FWS was required to act on CBD’s Petition to list the LCR basin** 9 **roundtail chub as a DPS.**

10 When a petition for designation of a DPS is submitted, the ESA mandates that FWS  
11 act on that petition. *See* 16 U.S.C. § 1553(b)(3) (requiring the Secretary to act on the  
12 petition within mandatory timelines); *Coos Cnty. Bd. of Cnty. Comm’rs*, 531 F.3d at 808  
13 (recognizing that when presented with a petition for listing, the Secretary’s discretion is  
14 “replace[d] . . . with mandatory, nondiscretionary duties.”); *Safari Club Int’l v. Jewell*, 960  
15 F. Supp. 2d 17, 65 (D.D.C. 2013) (*Safari Club*) (the ESA mandates that FWS respond to a  
16 petition to designate a population as a DPS under section 1533(b)(3)). In 2003, CBD  
17 petitioned FWS to list the LCR basin roundtail chub as a DPS, triggering the Service’s duty  
18 to consider whether the LCR basin roundtail chub population warranted listing. 16 U.S.C.  
19 § 1533(b)(3) (the Secretary must act on a petition); 16 U.S.C. § 1532(16) (the definition of  
20 “species” “includes . . . any distinct population segment of any species of vertebrate  
21 fish . . . which interbreeds when mature.”)

22 The taxonomic revision of the species roundtail chub to encompass the minnows  
23 formerly recognized as the separate species of headwater chub and Gila chub did not relieve  
24 FWS of its statutory obligation to consider the proposed listing. The revision does not  
25 change the fact that the LCR basin roundtail chub population remains a potential listable

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26 <sup>26</sup> CBD does not argue that FWS’s acceptance of the taxonomic revision did not  
27 rely on the best science. Although CBD is critical of the scientific reports underlying the  
28 revision, CBD’s argument is that FWS failed to consider the best available science, after  
accepting the revision, in withdrawing the proposed rule. (Doc. 26, 7, 22-31; Doc. 32, p. 6  
n.1.)

1 entity under the ESA as a DPS of the roundtail chub. Thus, although the data underlying  
2 FWS's consideration of that entity would necessarily need to be re-evaluated as a result of  
3 the revision, the revision did not, by itself, relieve FWS of its statutory obligation to  
4 consider the petition.<sup>27</sup>

5 **B. FWS failed to articulate a rational connection between its acceptance of**  
6 **the taxonomic revision and its withdrawal of the proposed rule**

7 In 2017, FWS abandoned the listing process before considering whether the LCR  
8 roundtail chub population remained listable as a DPS in light of the taxonomic revision.  
9 The determination whether a population is a DPS requires consideration of the population  
10 segment's (1) discreteness in relation to the remainder of the species, (2) significance to  
11 the species to which it belongs, and (3) conservation status. (See D000755.) FWS did not  
12 consider the DPS criteria with regard to the LCR basin roundtail chub population after the  
13 taxonomic revision.

14 FWS asserts that it was proper to withdraw the rule because the taxonomic revision  
15 recognized only one species of Gila—the roundtail chub—instead of three species (the  
16 Gila, roundtail, and headwater chubs). (See Doc. 29, pp. 31-32.) FWS states that its only  
17 option was to withdraw the proposed listing because the analysis supporting the proposed  
18 listing was no longer accurate. In the withdrawal, FWS cited the comments it received  
19 which supported the conclusion that the LCR basin roundtail chub population remained a  
20 listable entity after the revision. (See Doc. 27, ¶ 115 (Dr. Dowling stating that the  
21 taxonomic revision “does not negate the fact that the complex as a whole has lost 85-90%  
22 of its range”); see also Doc. 33 ¶ 73 (CBD's comment setting forth support for the LCR  
23 basin roundtail chub population's continued discreteness and significance following the

24 <sup>27</sup> FWS cites *Safari Club* as authority for the position that the Service was not  
25 obligated to analyze on its own initiative whether there is a DPS based on the newly-revised  
26 roundtail chub. (Doc. 29, p. 32.) *Safari Club* is inapposite. In *Safari Club*, no party  
27 petitioned to designate a DPS and the case did not involve a taxonomic revision. 960 F.  
28 Supp. 2d at 66. *Safari Club* merely recognized that section 1533(b) permits listing either  
on the Secretary's own initiative or upon a petition, and if no petition has been filed, the  
agency is not required to consider designating a DPS on its own. *Id.* at 65. Notably, *Safari*  
*Club* was clear that when the Secretary is petitioned to designate a DPS, as in this case,  
“the ESA mandates that the FWS respond to the petition.” *Id.*

1 revision and noting that the combined population remained “clearly at risk of extinction in  
2 all or a significant portion of its range.”.) But FWS did not state in its withdrawal, and  
3 the administrative record does not show, why the Service could no longer consider whether  
4 the LCR roundtail chub recognized in the revision satisfied the DPS criteria. The  
5 withdrawal does not state how the information in the agency’s possession was insufficient  
6 to conduct the analysis or how the best available science no longer justified listing the LCR  
7 basin roundtail chub as a DPS. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 50  
8 (refusing to consider reasons that were not the agency’s reasons for its determination where  
9 the agency submitted no reasons at all). Notably, FWS does not show that any of the  
10 studies supporting the revision called into question whether the LCR basin roundtail chub  
11 remains discrete and significant following the taxonomic revision. And, despite FWS’s  
12 prior determination that the Gila, headwater and LCR basin roundtail chub each faced  
13 multiple threats, FWS declined to address comments concerning threats to the fish, either  
14 separately or as a whole, as beyond the scope of the withdrawal because withdrawal “is  
15 due to taxonomic revision.” (D000747.)

16 In its cross-motion for summary judgment, FWS argues that a taxonomic revision  
17 necessarily affects the analysis of the DPS under both the discreteness and significance  
18 prongs. (Doc. 29, p. 33; Doc. 34, p. 13.) In support, FWS points to AGFD’s comment that  
19 “[t]he basis of the original petition and subsequent findings and analyses by the Service for  
20 Roundtail Chub are no longer valid because they did not encompass the entire range of the  
21 species, which in Arizona alone substantially increases their range to more than 70 streams  
22 at present.” (Doc. 29, p. 33.) FWS also cites a Service visual showing the ranges of Gila,  
23 headwater and roundtail chubs in the lower Colorado River basin prior to the taxonomic  
24 revision. (*Id.*)

25 The Court recognizes that a taxonomic revision could impact a DPS analysis, and  
26 would have required re-analyzing the data underlying the proposed rule in this case. FWS  
27 proves this point in its Reply, citing to parts of the administrative record that demonstrate  
28 that, even before the taxonomic revision, the Service was considering what additional



1 analysis would be required if the DPS of the LCR basin roundtail chub were reconfigured.  
2 (Doc. 34, p. 13.) This includes a March 2016 draft paper discussion of alternative DPS  
3 configurations (for example whether there were 3 DPS of the roundtail chub instead of 1  
4 in the lower Colorado River basin), and a July 2016 Service personnel discussion in  
5 response to comments about the configuration of the DPS. In July 2016, Service personnel  
6 discussed that “1) reconfiguring the DPS would require additional analysis to determine if  
7 a potential LCR DPS would be significant and 2) [a]ny change in the DPS boundaries  
8 would require a republication of a proposed rule for notice and comment. And also a  
9 reconsideration of the status of those DPSs (threatened, endangered, or not warranted.)”  
10 (*Id.* at pp. 13-14 (internal quotation marks omitted).) But while both of these discussions  
11 acknowledge that further analysis would be necessary if the DPS were reconfigured,  
12 neither suggests that the analysis could not be done using information available to FWS.  
13 Moreover, these documents show that FWS was aware, before accepting the taxonomic  
14 revision, of the possibility that any change in DPS would likely require a revised DPS  
15 analysis.

16 Thus, although FWS argues that the record demonstrates that it carefully considered  
17 its options when presented with the Joint Committee’s report, and that it did not leap to the  
18 conclusion that withdrawal of the proposed rule was warranted, the only reason it gave for  
19 withdrawing the rule was its acceptance of the taxonomic revision. That reason, in and of  
20 itself, is insufficient. The taxonomic revision does not address whether the LCR basin  
21 roundtail chub was a listable DPS.

22 Taxonomic uncertainty as to roundtail, headwater and Gila chub in the Colorado  
23 River basin has always existed. Taxonomic fluidity is not uncommon in species  
24 classification efforts. *See e.g., Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d  
25 1250, 1260 (11th Cir. 2007) (“Given the nature of taxonomy, it would be surprising if there  
26 were not some disagreement about the proper classification of the [entity at issue] . . .”).  
27 Because FWS did not explain how this taxonomic revision impacted the DPS analysis, how  
28 it excused the Service from considering the DPS criteria, or why FWS could not re-visit

1 the DPS analysis in light of existing data, this Court cannot conclude that FWS was unable  
2 to fulfill its statutory mandate to determine whether the population was a listable DPS in  
3 light of the taxonomic revision.

4 **C. FWS did not rely on ESA time limits to abandon the listing process.**

5 In its cross-motion for summary judgment, FWS argued that it withdrew the  
6 proposed listing because, in light of the taxonomic revision, it lacked sufficient time to  
7 complete the analysis required under the ESA. (Doc. 29, p. 32.) In its reply, FWS  
8 acknowledged that it withdrew the proposed rule solely because the roundtail chub DPS  
9 was no longer considered a species under the ESA. (Doc. 34, p. 18.) Nonetheless, FWS  
10 suggests that its inability to have issued a final rule with a revised analysis within the  
11 statutory timeframe even if it choose to do so—as opposed to being required to under the  
12 ESA—is further evidence demonstrating that the Service acted reasonably in withdrawing  
13 the proposed rule. (*Id.*)

14 The Court agrees that FWS did not rely on ESA time limits as a basis for withdrawing  
15 the proposed listing. Although the notice of withdrawal alludes to time limitations imposed  
16 by the ESA, the notice states only that the taxonomic revision was the basis for the  
17 withdrawal of the proposed rule. (D000749-50.) Accordingly, the Court will not consider  
18 the time limits in support of FWS’s withdrawal of the listing. *See Motor Vehicle Mfrs.*  
19 *Ass’n of U.S., Inc.*, 463 U.S. at 50 (refusing to consider reasons that were not the agency’s  
20 reasons for its determination where the agency submitted no reasons at all). But the  
21 agency’s reference to the ESA time limits bears mention.

22 It is not apparent that FWS did not have time, in light of its adoption of the taxonomic  
23 revision, to analyze the data underlying the petition. Clearly, FWS was aware of the  
24 possibility of reconfiguration of the DPS. As discussed above, prior to the taxonomic  
25 revision, FWS personnel discussed in March 2016 whether there were three distinct  
26 population segments of roundtail chub instead of one in the lower Colorado River Basin  
27 and discussed in July 2016, possible alternative DPS configurations, including “separate  
28 DPS for the LCR populations.”

1 FWS is silent as to how much time would be needed to complete a DPS analysis. In  
2 August 2016, FWS extended the deadline for making a final determination based on its  
3 finding that there was “substantial disagreement regarding the sufficiency or accuracy of  
4 the available data relevant to” the proposed rule. (Doc. 30, ¶¶ 32, 33; Doc. 33, ¶¶ 32, 33.)  
5 At that point, FWS had eight months to make a listing determination. (Doc. 32, p. 15.)  
6 FWS accepted the taxonomic revision five months later—leaving three months to consider  
7 a DPS analysis.

8 Even if FWS could not complete its analysis within the statutory time limits, that  
9 would not provide evidence that FWS acted reasonably in withdrawing the rule and  
10 refusing to consider the petition further. The reasons for agency decisions must be based  
11 on non-arbitrary, relevant factors that are tied to the purpose of the underlying statute. *See*  
12 *Judulang*, 565 U.S. at 53, 55. Congress enacted ESA’s listing deadlines due to “particular  
13 concern for species that had languished for years in ‘status reviews.’” *Ctr. for Biological*  
14 *Diversity v. Norton*, 254 F.3d 833, 839–40 (9th Cir. 2001) (citation omitted). It would  
15 defeat the Congressional intent behind the ESA deadlines if the Service could decline to  
16 even consider a listing if it determined that it did not have sufficient time to do so under  
17 the ESA deadlines. And it would not be rational to abandon consideration of a listing based  
18 on the statutorily-mandated deadlines. “The Endangered Species Act does not require that  
19 a species be destroyed in order to preserve a part of the process meant to save it.” *Alabama-*  
20 *Tombigbee Rivers Coal.*, 477 F.3d at 1269 (rejecting plaintiffs’ request for order requiring  
21 the Service to re-start the listing process as a penalty for its failure to comply with ESA’s  
22 deadlines because that could condemn the Alabama sturgeon to extinction and would  
23 defeat the Congressional intent behind the ESA.)<sup>28</sup>

24 //

25 <sup>28</sup> FWS asserts that *Alabama-Tombigbee Rivers Coal.* is distinguishable because the  
26 plaintiffs, a group of industries and associations opposed to listing, had ulterior motives in  
27 requesting FWS to re-start the listing process, and no such motives can be attributed to  
28 FWS. This is a distinction without a difference. If FWS could escape its statutory  
obligations in instances where more time was required to complete those obligations than  
permitted by the ESA, the ESA would be eviscerated.

1           **D. Conclusion**

2           For the forgoing reasons, the Court concludes that FWS’s withdrawal of the  
3 proposed rule was arbitrary and capricious. FWS improperly failed to consider whether  
4 the LCR basin roundtail chub population remained discrete, significant, and in danger of  
5 extinction after FWS’s acceptance of the taxonomic revision, and FWS failed to articulate  
6 a rational connection between the taxonomic revision and its decision not to consider listing  
7 the LCR basin roundtail chub DPS. The Service could have explained why the taxonomic  
8 revision necessitates denying the LCR basin roundtail chub protection under the Act. The  
9 Service could have explained that the best available science demonstrates that the LCR  
10 basin roundtail chub is no longer in danger of extinction in the foreseeable future. But the  
11 Service failed to do so, rendering the withdrawal arbitrary and capricious.

12           Accordingly, the Court will grant Plaintiff’s Motion for Summary Judgment and  
13 deny Defendants’ Cross-Motion for Summary Judgment.

14           **IT IS ORDERED:**

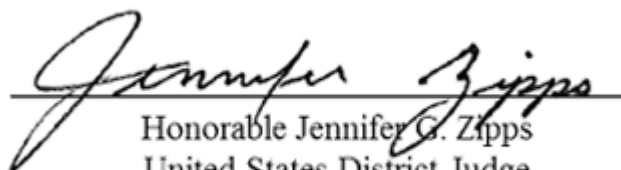
- 15           1. Pursuant to Rule 25(d), Fed. R. Civ. P., Secretary of the Interior Deb Haaland  
16 is substituted in place of Defendant Ryan Zinke.
- 17           2. Plaintiff’s Motion for Summary Judgment (Doc. 25) is GRANTED.
- 18           3. Defendants’ Cross-Motion for Summary Judgment (Doc. 28) is DENIED.

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4. The withdrawal of the proposed rule to list the lower Colorado River basin roundtail chub DPS is VACATED. Upon receipt of this Order, the U.S. Fish and Wildlife Service must promptly commence a status review of the lower Colorado River basin roundtail chub population *and* within one-year of the filing date of this Order, FWS must issue a 12-month finding regarding whether the listing of the lower Colorado River basin roundtail chub as an endangered or threatened DPS is warranted. 16 U.S.C. § 1533(b)(3)(A)-(B). If such listing is warranted, FWS shall issue a final rule in accordance with 16 U.S.C. § 1533(b)(6).

Dated this 31st day of March, 2021.

  
Honorable Jennifer G. Zipp  
United States District Judge