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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,¹ 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 ¹ 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.²

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).

28 ² 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 F3d. 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. § 1533.³ 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.”⁴ 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 statement⁵ to guide determinations of whether a DPS warrants listing under the ESA. (*See*
16 *D000752-55*.)⁶ 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 ³ The Secretary’s duties under the ESA are delegated to FWS pursuant to 50 C.F.R.
21 § 402.01(b).

22 ⁴ 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 ⁵ 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 ⁶ 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
- 2 (1) Discreteness of the population segment in relation to the remainder of
- 3 the species to which it belongs^[7];
- 4 (2) The significance of the population segment to the species to which it
- 5 belongs; and
- 6 (3) The population segment's conservation status in relation to the Act's
- 7 standards for listing (i.e., is the population segment, when treated as
- 8 if it were a species, endangered or threatened?).

9 (Id.)

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

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

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

19 16 U.S.C. § 1533(a)(1). Any one of these five factors, or combination of them, may support

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

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

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

23 1533(b)(1)(A).

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

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

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

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

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

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.*

⁷ 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.⁸ (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 ⁸ 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.⁹ (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 ⁹ 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.”¹⁰ 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 ¹⁰ 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.’”¹¹ (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
26 ¹¹ 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.¹² (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

26 ¹² 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. (E031301¹³;
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.)¹⁴

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

24 ¹³ 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 ¹⁴ 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).¹⁵ (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

26 ¹⁵ 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 SPR¹⁶ 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 ¹⁶ “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^[17] 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, 2017,¹⁸ FWS reopened the comment period

24 ¹⁷ 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.)

¹⁸ 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.¹⁹ (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 ¹⁹ 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.^[20]

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 ²⁰ 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.²¹ (Doc. 33, ¶ 55; *see*
28

²¹ 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.)²²

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
16 Community of Practice’s December 14, 2016 report; Marsh et al 2016, *Molecular genetics
17 informs spatial segregation of two desert stream Gila*, Transactions of the American
18 Fisheries Society; and comments from CBD (dated December 12, 2016), Peter Reinthal
19 (dated December 2, 2016), AGFD (dated December 16, 2016), New Mexico Department
20 of Game and Fish (dated December 6, 2016), and Dowling (dated December 10 and 17,
21 2016). (E029506-8.) The record also contains a shorter version of the agenda which,
22 according to CBD, may be an earlier draft. (E029496-7; Doc. 33, ¶ 55.)

23 ²² In an internal communication, FWS identified four possible scenarios for
24 resolving the status of the currently-listed Gila chub, including advantages and
25 disadvantages for each approach. (E031421-23.) The options ranged from delisting the
26 Gila chub and withdrawing the proposed listing for the headwater chub and LCR roundtail
27 chub DPS to publishing a “correction” to the list of threatened and endangered wildlife
28 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.²³ (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

27 ²³ 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.)²⁴ 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 ²⁴ 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.)²⁵

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

20
21 ²⁵ 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.²⁶ (*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

26 ²⁶ 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.²⁷

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 ²⁷ 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.)²⁸

24 //

25 ²⁸ 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.

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D. Conclusion

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

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

IT IS ORDERED:

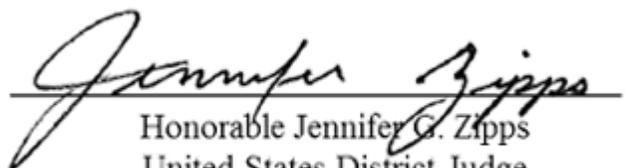
1. Pursuant to Rule 25(d), Fed. R. Civ. P., Secretary of the Interior Deb Haaland is substituted in place of Defendant Ryan Zinke.
2. Plaintiff’s Motion for Summary Judgment (Doc. 25) is GRANTED.
3. Defendants’ Cross-Motion for Summary Judgment (Doc. 28) is DENIED.

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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