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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
TUCSON DIVISION**

Center for Biological Diversity, a non-  
profit organization,

Plaintiff,

v.

Ryan Zinke, in his official capacity as  
Secretary of the Interior; U.S. Fish and  
Wildlife Service,

Defendants.

Case No.: \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff Center for Biological Diversity (“Center”) challenges, pursuant to the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”), the U.S. Fish and Wildlife Service’s (“FWS”) withdrawal of a proposed rule establishing

1 ESA protections for a distinct population segment (“DPS”) of the roundtail chub in the  
2 lower Colorado River basin (defined as the Colorado River and all of its tributaries south  
3 of Glen Canyon Dam) (hereafter, “LCR roundtail chub”). 82 Fed. Reg. 16,981 (Apr. 7,  
4 2017).

5 2. LCR roundtail chub (*Gila robusta*) are large minnows endemic to the  
6 lower Colorado River basin with slender, silver bodies and forked tail fins. Decimated  
7 by habitat degradation, non-native fish introductions, climate change, and other threats,  
8 LCR roundtail chub now occupy only a fraction of their historic range.

9 3. In 2003, the Center petitioned to list the LCR roundtail chub and another  
10 species, the headwater chub (*Gila nigra*), as threatened or endangered under the ESA.  
11 Although the ESA generally requires listing of a species to occur within two years from  
12 the submission of a petition, FWS delayed more than a decade before finally issuing a  
13 proposed rule to protect both fish as threatened species. 80 Fed. Reg. 60,754 (Oct. 7,  
14 2015).

15 4. Under FWS policy, a population of a species is considered a DPS when the  
16 agency determines that such population is “discrete” (usually through geographic  
17 separation) from other populations of the species and that such population is  
18 “significant” to the conservation of the species as a whole. FWS applied that policy in  
19 the 2015 proposed listing rule, concluding that the LCR roundtail chub comprises a DPS  
20 because of its unique genetic lineage, its separation from roundtail chub in the upper  
21 Colorado River basin by the Glen Canyon Dam, and because the loss of the species from  
22 the lower basin would result in a significant gap in the range of the species.

23 5. However, rather than issue a final rule and provide the LCR roundtail chub  
24 with the long overdue ESA protections it desperately needs, FWS reversed course and  
25 withdrew the proposed rule based on a September 2016 determination by the American  
26 Fisheries Society (“AFS”) that the roundtail chub, headwater chub, and Gila chub (*Gila*  
27 *intermedia*) (currently listed as endangered under the ESA) should be reclassified and  
28

1 combined as a single species referred to as the roundtail chub. 82 Fed. Reg. 16,982  
2 (April 7, 2017).

3 6. In its withdrawal, FWS claims that under the AFS reclassification, the  
4 LCR roundtail chub does not meet the definition of a species under the ESA. The  
5 withdrawal, however, is bereft of *any* explanation for the agency's reversal from its  
6 previous finding in the proposed listing rule that the LCR roundtail chub is a threatened  
7 DPS. Contrary to FWS's determination, even under the new, combined species  
8 reclassification, the LCR roundtail chub remains a threatened DPS, and continues to face  
9 imminent and severe threats. These deficiencies render the withdrawal decision  
10 arbitrary and capricious, and in violation of the ESA and APA. In making its  
11 withdrawal decision, FWS also unlawfully ignored and failed to respond to comments  
12 submitted by the Center and others that addressed these inadequacies in detail.

13 7. In order to remedy these ESA violations, the Center seeks an order  
14 vacating FWS's withdrawal of the proposed rule, and remanding the matter to FWS with  
15 instructions to conduct a new status review of the LCR roundtail chub, and at the  
16 conclusion of that status review, to issue a new 12-month finding regarding whether the  
17 listing of the LCR roundtail chub as an endangered or threatened DPS is warranted, and  
18 if such listing is warranted, directing FWS to timely issue a final listing rule.

### 19 JURISDICTION AND VENUE

20 8. This Court has jurisdiction over this action pursuant to 16 U.S.C. §  
21 1540(c) and (g) (action arising under ESA citizen suit provision); 5 U.S.C. § 702 (APA  
22 review); and 28 U.S.C. § 1331 (federal question jurisdiction).

23 9. The Court may grant the relief requested under the ESA, 16 U.S.C. §  
24 1540(g); the APA, 5 U.S.C. §§ 701–706; and 28 U.S.C. §§ 2201 and 2002 (declaratory  
25 and injunctive relief).

26 10. Plaintiff provided sixty (60) days' notice of its intent to file this suit  
27 pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to  
28 Defendants dated May 7, 2018. Defendants have not taken action to remedy their

1 continuing ESA and APA violations by the date of this complaint's filing. Therefore, an  
2 actual controversy exists between the parties under 28 U.S.C. § 2201.

3 11. The federal government has waived sovereign immunity in this action  
4 pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

5 12. Venue is proper in the United States District Court for the District of  
6 Arizona pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because a  
7 substantial part of the events or omissions giving rise to the Center's claims occurred in  
8 this District. Additionally, the Center resides in Tucson, Arizona.

### 9 **PARTIES**

10 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit  
11 environmental organization dedicated to the protection of native species and their  
12 habitats through science, policy, and environmental law. The Center has more than 1.1  
13 million members and on-line activists.

14 14. The Center's members include individuals who regularly visit natural areas  
15 which are occupied by roundtail chub, and seek to observe or study the roundtail chub in  
16 its natural habitat. The Center's members and staff derive recreational, spiritual,  
17 professional, scientific, educational, and aesthetic benefit from these activities, and  
18 intend to continue to use and enjoy these areas in the future.

19 15. The Center has a long history of environmental advocacy in relation to the  
20 roundtail chub. The Center submitted its Petition to List the Roundtail and Headwater  
21 Chubs as Endangered Species in the Lower Colorado River Basin in order to protect its  
22 own and its members' interests in the LCR roundtail chub.

23 16. The above-described aesthetic, recreational, professional, and other  
24 interests of the Center and its members, have been, are being, and will continue to be  
25 adversely harmed by Defendants' decision to withdraw the proposed listing rule for the  
26 LCR roundtail chub, and this harm would be remedied by a court order vacating that  
27 decision.  
28



1           23. A “species” “includes any subspecies of fish or wildlife or plants, and any  
2 distinct population segment of any species of vertebrate fish or wildlife which  
3 interbreeds when mature.” *Id.* § 1532(16).

4           24. FWS, along with the National Marine Fisheries Service, published the  
5 Policy Regarding the Recognition of Distinct Vertebrate Population Segments. 61 Fed.  
6 Reg. 4,722 (Feb. 7, 1996) (“DPS Policy”).

7           25. The DPS Policy requires FWS, when considering whether a population  
8 segment is a DPS, to first determine whether a population segment is discrete. A  
9 population is discrete if it is markedly separated from other populations of the same  
10 taxon as a consequence of physical, physiological, ecological, or behavioral factors.

11           26. If discrete, FWS must determine whether the population is significant.  
12 Whether a population is significant is based on FWS’s consideration of whether it  
13 persists in an ecological setting that is unusual or unique for the species; evidence that  
14 loss of the discrete population segment would result in a significant gap in the range of  
15 the species; evidence that the discrete population segment represents the only surviving  
16 natural occurrence of a species that may be more abundant elsewhere as an introduced  
17 population outside its historical range; or evidence that the discrete population segment  
18 differs markedly from other populations of the species in its genetic characteristics.

19           27. If FWS determines that a population segment is both discrete and  
20 significant, then the population segment qualifies as a DPS and meets the ESA’s  
21 definition of “species.” The ESA and the DPS Policy then require FWS to determine  
22 whether the DPS is “endangered” or “threatened.”

23           28. The ESA’s conservation measures generally apply only once FWS lists a  
24 species as threatened or endangered. For example, section 7 of the ESA requires all  
25 federal agencies to ensure that their actions do not “jeopardize the continued existence”  
26 of any listed species or “result in the destruction or adverse modification” of a species’  
27 “critical habitat.” 16 U.S.C. § 1536(a)(2). Section 9 of the ESA prohibits, among other  
28 things, “any person” from intentionally taking listed species, or incidentally taking listed

1 species, without a lawful authorization from FWS. *Id.* §§ 1538(a)(1)(B), 1539. Other  
2 provisions require FWS to designate “critical habitat” for listed species, *id.* § 1533(a)(3);  
3 require FWS to “develop and implement” recovery plans for listed species, *id.* § 1533(f);  
4 authorize FWS to acquire land for the protection of listed species, *id.* § 1534; and  
5 authorize FWS to make federal funds available to states to assist in FWS’s efforts to  
6 preserve and protect threatened and endangered species, *id.* § 1535(d).

7       29. To ensure the timely protection of species at risk of extinction, Congress  
8 set forth a detailed process whereby citizens may petition FWS to list a species as  
9 endangered or threatened. The process includes mandatory, nondiscretionary deadlines  
10 that FWS must meet so that species in need of protection receive the ESA’s substantive  
11 protections in a timely fashion. The three required findings, described below, are the 90-  
12 day finding, the 12-month listing determination (also known as a “12-month finding”),  
13 and for species that FWS determines warrant protection, the final listing determination.

14       30. Upon receipt of a listing petition, FWS must “to the maximum extent  
15 practicable, within 90 days” make an initial finding as to whether the petition “presents  
16 substantial scientific or commercial information indicating that the petitioned action may  
17 be warranted.” *Id.* § 1533(b)(3)(A). If FWS finds that the petition does not present  
18 substantial information indicating that listing may be warranted, the petition is rejected  
19 and the process ends.

20       31. If, on the other hand, as in this case, FWS determines that a petition does  
21 present substantial information indicating that listing may be warranted, then the agency  
22 must publish that finding and proceed to conduct a full scientific review of the species’  
23 status. *Id.* This is called a “status review.”

24       32. Upon completion of this status review, and within twelve (12) months  
25 from the date that it receives the petition, FWS must make a listing determination, or 12-  
26 month finding, with one of three determinations: (1) listing is “not warranted”; (2) listing  
27 is “warranted”; or (3) listing is “warranted but precluded” by other pending proposals for  
28 listing species, provided certain circumstances are present. *Id.* § 1533(b)(3)(B).



1           33. If FWS’s 12-month finding concludes that listing is warranted, the agency  
2 must publish notice of the proposed regulation to list the species as endangered or  
3 threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii).

4           34. FWS must generally issue a final listing rule within one year of the  
5 warranted finding and proposed listing rule. In limited circumstances, however, FWS  
6 may provide “notice that such one-year period is being extended . . . for no more than six  
7 months for the purposes of soliciting additional data . . . [regarding a] substantial  
8 disagreement regarding the sufficiency or accuracy of the available data relevant to the  
9 determination or revision concerned.” *Id.* § 1533(b)(6)(A)(i)(III).

10           35. If the one-year period is extended, and FWS decides to withdraw the  
11 regulation, FWS must “publish in the Federal Register ... notice of withdrawal of the  
12 regulation . . . , together with the finding on which the withdrawal is based.” *Id.* §  
13 1533(b)(6)(B)(iii). Such a finding must be made based on a finding that “there is not  
14 sufficient evidence to justify the action proposed by the regulation” and is judicially  
15 reviewable. *Id.* § 1533(6)(B)(ii).

## 16           **II. Administrative Procedure Act**

17           36. The ESA requires that listing decisions must comply with the rulemaking  
18 provisions of the APA, which in turn provide general rules governing the issuance of  
19 proposed and final regulations by federal agencies. 16 U.S.C. § 1533(b)(4).

20           37. Fundamental to the APA’s procedural framework is the requirement that,  
21 absent narrow circumstances, a federal agency publish as a proposal any rule that the  
22 agency is considering adopting and allow the public the opportunity to submit written  
23 comments on the proposal. 5 U.S.C. § 553.

24           38. Specifically, the APA provides that all federal agencies must give “general  
25 notice” of any “proposed rulemaking” to the public by publication in the Federal  
26 Register. *Id.* § 553(b).

27           39. In addition, “the agency shall give interested persons an opportunity to  
28 participate in the rulemaking through submission of written data, views, or arguments



1 with or without opportunity for oral presentation,” and, “[a]fter consideration of the  
 2 relevant matter presented, the agency shall incorporate in the rules adopted a concise  
 3 general statement of their basis and purpose.” *Id.* § 553(c).

4 40. The agency need not address every comment, but must respond in a  
 5 reasoned manner to those that raise significant issues.

6 41. An agency must also consider responsible alternatives to its chosen  
 7 decision and give a reasoned explanation for its rejection of such alternatives.

8 42. The APA provides that “[a] person suffering legal wrong because of  
 9 agency action, or adversely affected or aggrieved by agency action within the meaning  
 10 of a relevant statute, is entitled to judicial review thereof.” *Id.* § 702.

11 43. The APA provides that a court shall “hold unlawful and set aside agency  
 12 action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of  
 13 discretion, or otherwise not in accordance with the law,” *id.* § 706(2)(A), or agency  
 14 action that is undertaken “without observance of procedure required by law,” *id.* §  
 15 706(2)(D).

16 44. An agency’s action is arbitrary and capricious if the agency has relied on  
 17 factors which Congress has not intended it to consider, entirely failed to consider an  
 18 important aspect of the problem, offered an explanation for its decision that runs counter  
 19 to the evidence before the agency, or is so implausible that it could not be ascribed to a  
 20 difference in view or the product of agency expertise.

## 21 **FACTUAL BACKGROUND**

### 22 **I. Roundtail Chub in the Lower Colorado River Basin**

23 45. Roundtail chub, Gila chub, and headwater chub have been recognized as  
 24 distinct species or subspecies since the 1800s and continued to be recognized as distinct  
 25 species up until the AFS’s recent determination, a determination which continues to be  
 26 debated by experts. Regardless of taxonomic classification, all three species, both  
 27 separately or in combination, have experienced significant declines and face similar  
 28

1 threats, including competition and predation from nonnative species, and the destruction,  
2 degradation and fragmentation of habitat.

3 46. LCR roundtail chub live between eight to ten years on average, reaching  
4 maturity between ages three and five with spawning typically occurring in the late  
5 spring.

6 47. Opportunistic omnivores, LCR roundtail chub occupy the cool to warm  
7 waters of rivers, streams, and tributaries in the Salt, Verde, San Carlos, Three Forks,  
8 Little Colorado, Gila, and Bill Williams River watersheds.

9 48. In addition to habitat destruction and alteration, competition and predation  
10 from nonnative fish are primary threats to the LCR roundtail chub. The threat of  
11 nonnative fish is compounded by the loss of available habitat and the lack of available  
12 cover as these factors increase competition and predation.

13 49. LCR roundtail chub prefer deep pools and eddies with cover from undercut  
14 banks, large rocks and large woody debris. Spawning occurs in pools, riffles and runs  
15 with slow to moderate flowing water and is stimulated by late winter and spring  
16 snowmelt that provides suitable water temperatures. Juvenile and young of the year fish  
17 use vegetated, shallow and slow-moving waters. All of these habitat features and LCR  
18 roundtail chub themselves are highly sensitive to alteration from a variety of  
19 anthropogenic factors, such as water withdrawals, livestock grazing, and drought.

20 50. Climate change is a new and growing threat to the survival of the LCR  
21 roundtail chub, leading to reduced snowmelt and increased drought and water  
22 temperatures.

23 51. LCR roundtail chub have long been threatened by surface water diversion  
24 and groundwater pumping for agricultural and residential use with these threats on the  
25 increase in recent years.

26 52. Multiple dams isolate populations of the chub and severely reduce and  
27 alter seasonal flows. This in turn favors introduced fish species, such as flathead catfish,  
28 red shiner, western mosquitofish, and bass, which prey on and compete with LCR

1 roundtail chub. The reservoirs created by dams provide further habitat for these  
2 introduced fish species.

3 53. The LCR roundtail chub is also adversely affected by livestock grazing,  
4 recreation, urbanization, mining, roads, forestry practices, and wildfires.

5 54. Due to habitat loss and fragmentation, LCR roundtail chub populations are  
6 in most cases small and isolated, making them vulnerable to loss from stochastic events  
7 such as drought and wildfire.

8 55. Ultimately, regardless of whether the Gila chub, headwater chub, and  
9 roundtail chub are all considered to be roundtail chub or not, the LCR roundtail chub has  
10 been extirpated from large swaths of its historic range and currently is in danger of  
11 extinction due primarily to the introduction of nonnative aquatic species, the reduction  
12 of habitat, and climate change.

## 13 **II. Listing History Of The Gila Chub, Headwater Chub, And LCR Roundtail** 14 **Chub**

### 15 **a. Prior Listing History**

16 56. In 1998, the Center petitioned to list the Gila chub as endangered under the  
17 ESA. Following several court cases, FWS listed the Gila chub as endangered and  
18 designated critical habitat for the species after finding that the species was eliminated  
19 from up to 90 percent of its historic habitat and was heavily impacted by nonnative  
20 aquatic species and habitat loss and degradation.

21 57. On April 14, 2003, the Center petitioned to list the LCR roundtail chub  
22 and the headwater chub as threatened or endangered species with designation of critical  
23 habitat. The Center's petition demonstrated that the LCR roundtail chub qualified as a  
24 DPS, and that both the LCR roundtail chub and the headwater chub had experienced  
25 severe declines due to habitat loss and degradation, livestock grazing, dams, diversions,  
26 groundwater pumping, mining, recreation, human population growth, competition and  
27 predation from non-native fish, and inadequate existing laws and regulations.  
28

1           58. FWS did not provide a timely response to the Center's petition, failing to  
2 issue the required 90-day finding as to whether the requested listing may be warranted.  
3 On September 20, 2004, the Center filed suit seeking to compel FWS to make the  
4 required 90-day finding. *Center for Biological Diversity v. Norton* (D. Ariz. No. 04-cv-  
5 496-TUC-CKJ). The Center and FWS subsequently entered into a stipulated settlement  
6 agreement under which FWS agreed to submit a 90-day finding to the Federal Register  
7 by June 30, 2005.

8           59. On July 12, 2005, FWS issued a 90-day finding, determining that the  
9 Center's petition presented substantial scientific and commercial data indicating that  
10 listing the headwater chub and the LCR roundtail chub "may be warranted." 70 Fed.  
11 Reg. 39,981.

12           60. After a status review of the headwater chub and LCR roundtail chub, on  
13 May 3, 2006, FWS issued its 12-month finding on the Center's 2003 petition, denying  
14 protection for both species. Specifically, FWS determined that listing the headwater  
15 chub was "warranted" but precluded by higher-priority listing actions, and that listing  
16 the LCR roundtail chub was not warranted, as the lower Colorado River population was  
17 found not to constitute a DPS. 71 Fed. Reg. 26,007.

18           61. The Center filed suit on September 6, 2006, seeking to set aside the 12-  
19 month findings. *Center for Biological Diversity v. Kempthorne* (D. Ariz. No. 4:06-cv-  
20 00471-TUC-CKJ). The Center and FWS subsequently reached a stipulated settlement  
21 agreement under which FWS agreed to conduct a new status review of the LCR  
22 roundtail chub, and at the conclusion of that status review, to submit a new 12-month  
23 finding to the Federal Register by June 30, 2009.

24           62. On March 3, 2009, FWS published a notice in the Federal Register that it  
25 was initiating a status review and soliciting new information on the Center's 2003  
26 petition to list the LCR roundtail chub. 74 Fed. Reg. 9,205.

27           63. On July 7, 2009, FWS issued a new 12-month finding. 74 Fed. Reg.  
28 32,352. In that finding, FWS reevaluated its previous determination, and found that the

1 best available science demonstrated that the LCR roundtail chub was discrete, persisted  
2 in a ecological setting unique to the taxon, and that the loss of the lower Colorado River  
3 basin population of roundtail chub would result in a significant gap in the range of the  
4 taxon. Thus, the LCR roundtail chub constituted a DPS and was a listable entity.

5 64. FWS also determined that listing the LCR roundtail chub was warranted,  
6 based on findings that the species faces imminent threats, including the present or  
7 threatened destruction of its habitat, the impacts of nonnative species, and the  
8 inadequacy of existing regulatory mechanisms. FWS concluded, however, that the  
9 listing was precluded by higher priority listing actions.

10 65. On July 25, 2011, the Center and FWS reached a stipulated settlement  
11 agreement requiring the agency to make overdue decisions pertaining to 757 species,  
12 including the headwater chub and the LCR roundtail chub. *In re Endangered Species*  
13 *Act Section 4 Deadline Litigation* (D.D.C. Case No. 1:10-cv-0577-EGS) (Dkt. No. 42-1).  
14 Under the agreement, FWS was required to issue its listing proposal for the headwater  
15 chub and the LCR roundtail chub by 2015.

16 66. On October 7, 2015, FWS proposed to list the headwater chub and LCR  
17 roundtail chub as threatened. 80 Fed. Reg. 60,754. In the proposed rule, FWS  
18 determined that headwater chub and LCR roundtail chub constituted threatened species  
19 due primarily to the present or threatened destruction of their habitat and range,  
20 nonnative aquatic species, habitat reduction, and climate change.

21 67. In the proposed rule, FWS reaffirmed its previous finding that the LCR  
22 roundtail chub constitutes a DPS. Specifically, FWS again determined that the LCR  
23 roundtail chub was discrete from the upper Colorado River basin population of roundtail  
24 chub because it was separate historically and continues to be markedly separate today.  
25 FWS concurrently found that the LCR roundtail chub is significant to the species as a  
26 whole because the loss of this population would create a significant gap in the species'  
27 range and the population demonstrates a marked difference in genetic characteristics  
28 from the upper Colorado River basin population of roundtail chub. Thus, because the

1 LCR roundtail chub was both “discrete” and “significant,” it qualified as a DPS and was  
2 a listable entity under the ESA. FWS then concluded that the LCR roundtail chub DPS  
3 was threatened and at risk of extinction in the foreseeable future.

4 68. However, on August 15, 2016, rather than finalize the proposed rule and  
5 finally provide desperately needed and long overdue ESA protections to the headwater  
6 chub and LCR roundtail chub, FWS reopened the comment period on the proposed rule  
7 for an additional 30 days and asked for comments regarding the “taxonomic  
8 distinctness” of the headwater, Gila, and roundtail chubs. 81 Fed. Reg. 54,018.

9 69. The Center provided detailed comments in response to the August 15,  
10 2016 extension. These comments emphasized FWS’s duty to provide a determination as  
11 to whether listing the newly defined, combined LCR roundtail chub—now made up of  
12 the previously distinct Gila, headwater, and roundtail chub species—as a threatened or  
13 endangered DPS is warranted.

14 **b. The U.S. Fish and Wildlife Service’s Withdrawal of the Proposed Rule**

15 70. On April 7, 2017, FWS withdrew the proposed rule based on the pretense  
16 that the LCR roundtail chub is not a discrete taxonomic entity and does not meet the  
17 definition of a species under the ESA.

18 71. In doing so, FWS relied solely on AFS’s determination that the LCR  
19 roundtail chub, headwater chub, and Gila chub are not separate and distinct species, but  
20 parts of a single taxonomic species—the roundtail chub. However, AFS’s determination  
21 in no way called into question FWS’s previous determinations regarding the LCR  
22 roundtail chub’s discreteness from the upper Colorado River basin population or  
23 significance to the taxon as a whole.

24 72. The withdrawal failed to provide a determination as to whether listing the  
25 newly defined LCR roundtail chub as a threatened or endangered DPS is warranted, or  
26 to acknowledge the Center’s comments regarding the FWS’s duty to make such  
27 determination, as well as the continuing threats to the LCR roundtail chub. In response,  
28

1 FWS stated merely that such comments were outside the scope of the withdrawal. 82  
2 Fed. Reg. at 16,984.

3 **III. The Combined Lower Colorado River Basin Population Of Roundtail**  
4 **Chub Is Eligible For ESA Protection**

5 73. AFS determined that Gila, headwater, and LCR roundtail chub constitute  
6 one species, the roundtail chub.

7 74. FWS previously had determined that the LCR roundtail chub was discrete  
8 because it was separate from the upper Colorado River basin population of roundtail  
9 chub historically and continues to be markedly separate today. The Gila chub and  
10 headwater chub only occur in the lower Colorado River basin. As a result, the newly  
11 combined LCR roundtail chub remains discrete from the upper Colorado River basin  
12 population of roundtail chub.

13 75. FWS previously determined the LCR roundtail chub is significant to the  
14 roundtail chub species as a whole because the loss of the roundtail chub in the lower  
15 Colorado River basin would create a significant gap in the range, and eliminate genetic  
16 characteristics which are markedly different from those found in the upper Colorado  
17 River basin population of roundtail chub. The newly combined LCR roundtail chub still  
18 only exists, as the name implies, in the lower Colorado River basin. As a result, the loss  
19 of the newly combined LCR roundtail chub would still create a significant gap in the  
20 species' range, and the LCR roundtail chub remains significant to the species.

21 76. Nothing in AFS's determination called into question FWS's previous  
22 finding that the LCR roundtail chub is genetically distinct from the upper Colorado  
23 River basin population of roundtail chub. Thus, the combined LCR roundtail chub  
24 remains discrete and significant.

25 77. Before they were combined into one species, Gila chub, headwater chub,  
26 and LCR roundtail chub were all threatened primarily by competition and predation  
27 from nonnative organisms, and habitat degradation, alteration, destruction, and  
28



1 fragmentation. Their taxonomic reclassification into one combined species did nothing  
2 to address or mitigate these threats, which still exist with the same force today.

3 78. Before they were combined into one species, Gila chub, headwater chub,  
4 and roundtail chub had all been eliminated from most of their historic range. Their  
5 taxonomic reclassification into one combined species did nothing to mitigate this loss.

6 79. Regardless of whether the Gila chub, headwater chub, and LCR roundtail  
7 chub are all considered to be roundtail chub or not, the LCR roundtail chub qualifies as a  
8 DPS, has been eliminated from most of its historic range, and continues to be in danger  
9 of extinction due primarily to competition and predation from nonnative organisms, and  
10 habitat degradation, alteration, destruction, and fragmentation. Thus, it meets the  
11 definition of an “endangered” or “threatened” species, and FWS’s withdrawal of the  
12 proposed rule establishing “Threatened Species Status for the Headwater Chub and the  
13 Roundtail Chub Distinct Population Segment,” in the lower Colorado River basin was  
14 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

## 15 CLAIMS FOR RELIEF

### 16 FIRST CLAIM FOR RELIEF

#### 17 **The Withdrawal of the Proposed Rule Establishing Threatened Species Status** 18 **for the LCR Roundtail Chub Was Arbitrary and Capricious,** 19 **in Violation of the ESA and APA**

20 80. Plaintiff incorporates all preceding paragraphs by reference.

21 81. FWS’s withdrawal of the proposed rule was based on the incorrect  
22 assertion that “the entities previously proposed for listing are no longer recognized as  
23 species, as defined by the Act.”

24 82. FWS previously found the LCR roundtail chub to be discrete and  
25 significant.

26 83. Combining the LCR roundtail chub, headwater chub, and Gila chub into  
27 one species only reinforces the newly classified population’s significance while not  
28 undermining its discreteness.

1           84. The LCR roundtail chub qualifies as a DPS, meets the ESA's definition of  
2 "species," is a listable entity, and is a species that the Center petitioned FWS to list as an  
3 endangered species in the lower Colorado River basin.

4           85. The LCR roundtail chub is threatened by nonnative aquatic species, a lack  
5 of sufficient water to support the physical and biological components needed for all life  
6 stages and life-history functions, changes in the timing and amount of snowmelt runoff  
7 in the spring and precipitation from monsoons in the fall, reduction in hydrologic  
8 connectivity within and between streams, the reduction in the length of flowing reaches,  
9 climate change, livestock grazing, recreation, urbanization, mining, roads, forestry  
10 practices, and wildfires.

11           86. FWS's withdrawal violated the ESA and APA for various reasons,  
12 including but not limited to the following:

- 13           a. ignored the ESA's definition of "species", which includes  
14           "any distinct population segment of any species of vertebrate  
15           fish";
- 16           b. failed to consider the threats facing the LCR roundtail chub;
- 17           c. failed to properly apply the ESA's listing factors;
- 18           d. failed to adhere to the best available science;
- 19           e. failed to base its withdrawal on a finding that there is "not  
20           sufficient evidence" to justify listing the LCR roundtail chub  
21           as a DPS;
- 22           f. failed to respond to the Center's petition to list the LCR  
23           roundtail chub as a DPS and failed to determine whether the  
24           LCR roundtail chub DPS is endangered or threatened.

25           87. In doing so, Defendants have failed to perform non-discretionary duties  
26 and violated the ESA, 16 U.S.C. §§ 1533(a)(1), 1533(b)(1)(A), 1533(b)(6), 1532(16),  
27 and have acted arbitrarily and capriciously, in abuse of their discretion, and not in  
28 accordance with law.

          88. Defendants' violations are subject to judicial review under the ESA, 16  
U.S.C. §1540(g)(1)(C), and the APA, 5 U.S.C. §§ 701–706.

**SECOND CLAIM FOR RELIEF**

**The FWS Failed to Adequately Address Comments Before Withdrawing the Proposed Rule Establishing Threatened Species Status for the LCR Roundtail Chub, in Violation of the ESA and APA**

89. Plaintiff incorporates all preceding paragraphs by reference.

90. FWS's withdrawal violated the ESA and APA by failing to meaningfully respond to comments regarding FWS's duty to provide a determination as to whether listing the newly defined, combined LCR roundtail chub—now made up of the previously distinct Gila, headwater, and roundtail chub species—as a threatened or endangered DPS is warranted.

91. In doing so, Defendants failed to perform non-discretionary duties and violated the ESA, 1533(b)(4); violated the APA, 5 U.S.C. § 533; acted arbitrarily and capriciously, abused their discretion, failed to act in accordance with law, and failed to observe the procedures required by law.

92. Defendants' violations are subject to judicial review under the ESA, 16 U.S.C. §1540(g)(1)(C), and the APA, 5 U.S.C. §§ 701–706.

**REQUEST FOR RELIEF**

Wherefore, Plaintiff respectfully request that the Court:

1. Declare that Defendants' withdrawal of the proposed rule establishing "Threatened Species Status for the Headwater Chub and the Roundtail Chub Distinct Population Segment," in the lower Colorado River basin, 82 Fed. Reg. 16,981 (Apr. 7, 2017), was arbitrary, capricious, and in violation of the ESA and its implementing regulations;

2. Declare that Defendants' withdrawal of the proposed rule failed to observe the procedures required by the ESA, its implementing regulations, and the APA;

3. Set aside and vacate FWS's withdrawal of the proposed rule;

4. Order FWS to complete a new status review of the LCR roundtail chub within six months, and, within six additional months from the completion of such status review, issue a new 12-month finding regarding whether the listing of the LCR roundtail

1 chub as an endangered or threatened DPS is warranted. If such listing is warranted,  
2 further order FWS to issue a final rule to list the LCR roundtail chub as endangered or  
3 threatened within one additional year;

4 5. Award the Center reasonable attorneys' fees and costs associated with this  
5 action; and

6 6. Grant the Center such additional relief as the Court may deem just and  
7 proper.

8  
9 Respectfully Submitted this 15th day of August, 2018.

10 /s/ Ryan Adair Shannon

11 Ryan Adair Shannon (Or. Bar. No. 155537)

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