No. 23-15580

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK GESCHEIDT, LAURA CHARITON, AND ANIMAL LEGAL DEFENSE FUND,
Plaintiffs-Appellants,
v.
DEB HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior; **SHAWN BENGE**, in his official capacity as Director of the National Park Service; and **CRAIG KENKEL** in his official capacity as Superintendent of the Point Reyes National Seashore,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
NO. 4:21-cv-04734-HSG
THE HONORABLE JUDGE HAYWOOD S. GILLIAM, JR., PRESIDING

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Katherine A. Meyer
Harvard Animal Law & Policy Clinic
1585 Massachusetts Avenue,
Cambridge MA 02138
kmeyer@law.harvard.edu
Of Counsel

Rebecca L. Garverman
Harvard Animal Law & Policy Clinic
1585 Massachusetts Avenue,
Cambridge MA 02138
(617) 496-5145
rgarverman@law.harvard.edu
Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In their opening brief, Plaintiffs-Appellants (hereinafter the "Elk Advocates") demonstrated that, contrary to the finding of the district court, 54 U.S.C. § 100502 (the "National Parks and Recreation Act"), imposes on the National Park Service (the "Park Service") a mandatory duty to revise general management plans (GMPs). The Elk Advocates further established that this mandatory duty is enforceable under Section 706(1) of the Administrative Procedure Act (APA), which provides that a reviewing court "shall [] compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Elk Advocates also demonstrated that the Park Service had "unreasonably delayed" revising the GMP for Tomales Point by failing to do so in the forty plus years since the GMP was issued in 1980.

The Park Service has conceded that whether the preparation of a GMP revision is "discrete" within the meaning of *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55, 64 (2004), is not at issue here. Defendants' Brief ("Defs.' Br.") at 17. Accordingly, the only issue this Court needs to decide is whether Congress's inclusion of the phrase "in a timely manner" converts an otherwise mandatory duty that can be enforced under the APA, 5 U.S.C. § 706(1), to a discretionary one that cannot. As demonstrated below, the addition of this phrase does *not* convert an otherwise mandatory duty to a discretionary one.

Moreover, despite the Park Service's claim to the contrary, Ninth Circuit precedent does *not* require an explicit statutory timeline to find that a mandatory duty exists.

As also demonstrated below, the Park Service's heavy reliance on *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132 (9th Cir. 1998), which held that a statutory requirement to take an action "when appropriate" is discretionary, is completely misplaced. Although the agency argues that *ONRC* "employed similar language in a similar context," Defs.' Br. at 16, the language and context of the two statutes are in fact demonstrably *dissimilar*—i.e., requiring the Park Service to revise a GMP "in a timely manner" does not allow the Park Service to refrain from doing so if the agency does not deem such revision "appropriate." Rather, because the National Parks and Recreation Act requires the agency to revise the GMP "in a timely manner," whether its delay in doing so is "timely" is governed by the factors that apply to Section 706(1) claims, as elucidated in *Telecommunications Research & Action Center v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"). *See In re Pesticide Action Network North America, Natural Resources Defense Council*, 798 F.3d 809, 813 (9th Cir. 2015) (applying *TRAC* factors to unreasonable delay claims).

In its responsive brief, the Park Service also highlights its recent announcement that it now plans to revise the GMP for Tomales Point. Defs.' Br. at 11–12. However, tellingly, the agency does not make a mootness argument—nor

could it when, to date, the Park Service still has not revised the GMP with regard to Tomales Point, and the agency continues to insist that it is not required to do so. Therefore, as the Elk Advocates also demonstrate, without a court order to do so, there is no reason to expect that the agency will ever fulfill this mandatory duty. Accordingly, the district court's decision is incorrect and should be reversed.

ARGUMENT

I. THE NATIONAL PARKS AND RECREATION ACT IMPOSES A MANDATORY DUTY UPON THE PARK SERVICE TO REVISE GMPS.

The only issue before the Court is whether the National Parks and Recreation Act confers a mandatory duty upon the Park Service to revise GMPs. The Elk Advocates have brought an action under Section 706(1) of the APA, which provides that a reviewing court "shall [] compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under Supreme Court precedent, "a claim under § 706(1) can proceed . . . where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64 (emphasis in original). The National Parks and Recreation Act provides that, "[g]eneral management plans for the preservation and use of each System unit, including areas within the national capital area, *shall be prepared and revised in a timely manner by the Director*." 54 U.S.C. § 100502 (emphasis added). Because the Park Service made no argument that the task imposed on the

agency is not sufficiently "discrete," the only issue here is whether the statute confers a mandatory duty. *See* Defs.' Br. at 17. As the Elk Advocates demonstrated in their opening brief, and further demonstrate below, the duty to revise the GMP *is* mandatory.

A. The Language of the Statute Imposes a Mandatory Duty.

The Park Service's and district court's characterization of the statutory language is plainly illogical. The Park Service argues, and the district court agreed, that while "shall" typically creates a mandatory duty, inclusion of the phrase "in a timely manner" nevertheless converts the entire duty to revise GMPs to a discretionary task that the agency may ignore. Defs.' Br. at 23–24; Order Granting Def. Mot. Summ. J., at 21–22, ECF No. 63, ER-27–28. Under the agency's interpretation, this means that if the statute did *not* include the language "in a timely manner," it would confer a mandatory duty upon the Park Service. *See* Defs.' Br. at 19–25. It strains credulity that the addition of statutory language whereby Congress insists that something be done in a "timely manner" nevertheless negates an otherwise mandatory duty. On the contrary, the language, "in a timely manner," is a caveat that *reinforces*, rather than negates, the mandatory duty that must be carried out by the Park Service.

1. Congress's Use of the Word "Shall" Makes the Obligation Mandatory.

As explained in the Elk Advocates' opening brief, Plaintiffs' Opening Brief ("Pls.' Op. Br.") at 32, the word "shall" generally confers a mandatory duty. As this Court has explained, "[u]se of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made." *Jones v. Shalala*, 5 F.3d 447, 451 (9th Cir.1993) (quoting *City of Edmonds v. United States Dep't of Labor*, 749 F.2d 1419, 1421 (9th Cir.1984)).

The Park Service's reliance on *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001), to note that "the use of shall is not conclusive," Defs.' Br. at 19, is a misrepresentation of the ruling in that case. *Sierra Club* involved a challenge to the Environmental Protection Agency's (EPA) failure to bring an enforcement action under the Clean Water Act. Although that statute provides that the EPA Administrator "shall" bring an enforcement action under certain circumstances, this Court observed that there is a well-established presumption that enforcement decisions are not reviewable by a court, because "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Sierra Club*, 268 F.3d at 903 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985)). As this Court explained, "[A]n agency's refusal to investigate or enforce is within the agency's discretion, unless Congress has indicated otherwise." *Id.* at 902 (citing *Chaney*, 470 U.S. at 838). Therefore, as this Court has made clear, the

"holding in *Sierra Club* that the Environmental Protection Agency did not have a mandatory duty to bring enforcement actions under the Clean Water Act was driven by 'the traditional presumption that an agency's refusal to investigate or enforce is within the agency's discretion,' and based on an '[a]nalysis of the structure and the legislative history of the Clean Water Act.'" *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1064 (9th Cir. 2016) (quoting *Sierra Club*, 268 F.3d at 902, 904) (alteration in original).

Thus, *Sierra Club* is entirely different from the present case, where the Elk Advocates are *not* seeking to have the Park Service enforce any statute against a particular violator of that statute. Rather, they seek to have the agency comply with its own statutory duty to revise the GMP for Tomales Point. Moreover, in sharp contrast to *Sierra Club*, there certainly is a meaningful standard to apply here—the *TRAC* factors. *TRAC*, 750 F.2d at 80. *See also* Pls.' Op. Br. at 39–45.

The National Parks and Recreation Act imposes a mandatory duty under precedent outlined by the Supreme Court in *SUWA.* The Park Service's attempt to assert that "in a timely manner" creates a discretionary duty flies in the face of *SUWA*'s holding. *SUWA* involved the Federal Land Policy and Management Act of 1976 (FLMPA), which required the Bureau of Land Management (BLM) to "manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness." *Id.* at 59; 43 U.S.C. § 1782(c). Respondents sought

"relief for BLM's failure to act to protect public lands in Utah from damage caused by [off-road vehicle] use." *SUWA*, 542 U.S. at 60. Thus, respondents in *SUWA* argued that BLM must manage lands *in a particular manner*. *Id.* Here, the Elk Advocates ask only that the Park Service complete its statutorily mandated duty to revise the GMP for Tomales Point. Pls.' Op. Br. at 31–37. In accordance with *SUWA*, the *manner* of the agency's actions is left to the agency's discretion, but *whether* the agency must act is not a question of discretion. Should the Park Service comply with its duty to revise the GMP for Tomales Point, if anyone is dissatisfied with such revision, they may avail themselves of the opportunity to challenge that decision as arbitrary and capricious under Section 706(2) of the APA. 5 U.S.C. § 706(2).[1]

2. A Mandatory Duty Exists Without the Imposition of a Specific Timeline.

The Park Service erroneously asserts that *SUWA* held that "where, as here, a law imposes a duty on an agency and expressly leaves the timing *uncertain*, it

[1] The amicus ranchers' brief argues that the fence on the southern border of Tomales Point should not be removed in order to preserve ranches and dairies within the Seashore. *See* Pt. Reyes Seashore Ranchers Ass'n Amicus Br. at 21–23, Nov. 3, 2023. The ranchers fail to mention that their ranching activities have heavily polluted the Point Reyes Seashore, with a recent Park Service report finding that E. coli exceeded health standards in 31% of the water quality samples collected by the Park Service. *Water Quality Monitoring and Assessment Point Reyes National Seashore*, NPS 35 (Oct. 2023), https://perma.cc/GJX5-BEXX. In any event, unless and until the Park Service actually revises the GMP for Tomales Point and decides to remove the fence, that issue is not before this Court.

lacks 'the clarity necessary to support judicial action under § 706(1).'" Defs.' Br. at 22–23 (quoting *SUWA*, 542 U.S. at 66) (emphasis in original). *SUWA* says no such thing. It certainly does not say that, absent a specific deadline for action, there can be no mandatory duty that is enforceable under Section 706(1).

Rather, the language quoted by the government refers specifically to a provision of the Wilderness Study Act—one of the statutes at issue in *SUWA*—which requires certain public land to be managed "in a manner so as not to impair the suitability of such [land] for preservation as wilderness." 43 U.S.C. § 1782(c); *SUWA*, 542 U.S. at 65. The Supreme Court observed that "Section 1782(c) is mandatory as to the object to be achieved, but it leaves [the agency] a great deal of discretion in deciding how to achieve it." *SUWA*, 542 U.S. at 66. Thus, the Court explained, that statutory provision "assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of ORV [off-road vehicle] use"—the relief that the plaintiffs sought in that case. *Id.*

However, the Supreme Court did *not* say in *SUWA* that absent a statutory or regulatory deadline there can be no mandatory duty. Indeed, in *SUWA*, the Court specifically noted that if the agency defendant in that case had amended or revised its land use plan, the agency would have been required to perform additional review under the National Environmental Policy Act, citing the agency's own regulation that provides that "[a]n amendment shall be made through an

environmental assessment of the proposed change, or an environmental impact statement, if necessary," 43 C.F.R. § 1610.5-5 (2003), *regardless of the fact that the regulation does not impose any deadline for that mandatory analysis*. *SUWA*, 542 U.S. at 73; *see also id.* at 71 (explaining that "[o]f course, an action called for in a plan may be compelled when the plan merely reiterates duties the agency is already obliged to perform, or perhaps when language in the plan itself creates a commitment binding on the agency.").

As the Elk Advocates have already demonstrated, this Circuit's post-*SUWA* precedent makes this abundantly clear. *See, e.g.*, *Vaz v. Neal,* 33 F.4th 1131, 1137 (9th Cir. 2022) ("even though the [agency] has no duty to expedite or complete investigations within a certain period, the [agency] does have a mandatory duty to investigate."). For example, in *In re Pesticide Action Network North America, Natural Resources Defense Council* this Court found a viable unreasonable delay claim for an agency's more than eight-year delay to respond to a petition to ban a particular pesticide, despite a lack of a congressionally mandated timetable. 798 F.3d 809, 814 (9th Cir. 2015); *see also* Pls.' Op. Br. at 33–34 (collecting cases that find a mandatory duty despite the lack of an explicit timeline); *Assadian v. Oudkirk*, No. 322CV00921RBMBGS, 2023 WL 6237976, at *6 (S.D. Cal. Sept. 25, 2023) ("courts have found [that] a nondiscretionary duty to at some point adjudicate visa applications can exist in the absence of any time frame"); *Alaska*

Indus. Dev. & Exp. Auth. v. Biden, No. 3:21-CV-00245-SLG, 2023 WL 5021555, at *27 (D. Alaska Aug. 7, 2023) (even "[w]hen there is no set deadline by which an agency must act, a court evaluates whether the agency's delay is unreasonable by applying the six factors established by the D.C. Circuit in [*TRAC*].").[2]

The Park Service's attempt to distinguish *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068 (9th Cir. 2016), instead highlights that case's similarities to the present case. There, the Court found that the regulation established a mandatory duty to warn Vietnam veterans of new medical information relating to their health, despite finding "discretion in the manner in which the duty may be carried out," and despite the lack of any specific timeline. *Veterans*, 811 F.3d at 1079. Thus, the Court explained, a reviewing court can compel agency action under Section 706(1) if there is "'a specific, unequivocal command' placed on the agency to take a 'discrete agency action,' and the agency has failed to take that action." *Veterans*, 811 F.3d at 1075 (quoting *SUWA*, 542 U.S. at 63–64).

[2] The Park Service inaccurately states that *S.F. Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002), rejected an argument that "an agency action may be unreasonably delayed even when the governing statute does not require action by a certain date." Defs.' Br. at 22 (quoting *S.F. Baykeeper*, 297 F.3d at 885). In *S.F. Baykeeper*, this Court did not actually address this argument and merely held that a mandatory duty was never triggered in the first place by the relevant statute. *S.F. Baykeeper*, 297 F.3d at 885–86.

Indeed, this is precisely why the Elk Advocates relied on cases that have held that Section 555(b) of the APA imposes a mandatory duty when it states that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b); *see* Pls.' Op. Br. at 33–37. Those cases have found a mandatory duty within the meaning of *SUWA* without imposing a specific timetable for when the action must be completed—just as here, where the National Parks and Recreation Act imposes an obligation on the Park Service to revise its GMPs within "a timely manner." 54 U.S.C. § 100502. As explained in the Elk Advocates' Opening Brief, Pls.' Op. Br. at 36–37, Section 555(b)'s provision that agencies shall conclude matters brought before them "within a reasonable time," 5 U.S.C. § 555(b) involves language very similar to the National Parks and Recreation Act's instruction to revise GMPs "in a timely manner," 54 USC § 100502. Therefore, when the Park Service contends that "[a]ppellants fail to explain why cases in which § 555(b) supplied the mandatory duty support finding one in the [National Parks and Recreation Act]," Defs.' Br. at 30, it ignores the indisputable similarities between the language employed by these two statutes.

Both statutes impose a mandatory duty without specifying a timeline for completing the duty. Section 555(b) "imposes a clear nondiscretionary duty, on agencies 'to conclude a matter presented to it' '*within a reasonable time*.'" *Iqbal v. Blinken*, No. 223CV01299KJMKJN, 2023 WL 7418353, at *7 (E.D. Cal. Nov. 9,

2023) (quoting 5 U.S.C. § 555(b)) (emphasis added). Courts have extended this duty to various discrete duties imposed by statute or regulation. *See, e.g.*, *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 31 F.4th 1203, 1205 (9th Cir. 2022) (Environmental Protection Agency "is *required to resolve*" petitions to cancel pesticide registration under Federal Insecticide, Fungicide, and Rodenticide Act "'within a reasonable time'" (quoting 5 U.S.C. § 555(b) (emphasis added)); *In re Louisiana Pub. Serv. Comm'n*, 58 F.4th 191, 195 (5th Cir. 2023) (Federal Energy Regulatory Commission (FERC) must act "'within a reasonable time'" to conclude Section 206 proceedings "expeditiously" (quoting 5 U.S.C. § 555(b)); *Iqbal*, 2023 WL 7418353, at *7 (Section 555(b) imposes on consular officers "a nondiscretionary duty to adjudicate plaintiffs' immigrant visa petitions within a reasonable time."); *Dayton Tire v. Sec'y of Lab.*, 671 F.3d 1249, 1253 (D.C. Cir. 2012) (The court is "empowered to set aside the [Occupational Safety and Health Review] Commission's order" responding to plaintiff's appeal of a citation "on the basis of delay" under Section 555(b).); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418–19 (D.C. Cir. 2004) ("FERC's insistence that it is not obligated to address a petition filed under one of its own regulations allowing requests for discretionary action . . . is without merit" because FERC is "obligated under the APA [Section 555(b)] to respond to the . . . petition" requesting FERC to consult with environmental agency under Endangered Species Act.).

Not surprisingly, the government does not dispute that the language of 5 U.S.C. § 555(b) imposes a mandatory duty, despite the fact that, like the statute at issue here, it does not impose any specific timeline for the completion of the action before the agency. Instead, the Park Service relies on the district court's non sequitur that the "Plaintiffs have not petitioned the Park Service to do anything," to argue that all of the Section 555(b) cases "are readily distinguishable." Defs.' Br. at 29 (quoting Order Granting Defs.' Mot. Summ. J. at 20, ECF No. 63, ER-26). But here, the Elk Advocates are not relying on Section 555(b) as the source of the mandatory duty they seek to enforce. Rather, they rely on a different statute; the National Parks and Recreation Act's command that GMPs "shall be . . . revised in a timely manner" by the Park Service. 54 USC § 100502.

B. *ONRC* Does Not Apply Here.

The Park Service continues to rely heavily on this Court's decision in *ONRC Action v. Bureau of Land Management*. Defs.' Br. at 16, 20. However, as the Elk Advocates demonstrated in their opening brief, the language in the statute at issue in *ONRC*, directing the agency to revise land use plans "when appropriate," is materially different from the "in a timely manner" language at issue here. Pls.' Op. Br. at 37–38. While the former clearly confers discretion on the agency as to *whether* to take the action at all, the latter simply ensures that the required act will actually be carried out.

Indeed, the "when appropriate" language in the statute at issue in *ONRC* was included in that statute two years *before* the statute at issue here. *See* Pub. L. No. 94–579, 90 Stat. 2743 (1976) (1976 passage of the statute at issue in *ONRC*); Pub. L. No. 95–625, § 791, 92 Stat. 3467 (1978) (1978 amendment to the National Parks and Recreation Act). Therefore, had Congress meant to allow the Park Service to decide to revise its GMPs "when appropriate," it could easily have done so. Instead, Congress chose to require that this particular mandatory duty be done in a "timely manner." *See, e.g., Henson v. Santander Consumer USA Inc*., 582 U.S. 79, 86 (2017) ("when we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning").

C. The Park Service's Policy Argument Has No Merit.

Finally, the agency's hyperbolic contention that interpreting the National Parks and Recreation Act to establish this nondiscretionary duty will lead to "nonstop GMP revisions for every unit in the National Park System," Defs.' Br. at 16, is meritless. It has now been *forty-three years* since the Park Service issued the original GMP that applies to Tomales Point, which stated that "[r]estoration of historical natural conditions (*such as reestablishment of Tule elk*) will continue to be implemented when such actions will not seriously diminish scenic and recreational values." NPS, *General Management Plan Point Reyes National Seashore/California* 13 (1980), ER-144 (emphasis added). Therefore, the notion

that enforcing the statute's mandatory duty to revise that GMP, *when this supposedly protected wildlife has been dying by the hundreds in recent years due to lack of water and forage*, is somehow too burdensome—and therefore not required—strains credulity. As the Park Service's own policies explain, the Park Service "should amend a park GMP when: significant changes to the conditions discussed in an existing GMP have occurred; or substantial new issues related to any of the four statutory requirements have arisen." *See* NPS, *Director's Order #2: Park Planning* 5 (Jan. 2021), ER-188. Whether other GMPs must also be revised, because of "significant changes" to conditions at those Park units, has no bearing on whether *this* GMP must be revised. Indeed, the egregious suffering of elk at Tomales Point clearly constitutes the severity of circumstances Congress intended the Park Service to address through mandatory, "timely" revision of a GMP.

In any event, if the agency believes this duty is too burdensome it should take the matter up with Congress, which established the duty—rather than with this Court, which must give effect to Congress's mandate. As this Court has stressed, "'the remedy for any dissatisfaction with the results in particular [statutory-construction] cases *lies with Congress* and not with [the courts]'" because while "'Congress may amend the statute[,] we may not.'" *United States v. Lopez*, 998 F.3d 431, 438 (9th Cir. 2021) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982)) (emphasis added) (alteration in original).

II. THE PARK SERVICE'S CURRENT PROCEEDINGS DO NOT ALLEVIATE THE NEED FOR THE COURT TO RULE THAT THE PARK SERVICE HAS A MANDATORY DUTY TO REVISE THE GMP FOR TOMALES POINT.

Because the Park Service spends a good deal of time in its responsive brief highlighting the fact that it is now currently involved in a process to revise the GMP for Tomales Point, it is important to stress that the agency's belated decision to do so—as a direct response to this lawsuit—does not negate the need for this Court to rule that this is a mandatory duty that must be undertaken and completed. *See also* Defs.' Cross-Mot. Summ. J. Mem. at 24, ECF No. 57 (the Park Service argued that "no further relief is necessary" for Plaintiffs because it had started the process to revise the GMP). In this regard, the government's contention that the Elk Advocates have made a "false" assertion concerning the agency's inconsistent statements about this matter, Defs.' Br. at 13, is demonstrably wrong, as the agency's own public announcements confirm.

The record in this case shows that it was only *after* Plaintiffs filed their opening summary judgment brief in this case, on November 24, 2021, that the Park Service first announced, on December 14, 2021, that it had decided "to start the process for a new management plan for Tomales Point to be developed through an environmental impact statement." Attach 1. Kenkel Decl., at 2, ECF No. 57-2, ER-40. The Park Service further explained to the public that this new "plan would

replace the 1998 Tule Elk Management Plan," and that the agency would review and revise the GMP "where appropriate." *Id*. In other words, the agency initially said that it would only revise the GMP "where appropriate," and, in the district court, although it argued that this eliminated the need for the court to grant any relief to the Plaintiffs, the Park Service nevertheless continued to insist that it had no legal obligation to revise the GMP at all. Defs.' Cross-Mot. Summ. J. Mem., at 12–15, ECF No. 57.

Then, on June 9, 2023—after the district court ruled in its favor, finding that the agency had no mandatory duty to revise the GMP—the Park Service published a new announcement stating only that its new "plan w[ould] *replace the 1998 Tule Elk Management Plan*," and omitting all references to any revision of the GMP. *See The National Park Service Announces Availability of Comments and Update for the Tomales Point Area Plan at Point Reyes National Seashore*, NPS (June 9, 2023), https://perma.cc/PG8X-387D (emphasis added).[3]

[3] *Compare id.* (June 2023 Park Service announcement stating, "[o]nce completed, the plan will replace the 1998 Tule Elk Management Plan for this area") with Attach 1. Kenkel Decl., at 2, ECF No. 57-2, ER-40 (December 2021 Park Service announcement explaining, "[t]he plan would replace the 1998 Tule Elk Management Plan for the Tomales Point . . . *The plan will also contain programmatic analysis in a review and revision, where appropriate, of the General Management Plan for the park as it relates to Tomales Point*." (emphasis added)).

Most recently, after the Elk Advocates filed their opening brief in this Court highlighting the government's reversal of position with regard to whether it would actually revise the GMP for Tomales Point, Pls.' Op. Br. at 27–28, on August 25, 2023 the agency published a new scoping notice stating that the Park Service now *does* intend to revise both the GMP and the 1998 Tule Elk Management Plan. *Tomales Point Area Plan/Environmental Assessment,* NPS (Aug. 25, 2023), https://perma.cc/TB3J-WQNA. Thus, the Park Service more recently explained that the new Tomales Point Area Plan "will replace the park's 1980 General Management Plan *and* the 1998 Tule Elk Management Plan for the Tomales Point area of the Seashore." *Id.* (emphasis added). Therefore, the agency's accusation that Plaintiffs made a "false" statement that the Park Service flip-flopped on what it was proposing to do, Defs.' Br. at 13, is demonstrably incorrect.[4]

Put simply, unless and until the Park Service actually revises the GMP for Tomales Point, this case is not moot. *Knox v. Serv. Emps. Int'l. Union 1000*, 567 U.S. 307, 307 (2012) ("A case becomes moot only when it is impossible for the

[4] The Park Service also wrongly states that because "[t]he free-ranging elk herds . . . were created by NPS via helicopter capture and transport," the Elk Advocates "incorrectly suggest[ed] that the elk 'dispersed' 'over time' . . . into 'additional free-roaming herds.'" Defs.' Br. at 9 n.2. Plaintiffs merely explained that the elk dispersed into four sub-herds *within Tomales Point*, Pl.'s Opening Br. at 11, and specifically acknowledged that the Park Service moved the elk to create the free ranging herds south of the fence. *Id*. at 12 n.1.

court to grant any effectual relief whatever to the prevailing party." (internal quotation omitted)); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (noting that prudential mootness only applies "if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968))).

Therefore, in light of the agency's demonstrated inconsistency on this point, and more importantly, its continued insistence that it is not *required* to revise the GMP, the Elk Advocates need a ruling from this Court that such a revision is, in fact, statutorily required. Absent that ruling, and the concomitant determination that the agency's delay in revising the GMP is "unreasonable" under *TRAC*, there is no guarantee that the Park Service will ever actually revise the GMP for Tomales Point.

CONCLUSION

For the foregoing reasons, including those set forth in the Elk Advocates' opening brief, the district court's ruling should be reversed.[5]

[5] Plaintiffs-Appellants wish to acknowledge and thank Harvard Law School students Magdalene Beck, Nyala Carbado, and Samantha Goerger for their invaluable assistance in preparing this brief.

/s/ Rebecca L. Garverman

Rebecca L. Garverman
Harvard Animal Law & Policy Clinic
1585 Massachusetts Avenue,
Cambridge MA 02138
(617) 496-5145
rgarverman@law.harvard.edu
Attorney for Plaintiffs-Appellants

Katherine A. Meyer
Harvard Animal Law & Policy Clinic
1585 Massachusetts Avenue,
Cambridge MA 02138
kmeyer@law.harvard.edu
Of Counsel

FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) ____23-15580_____

I am the attorney or self-represented party.

This brief contains 4,798 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties.

[ ] a party or parties are filing a single brief in response to multiple briefs.

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature __s/ *Rebecca L. Garverman*_____ **Date** ____December 19, 2023____.