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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

16 JACK GESCHEIDT, et al.,  
17 Plaintiffs,

18 v.

19 DEB HAALAND,  
Secretary of Interior, et al.,  
20  
21 Defendants.

Case No. 21-4734-HSG

PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR A PRELIMINARY  
INJUNCTION

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1 **INTRODUCTION**

2 The only question presented by the instant motion is whether, given the strength of  
3 Plaintiffs’ unreasonable delay claim, and all of the equities involved, this Court should enter  
4 preliminary relief to ensure that the wildlife at issue does not continue to die from dehydration  
5 and/or starvation before this case can be decided. As Plaintiffs demonstrated in their opening  
6 brief, and further demonstrate below, the Court clearly has the authority to do so, and the facts of  
7 this case cry out for such temporary emergency relief.

8 **ARGUMENT**

9 **I. THE COURT SHOULD NEITHER ACCEPT DEFENDANTS’ FACTUAL**  
10 **ASSERTIONS NOR DEFER TO THE AGENCY’S “EXPERTISE” IN MANAGING**  
11 **THE TOMALES ELK.**

12 **A. The Park Service Keeps Revising Pertinent Facts to Suit its Needs.**

13 In light of the many inconsistencies the Park Service has put forward in the last few years  
14 about this matter, the Court should be extremely wary of accepting its latest presentation of the  
15 pertinent facts. For example, we know there is a fence maintained by the Park Service along the  
16 entire southern border of the Tomales Point elk habitat, and that, as a result, the Tule elk who live  
17 there are unable to reach water and forage on the other side of the fence. *See, e.g.*, Declaration of  
18 Dr. Howell, Pl. Ex. G, ECF No. 8-9, ¶¶ 4, 7–8. We also know that the reason the fence was  
19 installed over 43 years ago was to keep the elk on Tomales Point from competing for water and  
20 forage used by cattle south of the fence. *See* 1998 Management Plan, Pl. Ex. A, ECF No. 8-3, at 8  
21 (“The erection of a three-mile fence across the peninsula from the Pacific Ocean to Tomales Bay  
22 *isolated the herd from adjacent dairy farms*”) (emphasis added).

23 Now—for the first time—in an effort to defeat Plaintiffs’ request for emergency relief, the  
24 Park Service would have this Court believe that the fence has nothing to do with keeping the elk  
25 from habitat used by the ranches because the Tomales elk have no interest in traveling south of  
26 the fence. *See, e.g.*, Defendants’ Memorandum (“Def. Brf.”) at 21–22 (asserting that “because the  
27 elk have never been observed moving generally toward the fence, and tend to inhabit the same  
28 areas year after year regardless of drought, *fence removal would be unlikely to lead to migration*

1 *of the elk out of the Reserve*”) (emphasis added); *id.* (“Plaintiffs cannot show that removing the  
2 fence *would improve conditions for the elk herd*”) (emphasis added).

3 But if, in fact, the existence of the fence is so meaningless here—i.e., it neither deprives  
4 the Tomales elk of any food or water, nor is it needed to protect the cattle ranches from  
5 competition from the elk—what possible purpose does this fence serve at this point in time, and  
6 why is the Park Service so bent on keeping it in place? This glaring inconsistency in the Park  
7 Service’s narrative, alone, should make this Court wary of uncritically accepting the agency’s  
8 many self-serving factual statements. ***But there is much more.***

9 When 257 Tomales elk died during the 2013-2015 drought, the Park Service vehemently  
10 denied that the animals died from a lack of water. *See* National Park Service, Point Reyes  
11 National Seashore, *Tule Elk at Tomales Point FAQ*,  
12 [https://www.nps.gov/pore/learn/nature/tule\\_elk\\_tomales\\_point\\_faq.htm](https://www.nps.gov/pore/learn/nature/tule_elk_tomales_point_faq.htm) (last updated July 1,  
13 2021) (“[T]here is no evidence that the 2013–2015 herd decline was due to dehydration and a  
14 lack of water.”). Then, during the summer of 2020, when Plaintiffs and others personally  
15 witnessed dead and emaciated elk at Tomales Point and implored the Park Service to remove the  
16 fence so that the elk could have access to water, the Service denied that a large die-off was even  
17 occurring or that the elk had insufficient access to water. *See, e.g., id.* (informing the public that  
18 NPS did not supply any supplemental water during 2020 because “[r]egular monitoring of the  
19 available water sources for the elk determined that water was in sufficient supply and that there  
20 was *no need to provide supplemental water for the elk.*”) (emphasis added).

21 But then, in March 2021, the Park Service finally admitted the horrific truth that Plaintiffs  
22 had known all along: that ***in fact 152 of a total of 445—or one-third of the total population of***  
23 ***Tomales elk—died during 2020-2021.*** *See Tule Elk at Tomales Point FAQ, supra.* However, the  
24 agency still insisted that this massive die-off was unrelated to a lack of water, telling the public  
25 that the real problem was “poor forage quality.” *Id.*

1 Then, following a huge public outcry—including relentless media coverage critical of the  
 2 Park Service for allowing these animals to die such inhumane deaths<sup>1</sup>—the agency announced  
 3 that things had suddenly changed and that it had decided to provide the Tomales elk with some  
 4 supplemental water—despite recently telling the public that the problem was *not* a lack of water,  
 5 but instead a *lack of adequate forage*. See Will Houston, *Drought: Point Reyes supplies*  
 6 *emergency water for tule elk*, MARIN INDEPENDENT JOURNAL (June 11, 2021, 5:00PM),  
 7 [https://www.marinij.com/2021/06/11/drought-point-reyes-supplies-emergency-water-for-](https://www.marinij.com/2021/06/11/drought-point-reyes-supplies-emergency-water-for-%20tule-elk/)  
 8 [%20tule-elk/](https://www.marinij.com/2021/06/11/drought-point-reyes-supplies-emergency-water-for-%20tule-elk/). The agency has not, however, made any effort to provide these animals with any  
 9 supplemental *food*, and in fact now argues against this temporary remedy that would address what  
 10 it claims was the reason for the most recent massive die-off. See also Declaration of James Coda,

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 13 <sup>1</sup> See, e.g., Asher Elbein, *Home on the Range*, BIOGRAPHIC (March 23, 2021),  
 14 <https://www.biographic.com/home-on-the-range/>; Will Houston, *Point Reyes elk dying as dry*  
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 22 Schena, *Rally Against Mass Killing Of Tule Elk 2021: Pt. Reyes*, PATCH (April 10, 2021,  
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 24 [mass-killing-of-tule-elk-2021-pt-reyes](https://patch.com/california/sanrafael/calendar/event/20210410/1028869/rally-against-mass-killing-of-tule-elk-2021-pt-reyes); Gayle Ong, *Rare elk population declining due to drought*  
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 28 [deaths-protest-point-reyes-national-seashore/10506617/](https://abc7news.com/tule-elk-deaths-protest-point-reyes-national-seashore/10506617/); Gustaf Kilander, *Dozens of rare elk die*  
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[leases-kill-tule-elk/](https://www.earthisland.org/journal/index.php/articles/entry/fed-plan-extend-point-reyes-ranch-leases-kill-tule-elk/).

1 Pl. Ex. I, ECF No. 8-11, ¶¶ 10–12 (the supplemental water provided is only available to one of  
2 the four Tomales Point herds).

3 Now that Plaintiffs have filed this lawsuit and moved for a preliminary injunction in an  
4 effort to ensure that these animals do not continue to die from a lack of forage and water while  
5 this case is pending—as a result of what the Park Service itself admits are *worsening drought*  
6 *conditions*, Def. Brf. at 22—the Park Service would also have this Court believe that the elk are  
7 doing just fine, and, lo and behold, the problem is neither a lack of adequate water nor forage, but  
8 instead a lack of certain nutrients that exists throughout the National Seashore. Def. Brf. at 5  
9 (stating that the cause of death for elk—“irrespective of whether they lived within or outside of  
10 the Reserve—was attributable to *significant nutrient deficiencies*, although NPS could not  
11 determine whether these deficiencies were caused by simple lack of forage or more complex  
12 interactions with lacking micronutrients, such as copper and selenium”).

13 But, of course, a lack of certain nutrients *is* a forage problem that could be solved if the  
14 Tomales elk could obtain access to habitat south of the fence. As recently explained to Defendant  
15 Haaland by five wildlife biologists who have assisted the Park Service in the reintroduction,  
16 monitoring, and/or research on Tule elk since their release at Tomales Point in 1978, both the  
17 2015 and most recent population crash “were *the result of the inability of the confined elk to*  
18 *disperse from the Reserve to find more favorable forage.*” Letter to Secretary Haaland (June 24,  
19 2021), Pl. Ex. K (“Scientist Letter”) at 3 (emphasis added).

20 Moreover, if, as Defendants suggest, this problem exists throughout Point Reyes, the other  
21 elk herds at Point Reyes—who are free ranging south of the Tomales fence—would also be dying  
22 in large numbers. But, according to the Park Service’s own population numbers, that is not the  
23 case. Rather, in 2020, the Limantour herd declined only from 164 to 155 animals, and the Drakes  
24 Beach herd actually *increased by one*. See *Tule Elk at Tomales Point FAQ*, *supra*.

25 Defendants’ self-serving assertions that they have not “seen” elk congregating at the fence  
26 and that the majority of elk “observed to date by Park staff” appear “in good to excellent  
27 condition with no signs of starvation or dehydration,” Def. Brf. at 7, does not negate what  
28 Plaintiffs know to be true: that more than 150 elk have already died because they are prevented



1 from reaching adequate food and water and that, as drought conditions worsen, these animals will  
 2 continue to die if they cannot access adequate food and water. And, as demonstrated by the  
 3 Supplemental Declaration of Plaintiff Jack Gescheidt, who surveyed Tomales Point on July 16,  
 4 2021, in fact the elk are *not* doing fine, and any remaining water sources are miniscule at best. *See*  
 5 Supplemental Gescheidt Decl., Pl. Ex. L, (describing the carcasses and skeletons of many elk,  
 6 including animals found at the bottom of a dry ravine, and reporting that water sources are  
 7 scarce.); *see also* Photographs attached to Mr. Gescheidt’s Supplemental Declaration; *see also*  
 8 Scientist Letter, Pl. Ex. K, at 5 (“[r]emoving/opening the high fence across Tomales Point would  
 9 allow the confined tule elk to disperse away from areas of inadequate forage and water”);  
 10 Supplemental Kline Decl., Pl. Ex. M (Photographs taken of Tomales elk at the fence).

11 In light of these many factual inconsistencies—as well as the Park Service’s propensity to  
 12 shift its position on what has occurred and what is needed to rectify the situation—this Court  
 13 should be extremely wary of accepting the agency’s latest factual assertions made for the sole  
 14 purpose of defeating Plaintiffs’ motion for emergency relief. *See, e.g., Humane Soc’y of the*  
 15 *United States v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) (noting that “[divergent factual  
 16 findings” by an agency as to the cause of death of wildlife “raise questions as to *whether the*  
 17 *agency is fulfilling its statutory mandates impartially and competently*”) (emphasis added).

18 **B. Because the Park Service Has Failed to Revise the General Management Plan**  
 19 **for the Tomales Elk, There Is No Reason for Court to Defer to its**  
 20 **Management “Expertise” in this Case.**

21 There also is no reason for this Court to defer to the agency’s “expertise” in this matter, as  
 22 urged by Defendants. Def. Brf. at 16–23. The whole point of Plaintiffs’ underlying claim is that  
 23 the Park Service has unreasonably delayed revising its management approach for the Tomales elk  
 24 as required by the agency’s governing statute, based on events and circumstances that have  
 25 occurred *over the last 41 years*. *See* Plaintiffs’ Memorandum (“Pl. Brf.”) at 11–15. Thus, this  
 26 Court cannot defer to the agency’s “expert” management decision, as there has been no such  
 27 agency action to review—as Defendants themselves vehemently stress. Def. Brf. at 13–16.

28 There also is no basis for this Court to defer to such ad hoc, public relations driven,  
 management “decisions” upon which the Park Service so heavily relies throughout its brief.

1 Indeed, because these inconsistent management pronouncements are not tethered to any final  
2 agency action, they are *worse* than the kind of post hoc rationalizations to which courts must  
3 *never* defer. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

4 In this regard, it is also important to reject any notion that these large die-offs of the Tule  
5 elk are simply the result of “natural ecosystem processes” as asserted by Defendants. Def. Brf. at  
6 20. There is nothing *natural* about an eight-foot wire fence. As the Park Service itself explained  
7 in its 1998 Tule Elk Management Plan, although “[n]atural ecosystem processes will result in  
8 disease, predation, loss of fitness and eventually mortality . . . a healthy herd is one that does not  
9 suffer disease or mortality *due to artificially induced or human caused impacts.*” Pl. Ex. A, at 39  
10 (emphasis added). The three-mile-long wire woven fence that the Park Service maintains to  
11 restrict the elk’s access to habitat south of the fence is both “artificially induced” and “human  
12 caused.” *See id.* (observing that such “human caused influences” includes “*the fencing of elk on*  
13 *the peninsula of Tomales Point*”) (emphasis added); *see also* Howell Decl., Pl. Ex. G, ECF No. 8-  
14 9, ¶ 4 (“The fence located at Tomales Point creates a closed system, with no emigration or  
15 immigration in population, essential elements for natural population dynamics . . . *The fence is*  
16 *not a natural barrier and prevents the elk from reaching food and water that are part of the*  
17 *natural environment.*”) (emphasis added).

18 In fact, recent Marin County maps dramatically demonstrate there are many more water  
19 sources available on the fence’s southern side compared to its northern side. *See* Attachment 1  
20 (aerial maps showing water sources north and south of the Tomales Point fence). The  
21 photographs attached to the government’s brief do not show otherwise. Indeed, those  
22 photographs, one of which is included as Attachment 2 to this brief (Def. Ex. 32, ECF No. 16-32),  
23 show that what the Park Service is calling an adequate water supply north of the fence for  
24 *hundreds of animals each requiring about four gallons of water a day*<sup>2</sup> is actually nothing more  
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26 <sup>2</sup> *See* Konrad Hafen, *How Often Do Elk Need Water and How Much Do They Drink?*, PUBLIC  
27 LANDS JOURNAL, [https://publiclandsjournal.com/how-often-do-elk-need-water-and-how-much-  
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1 than a tiny puddle. *See id*; *see also* Supplemental Gescheidt Decl., Pl. Ex. L; *see also* Photographs  
2 attached to Mr. Gescheidt’s Supplemental Declaration.

3 As to available habitat for the elk south of the fence, the Park Service admits that “*grazing*  
4 *resources are not currently a limiting factor*” for the two free-ranging herds. *See* Environmental  
5 Impact Statement (Sept. 2020), Pl. Ex. N, at 187 (emphasis added); *see also* McCrea A. Cobb,  
6 Spatial Ecology and Population Dynamics of Tule Elk (*Cervus elaphus nannodes*) at Point Reyes  
7 National Seashore, California (Spring 2010), Pl. Ex. O, at 149–150 (explaining that “[u]nlike elk  
8 in the Tomales herds, elk in the D. Ranch and Limantour herds are not constrained by fences, and  
9 thus *have much more available high quality habitat surrounding their current ranges*”) (emphasis  
10 added).

## 11 **II. PLAINTIFFS HAVE A STRONG CASE ON THE MERITS.**

12 Plaintiffs have made a strong showing that the Park Service’s failure to revise the General  
13 Management Plan for this portion of the Park in a “timely manner,” as required by the governing  
14 statute, violates that mandate and constitutes agency action unreasonably delayed within the  
15 meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1)—a claim that Judge Armstrong  
16 has already ruled is justiciable. *See Res. Renewal Inst. v. Nat’l Park Serv.*, No. C 16-0688 SBA,  
17 2016 WL 11673179 (N.D. Cal. July 15, 2016); Pl. Brf. at 11–12. Thus, Defendants’ assertion that  
18 “Plaintiffs have failed to identify any specific legal command that NPS has not followed,” Def.  
19 Brf. at 24, is demonstrably incorrect.

20 Moreover, although this was the sole claim upon which Plaintiffs based their request for  
21 temporary relief, Pl. Brf. at 11–15, Defendants chose not to address the merits of *this* argument,  
22 and instead spent the bulk of their opposition contending that Plaintiffs had failed to show a  
23 likelihood of success on a *different* claim that, again, simply was not the basis for the instant  
24 motion. *See* Def. Brf. at 12–22 (arguing that there is no basis for Plaintiffs’ Third Claim under 5  
25 U.S.C. § 706(2)).

26 It is not surprising the government chose not to respond to Plaintiffs’ actual argument on  
27 the merits, in light of the extreme delay that has ensued since the agency issued the 1980 General  
28 Management Plan for the National Seashore, including Tomales Point. Indeed, experts have been

1 warning the Park Service for *decades* that it needs to evaluate the environmental needs and  
2 conditions of the Tomales elk and to revise its management of this wildlife accordingly.

3 In 1993, the Park Service’s own Scientific Advisory Panel reported that the increasing  
4 population of Tule elk at Tomales Point required the Park Service to consider various  
5 management actions before the elk started dying of starvation because they could not obtain  
6 access to adequate forage. McCullough, et al., “Report of the Scientific Advisory Panel on  
7 Control of Tule Elk on Point Reyes National Seashore” (October 18, 1993), Pl. Ex. P. The Panel  
8 warned that, with respect to the Park Service’s continued hands-off approach toward these elk,  
9 “[w]e can reliably predict that if such a strategy is employed the tule elk will seasonably be  
10 malnourished and appear less ‘healthy’ and that *dead and dying animals will become more*  
11 *evident.*” *Id.* at 4 (emphasis added). In 1998, the Park Service issued a Tule Elk Management  
12 Plan, which stressed that further action was needed “to provide for the protection of the elk that is  
13 consistent with scientifically sound principles, takes into account the interests of the public, and  
14 meets the objectives for which the Seashore was established.” Pl. Ex. A, at 1.

15 In his 2010 dissertation on this subject, McCrea Cobb stated in no uncertain terms that  
16 “[g]iven the predicted future abundances of elk and close proximity to ranches—conflicts are  
17 likely to occur within the next 10 years at Point Reyes.” Cobb, *supra*, Pl. Ex. O, at 150. He  
18 stressed that “NPS managers at Pt. Reyes are *strongly encouraged to develop a proactive plan to*  
19 *address this issue.*” *Id.* (emphasis added). But, again, the Park Service failed to take necessary  
20 action. Therefore, in view of the agency’s statutory mandate to revise its General Management  
21 Plans in a “timely manner” and the fact that it has known for *decades* that the population of elk at  
22 Tomales Point could reach population levels that could adversely affect their survival if they  
23 could not reach sufficient forage and water beyond the fence maintained by the Park Service,  
24 Plaintiffs’ unreasonable delay claim is extremely compelling.

### 25 **III. THE COURT CAN GRANT THE REQUESTED EMERGENCY RELIEF.**

#### 26 **A. The Court Has Equitable Authority to Grant the Requested Relief.**

27 This Court clearly has the authority to issue the requested preliminary relief. To begin  
28 with, requiring the Park Service to undertake measures to ensure that more elk do not continue to

1 die of starvation from a lack of food and water would *maintain the status quo*—i.e., the  
2 continuation of this wildlife population which is supposed to be preserved “unimpaired” for the  
3 enjoyment of future generations. 54 U.S.C. § 100101(a); 16 U.S.C. § 459c.

4 But, even if the requested relief is viewed as a mandatory injunction, this Court has ample  
5 authority to issue such relief under the extremely exigent circumstances of this case. It is  
6 axiomatic that “[t]he essence of equity jurisdiction” is the power of the Court “to do equity and  
7 mould each degree to the necessities of the particular case.” *Hecht Co. v. Bowles*, 321 U.S. 321,  
8 329–30 (1944). Indeed, “[where] the public interest is involved . . . those equitable powers  
9 assume an even broader and more flexible character than when only a private controversy is at  
10 stake.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

11 Here, where there is a strong public interest in preserving the Tomales elk and preventing  
12 more massive deaths of this wildlife by starvation and/or dehydration while this case is pending,  
13 this Court has ample equitable authority to direct the Park Service to initiate measures to ensure  
14 that these elk do not continue to die. *See, e.g., Red Wolf Coal. v. United States Fish & Wildlife*  
15 *Serv.*, No. 2:20-CV-75-BO, 2021 WL 230202 (E.D.N.C. Jan. 22, 2021) (issuing mandatory  
16 injunction requiring the Fish and Wildlife Service to draft an immediate plan to release captive  
17 red wolves into the Red Recovery Area to prevent extinction of the species).

18 Moreover, the Court of Appeals for this Circuit has made clear that such relief is  
19 appropriate where “*the law and facts clearly favor*” the moving party. *Garcia v. Google, Inc.*, 786  
20 F.3d 733, 740 (9th Cir. 2015) (en banc). Here, both the facts and the law clearly favor Plaintiffs’  
21 request for preliminary relief.

22 As to the law, Plaintiffs have made a strong showing that the Park Service’s failure to  
23 revise the General Management Plan for this portion of the Park in a “timely manner,” as  
24 required, violates that mandate and constitutes agency action unreasonably delayed within the  
25 meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1). Pl. Brf. at 11–15, *supra*.

26 As to the facts, Plaintiffs also have a compelling case in light of what is now occurring, as  
27 predicted by the agency’s own Scientific Advisory Panel over 28 years ago—i.e., *the elk, who*  
28

1 *are supposed to be protected and conserved, are dying of starvation and/or dehydration because*  
2 *they cannot traverse the human-erected fence.*

3 **B. The Requested Emergency Relief is Directly Related to Plaintiffs' Claim.**

4 The Park Service's assertion that the preliminary relief sought by Plaintiffs falls outside  
5 the scope of the ultimate relief they can obtain in this case, Def. Brf. at 11–12, is also incorrect.  
6 Plaintiffs seek to compel the Park Service to revise its General Management Plan with respect to  
7 Tomales Point and the elk who live there precisely so that the agency can address the current—  
8 and *long-standing*—management crisis, i.e., wild elk, who are supposed to be conserved for  
9 future generations, are dying horrific deaths because the animals cannot get past a fence that the  
10 Park Service erected more than 40 years ago and continues to maintain for the benefit of livestock  
11 ranchers who are permitted to use public lands south of the fence. Therefore, the relief Plaintiffs  
12 ultimately seek here should lead to management decisions *other than the current "management"*  
13 *by human-caused starvation*. In other words, Plaintiffs are asking the Court to order the Park  
14 Service to intervene to address a serious situation that *the agency itself created by failing to revise*  
15 *its General Management Plan for this portion of the Park "in a timely manner."* 54 U.S.C. §  
16 100502.

17 The cases cited by Defendants do not help their cause. *Center for Food Safety v. Jewell*,  
18 83 F. Supp. 3d 126 (D.D.C. 2015) did not involve a request for a preliminary injunction. Hence,  
19 the court had no occasion to decide whether emergency relief was appropriate in light of the  
20 underlying claim. Rather, that case simply held that plaintiffs challenging the Fish and Wildlife  
21 Service's (FWS) unreasonable delay in revising a conservation plan for certain refuges could not  
22 seek vacatur of cooperative farming agreements until the agency prepared the requisite plan. *Id.* at  
23 143. Moreover, there the court stressed that the plaintiffs did not seek to compel the FWS to  
24 update the plan—the only ultimate relief that is permitted in an unreasonable delay claim. *Id.*  
25 Here, however, Plaintiffs have asked the Court to compel the Park Service to revise the General  
26 Management Plan for Tomales Point. Compl. at 19. Thus, the only question here is whether the  
27 Court may issue appropriate temporary relief to ensure that this wildlife—the very subject of this  
28 case—*does not continue to die while the case is pending*. As demonstrated above, the Court



1 clearly has such authority. *See also Washington Toxics Coal. v. Env'tl. Prot. Agency*, 413 F.3d  
 2 1024, 1034 (9th Cir. 2005) (abrogated on other grounds) (holding that court can issue injunction  
 3 against continued use of pesticides while the FWS complies with its procedural obligations under  
 4 the Endangered Species Act).

5 Defendants' reliance on *Borenstein v. Lead Animal Shelter Animal Found.*, 810 F. App'x  
 6 573 (9th Cir. 2020), Def. Brf. at 12, is also misplaced. There, the Court simply held that the  
 7 plaintiff had failed to demonstrate a likelihood of success on the merits because the relief  
 8 sought—a mandatory injunction undoing an alleged past act of discrimination—was not  
 9 authorized by the Americans with Disabilities Act. *Id.* Here, however, the preliminary relief  
 10 sought by Plaintiffs—ordering Defendants to ensure that the Tomales elk have access to adequate  
 11 food and water by either (1) removing the fence that restrains their movements, or (2) providing  
 12 them supplemental food and water—are both permissible under the statute at issue here. The Park  
 13 Service clearly has authority to remove the fence, as there is no binding law that requires it.<sup>3</sup>

14 The Park Service also has authority to provide supplemental food and water to the elk—as  
 15 it has done in the past and is doing now with regard to some supplemental water. Def. Brf. at 1;  
 16 *see also* 54 U.S.C. § 100101(a) (NPS “shall promote and regulate the use of the National Park  
 17 System by means and measures that conform to the fundamental purpose of the System units,  
 18 which purpose is to conserve . . . the wild life . . .”). Therefore, the *Borenstein* case has no  
 19 relevance here.

20 \_\_\_\_\_  
 21 <sup>3</sup> The Park Service's reliance on a non-binding 1971 Task Force Report, Def. Brf. at 3, does not  
 22 supply any such mandate, nor does the non-binding 1998 Elk Management Plan, *see id.*, which by  
 23 its own terms *expired by 2008 at the latest*. *See* Pl. Ex. A at 1 (noting that the 1998 Elk  
 24 Management Plan was intended to guide management of the elk “for the next five to ten years.”).  
 25 Nor does the 1974 Memorandum of Understanding between the Park Service and California  
 26 Department of Fish and Game supply any such mandate. *See* Press Decl., ECF No. 16, ¶ 10. Not  
 27 only is that agreement now 47 years old—and issued at a time when the ranching leases were  
 28 only expected to be in effect for about 20 years—but it also states that the Park Service agrees to  
 “[p]rotect the elk and maintain as vigorous a herd as possible,” ECF No. 16-5, ¶ 6—something  
 the Park Service has utterly failed to do. Moreover, at least since 2018, that state agency has  
 opposed the fence's continued presence, stating that “artificial conditions associated with [the  
 elk's] confinement are undesirable in the long term.” CALIFORNIA FISH & WILDLIFE, ELK  
 CONSERVATION AND MANAGEMENT PLAN (2018),  
<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=162912&inline> at 454–456.

1           Indeed, the Park Service is already providing supplemental water to *some*, just not all, of  
2 the elk, and the government admits that “artificial feeding could conceivably improve short-term  
3 survival rates.” Def. Brf. at 19. Moreover, while Defendants raise concerns about potential  
4 adverse side-effects from *long-term* supplemental feeding, *id.*, ***Plaintiffs are willing to have this***  
5 ***case decided on an expedited summary judgment basis.*** Accordingly, there is no legitimate  
6 concern that providing the Tomales elk with supplemental feed in the short-term would result in  
7 any such negative effects that have occurred in the extremely *long-term* supplemental feeding  
8 projects cited by the agency. *See id.* (citing *Mayo v. Reynolds*, 875 F.3d 11, 17 (D.C. Cir. 2017);  
9 *Def. of Wildlife v. Salazar*, 651 F.3d 112, 113–14 (D.C. Cir. 2011) (review of environmental  
10 concerns from supplemental feeding of elk in Wyoming that has been going on since the “*turn of*  
11 *the last century.*”) (emphasis added). In fact, the Park Service has already successfully used short-  
12 term supplemental feeding for the Tomales elk when the initial population had trouble surviving.  
13 *See* Press Declaration, ECF No. 16, ¶¶ 12–13 (explaining that the elk were provided supplemental  
14 food “from mid-September 1979 until the elk stopped taking [it] after about six months”).

15           Accordingly, there is no sound reason why providing supplemental feed for these elk now,  
16 on a very short-term basis, would cause any countervailing adverse impacts. Indeed, the Park  
17 Service’s own 1998 Tule Elk Management Plan explains that “*large numbers of starving elk*” at  
18 the Seashore was the very kind of circumstance that “would require the Seashore to intervene”  
19 with a management solution. Pl. Ex. A at 46 (emphasis added).

#### 20 **IV. THE EQUITIES WEIGH IN FAVOR OF GRANTING THE INJUNCTION.**

21           As already demonstrated, Pl. Brf. at 16-18, Plaintiffs will continue to suffer irreparable  
22 harm in the absence of the requested temporary relief, and all of the equities weigh in their favor.

23           Defendants’ argument that Plaintiffs cannot demonstrate that the entire population of  
24 Tomales elk is currently in jeopardy, Def. Brf. at 22–23, misses the mark on several fronts. First,  
25 in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), the Supreme Court made clear  
26 that the irreparable harm necessary to support emergency relief must be to the *plaintiffs*, not the  
27 wildlife at issue. Here, Plaintiffs have submitted sworn affidavits attesting to the fact that their  
28 ability to enjoy this part of the National Seashore is ruined, and will continue to be ruined,



1 because the elk they enjoy observing and photographing are dying of starvation and dehydration.  
2 Pl. Exs. B–D. Because this situation will only persist as drought conditions *worsen*, this harm  
3 cannot be repaired unless the Park Service intervenes now to protect these elk by ensuring that  
4 they have adequate access to both food and water during the pendency of this case. *See, e.g.*, Def.  
5 Brf. at 22 (noting that drought conditions have “*worsened to levels not experienced since tule elk*  
6 *were reintroduced to Point Reyes in 1978*”) (emphasis added).

7         Second, the Park Service misstates the relevant law on this issue. In fact, in *Nat’l Wildlife*  
8 *Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818–19 (9th Cir. 2018), the Ninth Circuit  
9 held that the district court “did not err when it found irreparable harm *without finding an*  
10 *extinction-level threat to listed species*” because “[i]rreparable harm should be determined by  
11 reference to the purposes of the statute being enforced” and “[o]ne of the ESA’s central purposes  
12 is to conserve species,” not only to avoid their immediate extinction. (Emphasis added). Here,  
13 likewise, the central purpose of the NPS organic statute is to “*conserve . . . the wildlife*” within  
14 each national park unit “and to provide for the enjoyment of the same in such manner and by such  
15 means *as will leave them unimpaired for the enjoyment of future generations.*” 54 U.S.C. §  
16 100101(a) (emphases added); *see also* 16 U.S.C. § 459c (requiring the Park Service to administer  
17 the Point Reyes National Seashore “without impairment of its natural values.”). Thus, because  
18 continuing to allow this wildlife to die in such a horrific manner neither “conserves” the animals,  
19 nor leaves them “unimpaired” for the enjoyment of the public, Plaintiffs will continue to suffer  
20 irreparable harm if the Park Service does not take immediate measures to ensure the survival of  
21 the remaining Tomales elk during the pendency of this case.

22         Third, Plaintiffs *have* shown that the genetic viability of the entire population *is* in  
23 jeopardy. Pl. Brf. at 17–18; Howell Decl., Pl. Ex. G, ECF No. 8-9, ¶ 12. The agency’s statement  
24 that “the evidence does not bear out” Plaintiffs’ contention that “there is a serious concern that the  
25 entire population of elk may lose its genetic viability,” Def. Brf. at 23, is completely unsupported.  
26 The only evidence provided by the Service can be found in the Declaration of Jenny Powers, who  
27 merely states that the Park Service does “not have direct evidence *confirming* or contradicting”  
28 evidence of “sufficient genetic variation” in the tule elk at Tomales Point. Powers Decl., ECF No.

1 17, ¶ 12 (emphasis added). Therefore, even if Plaintiffs were required to demonstrate that the  
 2 entire Tomales Point elk population was at risk here—which is *not* their burden—they have done  
 3 so.<sup>4</sup>

4 On the other hand, Defendants have not shown that *anyone* will be harmed if the  
 5 requested injunction is granted. While Defendants generally refer to a need to “balance” the  
 6 concerns of the “multigenerational ranching operations in the Park,” Def. Brf. at 24, now that it  
 7 insists that the Tomales elk neither want –nor need—to go below the fence in search of food and  
 8 water, *see supra* at 1-2, this concern seems minimal at best and is greatly outweighed by the harm  
 9 posed to Plaintiffs.<sup>5</sup>

10 Finally, as to the public interest, Plaintiffs wholeheartedly agree with Defendants that  
 11 “[t]he federal government and the public it represents have a strong interest in *competent*  
 12 *management* of the national parks, consistent with applicable laws.” Def. Brf. at 24 (emphasis  
 13 added). This gets to the nub of Plaintiffs’ underlying claim in this case—i.e., the Park Service’s  
 14 decades-long failure to reconcile what it apparently believes are competing interests that the  
 15 agency is required to protect and preserve. *See, e.g.*, NPS Management Policies, § 5.3.5, Pl. Ex. Q  
 16 (“All cultural resource and natural resource values will be considered in defining specific  
 17 treatment and management goals . . . *Conflicts will be considered and resolved through the*  
 18 *planning process . . .*”) (emphasis added). Thus, the current situation is one of ***the agency’s own***  
 19 ***making—it has failed to manage the Tule elk at Tomales Point in a way that would have***  
 20 ***averted the present inhumane catastrophe, despite repeated warnings from its own scientists***  
 21 ***that it must do so to avoid such a crisis.*** *See supra* at 5–7. The Park Service’s chosen  
 22 management practice—allowing this wildlife to suffer and die because they are unable to obtain

23 \_\_\_\_\_  
 24 <sup>4</sup> Ms. Powers further explains that “a recent paper on tule elk herds in California, *but outside of*  
 25 *the Park*, shows sufficient genetic variation . . . and no evidence of inbreeding in the study  
 26 populations.” Powers Decl., ECF No. 17, ¶ 12 (emphasis added).

27 <sup>5</sup> Moreover, according to a recent scientific study of the interaction between the Drakes Beach elk  
 28 and cattle, “all grazed cattle pastures were *consistently avoided by elk.*” Hughey, et al., “Effects of  
 Human-Altered Landscapes on a Reintroduced Ungulate: Patterns of Habitat Selection at the  
 Rangeland-Wildlife Interface,” *Biological Conservation* 257 (2021) at 5, Pl. Ex. R (emphasis  
 added); *see also id.* at 9 (“contrary to common assumptions, our results indicate that native elk  
 minimize their interactions with cattle and thus, in this ecosystem, *grazing conflicts between*  
*wildlife and livestock may be limited*”) (emphasis added).

1 access to sufficient food and/or water below the Park Service’s fence—is certainly not  
2 “competent management” of this national park unit by any stretch of the imagination.

3 **V. THERE IS NOTHING VAGUE ABOUT PLAINTIFFS’ REQUESTED RELIEF.**

4 Finally, there is nothing vague about the relief requested here. Plaintiffs request that the  
5 Court order the Park Service to either remove all or some of the fence so that the Tomales elk can  
6 obtain access to alternative habitat, or provide supplemental water and food to the elk until this  
7 case can be resolved. To make absolutely clear what Plaintiffs are requesting, they are filing with  
8 this Reply two revised alternative orders so that the Court can decide which is most appropriate in  
9 light of all of the circumstances of this case. *See* Proposed Orders.<sup>6</sup> As explained *supra*, the Park  
10 Service has ample authority to remove all or part of the fence and to provide the necessary  
11 supplemental water and feed to these animals. Indeed, the Park Service stresses throughout its  
12 brief that it “stands ready to act if needed to safeguard the viability of the Tomales Point elk  
13 population.” Def. Brf. at 1. Thus, there is no question that, at an absolute minimum, the Park  
14 Service is capable of providing supplemental food and water to these animals while this case is  
15 pending.

16 However, what the agency should *not* be allowed to do is continue to “manage” this  
17 wildlife through starvation and dehydration caused by confinement behind a wire fence. Rather, if  
18 it is going to continue to maintain these elk in a captive state—like animals in a zoo—it must at  
19 least provide them adequate food and water to ensure that they do not continue to die horrific  
20 deaths by starvation and/or dehydration. *See, e.g.,* Animal Welfare Act, 7 U.S.C. § 2143  
21 (mandating as “minimum” standards for zoo animals “feeding [and] watering”).

22 **CONCLUSION**

23 For all of the foregoing reasons, and those set forth in our opening brief, Plaintiffs’ request  
24 for a preliminary injunction should be granted.

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27 <sup>6</sup> Although not mentioned by the Park Service, Plaintiffs provided Defendants’ counsel with a  
28 more specific revised proposed Order in advance of the June 28, 2021, case management  
conference.

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Respectfully submitted,



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