

Forbearing to Vacate: Grizzly Consequences of the *Allied-Signal* Test in the Tenth Circuit

INTRODUCTION

In *Western Watersheds Project v. Haaland* (“*Western Watersheds*”), the Tenth Circuit Court of Appeals evaluated the United States Forest Service’s 2019 approval of ten-year permits for horse and cattle grazing on a portion of land known as the Upper Green River Area Rangeland (“UGRA Project”) near Yellowstone National Park in Wyoming.¹ The Forest Service’s Record of Decision (ROD) authorizing the project relied on a biological opinion by the U.S. Fish and Wildlife Service which concluded that the project “would not jeopardize the continued existence of grizzly bears” in the Greater Yellowstone Ecosystem.² The U.S. Fish and Wildlife Service (FWS) listed grizzly bears as threatened under the Endangered Species Act in 1975, identifying livestock grazing practices as one key threat to the species.³

Western Watersheds Project and accompanying environmental advocacy organizations (the Appellants) argued that agencies’ assessment and approval of the UGRA Project violated the Endangered Species Act and the National Forest Management Act.⁴ The court agreed in part.⁵ Appellants requested that the court vacate the ROD authorizing the project.⁶ Instead, the court remanded to the FWS and the U.S. Forest Service (USFS) *without* vacatur or other injunctive relief, allowing livestock grazing to continue despite potential harms to grizzlies.⁷ The court provided limited support for its reasoning that remand to the agencies without vacatur was the appropriate remedy in this case, merely pointing to the consequences of a vacatur which were raised by USFS and FWS and which

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1. 69 F.4th 689, 697, 702 (10th Cir. 2023).

2. *Id.* at 698.

3. *Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species*, 40 Fed. Reg. 31,734 (July 28, 1975). Grizzlies were found to meet the criteria for a threatened species under the Endangered Species Act in part based on “livestock depredations on public and private lands,” noting that “[i]ncreasing human use of Yellowstone . . . National Park[], as well as livestock use of surrounding national forests . . . will exert increasing detrimental pressures on grizzly bears unless management measures favoring the species are enacted.” *Id.*

4. *See Western Watersheds*, 69 F.4th at 698.

5. *Id.* at 723.

6. Petitioners-Appellants’ Opening Brief at 2, *Western Watersheds* (No. 22-8031, No. 22-8043).

7. *Id.*

Appellants had not addressed.⁸ Nowhere in its decision did the court consider other injunctive relief.⁹ With this disposition, the court deviated from general practice of the Tenth Circuit and other circuits of remanding cases to district courts for evaluation of the appropriateness of vacatur or other injunctive relief. Given the substantive nature of the agency deficiencies of concern in *Western Watersheds*, this disposition sets an improper precedent and indicates that projects that seriously violate critical protective statutes may plunge ahead before being corrected.

I. LEGAL BACKGROUND

A. *Endangered Species Act*

The Endangered Species Act (ESA) requires government agencies to mitigate the risk of agency action jeopardizing the viability of listed endangered or threatened species.¹⁰ Under the ESA, an agency proposing an action which poses risks to the continued existence of listed species is required to consult with FWS. FWS must produce a biological opinion evaluating whether the agency action will likely jeopardize the viability of listed species.¹¹ If FWS's biological opinion finds the proposed agency action unlikely to jeopardize listed species, but finds that the action is "reasonably certain" to result in a "take" of a listed species, FWS is required to produce an Incidental Take Statement (ITS) in addition to its biological opinion.¹² The ITS provides an acceptable limit for take of a listed species; take within this limit is lawful under Section 10 of the ESA provided that the project complies with a conservation plan.¹³ If the ITS's take limit is exceeded, however, the permit allowing incidental take is revoked.¹⁴

B. *National Forest Management Act*

The National Forest Management Act (NFMA) mandates that every unit of the National Forest System have a land and resource management plan ("forest plan").¹⁵ The NFMA requires USFS to develop and implement site-specific projects under each forest plan.¹⁶ When a party challenges a project under the NFMA, the court evaluates whether the project is consistent with the relevant unit's forest plan; a project that is inconsistent with the unit's forest plan is in

8. See *Western Watersheds*, 69 F.4th at 722.

9. See *id.* at 722-23.

10. 16 U.S.C. § 1536(a)(2).

11. *Western Watersheds*, 69 F.4th at 699.

12. *Id.* (quoting *Appalachian Voices v. United States Dep't of Interior*, 25 F.4th 259, 264-65 (4th Cir. 2022)). "Take" is defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

13. *Western Watersheds*, 69 F.4th at 699; 16 U.S.C. § 1539(a)(1)(B); 16 U.S.C. § 1539(a)(2)(A-B).

14. 16 U.S.C. § 1539(a)(2)(C).

15. 16 U.S.C. § 1604(a); *Western Watersheds*, 69 F.4th at 700.

16. *Western Watersheds*, 69 F.4th at 700.

violation of the NFMA.¹⁷ The forest plan for the Bridger-Teton National Forest, the location of the UGRA Project, includes an objective “[r]equir[ing] that suitable and adequate amounts of forage and cover are retained for wildlife and fish” when USFS authorizes livestock grazing.¹⁸

C. Administrative Procedure Act

Courts apply the Administrative Procedure Act (APA) in assessing ESA and NFMA claims, as these statutes provide no private cause of action.¹⁹ Under the APA, courts defer to agency decisions except when those decisions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁰ Among other provisions, the APA requires agencies to document their reasoning to enable courts to evaluate agencies’ decision-making.²¹

II. CASE BACKGROUND

The Upper Green River Area Rangeland comprises of six allotments totaling 170,643 acres near Yellowstone in Wyoming.²² It provides critical habitat for sensitive amphibians, migratory birds, and threatened grizzly bears.²³ In 2017, the Greater Yellowstone Ecosystem was home to an estimated 718 grizzly bears, with the population having an estimated annual growth of between 0 and 2 percent.²⁴ Since the early 1900s, the region has also been a seasonal grazing land for thousands of head of livestock annually, with USFS issuing grazing permits.²⁵ Use of the land around Yellowstone National Park

17. *Id.*

18. FS Bridger-Teton National Forest Land Resource Management Plan (U.S.D.A. 2015) [hereinafter FS Bridger-Teton], 150-51.

19. *Western Watersheds*, 69 F.4th at 700.

20. *See id.*; 5 U.S.C. § 557(c)(3)(A). The Tenth Circuit has articulated that agency action is “arbitrary and capricious” if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Western Watersheds*, 69 F.4th at 700 (quoting *Wyoming v. United States Dep’t of Agric.*, 661 F.3d 1209, 1227 (10th Cir. 2011)) (internal quotation marks omitted).

21. 5 U.S.C. § 557(c)(3)(A).

22. *Western Watersheds*, 69 F.4th at 700.

23. Petitioners-Appellants’ Opening Brief at 1, *Western Watersheds* (No. 22-8031, No. 22-8043).

24. *Id.* at 10, *Western Watersheds* (No. 22-8031, No. 22-8043). The population grows slowly in part because of the extended time it takes for female grizzlies to reach sexual maturity, the fact that grizzly litters are generally small, and the “lengthy periods between litters.” *Id.* Quoting FWS, Petitioners note that “providing maximum protection for females is essential to [the] recovery’ of grizzly bears because females and dependent cubs are key to the species’ survival.” *Id.* The population of grizzly bears in the Greater Yellowstone Ecosystem “is more sensitive to annual survival of adult females than to any other single vital rate.” *Id.* at 11.

25. *Western Watersheds*, 69 F.4th at 700; Brief for Federal Respondents-Appellees at 6, *Western Watersheds* (No. 22-8031, No. 22-8043). *See generally* FS Bridger-Teton National Forest Land Resource Management Plan (U.S.D.A. 2015) at 39 (discussing the reduction in livestock use of the Bridger-Teton National Forest).

(Yellowstone) for livestock grazing is the “economic base” for communities across Western Wyoming.²⁶

This use of land in the Greater Yellowstone Ecosystem has come at a cost, particularly to grizzly bears in the Upper Green River Area Rangeland. Grazing within grizzlies’ habitat in the UGRA Project area has led to fatal standoffs between bears and ranchers protecting their livestock.²⁷ In the twenty-year period directly preceding the UGRA Project’s approval (1999-2019), thirty-five grizzly bears within the UGRA Project zone were killed due to livestock conflicts.²⁸ Between 2010 and 2014, more than half of all grizzly bear fatalities related to cattle grazing across the whole of Western Wyoming—an area of over 5.4 million acres—occurred in the UGRA Project area.²⁹ These takings occurred against a backdrop of an already precarious bear population. As of 2022, five out of the six land allotments comprising the UGRA Project area experienced female grizzly mortality rates that either exceeded or nearly exceeded female grizzly survival rates—a phenomenon known as a “sink habitat.”³⁰

The UGRA Project approved ten-year livestock grazing permits in the Upper Green River Area Rangeland.³¹ FWS’s biological opinion provided “conservation measures to help prevent conflicts between livestock and grizzly bears,” yet FWS’s accompanying ITS permitted incidental take of up to seventy-two grizzlies over that period.³² This incidental take limit amounted to more than quadruple the rate of livestock-related lethal grizzly bear take of the preceding twenty years.³³ The ITS did not specify a limit or reporting requirements for take of female grizzlies.³⁴

A. District Court Cases

In March 2020, the Center for Biological Diversity and the Sierra Club (collectively, “CBD”) and the Western Watersheds Project, the Alliance for the Wild Rockies, and Yellowstone to Uintas Connection (collectively, “WWP”) separately filed suits in the U.S. District Court for the District of Columbia raising claims that the UGRA Project violated the ESA.³⁵ The Petitioners

26. FS Bridger-Teton at 38-39.

27. Petitioners-Appellants’ Opening Brief at 11, *Western Watersheds* (No. 22-8031, No. 22-8043).

28. *Id.*

29. *Id.*

30. *Id.* at 11-12.

31. *Western Watersheds*, 69 F.4th at 701.

32. *Id.* at 703.

33. There were thirty-five lethal takes of grizzlies within the UGRA Project area between 1999 and 2019. *Id.*; Petitioners-Appellants’ Opening Brief at 11, *Western Watersheds* (No. 22-8031, No. 22-8043).

34. *Western Watersheds*, 69 F.4th at 707. Appellants argue that this lack of take limit or reporting requirements for female grizzlies is unlike “nearly every previous [biological opinion] for the [UGRA] allotments since 1999,” a reflection of “females’ vital importance to the species’ survival.” Petitioners-Appellants’ Opening Brief at 18, *Western Watersheds* (No. 22-8031, No. 22-8043).

35. *Western Watersheds*, 69 F.4th at 703. See *Center for Biological Diversity v. Bernhardt*, No. 20-cv-00855 (APM) and No. 20-cv-00860 (APM), 2020 WL 12674077 (D.D.C. Nov. 28, 2020); *W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29 (D.D.C. 2020).

claimed FWS's biological opinion was arbitrary and capricious and violated the ESA because it (1) did not sufficiently address lethal take of female grizzly bears; (2) failed to adequately consider the project's potential to exacerbate the area's existing mortality sink for female grizzlies; (3) relied on flawed conservation measures; and (4) did not consider broader take of grizzly bears throughout the Greater Yellowstone Ecosystem.³⁶ Petitioners further claimed that USFS's reliance on the flawed biological opinion was a violation of the ESA.³⁷ The State of Wyoming and various rancher groups joined the suit on the side of the government.³⁸ The court declined WWP's motion for a preliminary injunction, consolidated the cases, and granted the defendants' motion to transfer the case to the District of Wyoming.³⁹

In August 2021, WWP and CBD filed an amended petition with the district court for the District of Wyoming, reiterating the ESA violation claims and adding claims that USFS had violated the NFMA in greenlighting the UGRA Project.⁴⁰ With this new claim, Petitioners argued that USFS's ROD violated the NFMA by not complying with the relevant unit plan in failing to "provide adequate forage and cover for sensitive amphibians and migratory birds."⁴¹ The district court dismissed the petition.⁴²

B. Tenth Circuit Appellate Case

Petitioners appealed to the Tenth Circuit Court of Appeals.⁴³ The court applied the APA's arbitrary and capricious standard in assessing Appellants' ESA and NFMA claims.⁴⁴ Ultimately, the court affirmed the lower court's ruling in part, reversed in part, and remanded the matter to USFS and FWS without vacatur, citing disruption to cattle grazing that would result from vacatur.⁴⁵

In partially reversing the district court's holding, the appellate court found that FWS's biological opinion was arbitrary and capricious in failing to set a limit on lethal take of female grizzly bears and inadequately considering the project's potential to exacerbate the area's existing mortality sink for female grizzlies.⁴⁶ The court further held that USFS's ROD was arbitrary and capricious because it failed to consider whether the project allowed adequate forage and cover for migratory birds.⁴⁷ However, the court affirmed the lower court's decision that the biological opinion was not arbitrary and capricious for relying on the

36. *Western Watersheds*, 69 F.4th at 704.

37. *Id.*

38. *Id.* at 703-04.

39. *Id.* at 703.

40. *Id.* at 704. See *Center for Biological Diversity v. Haaland*, 603 F.Supp.3d 1094, 1097-98 (D. Wyo. 2022).

41. *Western Watersheds*, 69 F.4th at 703.

42. See *Center for Biological Diversity v. Haaland*, 603 F.Supp.3d at 1111.

43. *Western Watersheds*, 69 F.4th at 698.

44. *Id.* at 700.

45. *Id.* at 722-23.

46. *Id.* at 700.

47. *Id.* at 698.

conservation measures, and further held that the biological opinion adequately considered lethal take of grizzlies in the Greater Yellowstone Ecosystem as part of its analysis.⁴⁸ Finally, the court found that the ROD's analysis of the project's impact on sensitive amphibians was not arbitrary and capricious.⁴⁹

The court applied the *Allied-Signal* test in determining whether vacatur was the appropriate remedy for the identified agency deficiencies.⁵⁰ While *Allied-Signal* was decided twenty years prior, the Tenth Circuit did not adopt the test until 2023.⁵¹ *Allied-Signal* provides a two-factor test for vacatur under which courts consider “(1) the seriousness of the agency action's deficiencies (and thus the extent of doubt whether the agency chose correctly), and (2) the disruptive consequences of an interim change that may itself be changed.”⁵² The court here reasoned that vacatur was inappropriate “because the deficiencies in the biological opinion and the ROD [were] curable upon remand to the agencies, and vacatur would cause disruption.”⁵³

III. ANALYSIS

Under the *Allied-Signal* test, agencies' deficiencies in assessing and approving the UGRA Project were sufficiently serious for the Court of Appeals to order injunctive relief, which could have meant vacatur of the ROD or remand to the district court to consider vacatur with injunction of the project in the meantime. Courts' use of remand to agencies without injunction of the project at issue should be limited to cases in which only agencies' explanations are deficient. To uphold the purpose of the ESA, the NFMA, and other federal statutes, courts in the future should order injunctive relief and particularly vacatur as the appropriate remedy where agency action has substantively violated federal law.

48. *Id.* at 704.

49. *Id.* at 698.

50. *Id.* at 722; *see Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). In *Allied-Signal*, the D.C. Circuit reviewed a Nuclear Regulatory Commission action in the context of a petition claiming that the Commission had violated the Omnibus Reconciliation Act, acting in an arbitrary and capricious manner and failing to allocate costs “fairly and equitably” among those who receive the Commission's “regulatory services.” 988 F.2d at 148. Relying on *International Union, UMW v. FMSHA*, the *Allied-Signal* court articulated a test to determine the appropriateness of vacatur in a case of agency deficiencies. *Id.* at 150-52; *see Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 966-67 (D.C. Cir. 1990).

51. The test was first adopted by the Tenth Circuit in February 2023, in *Diné Citizens Against Ruining Our Env't v. Haaland*. *See* 59 F.4th 1016, 1025 (10th Cir. 2023). As of the date that Appellants and Appellees in *Western Watersheds* submitted their final briefs to the court in late 2022, the *Allied-Signal* test had yet to be adopted by the Tenth Circuit. *See* Reply Brief of Appellants Center for Biological Diversity and Sierra Club at 21, *Western Watersheds* (No. 22-8031, No. 22-8043).

52. *Western Watersheds*, 69 F.4th at 722; *see also Allied-Signal*, 988 F. 2d at 150-151.

53. *Western Watersheds*, 69 F.4th at 722-23.

A. *Remand with Vacatur is the Typical Disposition for
Deficient Agency Action*

The Supreme Court has reasoned that an agency decision which “is not sustainable on the administrative record made . . . must be vacated and . . . remanded for further consideration.”⁵⁴ As the Tenth Circuit Court of Appeals itself wrote in another 2023 opinion, many courts consider vacatur to be the “preferred remedy under the APA” for unlawful agency action.⁵⁵ Within the Federal, District of Columbia, First, Fifth, Ninth, Tenth, and Eleventh circuits, disposing of cases through remand *without* vacatur is a less common but not unheard-of practice in cases involving agency actions that are inadequately explained or otherwise procedurally deficient.⁵⁶

In *Western Watersheds*, the court remanded directly to the agencies (FWS and USFS) and declined to vacate.⁵⁷ Direct remand to agencies without vacatur is a departure for the Court of Appeals for the Tenth Circuit.⁵⁸ In *Diné Citizens*, the first Tenth Circuit Court of Appeals case which adopted the *Allied-Signal* test and which was decided mere months prior to *Western Watersheds*, the court noted that “[i]n the event the district court concludes vacatur is not appropriate under that test, it should determine whether injunctive relief is warranted.”⁵⁹

The agency action at issue in *Western Watersheds* was *substantively* deficient under federal law rather than being deficient merely in terms of explanation.⁶⁰ In holding USFS’s reliance on FWS’s biological opinion to be arbitrary and capricious, the court pointed to the fact that the biological opinion

54. *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)).

55. *Diné Citizens*, 59 F.4th at 1048; *see also WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) (noting that “[v]acatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts”); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1369 (11th Cir. 2008) (Kravitch, J., concurring in part and dissenting in part) (referring to vacatur as the “ordinary APA remedy”); *Southeast Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 654 (9th Cir. 2007), *rev’d on other grounds* 557 U.S. 261 (2009) (referring to vacatur and remand to the agency as “the normal remedy for an unlawful agency action [under the APA].”).

56. *See, e.g., Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed.Cir. 2001); *Allied-Signal*, 988 F.2d at 150; *Cent. Me. Power Co. v. Fed. Energy Regul. Comm’n*, 252 F.3d 34, 48 (1st Cir. 2001); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam); *Diné Citizens*, 59 F.4th at 1029; *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1290 (11th Cir. 2015).

57. 69 F.4th at 723. Indeed, CBD specifically requested that the court “temporarily enjoin the . . . [p]roject and remand to the district court to apply the *Allied-Signal* test to determine if vacatur is appropriate.” *Id.* at 722 n.20. The court “decline[d] to do so based on [its] determination of remedy.” *Id.*

58. When the court has found agency deficiencies in other cases similar to *Western Watersheds*, the cases are typically remanded to district courts to reconsider whether vacatur is an appropriate remedy under the *Allied-Signal* test or remanded to district courts with instructions to vacate. *See, e.g. Diné Citizens*, 59 F.4th at 1050 (remanding to district court “to apply the *Allied-Signal* factors and the test for injunctive relief”); *WildEarth*, 870 F.3d at 1239-40 (remanding to district court at district court’s discretion to vacate); *Utah Env’t Cong. v. Bosworth*, 439 F.3d 1184, 1195 (10th Cir. 2006) (remanding to district court with instructions to vacate).

59. *Diné Citizens*, 59 F.4th at 1025.

60. *See Western Watersheds*, 69 F.4th at 698.

“failed to consider (1) a limit on lethal take of female grizzly bears, and (2) the UGRA Project’s likely contribution to the already-existing mortality sink for female grizzly bears in the Project area.”⁶¹ This failure is distinct from a failure to adequately explain.⁶² Furthermore, regarding the NFMA violation of insufficient forage and cover for migratory birds, the court explicitly noted “this was not a matter of diversity of opinion among the [US]FS’s experts . . . [rather,] the [US]FS *ignored its own expert*[] by failing to address the concerns.”⁶³ Nowhere in its reasoning did the court stipulate that these violations constituted insufficient explanation on the part of agencies.⁶⁴ Rather, the arbitrary and capricious agency actions were substantive failures to consider and address concerns that cast doubt on whether the agencies “chose correctly.”⁶⁵

*B. Remand to Agencies Without Vacatur is
Overly Permissive of Violations of Federal Law*

The court nominally applied the *Allied-Signal* test in reaching its decision to remand to agencies without vacatur, but in fact gravely departed from the *Allied-Signal* test by practically ignoring the test’s first factor: “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly).”⁶⁶ The court cited precedent from the D.C. Circuit that “[a] strong showing of one factor may obviate the need to find a similar showing in another.”⁶⁷ Taking this invitation, in considering *Allied-Signal*’s first prong the

61. *Id.* at 716 (emphasis added). Compare this finding to the court’s treatment of the Appellants’ claim that FWS’s biological opinion was arbitrary and capricious based on lethal take of grizzly bears elsewhere in the Greater Yellowstone Ecosystem. The court rejected the latter claim, noting that “[a]lthough the [biological opinion] *could have been more complete* by including an accounting of all concurrently authorized lethal takes in the [Greater Yellowstone Ecosystem], this deficit does not amount to FWS’s *entirely fail[ing] to consider* anticipated take elsewhere in the [Greater Yellowstone Ecosystem].” *Id.* at 715 (internal citation omitted) (emphasis added).

62. Other circuit courts generally remand without vacatur directly to agencies only when the deficiency in agency action is a matter of insufficient explanation rather than a substantive deficiency, as “[a]n inadequately supported rule . . . need not necessarily be vacated.” *Allied-Signal*, 988 F.2d at 150; *see also Cent. Me. Power Co.*, 252 F.3d at 47-48 (noting that “a remand is appropriate for further explanation.”); *Nat’l Org. of Veterans’ Advocates*, 260 F.3d at 1380 (reasoning that “[i]t may be that the agency can provide a reasonable explanation for its decision.”). In these cases, courts remanded without vacatur, reasoning that the agency deficiencies at issue were a matter of the agencies failing to fully explain their actions. *Allied-Signal*, 988 F.2d at 150; *Cent. Me. Power Co.*, 252 F.3d at 47-48; *Nat’l Org. of Veterans’ Advocates*, 260 F.3d at 1380.

63. *Western Watersheds*, 69 F.4th at 721 (emphasis added).

64. Only one of the deficiencies held by the court—the biological opinion’s lack of consideration of a limit on take for female grizzlies—was held arbitrary and capricious based on a lack of explanation. *See Western Watersheds*, 69 F.4th at 708 (noting that “[t]he [biological opinion] did not contain the explanation now offered in the Federal Appellees’ brief . . . [a]nd without such an explanation in the [biological opinion] itself, we cannot credit a post-hoc rationalization stated by counsel in briefs.”) (internal quotation omitted).

65. *See Allied-Signal*, 988 F.2d at 150.

66. *See id.* (quoting *Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

67. *Western Watersheds*, 69 F.4th at 722 (quoting *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019)).

court merely quoted the Appellee Brief: the “FWS or the Forest Service would be able to cure such deficiencies on remand.”⁶⁸ The court provided no further support for this contention.

The court then relied heavily on *Allied-Signal*’s second factor to arrive at its decision not to vacate: “the disruptive consequences” of vacatur.⁶⁹ While the Appellees raised concerns regarding the consequences of a vacatur, including disruption to the seasonal pattern of rotation of cattle grazing and crop growing, Appellants did not directly respond to these concerns.⁷⁰ Instead, Appellants “argue[d] that vacatur would adhere to the [plain] language of the APA that courts shall hold unlawful and set aside agency action found to be arbitrary or capricious.”⁷¹ The court was unconvinced, dispensing with Appellants’ argument by citing to *Diné Citizens*: “vacatur is not always the appropriate remedy.”⁷² Having carefully weighed Appellants’ claims of the potential disruptive consequences of the project and agreed that USFS and FWS acted arbitrarily and capriciously and violated the ESA and NFMA over the course of the preceding thirty-three pages, the court dispensed with the question of whether vacatur or other injunctive relief was an appropriate remedy in a matter of perfunctory sentences.⁷³

CONCLUSION

The Tenth Circuit Court of Appeals granted FWS and USFS significant leeway for post hoc due diligence in this case, allowing the UGRA Project to proceed despite substantive violations of the ESA and the NFMA. At least two bear deaths have already occurred under the UGRA Project as affirmed by this decision.⁷⁴ The UGRA Project allows for quadrupled lethal take of grizzlies over the rate seen in the last two decades in the Upper Green River Area Rangeland, one of the few remaining habitats for grizzlies in the contiguous United States and already a hotbed site for fatal rancher/bear conflict.⁷⁵ More conflict is sure to come.

Western Watersheds is the first full application of the *Allied-Signal* test in the Tenth Circuit.⁷⁶ With this circuit constituting over 15 percent of the United States’ total area and over 18 percent of the nation’s federal land, the case sets

68. See *id.* (quoting Brief for Federal Respondents-Appellees at 53, *Western Watersheds* (No. 22-8031, No. 22-8043)).

69. See *Allied-Signal*, 988 F.2d at 150.

70. *Western Watersheds*, 69 F.4th at 722.

71. *Id.* (internal quotation omitted).

72. *Id.* (quoting *Diné Citizens*, 59 F.4th at 1049).

73. See *Western Watersheds*, 69 F.4th at 722.

74. Petitioners-Appellants’ Opening Brief at 18, *Western Watersheds* (No. 22-8031, No. 22-8043).

75. The Greater Yellowstone Ecosystem is one of five population areas for grizzlies, accounting for an estimated 718 bears in 2017 out of a total population of “more than 2,000.” *Western Watersheds*, 69 F.4th at 705.

76. The first application was *Diné Citizens*. See 59 F.4th at 1050 (adopting *Allied-Signal* test but remanding to the district court to apply the test). The case was remanded in February 2023, see generally *id.*, and the district court has not yet ruled on the remanded case.

an immensely important – and problematic – precedent for how *Allied-Signal* is applied across a large swath of the American Mountain West moving forward.⁷⁷ If replicated in future decisions, *Western Watershed's* primary focus on the *Allied-Signal* test's second factor at the expense of its first factor will mean that substantively flawed agency actions negatively impacting listed species are cleared to proceed by courts.

While injunctive relief is not always warranted by agency deficiencies under the ESA and the NFMA and remand without vacatur can be a useful approach to achieve a tailored remedy, remand to agencies without vacatur or any other injunction in the context of substantive deficiencies sets an inadvisable precedent. Future applications of the *Allied-Systems* test for remand without vacatur should clarify the standard under which courts should evaluate other forms of injunction.

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77. The Tenth Circuit states (CO, KS, NM, OK, UT, WY) total 355,890,560 acres in area, with the United States' total area being 2,271,343,360 acres. Federally-held land in the Tenth Circuit totals 112,108,572 acres, out of a total of 615,311,596 federal acres nation-wide. Within the contiguous United States/lower forty-eight states, the Tenth Circuit accounts for 18.7 percent of total landmass (355,890,560 acres out of 1,901,756,160 total acres in the lower 48 states) and 28.6 percent of federally owned land (112,108,572 acres out of 391,815,186 total federal acres in the lower 48 states). CAROL HARDY VINCENT & LAURA A. HANSON, R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7-9 (Cong. Rsch. Serv. 2020).

We welcome responses to In Brief. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.