Granted

No. 98-1991

In the

Supreme Court of the United States

PUBLIC LANDS COUNCIL, et al.,
Petitioners,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONERS

DAVID E. HADDOCK
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and California Cattlemen's Association

QUESTION PRESENTED

Whether, as the district court held and dissenting Judge Tacha substantially agreed, the Secretary of the Interior exceeded his authority under the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Public Rangelands Improvement Act, when he promulgated regulations that

(1) destroy the protection and priority statutorily accorded to adjudicated rights to graze livestock on public lands managed by the Bureau of Land Management, by replacing established "grazing preferences" with variable "permitted uses";

(2) provide that the United States in the future will have title to structural range improvements made and paid for by grazing permittees; and

(3) allow grazing permits to be issued to persons not "engaged in the livestock business."

The Tenth Circuit divided 5-5 over whether to rehear this case *en banc*.

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INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and the California Cattlemen's Association.[1] Written permission to file this brief has been obtained from all parties and has been lodged with the Clerk of the Court.

The California Cattlemen's Association is a nonprofit trade association that has been in existence since 1917. The Association represents, promotes, and protects the interests of the California cattle industry on local, state, and federal legislative, regulatory, and other public policy issues. The Association provides member services to approximately 3,000 members. Beef cattle producers operate on over 40 million of California's 100 million acres of land and contribute more than $1.5 billion to the state's economy. The beef industry provides more than 26,000 jobs in the State of California. Additionally, the Association coordinates with the Public Lands Council to represent the more than 900 permittees in California utilizing federal lands for livestock grazing, including the approximately 650 permits held upon the 10 million acres in California managed by the Bureau of Land Management (BLM). The 1995 Department of Interior regulations commonly known as Rangeland Reform continue to threaten the economic stability of California's historic family ranching operations that utilize Bureau of Land Management allotments. This threat to the continued sustainability of these ranches reinforces the significance of this case.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of federal agency authority. For example, PLF participated as amicus curiae before this Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and before the United States Court of Appeals in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

PLF seeks to augment the arguments of Petitioners by elucidating the limitations on federal agency power under administrative law principles. PLF believes its public policy perspective and litigation experience dealing with administrative law issues will provide an additional viewpoint on the legal issues presented.

STATEMENT OF THE CASE

BLM manages approximately 170 million acres of rangelands in the western United States. Many livestock ranchers in the West depend upon public rangelands in order to economically sustain livestock operations.

In the nineteenth century and beginning of the twentieth century, public rangelands were open. However, these rangelands suffered the "tragedy of the commons"--that is, because no one had a vested interest in their vitality, the quality of these rangelands deteriorated. Thus, in 1934, Congress passed the

Taylor Grazing Act. The Taylor Grazing Act set up a regulatory system intended to protect and recover the quality of public rangelands. The Taylor Grazing Act required BLM to identify lands suitable for grazing and foraging, to put these lands in grazing districts, and to grant permits or leases to livestock operators to use these grazing districts.

The regulatory scheme gave permittees a certain amount of security in the use of rangelands and a stake in their quality. The Taylor Grazing Act allowed permittees to install range improvements on their allotments and required subsequent permit holders to pay the prior holder for the value of these improvements. The Taylor Grazing Act required the BLM to give permit-renewal preferences to current permit holders and to otherwise "adequately safeguard" these grazing privileges. Until 1995, the Department of the Interior also recognized a substantive grazing preference: Holders of grazing permits were assured that, if the condition of the range was ideal, they would be able to utilize a certain maximum amount of forage on the range. This maximum amount of forage, termed a "grazing preference," could be diminished only because of the poor condition of the range.

The Taylor Grazing Act was later supplemented by the Federal Land Policy and Management Act (1976) and the Public Rangelands Improvement Act (1978). The former Act instructed BLM to manage rangelands for "multiple use and sustained yield" and required that BLM develop land use plans. The latter Act primarily imposed a new grazing fee formula.

Until 1995, though BLM altered and amended its regulations, they followed a general structure. Permits were issued for 10-year periods, and renewal was almost ministerial. Permit holders were given renewal preferences, and permits attached to "base property"--that is, if a rancher sold his ranch, the permit and grazing allotment would (with minor procedural requirements) transfer to the new owner, as though it was

attached to the land itself. Further, range improvements such as fences, wells, and pipelines, were held under shared title between the permittee and the federal government based on their respective contributions to the improvement. Finally, grazing permits had to be used for just that: grazing. So entrenched is this system in the West that ranchers have come to rely substantially upon their permit allotments. Not only are many ranches dependent upon grazing allotments, but banks value ranching operations in conjunction with the grazing rights attached, and loan money on that basis.

In 1995, however, BLM made substantial changes in its regulations. At issue in this case are four revised or new regulations. The regulations substantially alter the position of permit holders, and upset long-standing expectations and practices. First, a new "permitted use rule" redefines grazing preferences, allowing BLM to change foraging allotments attached to base properties that, in some cases, were adjudicated and settled decades ago. Second, under the new "range improvement rule," the federal government prospectively asserts title to all range improvements. Third, permits can now be let to individuals and organizations not in the livestock business. And finally, BLM promulgated a rule adding "conservation use" as a permissible use of a grazing permit.

In short, the new rules have introduced tremendous uncertainty into grazing permits and, essentially, demolish the prior position that livestock operators--and those with whom they do business--have relied on for decades. The Public Lands Council and several industry groups including the National Cattlemen's Association, the American Sheep Industry Association, and the American Farm Bureau Federation, challenged the regulations. The district court held these four regulations invalid. The court of appeals reversed on three, but held that the BLM had no authority to issue permits exclusively for conservation use, as the statute required that permits be issued "to graze livestock." The Public Lands Council

petitioned the Supreme Court for a writ of certiorari, supported by an amicus brief filed by a considerable number of Farm Credit Associations. This Court granted certiorari on October 12.

SUMMARY OF ARGUMENT

The "rangeland reform" regulations promulgated by the Department of the Interior in 1995 dramatically changed the basic privileges of those who utilize the public range for grazing purposes. Until 1995 the law granted livestock owners a preference that provided assurance about how much forage they could use in ideal conditions. Yet the new regulations provide only a preferred position with regard to permitting. For 60 years livestock owners held title to range improvements they financed and built. After the regulations at issue here, the government takes full title. Before the 1995 regulations, grazing permits were available only to those "engaged in the livestock business." Now they are offered to those who are not. These are substantial changes in policy that contravene decades of consistent interpretation.

In such circumstances, where an administrative agency contradicts its earlier position after decades of consistent interpretation, this Court accords such agency determinations considerably less deference than would otherwise be due if the agency had adhered to a consistently held view. Moreover, this Court *disfavors* changes which result in upsetting long-settled expectations and *prefers* interpretations made contemporaneous with the passage of the authorizing statute. Each of these factors argues against giving the agency's interpretation "controlling weight" in determining whether the Secretary of the Interior has exceeded his authority. In fact, a congressional delegation of authority, like this one, with so few limits that the Secretary can contradict himself after 60 years of consistent interpretation challenges the legitimacy of the original delegation. Where, as here, the "intelligible principle" that would guide the agency is so vague as to permit such diametric

reversals of policy, Congress has not provided the "limitation of a prescribed standard" characteristic of a legitimate delegation. In any case, such dramatic changes in policy are not entitled to deference.

This Court also requires administrative agencies to adhere to precedent and to carefully justify departures from it. Rather than supply a reasoned analysis for this dramatic change in position, the Secretary has characterized the new regulations as a mere "clarification." Instead of justifying a departure from precedent, the Secretary has acted as if nothing changed. More is required. By rescinding the prior rules in 1995, the Secretary obligated himself to provide a more "reasoned analysis for the change" than simply denying that the former rules ever existed.

ARGUMENT

I

THE AGENCY'S INTERPRETATION HAS CHANGED SUBSTANTIALLY

A. The Taylor Grazing Act

In 1934, Congress enacted the Taylor Grazing Act, "[i]n order to promote the highest use of the public lands." 43 U.S.C. § 315. In particular, Congress authorized the Secretary of the Interior (Secretary) to issue permits that would allow "bona fide settlers, residents, and other stock owners" to graze livestock on the public range. 43 U.S.C. § 315b. In issuing these permits, however, Congress directed that "[p]reference shall be given . . . to those . . . who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of" the property "owned, occupied, or leased by them." *Id.* Pursuant to this requirement of a "preference," the Secretary engaged the Department of the Interior in "a lengthy adjudication process to determine who was eligible for a grazing preference." *Public Lands Council v. United States Department of the Interior Secretary*, 929 F. Supp. 1436, 1440 (D. Wyo. 1996). Ultimately, "the term 'grazing preference' . . . came to represent an adjudicated right to place livestock on public lands," apart from any permitting priority. *Id.*

The grazing preference was not the same thing as a grazing permit. The grazing preference did not guarantee a permittee the right to graze a particular amount of forage each year. Rather, "the grazing preference represented the upper limit that a permittee could graze if optimal conditions prevailed, all relevant land could be placed in active use, and the Secretary allowed [the permittee] to graze up to that upper limit." *Public Lands Council v. United States Department of the Interior Secretary*, 167 F.3d 1287, 1310 (10th Cir. 1999) (Tacha, J., dissenting). This conception of "grazing preference" allowed the Secretary to manage the public range for long-term use, while also following the congressional intent "to provide stock operators with 'some type of assurance as to where and what kind of range they may have and depend upon for their stock, what they can definitely rely [on] in the way of pasturage.'" *Public Lands Council v. United States Department of the Interior Secretary*, 929 F. Supp. at 1440 (citing 78 Cong. Rec. 5371 (1934)). Thus, even if the range would not support grazing the maximum amount of forage in a given year, livestock owners could be confident that, if the condition of the range improved, the right to graze would be increased up to the amount of the grazing preference.[2]

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[2] The Tenth Circuit explained that, prior to 1995, the rangeland management rules in effect

> employed the term "grazing preference" to mean "the total number of animal unit months [AUM] of livestock grazing on public lands apportioned and attached to base property owned or controlled by the permittee or lessee." . . . This "grazing preference" included "active use,"

(continued...)

The Secretary's 1995 regulations significantly changed the grazing preference to the detriment of those who use the public range. Without any additional statutory authority to inspire the change, the Secretary has replaced the "grazing preference" with two different concepts. Under the 1995 regulations, "[g]razing preference or preference" refers only to "a superior or priority position against others for the purpose of receiving a grazing permit or lease." 43 C.F.R. § 4100.0-5 (1995). Thus, the definition of "grazing preference" no longer recognizes a livestock owner's right to utilize a certain maximum amount of forage as long as the condition of the range permits. Instead, the term merely sets permitting priorities. In addition, livestock owners are limited by the new term "permitted use." "*Permitted use* means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs [animal unit months]." *Id.* The 1995 regulations thus replace a reliable, adjudicated grazing privilege, limited only by the condition of the range, with an uncertain privilege, susceptible to the shifting sentiments of federal land use planners.

B. Range Improvements Rule

Before 1995, Bureau of Land Management regulations provided that title to permanent range improvements constructed under cooperative agreements was "shared by the United States and cooperator(s) in proportion to the actual

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[2](...continued)
defined as "the current authorized livestock grazing use," which was adjusted according to rangeland conditions and was "based upon the amount of forage available for livestock grazing established in the land use plan," as well as "suspended use," which could be converted to active use should the rangeland's carrying capacity increase.

Public Lands Council v. United States Department of the Interior Secretary, 167 F.3d at 1291 (internal citations omitted).

amount of the respective contribution to the initial construction." 43 C.F.R. § 4120.3-2 (1994). In fact, "the Department of Interior encouraged private investment in public lands by allowing private individuals, through cooperative agreements with the Department of Interior, to build and install structural range improvements (like fences, wells, stock tanks, and pipelines) on public lands." *Public Lands Council v. United States Department of the Interior Secretary*, 929 F. Supp. at 1442. However, after 1995, the regulations directed that "title to permanent range improvements such as fences, wells, and pipelines . . . shall be in the name of the United States." 43 C.F.R. § 4120.3-2 (1995).

C. Qualifications Rule

Before 1995, BLM regulations required that applicants for grazing permits "be engaged in the livestock business," in addition to owning or controlling property used in a livestock operation. 43 C.F.R. § 4110.1 (1994). From the passage of the Taylor Grazing Act, "the Department of the Interior consistently granted grazing permits . . . only to applicants engaged in the livestock business." *Public Lands Council v. United States Department of the Interior Secretary*, 929 F. Supp. at 1445. Yet the new qualifications rule promulgated in 1995 eliminated this condition, instead explaining that "private parties whose primary source of income is not the livestock business, but who meet the criteria of this section, are qualified for a grazing permit or lease." Final Rule, 60 Fed. Reg. 9,894, 9,901 (1995).

The foregoing constitute significant substantive changes in the law governing the rights and privileges of grazers on public lands. These changes are not mere "clarifications" as the Secretary of Interior blithely asserts. Whereas once the law granted livestock owners a preference that provided assurance about how much forage they could use in ideal conditions, the new regulations replace this assurance with only a preferred position with regard to permitting. Whereas for 60 years

livestock owners held title to range improvements they built and financed, after the regulations at issue here all new improvements are owned by the government only. Whereas grazing permits were only available to those "engaged in the livestock business," now they are available to those who are not. These changes in policy contravene decades of consistent interpretation and should be set aside.

II

CHEVRON DEFERENCE IS NOT APPROPRIATE HERE

A. A Sudden Change in Established Statutory Interpretation Is Disfavored by This Court

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, this Court explained the level of deference ordinarily due an agency interpretation of its authorizing statute. 467 U.S. 837, 842 (1984). As this Court recently reiterated,

> when we examine the Secretary's rule interpreting a statute, we ask first whether "the intent of Congress is clear" as to "the precise question at issue." If, by "employing traditional tools of statutory construction," we determine that Congress' intent is clear, "that is the end of the matter." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer "the court would have reached if the question initially had arisen in a judicial proceeding."

Regions Hospital v. Shalala, 118 S. Ct. 909, 915 (1998) (internal citations omitted).

Leaving for the parties to argue the first step of the *Chevron* analysis, whether Congress' intent is clear, Amici address the second step of the analysis--whether the agency's construction is permissible.

In decisions subsequent to *Chevron*, this Court has clarified that *Chevron* deference is not without bounds. For example, in *Immigration and Naturalization Service (INS) v. Cardoza-Fonseca*, this Court explained that the consistency of an agency's position is a factor in assessing the weight that position is due. As this Court explained:

> An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.

INS v. Cardoza-Fonseca, 480 U.S. 421, 446-47 n.30 (1987). *See also Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981) (observing that the "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling").

In *INS v. Cardoza-Fonseca*, the Immigration and Naturalization Service (INS) argued that two provisions of the Refugee Act had the same meaning. Perhaps more importantly, the INS argued that, under *Chevron*, the agency's interpretation of the Refugee Act of 1980 was entitled to substantial deference, even if this Court concluded that a different reading of the statutes was more in keeping with Congress' intent. This Court rejected INS' argument, in part, because of "the inconsistency of the positions the [Board of Immigration Appeals] has taken through the years." *INS v. Cardoza-Fonseca*, 480 U.S. at 446-47 n.30.

The Secretary's position in this case suffers from the same flaw. The 1995 regulations abandoned a position that had been

followed for 60 years. Even if the Secretary's interpretation of the Taylor Grazing Act might be more in keeping with Congress' intent, his interpretation is not entitled to deference when it results in such a dramatic and sudden change. Where an agency changes its position regarding a statutory scheme that is unchanged, the agency opens the door to a more expanded and skeptical inquiry by this Court. In particular, this Court *disfavors* changes which result in upsetting long-settled expectations:

> It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, *and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change.*

United States v. Alabama G.S.R. Co., 142 U.S. 615, 621 (1892) (emphasis added).

The Secretary's prior construction had been acted upon and relied upon for 60 years. Since 1934, those who use the public range could rely upon a substantive grazing privilege that would improve as the conditions of the range improved. They could depend upon keeping title to permanent improvements that they constructed themselves. And they had assurance that those not engaged in the livestock business would not compete for grazing privileges on the range. Each of these long-settled expectations was destroyed by the 1995 regulations. Because this change was so sudden, and contravened decades of consistent interpretation, the Secretary's decision is not entitled to deference, and should be looked on with disfavor by this Court.

B. An Interpretation of a Statute Contemporaneous with the Passage of the Statute Carries More Weight Than a Subsequent Inconsistent Interpretation

This Court prefers interpretations that are contemporaneous with the passage of the statute. *See Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) (holding that an agency's interpretation of an amendment that was contemporaneous with the amendment's passage was entitled to considerably more deference than an agency's current, inconsistent interpretation); *Davis v. United States*, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use."). *See also General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (rejecting the agency interpretation where "[i]t is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title").

In *Watt v. Alaska*, the Secretary of the Interior argued that the Wildlife Refuge Revenue Sharing Act of 1964, rather than the Mineral Leasing Act of 1920, governed the distribution of oil and gas revenues from the Kenai Moose Range in Alaska, even though the Department of the Interior had followed a different rule when the Wildlife Refuge Revenue Sharing Act was passed, and for 10 years thereafter. This Court explained that "[t]he Department's contemporaneous construction carries persuasive weight." *Watt v. Alaska*, 451 U.S. at 272-73. This same principle applies here.

Regarding this case, the Department of the Interior had consistently recognized a substantive grazing preference--one that provided more than mere permitting priorities--from 1934 until 1995, a period of 60 years. Even after 1976, when Congress enacted the Federal Lands Policy and Management Act, requiring that public lands be subjected to land use planning, the Secretary assured livestock operators that their

"adjudicated grazing use, their base properties, and their areas of use (allotments) will be recognized" under the new regulations. 43 Fed. Reg. 29,058 (1978). However, in 1995, without any intervening legislation, the Secretary dramatically changed position. The "grazing preference" was reduced to nothing more than a favorable position regarding permit renewals. Likewise, the 1995 regulations abandoned established policies that addressed title to permanent range improvements, and the qualifications of those entitled to grazing permits, replacing those policies with polar opposites. These are not agency determinations of the variety discussed in *Chevron*, which this Court determined deserve "controlling weight." 467 U.S. at 844.

Thus, what is entitled to deference here is not the Secretary's current evaluation of what kind of "preference" livestock owners are due, but rather, the Secretary's *prior* interpretation of the statute, acted upon for a number of years, consistently recognizing that a "grazing preference" is a substantive, adjudicated privilege to graze a particular amount of forage if the condition of the range allows. The former interpretation not only reflects the Secretary's contemporaneous construction of the enabling statute, it is also a construction that the agency adhered to for 60 years. This startlingly recent change in the agency's position should not be countenanced by this Court. Legislative delegations are not unlimited grants of power that can be stretched and compressed at the whim of an agency or as the winds of political sensibilities shift.

Any policy that would require deference in situations such as this, where an administrative agency has reversed course after years of consistent interpretation, invites questions about the congressional delegation of authority itself. As this Court recently explained:

> The Constitution permits Congress to "see[k] assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."

Clinton v. City of New York, 118 S. Ct. 2091, 2125 (1998) (internal citations omitted).

In the Taylor Grazing Act, Congress delegated to the Secretary of the Interior authority to issue grazing permits, directing that "[p]reference shall be given" to some range users. 43 U.S.C. § 315b. But the Act does not identify the "extent and character" of the preference Congress required. Consequently, the Secretary claims such expansive authority to decide the nature of the preference, that he can establish a substantive grazing privilege in 1934, and then redefine it out of existence in 1995. A congressional delegation of authority with so few limits that the Secretary can contradict himself after 60 years of consistent interpretation challenges the legitimacy of the original delegation. The Secretary views the Taylor Grazing Act as such a broad grant of authority that he can recognize a "preference" that is no more than permitting priority, or he can recognize a "preference" that provides a guaranteed amount of forage in ideal conditions. The Taylor Grazing Act itself provides no guidance as to the proper position between these two extremes. Where, as here, the "intelligible principle" that would guide the agency is so vague as to permit such diametric reversals of policy, Congress has not actually provided the genuine "limitation of a prescribed standard" characteristic of a

legitimate delegation. After years of consistent interpretation, this Court should recognize the contemporaneous administrative interpretation recognized by Congress for over 60 years as providing the necessary "intelligible principle." Any modifications of policy must be consistent with the long-established grazing preference. In any case, these reversals of policy are not entitled to deference from this Court.

III

THE SECRETARY SHOULD BE REQUIRED TO JUSTIFY HIS DEPARTURE FROM THE EARLIER INTERPRETATION

Principles of administrative law do not grant the Secretary the freedom to interpret afresh the Taylor Grazing Act, as though Congress had enacted the law yesterday. Whatever may have been the merits of limiting established livestock owners to a mere permitting preference when the Secretary first interpreted the statute in 1934, the day is long past when the agency could have justified its current rule under ordinary principles of deference. As this Court recognized in *Flood v. Kuhn*, 407 U.S. 258 (1972), in circumstances such as this, the reasonable course is to adhere to precedent:

> We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, *by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.*
>
> Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.

Flood, 407 U.S. at 283-84 (emphasis added). If the judiciary is so bound by precedent as to require it to refer the revision of long-standing policy to Congress, an executive agency such as the Department of the Interior is no less so.

The modern administrative state could not long survive if agencies could upset long-settled constructions of law, merely because a problem appeared in need of a solution. The Department of the Interior was not created to be a "roving commission to inquire into evils and upon discovery correct them." *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). Rather, its mandate is more limited.

This Court has required administrative agencies to adhere to precedent and to carefully justify departures from it. This Court has explained that when an agency makes a decision, it "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Association of United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Where an administrative agency changes its position about the proper course to follow, this Court has required the agency to provide more support for its decision than would be required in the case of a new decision.

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which

> may be required when an agency does not act in the first instance.

Id. at 41-42 (internal citation omitted).

Regarding the "grazing preference" at issue in this case, the Secretary changed rules that had been consistent for 60 years. Many parties in the economic chain, from livestock owners to farm credit banks, have relied upon the established rules. However, rather than explain why present circumstances, or a prior error in judgment, or any other factor, justified a change in established rules, the Department simply fails to acknowledge that any substantive change occurred. For the Secretary, "[t]he change is merely a clarification of terminology." 60 Fed. Reg. at 9,922. According to the Secretary, the concept of a substantive grazing preference that assured livestock owners of maximum forage in ideal conditions was not the rule when the Secretary began to adjudicate grazing preferences in 1934. Rather, the concept "evolved" to have this meaning "through time." *Id.* Somehow, in the Secretary's estimation, "this usage dilutes the original statutory intent of the term [grazing preference] as an indication of relative standing" (*id.*) despite the fact that the usage had been constant for 60 years.

This Court requires administrative agencies to carry the burden of justifying departures from long-standing precedent. In this case, the Secretary has in fact departed from a consistent rule that had been followed for 60 years. Rather than justify the change in policy, the Secretary minimizes the transformation by acting as if nothing happened. More is required. This Court has required that agencies actually support changed positions with "reasoned analysis." The Department of the Interior cannot act now as if it were 1934. If, in 1934, the Secretary had interpreted the Taylor Grazing Act to require only permitting priorities, it would have been required to provide less explanation than is due here. But, beginning in 1934, the

Secretary interpreted the Taylor Grazing Act to require a substantive grazing preference, which was consistently recognized until 1995. By rescinding that rule in 1995, by changing the definition of "grazing preference," the Secretary obligated himself to provide a more "reasoned analysis for the change" than simply denying that the rule ever existed. *Id.*

CONCLUSION

By the 1995 regulations at issue here, the Secretary of the Interior has dramatically changed the nature of the "grazing preference" that had been recognized for 60 years. Likewise, the regulations have reversed policy on title to permanent range improvements and the qualifications for using the range for grazing purposes. Since these drastic changes have not been prompted by Congress, and abandon decades of consistent interpretation, the Secretary's interpretation is not entitled to deference. Rather, since the Secretary has declined to follow his own precedent, he should be required to provide special justification for the change in policy.

For the foregoing reasons, Amicus respectfully requests this Court to reverse the decision of the Court of Appeals below.

DATED: November, 1999.

Respectfully submitted,

DAVID E. HADDOCK
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and California Cattlemen's Association