Granted

No. 98-1991

In The

Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL.,

Petitioners,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF THE INTERIOR SECRETARY, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF CONGRESSMAN DON YOUNG, CHAIRMAN OF THE HOUSE RESOURCES COMMITTEE; CONGRESSMAN JAMES V. HANSEN, CHAIRMAN OF THE SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS OF THE HOUSE RESOURCES COMMITTEE; AND SENATOR LARRY CRAIG, CHAIRMAN OF THE SUBCOMMITTEE ON FORESTS AND PUBLIC LAND MANAGEMENT OF THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI**

Congressman Don Young serves as Chairman of the Committee on Resources of the House of Representatives. Congressman James V. Hansen serves as Chairman of the Subcommittee on National Parks and Public Lands. Senator Larry Craig serves as Chairman of the Subcommittee on Forests and Public Land Management of the Senate Energy and Natural Resources Committee. In their respective capacities, these members of Congress and the committees that they chair have a substantial interest in the management of public lands and grazing use. *See* U.S. Const., Art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Throughout the nation's history, Congress has exercised its constitutional powers in both legislation and active oversight of the Executive Branch's management of the federal lands.

The House Committee on Resources has jurisdiction over virtually all federal land issues, including management of public lands. The House Subcommittee on National Parks and Public Lands is specifically charged with matters relating to the public lands, including measures and legislation affecting the National Park System,

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* All parties have consented to the filing of this brief, and their consent letters are on file with this Court. No counsel for any party authored this brief in whole or in part. Except for the Wyoming State Grazing Board, which paid for the cost of printing this brief, no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

federal reserved water rights, the National Wilderness Preservation System on all units except the National Forests and Alaska, military parks, recreation, preservation, grazing, and programs authorized by the Land and Water Conservation Fund Act of 1965 and the Outdoor Recreation Act of 1963.[1] The Subcommittee on Forests and Public Land Management of the Senate Energy and Natural Resources Committee has jurisdiction for "public lands administered by the Bureau of Land Management and the U.S. Forest Service, including farming and grazing thereon."[2]

The Interior and Insular Affairs Committee, which was the predecessor to the Committee on Resources, and the Senate Interior Committee, the predecessor to the Senate Energy and Natural Resources Committee, also exercised jurisdiction with respect to legislation and oversight on public land matters including grazing. These committees held hearings and reported on legislation directly bearing on the issues in this case, including the Taylor Grazing Act of 1934 ("TGA"), Federal Land Policy and Management Act of 1976 ("FLPMA"), and the Public Rangelands Improvement Act of 1978 ("PRIA"). Many of the members of the committees and subcommittees represent the western states where public land grazing is an integral part of the agricultural economy, so they are

[1] The House Committee on Resources and its subcommittees are described at the Committee's web site at <http://www.house.gov/resources>.

[2] The Senate Forests and Public Land Management Subcommittee is described at the committee's web site at <http://www.senate.gov/~energy>.

personally knowledgeable about public land management and livestock grazing. Moreover, many members of the Senate Subcommittee on Forest and Public Land Management actively opposed the unsuccessful efforts of the Respondent to secure legislation to enact the rules later adopted in the regulations before the Court in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Taylor Grazing Act ("TGA") in 1934 to protect the livestock industry from the destruction of the public rangelands. For the next six decades, the TGA assured the predictability and stability for users of the public rangelands, just as Congress had expected. Then, in 1993, Secretary Babbitt sought legislation to adopt the grazing rules now at issue in this case. Congress declined to change the law. Undaunted, Secretary Babbitt promulgated regulations in 1995 that replaced several of the rules that had always been applied under the TGA in the manner that Congress had just rejected two years before. One rule divided the lengthily adjudicated and longstanding "grazing preferences" into two distinct components, so that the guarantee of a certain amount of forage was no longer protected by federal law. Another rule claimed title on behalf of the federal government to all fences, wells and other structural improvements to public rangelands, thereby abandoning the longstanding shared ownership between the government and the private rancher who had paid for all or part of an improvement. The third rule expanded the category of those entitled to receive "permits to graze livestock" to

those who had no commercial or personal intention to actually graze livestock on the public lands.

Each of these new regulations contradicts the language, structure, and history of the TGA. In doing so, they disregard the careful attention that Congress has paid to federal grazing law since it approved the TGA sixty-five years ago. The court of appeals could reach a contrary conclusion only by relying upon the general purposes of the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784, and the Public Rangelands Improvements Act ("PRIA"), 43 U.S.C. §§ 1901-1912, in which Congress deliberately declined to change the rules that had long been followed under the TGA. The court of appeals also justified the regulations by deferring to the Secretary's interpretation notwithstanding the actual language and historical context of the TGA. For the livestock industry, the result has been to sow the very confusion and economic uncertainty that the TGA sought to dispel. For Congress, the result threatens to compromise the ability of the legislature to rely upon its statutes as providing a definitive answer to the questions which they address.

ARGUMENT

I. THE SECRETARY'S REGULATIONS CONFLICT WITH THE STATUTES ENACTED BY CONGRESS.

Congress has a keen institutional interest in the way in which the statutes it enacts are understood and implemented by executive agencies and the courts. This is often reflected by decisions abiding by the plain meaning

of a statute. *See, e.g., Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 474 (1997) (explaining that "the purposes underlying [a statute] are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it"). It is equally supported by the common suggestion that intent of Congress is the touchstone to statutory interpretation. The common theme is that the courts – and executive agencies – should respect the policy decisions that Congress has reached when it enacts a statute.

The canons and other rules that this Court employs when interpreting a statute are premised on this institutional understanding. Rules advising consideration of the interplay of terms within different provisions of a statute (and different statutes), the meaning of statutory language to the legislators who approved it, and a statute's historical context all guide the search for the meaning that the statute had to the Congress and the President who approved the law. Likewise, the interpretive scheme following from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), seeks to identify those instances in which Congress has delegated a policy decision to the executive agencies rather than making the policy decision itself. The executive's misapplication of any such rules of statutory interpretation divorced from their institutional context – as happened here – aggrandizes one branch of the government at the expense of another, a result contrary to this Court's repeated teaching about the constitutional separation of powers. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 381-382 (1989).

A. The Secretary's Regulations Eliminate The Recognition Of The Grazing Preferences Established By Congress In The Taylor Grazing Act.

The TGA states that "[s]o far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. § 315b. Like other public lands statutes, this provision of the TGA must be understood in its historical context. *See Amoco Prod. Co. v. Southern Ute Indian Tribe*, 119 S. Ct. 1719, 1725 (1999); *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979). As well described by Judge Tacha's dissent, *see* Pet. App. 51a-56a, and by the Brief for the Petitioners (at 7-9, 18-20, 29-33), the means by which grazing privileges were recognized and acknowledged in the years after the passage of the TGA involved detailed adjudicative proceedings that took over twenty years to complete. The result of these proceedings was that "grazing preferences" were extended to qualified applicants, and that those preferences were "safeguarded" by relying upon their determinations when the Secretary subsequently issued grazing permits.

This implementation of the grazing privileges referred to in the TGA fit perfectly with the expectations of Congress when it approved the statute in 1934. *See, e.g.*, H.R. Rep. No. 73-903, at 7 (1934) (quoting the observation of Secretary of the Interior Harold Ickes that the TGA would provide "those engaged in the livestock industry" with "certainty of tenure in their grazing use of the public lands"); 78 Cong. Rec. 5371 (1934) (remarks of Rep. Taylor) (emphasizing the need to provide "some assurance as to where and what kind of range [livestock ranchers] may rely upon for their stock, what they can

definitely rely upon in the way of pasturage"); *see generally* Brief for the Petitioners at 18-26; Pet. App. 64a-65a. It is, of course, the understanding of the statute to the Seventy-Third Congress that enacted the TGA that continues to determine the meaning of the statute today. *See Southern Ute Indian Tribe*, 119 S. Ct. at 1725. Any other rule would frustrate the legitimate role of Congress by imposing a duty of vigilance to monitor any and all later events that could conceivably be deployed to change the meaning of a statute.

There is abundant evidence that "grazing privileges" maintained its original meaning from the time Congress enacted the TGA until sixty years later when the Secretary promulgated the regulations involved in this case. *See, e.g.*, Department of the Interior, Office of the Secretary, *Legal Problems in Grazing Regulation* at 3 (November 14, 1936) (explaining that "preference" is "measured by the amount of grazing which is necessary to make use of the lands, water, or water rights owned, occupied or leased by him); P. Foss, Politics and Grass 63 (1960) (quoting Grazing Director Carpenter as stating that "preference rights" are "adjunctive pasture rights which naturally belong to" the "base property"); *see also* Brief for the Petitioners at 29-33 (citing numerous additional sources). And Congress knew that. Speaking in 1941, Congressman Taylor noted that the TGA had recognized "the legitimate range rights attached to the private property upon which grazing privileges are based." 87 Cong. Rec. A3147-48 (1941). More generally, Congress held numerous hearings in the years following the enactment of the TGA, and administration witnesses in those hearings referred to the role that grazing privileges played in ensuring that the

permit owners would enjoy the stability promised by the TGA. *E.g.*, HEARINGS ON H.R. 3019 BEFORE THE HOUSE COMM. ON THE PUBLIC LANDS, 74th Cong., 1st Sess. 644 (1935) (testimony of Assistant Secretary of the Interior R.G. Poole).

Such congressional awareness distinguishes this case from those instances in which the courts rightly refuse to abide by a purported earlier interpretation that was either uncertain, wavering, or hidden from public view. Nor is this case like *Brown v. Gardner*, 513 U.S. 115 (1994), where evidence of congressional acquiescence failed to save an agency interpretation of a statute that was contrary to the statute's plain meaning. Here, by contrast, congressional acquiescence in a settled interpretation is pitted not against the meaning of the language Congress wrote in the statute itself, but rather against a novel interpretation of the statute by an administrative agency. The decision of Congress not to amend the statute takes on particular weight when the case for a new interpretation is based on an administrative change of mind instead of the words that Congress actually enacted.

Additionally, Congress presumptively ratified the settled understanding of the effect of the grazing preferences when it legislated other changes to the TGA and federal grazing law after the enactment of the TGA. Congress never affected the way in which the TGA safeguarded grazing preferences, even on those occasions when it amended the law. *See, e.g*, Act of June 26, 1936, Title I, § 1, 49 Stat. 1976; Act of May 28, 1954, § 2, 68 Stat. 151. Then Congress passed FLPMA in 1976 and the PRIA in 1978 without changing the TGA's structure for regulating grazing on the public lands. In particular, neither

FLPMA nor PRIA contains any statutory reference to the grazing preferences that had been established by the TGA and so laboriously developed in years thereafter.

The court of appeals majority made much of the conservation policies articulated in FLPMA, *see* Pet. App. 26a-31a, but the court wrongly inferred that Congress had decided to work sweeping changes in the existing law governing grazing on public lands, and on the allocation of grazing preferences in particular. In fact, Congress emphasized that FLPMA's general policies should "be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law." 43 U.S.C. § 1701(b); *see also* 90 Stat. 2744, § 701(a) ("[n]othing" in FLPMA "shall be construed as terminating any * * * land use or authorization existing on the date of approval of this Act"). The PRIA contains similar provisions. *E.g.*, 43 U.S.C. § 1903(b) (directing the Secretary to "manage the public rangelands in accordance with [the TGA, FLPMA], and other applicable law consistent with the public rangelands improvement program pursuant to this Act"). Congress was careful to provide that the general provisions of FLPMA and the PRIA did not displace the specific rules established by existing statutes like the TGA, a result consistent with this Court's general unwillingness to treat later statutes as implicitly repealing the commands of earlier ones. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 380 (1996).

The congressional debate on grazing law revisions that occurred the year before the Secretary promulgated his regulations offers another indication that Congress recognized and accepted the original understanding of

grazing preferences in the TGA. In 1993, Congress rejected many of the proposals embodied in the regulation that the Secretary decreed in 1995. The congressional supporters of the Secretary refused to even propose any legislative changes to the function of the grazing preferences because they knew how unpopular such changes would be in Congress. As explained by Senator Reid, the sponsor of the proposed grazing law changes, to "eliminate the preference * * * would devaluate the permit in the eyes of lending institutions. I knocked that out." 139 Cong Rec. S14083, S14087 (1993). No one else in Congress tried to put it back in.

Congress had no reason to revisit the settled understanding of the statutorily established grazing preferences prior to the Secretary's disputed actions in this case. The events of the decades following the enactment of the TGA suggest that Congress justifiably relied on the interpretation because of the extent to which affected individuals and the law itself relied on the law as it had always been understood. To hold otherwise would be to require Congress to divert its limited resources to rewriting statutes on the off chance that someday an administrator might decide that the statute has an entirely different meaning, the reliance of Congress and many private parties notwithstanding.

B. The TGA Specifies That Parties Who Own Grazing Permits Also Own Any Improvements That They Construct.

Section 315 of the TGA requires that compensation must be paid "for improvements constructed and owned

by a prior occupant" whenever a new permit is issued. 43 U.S.C. § 315b. FLPMA further entitles permittees and lessees to compensation from the federal government for the value of their interest in any range improvements if the grazing permit is canceled because the public lands are no longer to be for grazing or they are to be disposed. 43 U.S.C. § 1752(g). Until 1995, that provision had always been understood to provide that a private individual and the federal government would share title to any structural range improvements "in proportion to the actual amount of respective contribution to the initial construction." 43 C.F.R. § 4120.3-2 (1994). The Secretary's 1995 regulations claim that all title to any new improvements will now vest in the federal government.

The reading necessary to achieve this result necessitates a distinction between those improvements constructed by private individuals and those improvements owned by private individuals. *See* Pet. App. 37a. But that reading makes it difficult to explain the presence of the compensation provision of the TGA, which directs the federal government to compensate a private permit holder for the value of his or her interest in any range improvements once a permit is canceled. 43 U.S.C. § 1752(g). Nor is there an answer to Judge Tacha's observation that while the TGA grants the Secretary discretionary authority on many issues, the act neglects to mention that the Secretary may decide something as fundamental as whether individuals hold any title to improvements that they help to build. Pet. App. 70a. The regulation thus offends the structure of the TGA that Congress so carefully crafted.

Many of the indications of congressional approval of the traditional understanding of the role of grazing preferences reveal congressional approval of the traditional ownership rule as well. The sharing of title to improvements was a feature of the law from the time of its passage until the promulgation of the regulations challenged in this case. Congress had numerous opportunities to vest all title in the United States when it amended other parts of the TGA or when it oversaw the implementation of the TGA, but it let them all pass by. Nor was a shift in title suggested to Congress during the otherwise sweeping debate over proposed grazing reforms in 1994. Congress appears to have accepted the settled understanding of the division of title to range improvements.

C. The TGA Limits The Provision Of Grazing Permits To Those Who Are In The Business of Grazing Livestock.

Section 315b of the TGA provides that the Secretary can issue "permits to graze livestock * * * to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range." 43 U.S.C. § 315b. Again, this provision had a settled meaning from the time of the enactment of the TGA until 1995: grazing permits may be issued to those who are engaged in the livestock business who own land or water or water rights or who are bona fide occupants or settlers. The Secretary's regulations changed this scheme by eliminating the requirement that one must make beneficial use of the public range in order to receive a grazing permit. The Secretary's regulations also

included a provision allowing the issuance of a permit *not* to graze the public lands. The court of appeals held that the law did not authorize the issuance of such permits, but it somehow decided to leave the companion regulatory change in place. *See* Pet. App. 42a-49a.

This change means, for example, that those who keep livestock but who have no interest in using the public lands can nonetheless receive a grazing permit. But the TGA makes separate provision for grazing rights for those who keep livestock "for domestic purposes," 43 U.S.C. § 315d, and nowhere else in the statute did Congress hint at a third category beyond those who are in the business of raising livestock and those who use livestock for domestic purposes. Rather, the ordinary meaning of the language that Congress used in the TGA suggests that a "grazing permit" is available only to those who are interested in grazing. The congressional debates that culminated in the TGA confirm that the act was designed to encourage the productive use of the public lands by the livestock industry. *See* H.R. Rep. No. 73-903, at 2 (1934). And again, Congress has never questioned that commitment since the TGA became law.

II. DEFERENCE TO THE SECRETARY'S REGULATIONS WOULD BE CONTRARY TO THE STATUTORY SCHEME THAT CONGRESS WAS SO CAREFUL TO CONSTRUCT.

The attention that Congress has paid to the laws governing grazing on the public lands belies any suggestion that Congress has not answered the questions involved in this case. As Judge Tacha put it in her dissent

below, "in interpreting a statute, we should begin with the strong presumption that Congress expressed its will on the issue at hand." Pet. App. 69a. Sometimes Congress delegates policymaking authority to an executive agency. *E.g., National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior*, 119 S. Ct. 1003, 1011 (1999) (concluding that "Congress 'left' the matters of whether, when, and where midterm bargaining is required 'to be resolved by the agency charged with the administration of the statute in light of everyday realities' ") (quoting *Chevron*, 467 U.S. at 865-866). Sometimes Congress specifies the precise details of the law to be applied by executive officials and the courts. But it is unusual for Congress not to affirmatively choose one course or the other, especially when the issues are foreseeable, controversial, and brought to the attention of Congress.

The evidence discussed above is consistent with the presumption articulated by Judge Tacha. The three issues in this case – the grazing preferences, the improvements rule, and the qualifications – have each played a prominent role in the recovery and growth of the grazing industry since Congress enacted the TGA. The statutory language itself offers a powerful explanation why. The language of the TGA guarantees the "adequate[ ] safeguard[s]," ownership rights, and qualification provisions that guided the interpretation of the statute since its enactment. Ranchers, banks, local communities, and subsequent Congresses have all relied on the stability that the regulations had established until the Secretary's acts of 1995.

The majority in the court of appeals mistakenly assumed that the principles described in *Chevron* mandated judicial acceptance of the Secretary's actions. Pet. App. 33a-35a, 44a. Such unqualified deference to an administrative interpretation is especially problematic in the context of public land law. Congress possesses the constitutional authority to make "all needful Rules and Regulations" governing the public lands, *see* U.S. CONST., Art. IV, § 3, cl. 2, so an agency's interpretation of a statute must not contradict the meaning of the statute to the Congress that enacted it and subsequent Congresses that relied upon that understanding. Deference to a novel administrative interpretation is still more troublesome when the new interpretation follows an unsuccessful effort to persuade Congress to amend the applicable statute. *Cf. Utah v. Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998) (describing the contested administrative actions taken by the Secretary after he acknowledged a "stalemate" with Congress on the appropriate designation of public lands in Utah); *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1169-1172 (10th Cir. 1997) (rejecting the Secretary's argument that "Congress left the mechanism for determining eligibility [for mining patents] to him," and holding that his interpretation of the statute was not entitled to deference under *Chevron*).

More generally, this Court has never held that *Chevron* or its progeny immunizes a novel administrative interpretation that is contrary to the statute's own terms, structure, historical context, legislative history, or consistent congressional understanding. An agency's regulation cannot stand if it conflicts with the plain meaning of the statute the agency purports to be interpreting. *E.g., City of*

Chicago v. Environmental Defense Fund, 511 U.S. 328, 339 (1994). That is enough to support reversal in this case. But a conflict with a statute's plain meaning is not the only circumstance in which what Congress has done precludes an agency's interpretation. This Court has overturned agency regulations that were contrary to a statute's legislative history and canons of statutory interpretation, *e.g.*, *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987); and to settled past interpretations of a statute, *e.g.*, *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). It should do so again here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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