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 OF *AMICUS CURIAE* STATE OF WYOMING IN SUPPORT OF PETITIONERS

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INTERESTS OF THE STATE OF WYOMING

As an incentive to join the Union, Wyoming was promised by the federal government, among other things, specified sections in each township within the state to provide for the support of schools. Many of those school lands in Wyoming are directly affected by management decisions on adjacent federal lands. Among its school parcels, Wyoming has approximately one and one-half million acres wholly contained within or immediately adjoining Department of Interior, Bureau of Land Management (BLM) grazing districts. Because Wyoming's schools are dependent on the income from the state-managed school lands and because those school lands are often managed together with the federal lands within a grazing district, Wyoming has a unique interest in the management of the adjacent or surrounding federal lands.

Over the years since statehood, the western states, their private landowner constituents and the federal government have developed mutually beneficial land management relationships. Key to those relationships is the operation of practically-defined grazing districts which provide for management of large areas of the lands as a whole. Due to the mosaic ownership of grazing lands in the arid west and the resultant inefficiency of management of each parcel as a separate unit, custom, practice and ultimately the law, developed to accommodate the practical solution of grazing units which extended beyond ownership boundaries. Many of Wyoming's school lands have historically been contained and managed within such units in order to maximize their sustained productivity. As a result, Wyoming has very real

and distinct interests in the revised federal land management scheme advanced by Interior's new grazing rules which could impact its schools by reducing the value of the state school land leases. Wyoming also has a keen interest in preserving the certainty its citizens have enjoyed in the administration of federal and state grazing leases since the enactment of the Taylor Grazing Act and in protecting the stability of its local economies against the impacts that would be felt if historic grazing practices are changed.

At issue in this appeal are three provisions of the new grazing rules adopted by the Department of Interior in 1995 (the 1995 Rules) as part of Interior Secretary Babbitt's "rangeland reform" movement. Those provisions are: the redefinition of the "grazing preference" to exclude the permitted level of grazing use; the removal of the previous requirement that a grazing permit holder be engaged in the livestock business; and the new provision that title to all range improvements must be solely in the federal government. Wyoming supports petitioners' appeal as it relates to all three of these provisions. However, this brief will focus on the issue of the grazing preference as that provision has the greatest potential to affect the value of Wyoming's school lands, and the security of its citizens' property interests, water rights and grazing leases.

SUMMARY OF ARGUMENT

Although not often accurate in their rendition of the facts, Hollywood tales of life in the arid western states

are not without some basis in history. Competition for the "free range" of the west, those federal lands which had not been acquired under any of the land entry acts (sometimes referred to as "homestead acts"), often led to struggles between its users, and sometimes even led to their premature demise. Thus, the famous range wars ensued, where those grazing cattle were pitted against those herding sheep; and each of them pitted against their own. Accusations were rampant over improper fencing of federal lands, overgrazing, wholesale livestock slaughters and other rangeland ills.

During these hard times, there was much discussion in rangeland states over methods of controlling these conflicts and restoring stability to the local environment. Our then grazing-based economies had seen upswings and downturns. But it was apparent to many that without some control over the vast expanse of unregulated federal lands no stability would result. Many proposals for gaining control of those lands were introduced to protect the range and provide certainty for stockmen and the economies built in reliance on the grazing. Those proposals included enacting legislation mandating that the federal government cede those lands to the arid western states, increasing the homestead allotments to a size more conducive to rangeland livestock operations, and some sort of controlled leasing arrangements between the grazers and the federal government.[1]

[1] For one interesting description of these and many other historic events of the times, *see* T.A. Larson, *History of Wyoming*, Chs. 12 and 14 (2d ed. 1978).

Ultimately, the latter of these approaches was adopted. Named after the Colorado congressman who sponsored the legislation, the Taylor Grazing Act was adopted in 1934. The Taylor Grazing Act requires that "[s]o far as is consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded." After passage of the Act, the Secretary undertook to adjudicate the components of those recognized and acknowledged privileges, including the amount of forage allotted to each permittee. The result of those adjudications was to define the federal grazing privileges commensurate with particular private holdings of land and water rights. A permittee's private property interests, which often included state school land leases, were recognized as the permittee's commensurable holdings, upon which those adjudicated amounts of forage were based. The adjudications determined a permittee's eligibility for a grazing permit, identified the commensurable holdings to which the grazing privileges would attach, and identified the maximum amount of forage that a permittee's livestock could graze on the public lands. This set of privileges was known collectively as the "grazing preference." The term encompasses much more than a simple preference for renewal of the permit. However, Secretary Babbitt's 1995 Rule changes eviscerated the "grazing preference," leaving no more than an empty preference for permit renewal in its place.

Because the Secretary's 1995 Rules regarding changes to the definitions of the terms "grazing preference" and "permitted use" eliminate recognition of the levels of grazing use adjudicated after the passage of the Taylor

Grazing Act, they fail to protect recognized and acknowledged grazing privileges, as required by the Act. Wyoming believes that the federal district court's order was consistent with a reasonable, practical interpretation of both the Taylor Grazing Act and the Federal Land Policy and Management Act (FLPMA). The Tenth Circuit's decision was not.

ARGUMENT

I. THE 1995 RULES ARE A REVERSAL OF THE HISTORIC TREATMENT OF THE GRAZING PRIVILEGES PROTECTED BY THE TAYLOR GRAZING ACT

In order to understand the extent of the grazing privileges recognized and protected by the Taylor Grazing Act, familiarity with the history of public land livestock grazing in the arid west is critical. Judge Brimmer's opinion in the district court and Judge Tacha's dissent in the Tenth Circuit demonstrate that an understanding of the history of the Taylor Grazing Act at the time of its enactment, and of the way it has been implemented, direct that the Tenth Circuit decision be reversed.

A. Events leading to the passage of the Taylor Grazing Act

Prior to the passage of the Taylor Grazing Act, the lands that the Act organized into grazing districts had been largely open and unfenced tracts and had been in use for many years by a collection of both large and small

livestock operators. Most of this land had been open to homestead entry under the numerous land entry laws which encouraged settlers to move west and take up farming on small tracts. Because this land was so arid as to be unsuitable for farming, little of it was settled under those homestead acts. West of the 100th meridian, tracts which had access to water for primitive irrigation were homesteaded. Most of the remaining lands were unsuitable for cultivation.

The land which remained unappropriated was treated as open range, available to any stockman who could get livestock to the land and provide water for them. No authority limited the amount of forage the stock could graze or the seasons of use. The available forage was consumed by those animals who reached the land earliest in the year. The result was the classic "tragedy of the commons" predicted by economists when use of a resource is unregulated. Each stockman and homesteader had an incentive to place as many animals on this land as he could, since any benefits to the range derived from his stewardship would only be appropriated by someone else.

This situation led many stockmen to seek some controls over grazing on the open range. Although such proposals were originally made before the turn of the century, it took more than thirty years to get a grazing bill through Congress. The delay resulted in part from the reluctance of many congressmen to give up their dreams of settling the west through the various land entry acts, and in part from the difficulties involved in crafting a bill that would satisfy enough of the various interests

involved to receive a passing vote.[2] Ultimately, it took the drought of the 1930's, the Dust Bowl Era, and the resultant accusations of overgrazing and mismanagement of federal grazing lands to provide Congress adequate incentive to address the problems. Finally, in 1934, Congressman Taylor was successful in getting a grazing bill passed which gave the Secretary of the Interior responsibility over the vast expanse of federal range lands. Contrary to the implications in the Brief for the Respondents in Opposition to certiorari, the legislation was not introduced by a movement from within Congress for the sole purpose of preserving the vast federal lands from overgrazing. The Act was initiated by congressmen from the affected western states for two purposes: to protect those western lands from overgrazing in order to ensure continued grazing in the future; and, no less importantly, to provide certainty to the livestock industry and stability to citizens of the communities that relied on those industries.

B. Historical treatment of the "Grazing Preference" under the Act.

The history of the Taylor Grazing Act and the case law developed under it demonstrate that the underlying objectives of the Act were to stabilize the livestock industry and to protect the rights of livestock growers from interference. *Faulkner v. Watt*, 661 F.2d 809, 812 (9th Cir.

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[2] For a discussion of the competing proposals and the political climate leading to passage of the Taylor Grazing Act, *see generally* Phillip O. Foss, *Politics and Grass, The Administration of Grazing on the Public Domain*, ch. 3 (1960).

1981), *see also Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) (reasoning that the purpose of the Act was to provide for the most beneficial use possible of public range in the interest of grazers and the public at large, to define grazing rights and to protect those rights by regulation against interference). More than a bare preference for renewal of a permit, the "grazing preference" was the vehicle by which a permittee's grazing privileges were defined and protected. Long before the 1995 Rules were proposed, historian Phillip Foss described the purposes of the Act and the derivation of the "grazing preference" in his 1960 study of the administration of grazing on the public domain:

> The avowed purposes of the Taylor Grazing Act were to "stop injury to the public grazing lands by preventing overgrazing" and to "stabilize the livestock industry dependent on the public range." To carry out these purposes it was first necessary to determine the grazing capacity of the district – that is, the maximum number of livestock that could be grazed without injury to the range. After this figure had been decided upon, it was necessary to work out a system to allocate this grazing capacity to the various claimants according to some orderly and consistent criterion – to stabilize the use of the range.
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> The act furnished a clue to the method of allocating grazing privileges. "Preference," said the statute, "shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business . . . or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them." This clause restricted grazing rights to landowners or owners of water or water rights; the propertyless nomad was eliminated from consideration. The clause "as may be necessary to permit the proper use of lands" was interpreted to mean that the applicant must have private holdings sufficient to sustain his livestock when they were off the district, and conversely, that the district lands should complement his private holdings. . . . The director, after meetings with the stockmen, decided upon an additional system of preferences based on customary past use of the federal lands. This modified "squatter's right" idea was based on the old western common law of "first in time is first in right." The director found legal justification for this concept in the language of the statute which stated "grazing privileges recognized and acknowledged shall be adequately safeguarded."

Phillip O. Foss, *Politics and Grass, supra* at 61-63. Clearly, the director of the Grazing Service at the time of its enactment interpreted the Taylor Grazing Act to require that potential permittees' prior use of the public land for grazing be adequately protected in adjudicating their grazing rights under the Act. The resultant adjudications established the maximum levels of grazing use to which the permittee would be entitled.

The Secretary of the Interior also recognized both the prior privileges of stockmen grazing on the public lands and the Taylor Grazing Act's directive to safeguard those claims. During the Senate hearings on the Act, Interior Secretary Ickes recognized these same claims, stating:

"We have no intention to . . . drive stockmen off their ranges or deprive them of rights to which they are entitled either under state laws or by customary usage." *To Provide for the Orderly Use, Improvement, and Development of the Public Range: Hearings on H.R. 6462 Before the Committee on Public Lands and Surveys of the United States Senate*, 73rd Cong., 2nd Sess. 10 (1934) (statement of Harold Ickes, Secretary of the Interior). Since the administrator charged with adjudicating grazing rights read the Act to require that he safeguard the past grazing use of a permittee, surely once they have been adjudicated those rights are no less "recognized and acknowledged." They are entitled to the same protection under the Act.

Because the Secretary's 1995 "permitted use" rule eliminates the adjudicated maximum forage levels which were recognized and acknowledged under the Taylor Grazing Act through the adjudications, the adoption of that rule exceeds the Secretary's statutory authority.

II. THE TENTH CIRCUIT IMPROPERLY APPLIED THE *CHEVRON* DEFERENCE STANDARD IN UPHOLDING THE 1995 RULES' EVISCERATION OF THE GRAZING PREFERENCE.

The two member majority on the Tenth Circuit applied the *Chevron*[3] deference test to hold that the agency's interpretation of the Taylor Grazing Act should be accorded deference and, therefore reversed the district court and upheld the 1995 Rules. The court's reliance on

[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984).

Chevron, however, is misplaced. Without even finding ambiguity in the Taylor Grazing Act, the court applied the *Chevron* standard to the Secretary's current-day interpretation of his authority under the Act. Given the plain language of the Act, requiring the Secretary's protection of grazing privileges and the contemporaneous understanding of the terms of that Act, described above, resort to a *Chevron* analysis was inappropriate. This is a practical statute, subject to practical construction based upon what the words of the statute meant in their ordinary and popular sense at the time it was enacted. *See Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 679 (1914). Unlike the Clean Air Act Amendments involved in *Chevron*, the Taylor Grazing Act is not "lengthy, detailed, technical [or] complex," *Chevron* at 848, nor does its comprehension depend upon "more than ordinary knowledge respecting the matters subjected to agency regulations."*Id.* at 844.

Regardless of how laudable the Secretary may believe his goals to be in 1999, in interpreting congressional intent, the words used in the statute " 'will be interpreted as taking their ordinary, contemporary, common meaning' at the time Congress enacted the statutes." *Amoco Production Co. v. Southern Ute Tribe*, 526 U.S. 865 (1999), quoting from *Perrin v. United States*, 444 U.S. 37, 42 (1979). Such interpretation must control over one developed later based on changed scientific understandings or societal values. *See Amoco*, 526 U.S. 865; *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). The Secretary's failure to recognize the adjudicated grazing levels as privileges subject to continued protection under the Act violates clear congressional intent and requires that the 1995

Rules regarding the new category of "permitted use" be set aside.

There can be no doubt that the intention of the Taylor Grazing Act at enactment was to control grazing on federal lands and to provide the livestock industry stability through the establishment of the grazing preference. The Secretary's evisceration of that preference "with a mere stroke of his pen" (District Court Order, Pet. App. at 79a), is a blatant violation of the mandates of that Act, especially in light of his previous failed attempt to get similar changes to the historic grazing laws passed through Congress by stealth. *See generally* 139 Cong. Rec. S15594-02 (1993) (statement by Senator Hatfield discussing the impropriety of the attempt by Senator Reid and Secretary Babbitt to enact substantive changes to grazing laws in a rider on an appropriations bill without review, consultation or hearings). It is no coincidence that the Reid/Babbitt "compromise" was not enacted: neither that bill nor the 1995 Rules are a reflection of congressional intent.

There is no ambiguity in the requirements of the Taylor Grazing Act, as understood in 1934. Rather, any claim of ambiguity has only arisen due to the Secretary's interpretation of his authority to meet perceived 1995 societal values. That being the case, there is no reason to resort to canons of construction, such as the *Chevron* deference principle, because no ambiguity exists. *See Amoco*, 526 U.S. 865. The Court should not accord the Secretary *Chevron*-type deference in any event where, as here, over 60 years of Interior's actions, both contemporaneous to the Act and in all the years subsequent, demonstrate the understanding that the Taylor Grazing Act requires the recognition and protection of all aspects of

grazing preferences. 43 U.S.C. § 315b; *Cf. Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949). No canon permits Secretary Babbitt to demand deference to his current interpretation in place of that of all his predecessors since passage of the Act. The Secretary's elimination of the substance of the statutory grazing preference is contrary to the Taylor Grazing Act on its face and is thus an unlawful exercise of the Secretary's regulatory authority.

III. THE FEDERAL LAND POLICY AND MANAGEMENT ACT DID NOT NULLIFY THE ADJUDICATIONS MADE UNDER THE TAYLOR GRAZING ACT.

Both the Tenth Circuit majority and the Respondents suggest that the multiple use provisions of the Federal Land Policy and Management Act (FLPMA), in effect, nullified the Taylor Grazing Act's grazing adjudications. However, since nothing in FLPMA supports that interpretation, they again resort to principles of deference to the Secretary's interpretation. As discussed above, such interpretative deference only arises if the statute is ambiguous. Here, FLPMA is not ambiguous; indeed it contains no language which can legitimately be interpreted as nullifying those adjudications. Once again, the Interior Department's practices and interpretations, contemporaneous with the passage of FLPMA in 1976 and in the following 19 years, belie Secretary Babbitt's 1995 assertion that FLPMA nullified such adjudications.

It has been contended that FLPMA contains two provisions which may support the Secretary's interpretation of his statutory authority to promulgate the 1995 Rules. The first, 43 U.S.C. § 1712, provides: "Land use plans

shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." The second, 43 U.S.C. § 1752, addressing grazing permits issued under the Taylor Grazing Act, provides that permits shall be issued for a period of ten years and will be subject to conditions imposed by the Secretary, including his ability to cancel, suspend or modify the permit pursuant to those conditions. Neither provision can legitimately be read to eliminate the grazing preference or to otherwise alter the protections afforded the livestock industry under the Taylor Grazing Act.

Section 1712 merely articulates congressional intent to include all the public lands under appropriate land use planning. However, it no more nullifies grazing adjudications than it restores withdrawn wilderness areas to acquisition under the land entry laws. Instead, § 1712's obvious purpose is to insure that the Secretary consider the grazing, wilderness or other characteristics of such lands in the development and implementation of his land use plans. Section 1752, on the other hand, merely rewords the provisions of the Taylor Grazing Act that require adherence to conditions imposed on permittees by the Secretary. Nothing in either section even alludes to the cancellation of previously adjudicated preferences. As pointed out in Judge Tacha's dissent, when new regulations were adopted in 1978 revising the grazing preference system, those regulations continued to recognize pre-1978 grazing adjudications. (Pet. App. at 59a) (citing *McLean v. BLM*, 133 IBLA 225 (1995)). In sum, nothing in FLPMA authorized the Secretary to adopt regulations contrary to the language and intent of the Taylor Grazing

Act and his statutory authority. Nothing in FLPMA justifies his otherwise unlawful action.

CONCLUSION

The district court was correct in setting the unlawful provisions of the 1995 Rules aside. In adopting the 1995 Rules, the Secretary acted outside of his authority and contrary to law. As a result, the Tenth Circuit's decision regarding the issues on appeal should be reversed and the district court's order reinstated.

Respectfully submitted,

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